Date and Time: Sunday, October 22, 2023 1:02:00 PM CST
Job Number: 208634576

Documents (100)

1. TEXTRON FIN. CORP. v. NATIONAL UNION FIRE INS. CO., 2002 Cal. App. Unpub. LEXIS 6131

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

2. Nystrom v. Trex Co., 2002 U.S. Dist. LEXIS 27502

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

3. McNamara v. Bre-X Minerals Ltd., 214 F.R.D. 424

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

4. Tassy v. Brunswick Hosp. Ctr., 2002 U.S. App. LEXIS 22600

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

5. Tassy v. Brunswick Hosp. Ctr., Inc., 296 F.3d 65

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

6. ACT, Inc. v. Sylvan Learning Sys., 296 F.3d 657

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

7. Holiday Wholesale, et al v. Philip Morris, et al., 231 F. Supp. 2d 1253

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

8. G-I Holdings v. Baron & Budd, 238 F. Supp. 2d 521

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

9. Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft, 213 F. Supp. 2d 612

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

10. Ohio Bell Tel. Co. v. CoreComm Newco, Inc., 214 F. Supp. 2d 810

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

11. Dee-K Enters. v. Heveafil Sdn. Bhd., 299 F.3d 281

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

12. In re Auto. Refinishing Paint Antitrust Litig., 2002 U.S. Dist. LEXIS 15099

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

13. Covad Communs. Co. v. BellSouth Corp., 299 F.3d 1272

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

14. Fresh Made, Inc. v. Lifeway Foods, Inc., 2002 U.S. Dist. LEXIS 15098

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

15. Apani Southwest, Inc. v. Coca-Cola Enters., 300 F.3d 620

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

16. *Verizon N.J., Inc. v. Ntegrity Telecontent Servs., 219 F. Supp. 2d 616*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

17. *Berlyn, Inc. v. Gazette Newspapers, Inc., 214 F. Supp. 2d 530*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

18. *Dagher v. Saudi Ref., Inc., 2002 U.S. Dist. LEXIS 27935*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

19. *Donnelly Corp. v. Reitter & Schefenacker USA L.P., 2002 U.S. Dist. LEXIS 15205*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

20. *Berlyn, Inc. v. Gazette Newspapers, 223 F. Supp. 2d 718*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

21. *Flamingo Indus. v. United States Postal Serv., 302 F.3d 985*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

22. Haynes Trane Serv. Agency, Inc. v. Am. Std., Inc., 51 Fed. Appx. 786

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

23. Pfau v. Reliant Energy, Inc. (In re Reliant Sec. Litig.), 2002 U.S. Dist. LEXIS 27777

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

24. In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

25. Avery Dennison Corp. v. Four Pillars Enter. Co., 45 Fed. Appx. 479

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

26. Mendoza v. Zirkle Fruit Co., 301 F.3d 1163

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

27. Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp., 224 F. Supp. 2d 657

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

28. Winoff Indus. v. Stone Container Corp. (In re Linerboard Antitrust Litig.), 305 F.3d 145

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

29. Major v. Microsoft Corp., 2002 OK CIV APP 120

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

30. Turicentro v. Am. Airlines, 303 F.3d 293

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

31. Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

32. In re Terazosin Hydrochloride Antitrust Litig., 2002 U.S. Dist. LEXIS 29916

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

33. N. Am. Energy Sys., LLC v. New Eng. Energy Mgmt., 269 F. Supp. 2d 12

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

34. Journal Publ'g Co. v. Hartford Courant Co., 261 Conn. 673

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

35. Broadway Theatre Corp. v. Buena Vista Pictures Distrib., 2002 U.S. Dist. LEXIS 27368

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

36. Loeb Indus. v. Sumitomo Corp., 306 F.3d 469

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

37. [Sanderson v. Brugman, 2002 U.S. Dist. LEXIS 19212]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

38. [Dresses for Less, Inc. v. CIT Group/Commercial Servs., 2002 U.S. Dist. LEXIS 18338]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

39. [Marchon Eyewear, Inc. v. Tura LP, 2002 U.S. Dist. LEXIS 19628]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

40. [Spradlin v. Lakestates Workplace Solutions, Inc. (In re Spradlin), 284 B.R. 830]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

41. [Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1, 309 F.3d 836]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

42. [Livingston Downs Racing Ass'n v. Jefferson Downs Corp., 257 F. Supp. 2d 819]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

43. *Dickson v. Microsoft Corp., 309 F.3d 193*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

44. *A Fisherman's Best v. Rec. Fishing Alliance, 310 F.3d 183*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

45. *Elkins v. Microsoft Corp., 174 Vt. 328*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

46. *NEW YORK v. MICROSOFT, 231 F. Supp. 2d 203*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

47. *New York v. Microsoft Corp., 224 F. Supp. 2d 76*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

48. New York v. Microsoft Corp., 224 F. Supp. 2d 76

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

49. New York v. Microsoft Corp., 224 F. Supp. 2d 76

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

50. United States v. Microsoft Corp., 231 F. Supp. 2d 144

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

51. Golan v. Pingel Enter., 310 F.3d 1360

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

52. Rolex Watch U.S.A. v. Zeotec Diamonds, 2002 U.S. Dist. LEXIS 30757

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

53. *Innomed Labs, LLC v. Alza Corp., 2002 U.S. Dist. LEXIS 21840*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

54. *Woman's Clinic, Inc. v. St. John's Health Sys., 252 F. Supp. 2d 857*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

55. *Gross v. Woodman's Food Mkt., 2002 WI App 295*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

56. *Scana Energy Mktg. v. Cobb Energy Mgmt. Corp., 259 Ga. App. 216*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

57. *Cadence Design Systems, Inc. v. Avant! Corp., 29 Cal. 4th 215*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

58. [Fieldturf, Inc. v. Southwest Rec. Indus., 235 F. Supp. 2d 708]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

59. [Smithkline Beecham Corp. v. E. Applicators, 2002 U.S. Dist. LEXIS 23511]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

60. [Viazis v. Am. Ass'n of Orthodontists, 314 F.3d 758]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

61. [Elec. Inspectors, Inc. v. Vill. of E. Hills, 320 F.3d 110]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

62. [Morris Communs. Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

63. [People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

64. *Ciamaichelo v. Independence Blue Cross, 814 A.2d 800*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

65. *Covad Communs. Co. v. Bellsouth Corp., 314 F.3d 1282*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

66. *Friedman v. Salomon/Smith Barney, 313 F.3d 796*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

67. *Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

68. *Sunny Isle Shopping Ctr., Inc. v. Xtra Super Food Ctrs., Inc., 237 F. Supp. 2d 606*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

69. [Wallis v. Giromex, Inc., 2002 Cal. App. Unpub. LEXIS 11954]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

70. [Pepsico, Inc. v. Coca-Cola Co., 315 F.3d 101]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

71. [Wal-Mart Stores v. Rodriguez, 238 F. Supp. 2d 395]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

72. [Whitehall Co. v. Merrimack Valley Distrib. Co., 56 Mass. App. Ct. 853]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

73. [Brunson Communs., Inc. v. Arbitron, Inc., 239 F. Supp. 2d 550]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

74. [Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

75. [Phillips Getschow Co. v. Green Bay Brown County Prof'l Football Stadium Dist., 270 F. Supp. 2d 1043]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

76. [Daniel v. Am. Bd. of Emergency Med., 269 F. Supp. 2d 159]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

77. [Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.(In re Cal. Wholesale Elec. Antitrust Litig.), 244 F. Supp. 2d 1072]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

78. [Menasha Corp. v. News Am. Mktg. In-Store, Inc., 238 F. Supp. 2d 1024]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Sep 14, 1998 to Dec 31, 2022

79. [Four B Corp. v. Ueno Fine Chems. Indus., Ltd., 241 F. Supp. 2d 1258]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

80. [Miller v. Am. Stock Exch. (in Re Stock Exchs. Options Trading Antitrust Litig.), 317 F.3d 134]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

81. [Miller's Pond Co., L.L.C. v. City of New London, 2003 Conn. Super. LEXIS 57]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

82. [Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 239 F. Supp. 2d 180]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

83. [Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

84. [Big Island Candies, Inc. v. Cookie Corner, 244 F. Supp. 2d 1086]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

85. [BAXTER INT'L, INC. v. ABBOTT LABS., 315 F.3d 829]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

86. [Bronx Legal Servs. v. Legal Servs., 2003 U.S. Dist. LEXIS 695]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

87. [Empagran S.A. v. F. Hoffman-Laroche, 315 F.3d 338]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

88. [Confederated Tribes of Siletz Indians v. Weyerhaeuser Co., 2003 U.S. Dist. LEXIS 25829]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

89. [Trueposition, Inc. v. Allen Telecom, 2003 U.S. Dist. LEXIS 881]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

90. *Money Masters, Inc. v. TRW, Inc., 2003 Tex. App. LEXIS 622*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

91. *Star Fuel Marts v. Murphy Oil USA, 2003 U.S. Dist. LEXIS 4545*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

92. *Spanish Broad. Sys. v. Clear Channel Communs., Inc., 242 F. Supp. 2d 1350*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

93. *Royce v. Willowbrook Cemetery, Inc., 2003 Conn. Super. LEXIS 262*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

94. *In re S.D. Microsoft Antitrust Litig., 2003 SD 19*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

95. *Coatings Res. Corp. v. Akzo Nobel Coatings, Inc., 57 Fed. Appx. 752*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

96. *Mikeron, Inc. v. Exxon Co., U.S.A., 264 F. Supp. 2d 268*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

97. *Stolow v. Greg Manning Auctions, Inc., 258 F. Supp. 2d 236*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

98. *Kovac v. Crooked River Ranch Club & Maint. Ass'n, 186 Ore. App. 545*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

99. *In Town Hotels Ltd. Pshp. v. Marriott Int'l, Inc., 246 F. Supp. 2d 469*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

100. *Four B Corp. v. Daicel Chem. Indus., 253 F. Supp. 2d 1147*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

TEXTRON FIN. CORP. v. NATIONAL UNION FIRE INS. CO.

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

June 28, 2002, Filed

G020323

Reporter

2002 Cal. App. Unpub. LEXIS 6131 *; 2002 WL 1399105

TEXTRON FINANCIAL CORPORATION, Plaintiff and Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA et al., Defendants and Appellants.

Notice: **[*1]** NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

Prior History: Appeals from a judgment and postjudgment orders of the Superior Court of Orange County, Super. Ct. No. 734096. Nancy Wieben Stock and Raymond J. Ikola, Judges.

Disposition: Judgment and postjudgment orders affirmed.

Core Terms

trial court, award of punitive damages, punitive damages, damages, insurer, cause of action, concealment, notice, offset, costs, reprehensibility, oppression, employees, malice, deleted, phase, compensatory damages, unfair competition, special verdict, new trial, endorsement, insurance company, managing agent, cancellation, remittitur, practices, contends, coverage, parties, unfair

Counsel: Albert, Weiland & Golden, Marcus M. Kaufman; Stephan, Oringher, Richman & Theodora and Robert M. Dato for Plaintiff and Appellant.

Horvitz & Levy, Michell C. Tilner, Peter Abrahams; Lewis D'Amato, Brisbois & Bisgaard, R. Gaylord Smith and Michael W. Connally for Defendants and Appellants.

Judges: RYLAARSDAM, J. WE CONCUR: SILLS, P. J., O' LEARY, J.

Opinion by: RYLAARSDAM

Opinion

Plaintiff Textron Financial Corporation sued defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union) and others over its refusal to honor a claim for insurance benefits concerning property damage to a commercial bus in which plaintiff held a security **[*2]** interest. Plaintiff settled with two parties and proceeded to trial against National Union and American International Adjustment Company, Inc. (AIAC), National Union's claims adjuster. After a trial divided into three phases, the trial court entered judgment on a jury's special verdict awarding plaintiff $ 165,414.40 in compensatory damages and $ 10 million in punitive damages against National Union. The court entered judgment, including costs, for AIAC against plaintiff.

Both plaintiff and National Union filed postjudgment motions. The trial court denied National Union's motion for judgment notwithstanding the verdict and plaintiff's motion for a new trial, but conditionally granted National Union a new trial unless plaintiff agreed to reduce the punitive damage award to $ 1.7 million. Plaintiff agreed to the remittitur. The court also struck plaintiff's request for expert witness fees.

Both plaintiff and National Union appealed from the judgment and postjudgment orders. Plaintiff challenged the trial court's striking of its cause of action for unfair business practices, the judgment in favor of AIAC, including costs, the remittitur of punitive damages, and the denial of its request **[*3]** for expert witness fees. National Union attacked the punitive damage award on several grounds, and the trial court's refusal to offset the amounts plaintiff received in the pre-trial settlements.

In an unpublished opinion filed January 29, 2001, we affirmed the judgment and postjudgment orders in their entirety. National Union filed a petition for writ of certiorari with the United States Supreme Court. On October 9, the Supreme Court issued an order granting the writ, vacated our judgment and remanded the matter to us for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424, 149 L. Ed. 2d 674, 121 S. Ct. 1678*. We granted the parties the opportunity to file supplemental briefs on the issue of whether the punitive damage award violates federal due process when reviewed under a de novo standard of review.

Having reviewed the matter in accordance with the United States Supreme Court's direction, we again affirm the trial court's judgment and postjudgment orders in their entirety.

FACTS

Il Sung Ko operated a tour bus company, Taeguk Tour and Sightseeing (Taeguk). Plaintiff loaned Ko funds to purchase a bus, **[*4]** receiving in return a security interest in the vehicle. The security agreement required Ko to insure the bus. Ko obtained a National Union liability insurance policy through D. W. Ferguson & Associates, Inc. (Ferguson), an independent insurance brokerage. The policy was issued through TRM International, Inc. (TRM), a company appointed by National Union to solicit, bind, write, and administer policies for its commercial bus program. The policy listed plaintiff as a loss payee and required National Union to mail plaintiff notice in advance if it cancelled the policy.

Taeguk suffered a downturn in business and Ko failed to timely pay his insurance premiums. In October 1992, TRM sent Ko notice it intended to cancel the policy. TRM did not send a copy of the cancellation notice to plaintiff. The policy terminated November 27.

Beginning in late October and throughout November, Ferguson and Taeguk discussed reducing the insurance premiums by deleting coverage for some of Ko's vehicles. Ferguson also corresponded with a TRM underwriter about the situation, proposing the issuance of a new policy covering only some of Ko's busses. The underwriter suggested an alternative whereby TRM would **[*5]** reinstate the original policy and give Ko a credit against his policy's premium if he agreed to certain conditions, which included delivering the license plates of two buses to Ferguson and temporarily suspending use of those vehicles. Plaintiff presented expert testimony that, unlike a transaction where a vehicle is deleted from a policy, the alternative approach implemented a procedure described as lay-up credit. Under a lay-up credit, the insured maintains coverage on a vehicle while it is not being operated.

Ko agreed to this proposal, and on December 1, TRM retroactively reinstated the policy effective November 27. The bus encumbered by plaintiff's security interest was one of the vehicles Ko intended not to use. Plaintiff did not receive notice of the policy reinstatement with the endorsement which reflected Ko's business received a premium credit due to the vehicle's non-use. National Union claimed it sent a copy of this endorsement to plaintiff, but plaintiff denied receiving it.

In January 1993, the bus encumbered by plaintiff's lien suffered extensive damage when it collided with another vehicle on a public highway. At Taeguk's request, Ferguson submitted a notice of **[*6]** claim to AIAC. On February 4, TRM sent AIAC a notice verifying coverage for the vehicle and confirming plaintiff as a loss payee. However, after further correspondence with Taeguk and TRM, AIAC denied the claim, asserting the bus had been deleted from the policy before the accident. TRM prepared an endorsement deleting the bus from the policy (Number 8) on February 16. This endorsement purported to be effective as of December 1, 1992.

In late 1993, Ko defaulted on plaintiff's loan. Plaintiff then learned about the accident and contacted Ferguson concerning insurance benefits to repair the vehicle. Ferguson informed plaintiff the bus had been removed from the policy before the accident. Plaintiff sued Ko, recovering a judgment against him and incurring $ 3,859.50 in legal fees in the process. However, Ko filed bankruptcy and discharged the debt.

Plaintiff submitted a claim to National Union for benefits under the insurance policy. At that time, it possessed only a certificate of insurance, not a copy of the policy.

AIAC also handled plaintiff's claim. TRM informed AIAC the encumbered bus had been deleted from the policy before the accident and sent it a copy of endorsement Number **[*7]** 8. A certificate of mailing on that copy covered the part of the endorsement reflecting the date TRM had prepared it. After an AIAC claims manager discussed the matter with John Lavin, a senior underwriter with the division handling National Union's bus program, and Tom Spangenberg, TRM's president, AIAC advised plaintiff the claim was being denied. The basis of the denial was that Ko deleted the bus from the policy before the accident, and TRM and AIAC concluded National Union's policy did not obligate it to give plaintiff advance notice of the deletion. National Union did not send plaintiff a copy of the policy until August 1994. Again, the mailing certificate covered the portion of endorsement Number 8 displaying the date on which it had been prepared.

PROCEDURAL BACKGROUND

The trial's first phase dealt with plaintiff's breach of contract claim against National Union. The court found, as a matter of law, the insurance contract's loss-payable clause constituted a separate agreement between plaintiff and National Union, obligating National Union to provide 30 days' notice of the policy's cancellation or the bus's deletion from it, and that National Union failed to comply with **[*8]** this requirement. The jury subsequently awarded plaintiff $ 61,513.80 under the policy.

The second phase involved plaintiff's causes of action for bad faith against National Union and fraud against both National Union and AIAC. The jury returned a special verdict finding National Union violated the policy's implied covenant of good faith and fair dealing and that it acted with oppression, malice, and fraud in doing so. The jury also returned a special verdict finding National Union liable for intentional misrepresentation and concealment and awarded plaintiff $ 3,859.80 in damages. Based on its interpretation of the jury's answers in the special verdict, the trial court entered judgment for AIAC on the fraud count.

During this phase, the trial court also ruled plaintiff could recover $ 30,268.16 in attorney fees as damages under *Brandt v. Superior Court* (1985)

37 Cal.3d 813. The parties stipulated plaintiff was entitled to $ 55,616.34 in costs pursuant to *Brandt*. Subsequently, the court denied National Union's request to offset the pretrial settlements plaintiff received from Ferguson ($ 26,500) and TRM ($ 62,500) against the compensatory award imposed **[*9]** on it.

The trial's third phase dealt with punitive damages. The jury awarded $ 10 million in punitive damages against National Union which the trial court subsequently reduced to $ 1.7 million. In addition, the judgment awarded plaintiff compensatory damages, consisting of the policy benefits plus interest, the legal expenses recoverable under *Brandt v. Superior Court, supra, 37 Cal.3d 813*, and the damages for fraud. Finally, the court awarded AIAC $ 10,277.52 in costs against plaintiff.

DISCUSSION

PLAINTIFF'S APPEAL

Demurrer to the Unfair Business Practices Cause of Action

The complaint's fourth count sought injunctive and restitutionary relief under Business and Professions Code section 17200 et seq. against National Union and AIAC for "engaging in unfair competition" in the "handling [of plaintiff's] claim, and the claims of other persons." Plaintiff alleged National Union, "aided and abetted" by AIAC, "used misleading documents to falsely suggest that it would provide insurance . . . where it had no intention to do so," "falsely suggested that it would . . . provide timely notice of [policy] cancellations," "misrepresented the terms and **[*10]** meaning of its policies . . . to provide a pretext for its refusal to provide timely notice," and "engaged in a pattern and practice of wrongful and false cancellations of insurance policies . . . ."

Relying on *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988)

46 Cal.3d 287, National Union and AIAC generally demurred to this count. The trial court sustained the demurrers without leave to amend. Citing State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, plaintiff contends the trial court's ruling was erroneous.

Moradi-Shalal held the Unfair Insurance Practices Act (Ins. Code, § 790 et seq.; UIPA) does not create a private cause of action against insurers who violate its provisions. (Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal.3d at pp. 304-305.) This rule applies to both first party and third party claims. (Maler v. Superior Court (1990) 220 Cal. App. 3d 1592, 1597-1598, 270 Cal. Rptr. 222; Zephyr Park v. Superior Court (1989) 213 Cal. App. 3d 833, 836-838, 262 Cal. Rptr. 106.) While insurance companies are subject to California laws generally **[*11]** applicable to other businesses, including laws governing unfair business practices (Ins. Code, § 1861.03, subd. (a)), parties cannot plead around *Moradi-Shalal's* holding by merely relabeling their cause of action as one for unfair competition. (Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257, 283-284, 895 P.2d 56; Maler v. Superior Court, supra, 220 Cal. App. 3d at p. 1598; Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 1494, 265 Cal. Rptr. 585.)

The specific allegations of wrongful conduct contained in plaintiff's fourth cause of action, using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of activities covered by the UIPA. (Ins. Code, § 790.03, subds. (a) & (h).) In Safeco Ins. Co. v. Superior Court, supra, 216 Cal. App. 3d 1491, the court ordered dismissal of an action which included a request for injunctive relief under Business and Professions Code section 17200 et seq. based on an insurer's allegedly unfair claims settlement practices. (Id. at pp. 1493-1494.) **[*12]** "Though the issue is one of first impression, we have no difficulty in deciding the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal* . . . . To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless." (Id. at p. 1494.) Under the foregoing cases, merely alleging these purported acts constitute unfair business practices under the unfair competition law is insufficient to overcome *Moradi-Shalal*.

In a few cases, the Supreme Court has allowed an action against an insurance company under the unfair competition law where the alleged conduct constituted an unlawful restraint on trade under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), even though it also violated the UIPA. (Quelimane Co. v. Stewart Title Guarantee Co. (1998) 19 Cal.4th 26, 43-44, 960 P.2d 513; Manufacturers Life Ins. Co. v. Superior Court, supra, 10 Cal.4th at pp. 283-284.) "This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful insurance business **[*13]** practices in section 790.03, and therefore that section did not create a private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices." (Manufacturers Life Ins. Co. v. Superior Court, supra, 10 Cal.4th at p. 284.)

The case on which plaintiff relies, State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th 1093, held the plaintiff-insureds had sufficiently alleged a cause of action against their insurer under the unfair competition law based on allegations of conduct constituting common law fraud and breach of the implied covenant of good faith and fair dealing, even though the same conduct violated the UIPA. "While *Moradi-Shalal* clearly held that the Legislature did not intend to create new causes of action when it enacted section 790.03, it is also clear that the Legislature did not intend in any way to circumscribe the previously existing common law right of an insured to seek redress for an insurer's fraudulent deception **[*14]** or breach of the covenant of good faith implied in the policy. . . . Thus, . . . common law claims remain as a firm legal basis on which an insured may rely to seek redress against an insurer." (*Id. at pp. 1107-1108*.)

The persuasiveness of *State Farm* has been undercut by the Supreme Court's subsequent disapproval of its definition of "unfair" business practices. Quoting from *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164*, *State Farm* declared: "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . . [Citations.]' . . . . An 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" (*State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at pp. 1103-1104,* **[*15]** fn. omitted.)

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 973 P.2d 527*, the Supreme Court found this definition is "too amorphous and provides too little guidance to courts and businesses." (*Id. at pp. 184-185*.) While *Cel-Tech Communications* limited its discussion to the context of an action between competitors, the court concluded, "any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," and that under *Business and Professions Code section 17200*, "the word 'unfair' . . . means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law . . . ." (*Id. at pp. 186-187*, fn. omitted; see also *Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1165-1167* [applying *Cel-Tech Communications, Inc.'s* standard in vehicle lessee's action against rental agency for allegedly concealing or obscuring the rental agreement's **[*16]** fuel service charge].)

Harmonizing *Moradi-Shalal's* holding with the foregoing decisions supports a conclusion the trial court properly sustained the demurrers to plaintiff's unfair competition claim. First, the holding in *Safeco Ins. Co. v. Superior Court, supra,*

216 Cal. App. 3d 1491 supports this result. Second, this case is distinguishable from *Quelimane* and *Manufacturers Life* in two respects. Neither decision involved an action by an insured or a third party based on the insurer's alleged failure to comply with a policy or to provide benefits. In *Quelimane*, parties who acquired real estate at tax sales sued title insurance companies for refusing to issue policies on their property. *Manufacturers Life* concerned an insurance agency's action against insurance companies for boycotting the agency. Also, in both cases the plaintiff alleged a Cartwright Act violation as the basis for its unfair competition cause of action. Finally, given the Supreme Court's disapproval of *State Farm's* "amorphous" definition of "unfair" practices and its focus on legislatively declared public policy, reliance on general common law principles **[*17]** to support a cause of action for unfair competition is unavailing.

Under these circumstances, the trial court properly found plaintiff failed to state a cause of action against National Union and AIAC for unfair business practices.

The Jury's Phase Two Findings

During the second phase, the jury returned a special verdict containing findings on the elements of two theories of deceit, intentional misrepresentation and concealment of a material fact. The jury's responses reflect it found both National Union and AIAC made representations of a material fact on which plaintiff justifiably relied to its injury and that both defendants made the representations "recklessly without knowing whether [they were] true or false." However, the jury concluded AIAC did not know the representations were false and did not make them with the intent to defraud plaintiff. On the concealment theory, the jury found both defendants concealed or suppressed a material fact which resulted in injury to plaintiff, but also found AIAC did not intentionally conceal or suppress a material fact with the intent to defraud plaintiff. In addition, the jury concluded both defendants were "guilty of fraud, **[*18]** malice, or oppression in the conduct upon which [it] based [its] finding of liability . . . ."

When the jury returned its special verdict, the court discussed the inconsistency in the findings with counsel and ultimately ruled AIAC "is not liable for fraud or concealment." Plaintiff argues the trial court erred by construing the jury's findings to exonerate AIAC.

The distinction between a general and special verdict is that under the former a jury "pronounces generally upon all or any of the issues," while the latter is one "by which the jury find the facts only, leaving the judgment to the court." (Code Civ. Proc., § 624.) In a case "where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (Code Civ. Proc., § 625; see also Tavaglione v. Billings (1993) 4 Cal.4th 1150, 1156-1157, 847 P.2d 574; Bond v. DeWitt (1954) 126 Cal. App. 2d 540, 544.)

The jury's findings that AIAC made representations recklessly but without knowing the statements were false are inherently inconsistent. A representation made recklessly without knowledge of its falsity **[*19]** is sufficient to establish scienter. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 705, p. 806.) However, on both fraud theories the jury found AIAC did not act with an intent to defraud plaintiff. An intent to induce reliance on a misrepresentation or nondisclosure by the plaintiff is essential to establish liability for either an intentional misrepresentation or concealment of a material fact. (Lovejoy v. AT&T Corp. (2001) 92 Cal.App.4th 85, 93; Conrad v. Bank of America (1996) 45 Cal.App.4th 133, 157; 5 Witkin, Summary of Cal. Law, *supra,* §§ 706, 710, pp. 807, 810.) The absence of this element defeats plaintiff's fraud claim against AIAC. Furthermore, the finding relevant to defendants' punitive damages liability was in the nature of a general verdict and is subordinate to the jury's specific finding of no intent to defraud. Thus, the trial court properly entered judgment for AIAC on the fraud claim.

Plaintiff contends AIAC could be found liable either as a co-conspirator of National Union or on a theory of negligent misrepresentation. These contentions are without merit.

First, since plaintiff did not assert the latter theory **[*20]** at trial, and the court did not instruct the jury on it, it is now too late to do so. (*Overgaard v. Johnson* (1977)

68 Cal. App. 3d 821, 826.) Second, while the court did instruct the jury on conspiracy as a basis for imposing liability, as plaintiff concedes the jury was not asked to return a special verdict on this allegation. Had the jury concluded AIAC was liable as a co-conspirator with National Union, it should have returned a finding of an intent to defraud.

A review of plaintiff's closing argument also reflects it relied on the representations and conduct of AIAC's employees, not conspiracy, to support its fraud claim. In fact, while discussing the question of whether National Union acted with malice, plaintiff's counsel suggested no conspiracy existed. "An insurance company whose job is to . . . investigate the situation thoroughly, concealing information which it knows is going to lead to a discovery that there's coverage - even concealing that information from its own claims people so that they won't have a guilty conscience about denying the claim - that's malice."

The trial court properly entered judgment for AIAC on the fraud claim.

The Brandt **[*21]** Damage Award

Plaintiff retained legal counsel under an agreement requiring it to pay counsel 40 percent of all amounts recovered in the case. After a lengthy discussion, the trial court limited the sum plaintiff could recover as damages under Brandt v. Superior Court, supra, 37 Cal.3d 813, to 40 percent of the amount recovered as policy benefits during the trial's first phase. Plaintiff attacks this ruling and claims it should have been allowed to recover the reasonable value of counsel's services which it calculates is nearly $ 300,000 greater than the amount awarded by trial court. This contention lacks merit.

Brandt held attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages. (Brandt v. Superior Court, supra, 37 Cal.3d at pp. 815, 817.) "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss - damages - proximately caused by the tort. [Citation.]" (**[*22]** *Id. at p. 817*.)

The retainer agreement required plaintiff to pay counsel 40 percent of all sums recovered in this action. It had no further legal obligation to pay counsel for the legal services rendered to it. *Brandt* expressly held the "fees recoverable . . . may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract." (*Brandt v. Superior Court, supra, 37 Cal.3d at p. 819*.) Plaintiff cites no authority permitting a post-trial modification of the retainer agreement. Thus, the trial court did not err by limiting the damage award under *Brandt v. Superior Court, supra, 37 Cal.3d at p. 813* to the percentage specified in the parties' contingency agreement.

The Costs Award

Plaintiff attacks the trial court's postjudgment rulings concerning the award of costs on two grounds. Both arguments lack merit.

First, it disputes the court's finding AIAC was a prevailing party. Plaintiff argues that since National Union and AIAC filed a joint answer to the complaint and were represented by the same counsel during trial, they held a unity of interest which precludes AIAC **[*23]** from acquiring this status.

Code of Civil Procedure section 1032 defines prevailing party to include "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. . . . In situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides . . . ." (*Code Civ. Proc., § 1032, subd. (a)(4)*.) In conformity with this statute, the case law holds that where only one of multiple, jointly-represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. (*Webber v. Inland Empire Investments, Inc. (1999) 74 Cal.App.4th 884, 920*; *Slavin v. Fink (1994) 25 Cal.App.4th 722, 725-726*; *Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 272, 150 Cal. Rptr. 828*.)

Plaintiff asserts the trial court did not exercise its **[*24]** discretion in this case, citing a statement by the trial judge during the hearing on the motion to strike AIAC's cost bill. However, the court made that comment in response to plaintiff's contention "no evidence" exists "to support any particular allocation" between AIAC and National Union, and that the latter entity presumably "fronted" AIAC's trial expenses. The record as a whole does not support a conclusion the trial court failed to exercise its discretion concerning AIAC's status and its recovery of costs.

The related arguments also fail. Contrary to plaintiff's assertion this is not a case where it established wrongdoing against AIAC, but simply failed to recover a monetary award. The jury found AIAC did not commit fraud. Furthermore, since the injunctive relief claim had been previously dismissed, this was an action for damages. Thus, the evidence indicating AIAC subsequently modified its operating procedures concerning claims handling does not preclude it from being deemed a prevailing party.

Second, plaintiff contends the trial court erred by denying its recovery of expert witness fees under *Code of Civil Procedure section 998*. Nearly a year before trial, plaintiff served **[*25]** on National Union and AIAC an unsuccessful pretrial offer to compromise proposing "to allow judgment be taken . . . against defendants" for $ 626,489.26. In denying plaintiff's request for expert witness fees, the court cited *Taing v. Johnson Scaffolding Co. (1992) 9 Cal.App.4th 579*.

Code of Civil Procedure section 998, subdivision (d) authorizes the court to award a prevailing plaintiff its expert witness fees if the plaintiff made timely pretrial offer to compromise which the defendant does not accept, and "the defendant fails to obtain a more favorable judgment . . . ." In *Taing*, the court reversed an award of costs, declaring "if a plaintiff elects to submit a *section 998* offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing v. Johnson Scaffolding Co., supra, 9 Cal.App.4th at p. 586*.) *Taing* explained its rule as follows: "An unapportioned offer by a single plaintiff to multiple defendants . . . requires any **[*26]** defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (*Id. at p. 585*.)

National Union and AIAC were not jointly and severally liable to plaintiff. (Cf. *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996)

50 Cal.App.4th 1542, 1547-1549.) The complaint sought recovery against National Union on theories of breach of contract, bad faith, and fraud. AIAC was alleged to be liable only on the latter theory. Furthermore, the evidence relating to each defendant's liability for fraud was separate. Thus, the trial court did not err by exercising its discretion to deny recovery of expert witness fees in this case.

NATIONAL UNION'S APPEAL

Denial of an Offset

National Union moved to have the settlement amounts plaintiff received from Ferguson and TRM offset against the damages plaintiff recovered from it. The trial court issued a lengthy written order denying the request as to both the contractual damages and the tort damages recovered by plaintiff. National Union contends the trial court **[*27]** erred by denying an offset in this case.

Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (*Evid. Code, § 500*), "[a] defendant seeking an offset against a money judgment has the burden of proving the offset. [Citation.]" (*Conrad v. Ball Corp. (1994) 24 Cal.App.4th 439, 444*.)

With respect to plaintiff's contractual recovery, an insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable "merely because [the insured] has 'collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him.' [Citations.]" (*Strickland v. Federal Ins. Co. (1988) 200 Cal. App. 3d 792, 801, 246 Cal. Rptr. 345*, quoting *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 251, 18 Cal. Rptr. 650*, disapproved on another ground in *Sabella v. Wisler (1963) 59 Cal.2d 21, 34, 27 Cal. Rptr. 689, 377 P.2d 889*.) An insurer's right to recoup payment of policy benefits is covered **[*28]** by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss. (*Sapiano v. Williamsburg Nat. Ins. Co. (1994) 28 Cal.App.4th 533, 538*; *Chase v. National Indemnity Co. (1954) 129 Cal. App. 2d 853, 861-862, 278 P.2d 68*.)

National Union refused to pay any policy benefits to plaintiff. The cases on which it relies to establish an offset against the contract damages involve an insured's recovery of tort damages and whether the collateral source rule applied. Its contention the trial court "misread" *Kardly v. State Farm Mut. Auto. Ins. Co.* (1989)

207 Cal. App. 3d 479 is incorrect. Contrary to National Union's claim, *Kardly* did not hold the insurer waives the right of subrogation by breaching the insurance contract. The part of the *Kardly* opinion National Union quotes refers to the facts of another appellate decision. (*Id. at p. 489*.) Thus, the trial court properly refused to offset the Ferguson and TRM settlements against the contractual damage award.

As for plaintiff's recovery of tort damages, the trial court agreed the collateral source doctrine did not apply because **[*29]** Ferguson and TRM could not be deemed collateral sources under the facts of this case. However, the court detailed the potential liability facing Ferguson and TRM, and found their potential liability exceeded $ 261,000 which included nonduplicative exposure exceeding $ 96,000. Applying the tort of another doctrine, the court concluded the settlement sums paid by Ferguson and TRM should not be offset against plaintiff's recovery from National Union.

Generally, a party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong.

(6 Witkin, Summary of Cal. Law*, supra,* Torts, § 1322, at p. 779.) "It has long been recognized that if one tortfeasor pays partial compensation to the plaintiff, the liability of other tortfeasors will be correspondingly reduced: ' . . . payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible **[*30]** for the purpose of reducing pro tanto the amount of the damages he may be entitled to recover.' [Citations.]" (*Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 673, 192 Cal. Rptr. 793*.)

Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert. (*Sanchez v. Bay General Hospital (1981) 116 Cal. App. 3d 776, 796, 172 Cal. Rptr. 342*.) Thus, while plaintiff sued National Union for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud, but only sought damages against Ferguson and TRM for negligence, the injury it suffered was the same.

However, the court did find the tort of another doctrine applicable to this case. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. [Citations.]" (*Prentice v. North Amer. Title Guar. Corp. (1963) 59 Cal.2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645*.) **[*31]**

Generally, a party seeking to recover litigation costs under this rule must plead and prove the claim. (*Hsu v. Abbara (1995) 9 Cal.4th 863, 869, fn. 4, 891 P.2d 804*.) While plaintiff did not do so here, the potential for its recovery of damages from Ferguson and TRM was made known to them during pretrial discovery. Furthermore, had it not settled with Ferguson and TRM, plaintiff could have amended the complaint to assert its right to recover the fees and expenses incurred in its action against National Union.

The record supports the trial court's denial of National Union's request for an offset.

PUNITIVE DAMAGES

Introduction

Both parties attack the punitive damage award. National Union challenges the sufficiency of the evidence supporting the recovery of exemplary damages, the court's refusal to instruct the jury National Union could only be subject to punitive damages based on its own employees' conduct, and the constitutionality of the award imposed on it. Plaintiff contends the trial court erred by reducing the punitive damage award to $ 1.7 million.

Sufficiency of the Evidence

National Union claims its own conduct was not oppressive, **[*32]** fraudulent, or malicious, TRM's activity cannot be attributed to it, and it did not ratify TRM's actions.

Civil Code section 3294 authorizes the award of punitive damages in any "action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." (*Civ. Code, § 3294, subd. (a)*.) In *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 169 Cal. Rptr. 691, 620 P.2d 141*, the Supreme Court upheld an award of punitive damages against an insurer based on evidence two employees, a claims manager and a claims adjuster, failed to adequately investigate the insured's claims under a disability insurance policy. "The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.

When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning **[*33]** those claims to the corporation." (*Id. at pp. 822-823*.)

Subsequently, the Legislature amended *Civil Code section 3294* to provide, "an employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (*Civ. Code, § 3294, subd. (b)*.)

In *White v. Ultramar, Inc. (1999) 21 Cal.4th 563, 981 P.2d 944*, the Supreme Court considered the effect of this amendment in an action for wrongful termination. A manager who was responsible for eight stores, covering sixty-five employees, had fired the plaintiff, a convenience store employee. The jury awarded plaintiff both compensatory and punitive **[*34]** damages.

In affirming, the Supreme Court concluded that "in amending *section 3294*, the Legislature intended (like *Egan, supra, 24 Cal.3d at p. 823*) to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc., supra, 21 Cal.4th at p. 573*.) The court noted "*section 3294, subdivision (b)*, placed ['managing agent'] next to the terms 'officer' and 'director,' intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." (*Ibid.*) The critical factor "'" . . . is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." [Citation. **[*35]**]'" (*Id. at p. 573*.)

The agency agreement between National Union and TRM and the evidence in this case shows TRM had broad discretion over National Union's bus insurance program. TRM could "solicit, bind, write and administer insurance" policies, and "exercise [its] independent judgment as to the time, place and manner of soliciting insurance and servicing policyholders." There was evidence AIAC directed its employees to contact TRM when seeking coverage verification. In this case, TRM participated in issuing the policy to Ko, in subsequently canceling it, and then reinstating a modified version of it. Later, when Ko submitted a claim on the bus, TRM initially issued a coverage determination, but then prepared an endorsement deleting the vehicle from the policy, and advised AIAC to deny the claim. Furthermore, TRM's president was in contact with both AIAC and the senior management of the division handling National Union's bus program when plaintiff's claim was being considered, and participated in the ultimate decision to deny it. This evidence supports the jury's conclusion TRM was National Union's managing agent, thereby subjecting it to punitive damages under **[*36]** *Civil Code section 3294*. (*White v. Ultramar, Inc., supra, 21 Cal.4th at p. 577*; *Egan v. Mutual of Omaha Ins. Co., supra, 24 Cal.3d at p. 823*.)

In light of this conclusion it is unnecessary to consider National Union's additional claims concerning instructional error and alleged insufficiency of the evidence based on its own conduct.

Validity of the Trial Court's Remittitur

The trial court issued a post-judgment order conditionally granting National Union a new trial on the insurance bad faith and fraud counts and on plaintiff's right to receive punitive damages unless the latter agreed to reduce the punitive damage award to $ 1.7 million. Plaintiff timely consented to the remittitur. After National Union filed its appeal, plaintiff cross-appealed and now challenges the remittitur's validity.

A trial court has the discretion to conditionally grant a new trial unless the plaintiff consents to a reduction of a damages award where the court independently determines the jury's award is excessive. (*Code Civ. Proc., § 662.5,* subd. (b); Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal.3d 442, 452-453, 198 Cal. Rptr. 155, 673 P.2d 743; **[*37]** West v. Johnson & Johnson Products, Inc. (1985) 174 Cal. App. 3d 831, 876, 220 Cal. Rptr. 437.) Reversal of the ruling is allowed only where there is no substantial basis in the record to support the reasons articulated by the trial court for its decision. (Code Civ. Proc., § 657; Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 408, 214 Cal. Rptr. 119.)

The court noted the ratio of the original punitive damage award to compensatory damages (60 to 1) created a presumption the jury's verdict was the result of passion and prejudice. (Rosener v. Sears, Roebuck & Co. (1980) 110 Cal. App. 3d 740, 752, 168 Cal. Rptr. 237.) Plaintiff focuses much its argument on the reprehensible nature of National Union's conduct. While the court agreed the evidence supported the jury's conclusion National Union had acted reprehensibly, it concluded the jury had placed too much emphasis on National Union's financial wealth and failed to adequately consider the relationship between the injury suffered by plaintiff and the amount of the punitive damage award. The court noted this lawsuit involves an action by one corporate entity against another corporate entity **[*38]** to recover only for economic loss, the value of plaintiff's security interest in a damaged bus. Given these circumstances, the trial court noted upholding the original award raised serious constitutional concerns.

Plaintiff also challenges the portion of the remittitur order requiring it to choose between a reduction in punitive damages and a new trial on *both* liability and the amount of punitive damages. In so ruling, the trial court cited Medo v. Superior Court (1988) 205 Cal. App. 3d 64, 251 Cal. Rptr. 924. Plaintiff relies on Torres v. Automobile Club of So. California (1997) 15 Cal.4th 771, 937 P.2d 290 in challenging the trial court's ruling.

Torres held Civil Code section 3295, subdivision (d) did not require an *appellate* court which reverses an excessive punitive damage award to order a new trial on all issues, including liability and the amount of compensatory damages. (Id. at pp. 777-781.) In so ruling, *Torres* distinguished *Medo*. (Id. at p. 780.) In *Medo*, the *trial* court ordered a new trial on all issues when the jury was discharged after completion of the liability phase. **[*39]** While agreeing with the plaintiffs' assertion that the defendants had waived their right to have the same jury determine both liability and the right to punitive damages, the appellate court nonetheless noted, "punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case*. Thus . . ., the instruction on punitive damages[] tells the jury that in arriving at an award of punitive damages, it is to consider the reprehensibility of the conduct of the defendant and that the punitive damages must bear a reasonable relation to the actual damages. In order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability." (Medo v. Superior Court, supra,

205 Cal. App. 3d at p. 68.)

However, even assuming the trial court erred by relying on *Medo* to order a new trial on all issues if plaintiff refused to accept a reduction in the punitive damage award, the ruling does not require reversal. As the trial judge concluded, the jury's $ 10 million punitive **[*40]** damage award was clearly constitutionally suspect. Thus, ordering a remittitur in this case was appropriate under the circumstances.

Validity of the Award

Finally, National Union contends even the $ 1.7 million punitive damage award is unconstitutional and excessive. In our original opinion, we upheld the award under a deferential standard of review. The United States Supreme Court vacated the original judgment and directed us to review the punitive damage award's constitutional validity under the independent review standard enunciated in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. 424.

The Supreme Court has declared, "the broad discretion" possessed by the states "with respect to the imposition of . . . punitive damages," is limited by the Constitution's Due Process Clause which "prohibits the States from imposing 'grossly excessive' punishments on tortfeasors . . . [citations]." (Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at pp. 433-434.) In determining whether the punitive damage award in a particular case is "'grossly disproportional' to the gravity of [defendants'] **[*41]** offenses"' (Cooper Industries, Inc. v. Leatherman

Tool Group, Inc., supra, 532 U.S. at p. 434), a reviewing court must consider "three guideposts": "The degree of reprehensibility [of the wrongdoer's conduct]; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." (BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 574-575, 134 L. Ed. 2d 809, 116 S. Ct. 1589; see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 435.) On appeal, a reviewing court considering a constitutional challenge to a punitive damage award must conduct a "thorough, independent review" of the award. (Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 441.)

The bulk of National Union's argument focuses on the reprehensibility factor. The evidence clearly reflects reprehensible conduct occurred in this case. To the extent National Union suggests Textron was not subjected to any oppression, fraud, or malice, *Cooper Industries* **[*42]** recognizes that, in making an independent determination on the constitutionality of a punitive damage award, an appellate court "should defer to the [trial court's] findings of fact unless they are clearly erroneous. [Citation.]" (Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 440, fn. 14.) Here, the evidence supports the jury and trial court's finding of the predicate fact required for imposing exemplary damages.

National Union argues TRM, not it, committed the wrongdoing and its liability for TRM's actions is merely vicarious. But as discussed above, TRM "exercised substantial discretionary authority over decisions . . . ultimately determining corporate policy" for the bus insurance program (White v. Ultramar, Inc., supra, 21 Cal.4th at p. 573), and thus constituted National Union's managing agent. Simply describing National Union's liability as vicarious does not militate against imposing a proportionately appropriate punitive damage award against it based on TRM's wrongdoing.

National Union also claims that "at most [it] failed to properly investigate TRM's conduct, and was not itself involved in the scheme **[*43]** to manufacture documents to conceal the existence of coverage." We reject the proposition that, to limit or avoid liability for exemplary damages, a principal may rely on its own self-imposed ignorance of a managing agent's wrongdoing. National Union further contends the reprehensibility factor does not support the punitive damage award because the injury suffered was only economic in nature. But the Supreme Court has recognized "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, [citation] . . . can warrant a substantial penalty." (BMW of North America, Inc. v. Gore, supra, 517 U.S. at p. 576.)

The second "guidepost[]" relevant to the constitutional validity of the punitive damage award is "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award . . . ." (BMW of North America, Inc. v. Gore, supra, 517 U.S. at p. 575.) Here, Textron recovered compensatory damages exceeding $ 165,000. Thus, the ratio between the actual harm caused by National Union and the trial court's reduced punitive damage award of $ 1.7 million is roughly 10 to 1.

National **[*44]** Union claims the ratio between compensatory damages and punitive damages should not exceed 4 to 1, and thus, the 10 to 1 ratio in this case is constitutionally impermissible. We disagree. BMW of North America, Inc. v. Gore, supra, 517 U.S. 559 declared, "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . ." (Id. at p. 582.) In a passage relevant to the present case, the Court emphasized this point by noting, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." (*Ibid*.) While the compensatory award in this case was modest, in light of the reprehensible conduct attributable to National Union, the trial court properly imposed a punitive damage award sufficiently high to achieve the twin objectives of punishment and deterrence.

The third "guidepost[]"concerns a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct . . . ." (BMW of North America, Inc. v. Gore, supra, 517 U.S. at p. 583.) **[*45]** National Union notes the Insurance Code only imposes fines of between $ 10,000 and $ 55,000 for misconduct by insurers. However, Textron notes Penal Code section 550, subdivision (b) makes it a felony subject to fine or imprisonment to "knowingly assist or conspire with any person to" either "present" or "prepare" a "written .

. . statement . . . in . . . opposition to [] a claim" for insurance benefits, or to "conceal, or . . . fail to disclose the occurrence of [] an event that affects any person's initial or continued right or entitlement to any insurance benefit or payment . . . ." (*Pen. Code, § 550, subd. (b)(1)*, *(2)* & *(3)*.) Furthermore, the focus of an analysis of a punitive damage award's constitutionality is to ensure the wrongdoer "receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore, supra, 517 U.S. at p. 574*, fn. omitted.) In reversing the award in *Gore*, the Supreme Court noted "there does not appear to have been any judicial decision in Alabama or elsewhere indicating [the defendant's wrongful activity] might give **[*46]** rise to such severe punishment." (*Id. at p. 584*.) Here, the same cannot be said to be true. It has long been common knowledge acts of bad faith by insurers could subject that party to significant punitive damage awards. (See *Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 928-929, 148 Cal. Rptr. 389, 582 P.2d 980*.)

Thus, we conclude that, even under a de novo review, the $ 1.7 million punitive damage award in this case does not violate National Union's constitutional right to due process of law.

As for the excessiveness of the punitive damage award under state law, "the California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp.* (1996)

49 Cal.App.4th 1645, 1658.) On appeal, the award is presumed to be correct and will be reversed only if the record, viewed most favorably to the judgment, **[*47]** reflects the award is the result of passion or prejudice. (*Ibid.*)

Our foregoing discussion of the reprehensibility and ratio criteria is equally applicable in this context and need not be repeated. As for the third factor, "the wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence. [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp., supra, 49 Cal.App.4th at p. 1658*.) Consequently, to enforce the purposes of punishing the wrongdoer and deterring similar future wrongful conduct (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 432*; *PPG Industries, Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310, 317, 975 P.2d 652*), the award necessarily had to be large enough to affect a corporate entity such as National Union. We conclude the punitive damage award is not excessive under California law.

DISPOSITION

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.

End of Document

Nystrom v. Trex Co.

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

July 1, 2002, Decided ; July 2, 2002, Filed

Civil Action No. 2:01cv905

Reporter
2002 U.S. Dist. LEXIS 27502 *

RON NYSTROM, Plaintiff/Counterclaim-Defendant, v. TREX COMPANY, INC. and TREX COMPANY, LLC, Defendants/Counterclaim-Plaintiffs.

Subsequent History: Patent interpreted by *Nystrom v. Trex Co., 2002 U.S. Dist. LEXIS 27501 (E.D. Va., Aug. 19, 2002)*

Disposition: **[*1]** Plaintiff's motion for sanctions denied.

Core Terms

counterclaims, antitrust, patent, monopolize, proceedings, sham, defendants', sanctions, multiply, bad faith, vexatiously, decking, lawsuit, antitrust violation, patent infringement, declaration, argues

LexisNexis® Headnotes

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN1[] **Sanctions, Misconduct & Unethical Behavior**

See *28 U.S.C.S. § 1927*.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN2[] **Sanctions, Misconduct & Unethical Behavior**

The award of sanctions under *28 U.S.C.S. § 1927* is in the discretion of the district court. *Section 1927* was enacted to sanction attorneys who unreasonably extend court proceedings. Further, a court must find that the attorney acted in bad faith as a prerequisite to awarding fees under *§ 1927*.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN3[] Sanctions, Misconduct & Unethical Behavior

The filing of a single complaint cannot be held to have multiplied the proceedings unreasonably or vexatiously and therefore *28 U.S.C.S. § 1927* cannot be employed to impose sanctions.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN4[] Regulated Practices, Intellectual Property

The enforcement of fraudulently obtained patents to exclude others from the market can violate the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] Actual Monopolization, Anticompetitive & Predatory Practices

The elements of an antitrust violation include (i) a specific intent to monopolize the market, (ii) anticompetitive or predatory conduct designed to further that intent, and (iii) a dangerous probability of success.

Counsel: For RON NYSTROM, plaintiff: Joseph Scott Presta, Nixon & Vanderhye PC, Arlington, VA.

For RON NYSTROM, plaintiff: Michael Dean Gaffney, Washington, DC.

For TREX COMPANY, INC., TREX COMPANY, LLC, defendants: Daniel Todd Campbell, Willcox & Savage PC, Norfolk, VA.

For TREX COMPANY, INC., TREX COMPANY, LLC, defendants: David J. Ervin, John B. Williams, Collier Shannon & Scott PLLC, Patrick Joseph Coyne, Finnegan Henderson Farabow Garrett & Dunner LLP, Washington, DC.

For TREX COMPANY, INC., TREX COMPANY, LLC, counter-claimants: David J. Ervin, John B. Williams, Collier Shannon & Scott PLLC, Patrick Joseph Coyne, Finnegan Henderson Farabow Garrett & Dunner LLP, Washington, DC.

For RON NYSTROM, counter-defendant: Joseph Scott Presta, Nixon & Vanderhye PC, Arlington, VA.

Judges: Jerome B. Friedman, UNITED STATES DISTRICT JUDGE.

Opinion by: Jerome B. Friedman

Opinion

ORDER AND OPINION

On June 21, 2002, this court heard oral argument on Ron Nystrom's ("plaintiff") Motion for Sanctions Under *28 U.S.C. § 1927* against counsel for Trex Company, Inc. and Trex **[*2]** Company, LLC (collectively "defendants"). Based on the briefs submitted by the parties, the arguments made at the hearing, and for the reasons more fully articulated below, the plaintiff's Motion is denied.

I. Factual Background

In December of 2001, the plaintiff filed the instant lawsuit alleging patent infringement by the defendants of U.S. Patent No. 5,474,831 ("the '831 patent"). The '831 patent, which was issued to the plaintiff on December 12, 1995, discloses a uniquely shaped board for use in constructing exterior flooring surfaces (such as outdoor decks, porches, docks, etc.) that has a slightly rounded or curved top surface that enables the board to shed water, and bottom surface with a concave configuration which allows multiple boards to stack easily. The defendants' product is a composite board which is made from a mixture of cellulose fibers (usually sawdust) and plastic. These materials are mixed, heated, and extruded to produce a composite material board with a curved top and bottom. The parties have attempted to negotiate a licensing agreement in the past to no avail. The plaintiff subsequently filed this lawsuit.

In response to the plaintiff's complaint, **[*3]** the defendants first filed a counterclaim alleging attempted monopolization in violation of *section 2 of the Sherman Act* and conspiracy to restrain trade or commerce in violation of *section 1 of the Sherman Act*. See Defs.' First Countercl., Dkt. 4. The latter claim was filed against the plaintiff, his company, and the plaintiff's attorneys. After the plaintiff filed a motion to dismiss and a motion for preliminary injunction, the defendants voluntarily dismissed the counterclaims. Shortly thereafter, the defendants filed an amended counterclaim, where they allege attempted monopolization by obtaining a patent through fraud on the Patent and Trademark Office ("PTO") in violation of *section 2 of the Sherman Act* and attempted monopolization by instituting sham litigation in violation of *section 2 of the Sherman Act*. See Defs.'Am. Countercl., Dkt. 12. These counts were filed against the plaintiff only. After the plaintiff filed another motion to dismiss, a motion for preliminary injunction, and a *Rule 11* letter for sanctions, the defendants again voluntarily dismissed these counterclaims.

Subsequently, the plaintiff filed the instant motion, seeking sanctions against the defendants **[*4]** under *28 U.S.C. § 1927* for the filing of these counterclaims. The plaintiff seeks attorney's fees based on the defendants' "vexatious filing and subsequent abandonment of two consecutive sets of frivolous antitrust counterclaims, and an intentional filing of a groundless opposition brief." Pl.'s Mot., Dkt. 23, p. 3. The defendants maintain that while the first set of counterclaims was filed in error, the second set of counterclaims are fully supported by the facts as are known at this time and were only dismissed based on the defendants' desire to focus on the patent issues in the case first. The defendants noted that they may re-file these claims based on the resolution of the patent issues.

II. Analysis

Section 1927 of Title 28 of the United States Code provides that

> ***HN1***[] Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 **[*5]** (West. 1994). **HN2**[] The award of sanctions under section 1927 is in the discretion of the district court. See Chaudhry v. Gallerizzo, 174 F.3d 394, 410 (4th Cir. 1999). Section 1927 was enacted to sanction attorneys who "unreasonably extend court proceedings." Roadway Express, Inc. v. Piper, 447 U.S. 752, 757, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980); see also DeBauche v. Trani, 191 F.3d 499, 511 ("The unambiguous text of § 1927 aims only at attorneys who *multiply* proceedings.") (emphasis in original); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226 (6th Cir. 1984) ("A court may impose section 1927 fees only to sanction needless delay by counsel."). Further, a court must find that the attorney acted in bad faith as a prerequisite to awarding fees under section 1927. See Chaudhry, 174 F.3d at 411 n. 14 (quoting Brubaker v. City of Richmond, 943 F.2d 1363, 1382 n. 25 (4th Cir. 1991)); see also Knorr, 738 F.2d at 227.

In this case, the plaintiff contends that the filing of the antitrust counterclaims by the defendants was done in bad faith in order to delay and multiply **[*6]** the proceedings. The plaintiff cites a number of reasons for this allegation. First, the plaintiff notes that the defendants voluntarily dismissed the counterclaims after being notified that they were baseless based on current ***antitrust law***. Second, the plaintiff argues that the defendants' counsel hold themselves out as experts in ***antitrust law***; and as experts, they cannot maintain that they were unaware of the law surrounding these counterclaims. Third, the plaintiff points to the fact that Mr. Coyne, one of the defendants' attorneys, argued a case regarding sham litigation before the Supreme Court, and thus, he knew the counterclaim based solely on sham litigation was improper. See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (holding that even if a party can prove sham litigation, the party must still prove the elements of a substantive antitrust violation). Fourth, the plaintiff cites an article written by Mr. Coyne in the National Law Journal regarding whether a patentee can be guilty of antitrust violations for enforcement of his patent. Based on this article, written within **[*7]** days of the filing of these counterclaims, the plaintiff argues that the defendants knew that the counterclaim was without merit. Finally, the plaintiff alleges that Mr. Coyne committed perjury in his declaration when he stated that he had never met the plaintiff. Based on these allegations, the plaintiff argues that the defendants' counsel has acted in bad faith and intentionally and vexatiously multiplied the proceedings in order to harass the plaintiff and delay the litigation. [1]

[*8] The defendants argue that the antitrust counterclaims are legitimate, despite the voluntarily dismissal of these claims, and therefore, they are not guilty of unreasonably or vexatiously multiplying the proceedings. The defendants maintain their position that the plaintiff's lawsuit is a sham, based on the fact that the plaintiff knows the patent underlying their infringement action is invalid. Furthermore, the defendants allege that the plaintiff committed fraud on the PTO by misrepresenting the Zagelmayer patent to the examiner during the prosecution of the '831 patent. These factors, the defendants allege, strip the plaintiff, as patent holder, of his immunity from antitrust liability. See Professional Real Estate Investors, 508 U.S. at 60-61 (holding that "proof of a sham … deprives the defendant of immunity" from antitrust liability); see also Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-56, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) (citing Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)) (holding that "the enforcement of a fraudulently obtained **[*9]** patent could violate the Sherman Act.").

In analyzing these issues, the court has found that the defendants' initial counterclaim was improper in many respects. For example, the defendants improperly sued the plaintiff's attorneys and failed to plead the required elements of an antitrust violation. However, the Fourth Circuit held "as a matter of law that **HN3**[] the filing of a single complaint cannot be held to have multiplied the proceedings unreasonably or vexatiously and therefore, … § 1927 cannot be employed to impose sanctions." DeBauche, 191 F.3d at 511-12. Thus, the court must decide whether the filing of an additional amended counterclaim can be the basis of sanctions in this case.

[1] In a Supplemental Memorandum filed with the court on June 28, 2002, the plaintiff argues that the opinion of counsel letters produced by the defendants state that the Trex products may infringe upon the plaintiff's patent and therefore, the defendants' contention that the underlying patent infringement case is baseless is unreasonable. See Dkt. 44. However, the court does not agree. The opinion of counsel letter also states that certain claims of the '831 patent may be invalid based on prior public use and the Zagelmayer patent. This portion of the letter gives the defendants a reasonable basis to argue that the plaintiff's patent is invalid and that the infringement suit is groundless.

It appears that the amended counterclaim was not as deficient as the initial counterclaim for several reasons. First, the amended counterclaim alleges violations of ***antitrust law*** against the plaintiff only and not the plaintiff's attorneys. While this court is not going to judge the success of such a counterclaim, particularly since it has been voluntarily dismissed by the defendants, the court notes that such antitrust counterclaims to patent infringement lawsuits are not uncommon. **[*10]** Courts have held that ***HN4***[] the enforcement of fraudulently obtained patents to exclude others from the market can violate the *Sherman Act*. See, e.g., *Spectrum Sports, 506 U.S. at 455*. Further, the defendants have alleged specific instances where they believe the plaintiff committed fraud on the PTO, which can also be the basis for antitrust violations. See Defs.' Am. Countercl., Dkt. 12, PP 20-30; see also *Walker Process, 382 U.S. at 174*.

Second, the defendants have plead ***HN5***[] the elements of an antitrust violation, including (i) a specific intent to monopolize the market, (ii) anticompetitive or predatory conduct designed to further that intent, and (iii) a dangerous probability of success. See *Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 926 (4th Cir. 1990)*. Specifically, the defendants allege the following:

> P 47 - Nystrom has demonstrated the specific intent to monopolize by instituting one or more patent infringement suits with the knowledge that the patent was not valid.
>
> P 48 - In furtherance of his attempt to monopolize, Nystrom engaged in and continues to engage in the following activities, among others: the filing and **[*11]** prosecution of this patent infringement suit against Trex, which is a sham and false and known by Nystrom to be so; bad faith prosecution of suit; and upon information and belief, the assertion of the '831 patent against Universal Forest Products, and possibly others, which was a sham and false and known by Nystrom to be so.
>
> P 49 - By erecting a substantial barrier to entry through unlawful assertion and/or enforcement of the '831 patent, which Nystrom knows or should know is invalid, Nystrom has a dangerous probability of succeeding in his attempt to monopolize.

Defs.' Am. Counterclaim, Dkt. 12. Again, the court does not judge the truth in these allegations, but notes that the proper elements are plead for an antitrust cause of action.

The plaintiff spends considerable time arguing the fact that the defendants initially did not state the relevant market, and then once they did plead the relevant market, it was not the market the plaintiff is in. Specifically, the defendants allege that the plaintiff has attempted to monopolize the market for composite decking material with a curved top that sheds water. See Defs.' Am. Countercl., Dkt. 12, PP 32, 44. The plaintiff **[*12]** states that he operates solely in the market for milling decking material and therefore, cannot monopolize a market he is not in. Based on this, the plaintiff argues that the defendants have misrepresented the plaintiff's actions and the relevant market to the court. The defendants state that they rely on a number of statements made by the plaintiff during the prosecution of his patent which lead them to believe that he intends to monopolize both the milled decking material and composite decking material markets. See, e.g., Defs.' Am. Countercl., Dkt. 12, P 18 ("the invention is replacing analogous products that have heretofore enjoyed widespread usage."). At this stage of the proceedings, the court does not have sufficient evidence to limit the interpretation of this statement to analogous products in only the milled decking material market. Therefore, the court does not find that the defendants acted in bad faith for making this assertion.

Similarly, the court does not find that misstatement in Mr. Coyne's declaration rises to the level of perjury. In his first declaration, Mr. Coyne states that "I have never met personally with Mr. Nystrom." See Defs.' Resp., Dkt. 25, Ex. **[*13]** N, P 8. After being confronted by declarations from the plaintiff and the plaintiff's attorneys stating that Mr. Coyne was in a meeting with Mr. Nystrom in the spring of 1999, Mr. Coyne recanted his earlier declaration and stated that he "has no recollection of ever having met Mr. Nystrom." See Supplemental Decl. of Patrick J. Coyne, Dkt. 42, P 6. The court finds insufficient evidence to sanction the defendants for counsel's lapse of memory; however, the court cautions Mr. Coyne about making definitive statements on issues where he is unsure of, or does not recall, the actual facts.

Finally, the plaintiff argues that the fact that the defendants voluntarily withdrew these counterclaims prior to a hearing before the court, that they have somehow conceded that these counterclaims are baseless. However, the court disagrees with this assertion. The Supreme Court has stated that if a plaintiff succeeds in his other underlying lawsuit, that any antitrust counterclaims cannot succeed as there is no sham litigation. See *Professional Real Estate Investors, 508 U.S. at 61 n. 5*. Therefore, it is not unreasonable for the defendants to decide to voluntarily dismiss their antitrust **[*14]** counterclaims pending resolution of the underlying patent infringement case. If the plaintiff is successful in his lawsuit, the defendants will have saved time and money by not maintaining the antitrust counterclaims. However, if the plaintiff loses his case, the defendants may re-file their counterclaims. The Supreme Court notes that in such a case, a district court must "'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" Id. (quoting *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978))*.

In conclusion, this court does not condone the actions of the defendants in this case, particularly in filing an initial counterclaim without first researching the merits of the claims. However, the court does not believe that the defendants' actions were made in bad faith to vexatiously multiply and delay the proceedings. Therefore, the plaintiff's Motion for Sanctions is denied.

III. Conclusion

For the reasons stated above, the plaintiff's Motion for Sanctions Under *28 U.S.C. § 1927* **[*15]** is **DENIED.**

The Clerk is **REQUESTED** to send a copy of this Order and Opinion to counsel of record.

It is so **ORDERED.**

Jerome B. Friedman

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 1, 2002

McNamara v. Bre-X Minerals Ltd.

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

July 3, 2002, Decided ; July 3, 2002, Filed, Entered

5:97-CV-159

Reporter
214 F.R.D. 424 *; 2002 U.S. Dist. LEXIS 26465 **

LANE McNAMARA, ET. AL., Plaintiffs, v. BRE-X MINERALS LTD., ET. AL., Defendants.

Subsequent History: Motion to strike granted by, in part, Motion to strike denied by, in part *McNamara v. Bre-X Minerals, Ltd., 2002 U.S. Dist. LEXIS 27473 (E.D. Tex., Sept. 30, 2002)*

Prior History: *McNamara v. Bre-X Minerals Ltd., 197 F. Supp. 2d 622, 2001 U.S. Dist. LEXIS 4571 (E.D. Tex., 2001)*

Disposition: [1]** Plaintiffs' and Bresea's Motion for Preliminary Approval of Settlement GRANTED.

Core Terms

settlement, notice, class member, certification, settlement agreement, proposed settlement, opt-out, pool, class action, opt out, preliminary approval, Plaintiffs', proposed class, certify, class certification, attorney's fees, predominate, parties, meets, stock, class representative, briefing, purposes, shares

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

HN1[] **Special Proceedings, Class Actions**

See *Fed. R. Civ. P. 23(e)*.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Attorneys > General Overview

HN2[] **Class Actions, Compromise & Settlement**

Approval of a class action settlement involves a two-step process. First, the court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel. Second, if the court determines that the settlement is fair, the court directs that notice pursuant to *Fed. R. Civ. P. 23(e)* be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN3[] **Class Actions, Certification of Classes**

Approval of a settlement in a class action necessarily requires the court to determine if the proposed class is a proper class for settlement purposes.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] **Class Actions, Certification of Classes**

With the exception of the manageability requirement, a settlement class must meet the requirements of *Fed. R. Civ. P. 23* just as if the case were to be litigated. Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *Fed. R. Civ. P. 23(b)(3)(D)*. But other specifications of *Rule 23* - those designed to protect absentees by blocking unwarranted or over broad class definitions - demand undiluted, even heightened, attention in the settlement context.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] **Class Actions, Certification of Classes**

A district court may certify a class only if the plaintiff meets his burden to show that proposed class and the proposed class representatives meet the four prerequisites in *Fed. R. Civ. P. 23(a)* and one of three additional requirements in *Fed. R. Civ. P. 23(b)*. *Fed. R. Civ. P. 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN6[] **Class Actions, Certification of Classes**

A district court has "great discretion" in determining whether to certify a class, but the district court must make a reasoned and thorough analysis under *Fed. R. Civ. P. 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN7[] **Class Actions, Certification of Classes**

The four *Fed. R. Civ. P. 23(a)* prerequisites include: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. All four must be satisfied in order for the court to certify the class. Once the plaintiff satisfies these prerequisites, he must then satisfy the requirements of one of the three subdivisions of *Fed. R. Civ. P. 23(b)*. The requirements of these subdivisions include: (1) inconsistent adjudications would result in incompatible standards of conduct or any adjudication would bear heavily on the interests of non-parties; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; and (3) issues of law and fact predominate issues unique to individual class members, and maintaining the class action is the superior procedural vehicle. *Fed. R. Civ. P. 23(b)(1)-(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN8[] **Class Actions, Certification of Classes**

In the context of *Fed. R. Civ. P. 23(b)(3)*, the predominance requirement is readily met in certain cases alleging consumer or securities fraud or violations of ***antitrust law***.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN9[] Class Actions, Compromise & Settlement

In the context of *Fed. R. Civ. P. 23(b)(3)*, the court need not consider manageability of the class where the proposed class is a limited purpose, settlement only class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN10[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23(c)(2) provides that in a class action maintained under *Fed. R. Civ. P. 23(b)(3)*, the court shall direct to the members of the class the best notice practicable under the circumstances. The notice shall advise each member that the court will exclude the member from the class if the member so requests by a specified date. This request for exclusion is popularly known as "opting out" of the class.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Attorneys > General Overview

HN11[] Class Attorneys, Fees

If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of a class representative or of segments of the class, or of excessive compensation for attorneys, and appears to fall within the rage of possible approval, the court should direct that notice under *Fed. R. Civ. P. 23(e)* be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

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

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Costs & Attorney Fees

HN12[] **Class Actions, Compromise & Settlement**

The PSLRA expressly provides that the total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class. *15 U.S.C.S. § 78u-4(a)(6)*. Courts assess the reasonableness of attorneys' fees to protect class members from unfair settlements, to minimize conflicts of interest between class members and their representatives, and to prevent perpetuating a public perception that attorneys exploit class members for hefty fees. The court must make an independent review of the reasonableness of fees sought in a class settlement.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Costs & Attorney Fees

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN13[] **Costs & Attorney Fees, Clayton Act**

Purported members of a class must receive the best notice practicable under the circumstances. *Fed. R. Civ. P. 23(c)(2)*. The notice must contain an adequate description of the proceedings written in objective, neutral terms that, insofar as possible, may be understood by the average absentee class member. The notice must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment. Under the PSLRA, notice must conform to certain additional articulated standards. The notice must include a statement of plaintiff recovery, determined in an aggregate and on an average per share basis. *15 U.S.C.S. § 78u-4(a)(7)(A)*. The notice must provide a statement of potential outcome of the case. *15 U.S.C.S. § 78u-4(a)(7)(B)*. The notice must supply a statement of attorneys' fees or costs sought. *15 U.S.C.S. § 78u-4(a)(7)(C)*.

Counsel: For LANE MCNAMARA, REUVEN RANDALL SINGER, ALL PLAINTIFFS, BRUCE FLINT, plaintiffs: H Lee Godfrey, Susman Godfrey LLP, Houston, TX.

For LANE MCNAMARA, REUVEN RANDALL SINGER, ALL PLAINTIFFS, BRUCE FLINT, plaintiffs: Damon Young, Young Pickett & Lee, Texarkana, TX.

For REUVEN RANDALL SINGER, BRUCE FLINT, plaintiffs: A Paul Miller, Miller James Miller & Hornsby, Texarkana, TX.

For REUVEN RANDALL SINGER, ALL PLAINTIFFS, BRUCE FLINT, plaintiffs: R Paul Yetter, Yetter & Warden, Houston, TX.

For ALL PLAINTIFFS, plaintiff: James T Southwick, Susman Godfrey LLP, Thomas Robert Ajamie, Schirrmeister Ajamie, Houston, TX.

For ALL PLAINTIFFS, plaintiff: Steven J Toll, Cohen, Milstein, Hausfeld & Toll, Washington, DC.

For ALL PLAINTIFFS, BRUCE FLINT, plaintiffs: Michael C Spencer, Hynes & Lerach LLP, U Seth Ottensoser, Milberg Weiss Bershad Hynes & Lerach LLP, New York, NY.

For ALL PLAINTIFFS, plaintiff: Adam R Gonnelli, Jeffrey G Smith, Peter W Smith, Wolfe Haldenstein Adler Freeman & Herz LLP, Curt P Beck, James S Notis, Abbey Gardy LLP, New York, NY.

For ALL PLAINTIFFS, plaintiff: **[**2]** Robert C Schubert, Schubert & Reed LLP, San Francisco, CA.

For ALL PLAINTIFFS, plaintiff: Murray Lewis, Matthew J Ide, Cohen Milstein Hausfeld & Toll, Seattle, WA.

For ALL PLAINTIFFS, plaintiff: Guy A Wilson, Worthington & Worthington, Santa Rosa, CA.

For BRUCE FLINT, plaintiff: Charles Robert Eskridge, III, Susman Godfrey LLP, Houston, TX.

For BRUCE FLINT, plaintiff: Edward Miller, Keeney Anderson Miller James & Miller, Texarkana, TX.

For JOHN B FELDERHOF, defendant: John Anderson Gilliam, Hawkins Parnell & Thackston, Dallas, TX.

For JOHN B FELDERHOF, defendant: Andrius R Kontrimas, Jenkens & Gilchrist, Houston, TX.

For JOHN B FELDERHOF, defendant: John Robert Mercy, Mercy Carter Tidwell & Elliott, Texarkana, TX.

For JEANNETTE WALSH, defendant: McGlinchey Stafford, Houston, TX.

For ROLANDO C FRANCISCO, defendant: Karen Patton Seymour, Tiffany M Erwin, D Stuart Meiklejohn, Sharon Nelles, Sullivan & Cromwell, New York, NY.

For ROLANDO C FRANCISCO, defendant: Preston Worley McGee, Flowers Davis LLP, Tyler, TX.

For HUGH C LYONS, defendant: Gary D Grimes, Grimes & Craytor, Texarkana, TX.

For PAUL M KAVANAUGH, defendant: Johnny **[**3]** Paul Arnold, Attorney at Law, Texarkana, TX.

For PAUL M KAVANAUGH, defendant: David E McCraw, Clifford Chance Rogers & Wells, New York, NY.

For SNC-LAVALIN GROUP, INC., KILBORN ENGINEERING PACIFIC, P.T. KILBORN PAKAR REKAYASA, defendants: Andrew T Solomon, Sullivan & Worcester, New York, NY.

For KILBORN ENGINEERING PACIFIC, P.T. KILBORN PAKAR REKAYASA, defendants: Winford L Dunn, Jr, Dunn Nutter & Morgan, Texarkana, AR.

For KILBORN ENGINEERING PACIFIC, P.T. KILBORN PAKAR REKAYASA, defendants: David J Beck, Beck Redden & Secrest LLP, Houston, TX.

For KILBORN ENGINEERING PACIFIC, P.T. KILBORN PAKAR REKAYASA, defendants: Paul E Summit, Sullivan & Worcester, Boston, MA.

For P.T. KILBORN PAKAR REKAYASA, defendant: L Nicole Batey, Eric J R Nichols, Beck Redden & Secrest LLP, Houston, TX.

For BARRICK GOLD CORPORATION, defendant: John Hess McElhaney, Locke Liddell & Sapp, Dallas, TX.

For BARRICK GOLD CORPORATION, defendant: John David Crisp, Crisp Boyd Poff, Texarkana, TX.

For BARRICK GOLD CORPORATION, defendant: Mark Douglas Wegener, Martin Cunniff, Howrey Simon Arnold & White LLP, Washington, DC.

Judges: DAVID FOLSOM, UNITED STATES DISTRICT JUDGE. **[**4]**

Opinion by: DAVID FOLSOM

Opinion

[*425] MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' and Defendant Bresea Resources's (Bresea) Revised Joint Motion for Preliminary Approval of Proposed Settlement Between Plaintiffs and Bresea (Doc. No. 787). The motion requests that the Court issue an order (1) granting preliminary approval of the settlement, (2) conditionally certifying a plaintiff class for purposes of settlement only, (3) approving forms of notice to class members, and (4) setting terms and schedule for the settlement approval process. Having considered the arguments and briefs, the Court finds that the motion is well taken and should be **GRANTED.**

I. BACKGROUND

For purposes of this Order, the Court will not recite the complete factual background of the case but will instead only detail the relevant points. For a complete description of the factual nature of this case, see this Court's opinion reported as *McNamara v. Bre-X Mineral, Ltd., 57 F. Supp. 2d 396 (E.D. Tex. 1999)*.

On November 2, 2001, Plaintiffs and Bresea filed a motion seeking approval of a proposed settlement. This Court received **[*426]** extensive briefing on the subject **[**5]** and held a hearing on the matter on November 20, 2002. On January 15, 2002, the Court issued a ruling (the January 2002 order) denying the initial motion for approval of settlement. The original settlement sought to include in the class, "all persons who purchased or otherwise acquired Bre-X Minerals Ltd. common shares and/or Bresea Resources Ltd. common shares between May 6, 1993 and May 2, 1997 and who suffered a loss as a consequence of dealing in shares of Bre-X and/or Bresea." As grounds for denial of this motion, the Court held that the proposed class did not meet the predominance requirement of *Rule 23* as it included plaintiffs who were not covered in the complaint and because it included plaintiffs whose claims arose after Freeport MacMoran announced that there were insignificant amounts of gold at Busang and who would therefore be required to prove individual reliance.

Plaintiffs and Bresea have reached a new settlement (the 2002 Settlement) which excludes those plaintiffs. Additionally, Plaintiffs claim that the 2002 Settlement is materially different from the original settlement in the following ways:

> $ 4.48 million (minus attorney fees and "certain other deductions") **[**6]** of the $ 5.76 million payment by Bresea will be distributed to the eligible class members and will not be distributed to the Bre-X Trustee (the remaining $ 1.28 will be given to the Bre-X Trustee.)
> Attorneys' Fees have been reduced by over $ 100,000.
> The Bre-X trustee has agreed to seek a declaration that injured Bre-X purchasers are creditors of Bre-X, but this is not a condition precedent to the rights and obligations of the parties under the settlement.
> Recoveries from Bre-X/Bresea insiders Francisco, Lyons, Thorpe, Coates, and Kavanagh will no longer be pooled among this action, the Ontario action, and the Bre-X trustee.
> Recoveries from Felderhof, the Walshes, and McAnulty will be pooled among this action, the Ontario action, and the Bre-X trustee only if Bre-X Trustee obtains and order declaring Bre-X share purchasers to be creditors of Bre-X. [1]

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[1] **Terms of the ORIGINAL SETTLEMENT AGREEMENT** were as follows:

> 1. Bresea agreed to pay $ 9 Million CDN to Deloitte, in its capacity as Trustee of the Estate of Bre-X Minerals, Ltd., that after the payment of certain expenses, including attorneys' fees, would be available for distribution to Bre-X shareholders in the U.S. and Canada.

[7]** The 2002 Settlement Agreement has been approved by Lead Plaintiffs and the Proposed Class Representatives from this action. The 2002 Settlement's completion is conditional on the approval of the Settlement Agreement by the three Courts with jurisdiction over the claims of Bre-X and Bresea share purchasers: this Court, the Alberta Court, and the Ontario Court. The Alberta Court approved the 2002 Settlement on June 25, 2002, and the Ontario Court approved the settlement on June 20, 2002.

IV. STANDARD FOR REVIEWING A PROPOSED SETTLEMENT

Federal Rule of Civil Proceure23(e) provides that, ***HN1***[] "A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such a manner as the court directs." ***HN2***[] Approval of a class action settlement involves a two-step process. First, the Court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel. Second, if the Court determines that the settlement is fair, the Court directs that notice pursuant to *Rule 23(e)* be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of **[**8]** and in opposition to the settlement.

A. Settlement Class

HN3[] Approval of a settlement in a class action necessarily requires the Court to determine **[*427]** if the proposed class is a proper class for settlement purposes. The law regarding approval of a settlement in a class action where the class has not yet been certified has undergone significant examination in the past five years. In 1997, the United States Supreme Court clearly held that ***HN4***[] with the exception of the manageability requirement, a settlement class must meet the requirements of *Federal Rule of Civil Procedure 23* just as if the case were to be litigated. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see *Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial. But other specifications of the Rule - those designed to protect absentees by blocking unwarranted or over broad class definitions - demand undiluted, even heightened, attention in the settlement context." *Amchem v. Windsor, 521 U.S. 591, 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)*. What was not articulated **[**9]** by the *Amchem* Court was at what point in the approval process courts are required to make an in depth analysis of the *Rule 23* requirements.

In 1999, the Supreme Court once again addressed the *Rule 23* requirements in a settlement class, this time in the context of a mandatory class. The Court held that the moment of certification required heightened attention because certification of a settlement class, "however provisional technically, effectively concludes the proceedings save for the final fairness hearing. And ... a fairness hearing under *Rule 23(e)* is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees'" *Ortiz v. Fibreboard Corp., 527 U.S. 815, 849, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999)* quoting *Amchem, 521 U.S. at 620*. The language of *Ortiz* suggests that a court must make a detailed *Rule 23* analysis and a final certification decision before the fairness hearing; however, *Ortiz* is distinguishable from the case at bar because in *Ortiz,* the court was considering certification of a mandatory class, and the court's only opportunity to address the propriety of the class was at **[**10]** the preliminary approval stage.

The present case, however, contains significant differences which make in-depth consideration of settlement class certification at the preliminary approval stage burdensome and unworkable. This is a complex securities litigation case that has been pending before this Court for over five years and consists of over eight-hundred docket entries. Plaintiffs have sought certification of several non-settling classes, and two of those classes taken together form the

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2. Bresea would create a pool consisting of shares equal to ten percent of the common equity of reorganized Bresea for the benefit of Bresea shareholders in the U.S. and Canada.

3. Bresea would pool any recoveries obtained from certain insider defendants in this action, the Ontario Class Actions, and the Trustee's Actions, and Deloitte would distribute those recoveries to Bre-X shareholders.

proposed settlement class. First, Plaintiffs seek certification of a "NASDAQ Class" that would include, "all persons who purchased or otherwise acquired shares of the common stock of Bre-X Minerals Ltd. on the NASDAQ exchange from August 19, 1996 up to March 26, 1997." The Court has received extensive briefing on and has conducted an evidentiary hearing regarding certification of the NASDAQ class. The Court has taken the issue under advisement, and the Court will issue an order regarding the propriety of certifying a NASDAQ Class before the Court makes a final determination of the settlement class following the fairness hearing.

Second, Plaintiffs have requested that the Court certify a class **[**11]** of U.S. citizens who purchased Bre-X and Bresea stock on Canadian exchanges from January 17, 1994 until March 26, 1997 (the Canadian Exchange Class). The Court intends to schedule a hearing on the Canadian Exchange Class for the same day it schedules a fairness hearing on the settlement class. The complex nature of the settlement class and the numerous issues raised by the briefing on the Canadian Class lead the Court to believe that a more accurate examination of the settlement class can be made after benefit of full-briefing and a hearing of the issues relevant to the Canadian Exchange Class. After benefit of that hearing, after consideration of the NASDAQ class, and after the fairness hearing, the Court will be in a better position to make a final determination on settlement-class certification. [2]

[12] [*428]** Noting that the Court will have ample opportunity to examine in detail the qualifications of the potential class in its examination of the NASDAQ class materials and the Canadian Exchange class materials, and furthernoting that the Court will take under consideration all objections to the settlement class certification at the fairness hearing, the Court will proceed to make a preliminary, conditional examination of the proposed settlement class's certification capability. Plaintiffs and Bresea request preliminary, conditional class certification for the limited purpose of settlement, and the Court will review the class qualifications with the caveat that detailed orders on certification of the NASDAQ Class and the Canadian Exchange Class will follow this ruling and may impact the validity of the settlement class. As previously stated, because the Court must necessarily conduct a hearing on the Canadian Exchange Class certification issue, final approval or disapproval of the 2002 Settlement will be delayed. The following review serves to demonstrate to the Court that no glaring deficiencies exist that would make final certification untenable. [3]

[**13] B. Standard

HN5[] A district court may certify a class only if the plaintiff meets his burden to show that proposed class and the proposed class representatives meet the four prerequisites in *Rule 23(a)* and one of three additional requirements in *Rule 23(b)*. *See* *FED. R. CIV. P. 23*; *see also* *Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 623 (5th Cir. 1999)*; *Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996)*. ***HN6***[] A district court has "great discretion" in determining whether to certify a class, but the district court must make a reasoned and thorough analysis under *Rule 23*. *Mullen, 186 F.3d at 624*.

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[2] Though not specifically deciding the point at which the certification determination is made, it is clear that other courts have taken a similar approach to certification. See *Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 942 (E.D. Tex., 2000)* (court engaged in extensive *Rule 23* analysis *after* preliminary certification and fairness hearing.) See also *In re Engineering Animation Securities Litigation, 203 F.R.D. 417 (S.D. Iowa, 2001)* (court in shareholder class action addressed in detail the requirements of *Rule 23* in an order issued *after* the fairness hearing was held.) Additionally, the purpose of the preliminary approval is to detect any *obvious* defects that will preclude final approval of the settlement, and the purpose of initial certification is so that *notice* may be sent to the proposed class. See *Manual for Complex Litigation, Third,* pg. 236-237.

[3] The Court undertook a similar analysis in its January 2002 order as the Court determined that the over-broad nature of the proposed settlement class was fatal to any possibility that a settlement class could be finally approved. The Court was required to consider the appropriateness of the pre-complaint class members and the post- Freeport MacMoran announcement members at the preliminary approval stage because, as was the case in *Ortiz,* the Court had no other opportunity to address those specific issues.

HN7[] The four *Rule 23(a)* prerequisites include: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)*. All four must be satisfied in order for the Court to certify the class. Once the plaintiff satisfies these prerequisites, he must then satisfy the requirements of one of the three subdivisions of *Rule 23(b)*. *See* Amchem, *521 U.S. at 614*. The requirements of these **[**14]** subdivisions include: (1) inconsistent adjudications would result in incompatible standards of conduct or any adjudication would bear heavily on the interests of non-parties; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; and (3) issues of law and fact predominate issues unique to individual class members, and maintaining the class action is the superior procedural vehicle. *FED. R. CIV. P. 23(b)(1)*-(3).

2. Analysis

Rule 23(a)

Plaintiffs and Bresea state that there is no issue of *numerosity,* that *common questions of law and fact predominate* because all plaintiffs allege that they purchased Bresea and Bre-X shares at artificially inflated prices, that there is *typicality* because all plaintiffs stand in the same position as other class members with respect to Bresea because they all purchased inflated stock caused by the Bre-X fraud, and that there is *adequacy of representation* because there is no conflict between named plaintiffs and the class members - they all seek maximum recovery - and because counsel is skilled and experienced. As a preliminary matter, the **[*429]** Court agrees that the requirements of *Rule **[**15]** 23(a)* are met.

Rule 23(b)(3)

Plaintiffs and Bresea seek to certify the class as a*23(b)(3)* class where common questions predominate over individual questions and a class action is superior to individual adjudication of claims. ***HN8***[] The *predominance* requirement, "is readily met in certain cases alleging consumer or securities fraud or violations of ***antitrust law***." *Amchem, 521 U.S. at 625*. The Court denied the earlier motion for settlement certification because common questions of law and fact did not predominate among the proposed class members. Plaintiffs and Bresea contend that concerns raised by the Court in that denial have been corrected by narrowing the settlement-class definition in accordance with the Court's order. The Court finds in its preliminary examination of the settlement class that Plaintiffs and Bresea have corrected the over-broad nature of the first settlement class. Next, Plaintiffs argue that the class is a *superior* method for resolving claims because the alternative is thousands of virtually identical individual claims. The Court finds that a class action is the superior method for resolving the dispute at issue because joinder of individual **[**16]** parties would be impossible. Finally, ***HN9***[] the court need not consider manageability of the class since the proposed class is a limited purpose, settlement only class. *See* *Amchem, 521 U.S. at 620*.

HN10[] *Federal Rule of Civil Procedure 23(c)(2)* provides that in a "class action maintained under subdivision *(b)(3)*, the court shall direct to the members of the class the best notice practicable under the circumstances …. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date …" This request for exclusion is popularly known as "opting out" of the class.

Defendants argue that the "opt-out" provided for in the settlement notice is really no "opt-out" at all but is simply a way of re-directing those plaintiffs who do not wish to take part in the settlement before this Court to another remedy that does not include litigation, thus creating a class where opt-out is not a real choice. Defendants argue that this effectively creates a mandatory class, and mandatory classes are disfavored for settlement classes. While still recognizing that non-settling defendants have no standing to oppose the settlement, **[**17]** the Court will address the opt-out concerns raised by Defendants as those concerns might suggest a legitimate problem with the settlement class.

Defendants contend that the Settlement allows no opt-out because in the Plaintiffs' and Bresea's motion to approve settlement the parties state, "[a] true 'opt-out' by a Bresea settlement class member would be futile since there is no alternative basis for that class member to assert a claim against Bresea, due to the fact that all claims will be settled by the Arrangement upon its becoming effective." (Mot. at 15). Plaintiffs and Bresea go on to state that the Arrangement's becoming effective is conditioned on this Court's approval of the 2002 Settlement. Apparently, the Arrangement's enactment is, at least in part, conditioned on this Court's approval of the settlement agreement. The fact that the Arrangement may be in force in the future, or the fact that another court may consider this Court's approval of the 2002 settlement in deciding to enact or honor the Arrangement does not require this Court to view the settlement as one that does not allow class members to opt out. So long as the settlement agreement itself does not limit or **[**18]** expand the rights of parties who choose to opt out of the class, the right to opt out is not threatened. Although remaining in the settlement class may be a more desirable option, that is not a question for this Court to explore, and it is not for this Court to decide the wisdom of opting out. "If certain plaintiffs wish to opt-out and take their chances at suing a foreign corporation, due process would seem to require that they be allowed to do so absent strong considerations to the contrary not present here." *Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897 (7th Cir. 1999)*. The decision to opt-out is left to the individual with a possible claim against Bresea.

As far as the precise, binding language of the settlement agreement itself, Paragraph six of the 2002 Settlement states that, "a pool consisting of shares equal to ten percent of **[*430]** the common equity of Bresea (the "Pool") will be established for the benefit of members of the U.S. Class who purchased Bresea common stock and suffered a loss … and also for … any person who opts out of this Action." At the hearing on the settlement class, Plaintiffs' counsel explained that this pool is a part of the Arrangement **[**19]** that will be used to compensate persons not covered by the class settlement. The implication of the language of the settlement agreement is that Bresea is setting aside a pool of ten percent of its common equity that may be used to compensate individuals who opt out of the settlement class. The settlement agreement in no way guarantees those who opt out a portion of the pool, and the settlement agreement in no way attempts to limit those who choose to opt out to recovering only the stock in the pool. Any windfall given to or limitation placed on those who opt out is the result of the Arrangement, *not the settlement agreement.* Basically, the information regarding the pool is articulated in the settlement agreement in order to inform those who remain in the class of the contingent nature of one aspect of the settlement. In accordance with the settlement agreement, settlement class members, in addition to the other concrete benefits of the settlement agreement, are entitled to recover portions of the pool not consumed by litigation with those who have opted out. The Court finds that this portion of the settlement agreement does not hinder the opt-out requirement of the *Rule 23(b)(3)* **[**20]** class as it does not enhance or restrict the rights of those who wish to opt-out of the settlement class.

Having reached the above conclusions, the Court finds that as a threshold matter, the proposed settlement class preliminarily meets the requirements of *Rule 23*. The Court will address in detail the propriety of settlement class certification after it issues orders on the NASDAQ Class and the Canadian Class and has a final opportunity to review the *Rule 23* qualifications of the proposed settlement class after the fairness hearing. At the present time, in order to move this case along and in order to allow the parties to more fully inform the Court on the issues regarding the Canadian Class, the Court finds as a threshold matter that the proposed settlement class is sufficiently adequate under *Rule 23* so that preliminary approval may be granted and the proposed class may be sent notice of the fairness hearing. As stated before, the Court reserves the right to deny certification after it has more fully examined the complex and novel issues in this case.

B. Fairness Determination - Preliminary Approval of the Settlement

1. Rule

Having determined that for purposes of issuance **[**21]** of notice the settlement class is preliminarily certifiable, the Court next determines whether the settlement meets preliminary fairness requirements.

> HN11[] If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of a class representative or of segments of the class, or of excessive compensation for attorneys, and appears to fall withing the rage of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation, Third, at 237.

2. Analysis

Plaintiffs Bresea assert that the 2002 Settlement is the result of arm's length negotiations between plaintiffs' co-lead counsel, counsel for Bresea, and the Bre-X Trustee. As support for this assertion, Plaintiffs and Bresea submitted the Second Affidavit of Autry R. Ross, co-lead counsel for Plaintiffs. Additionally Plaintiffs and Bresea assert that counsel for all sides are experienced and familiar with the factual **[**22]** and legal issues presented by the litigations and the settlement. The Court is in agreement that the settlement reached was one resulting from strenuous long-term negotiations between Plaintiffs and Bresea. As is articulated above, this case has been on file for over five years, and each party has pursued its case with vigor and determination. Counsel on all sides have proved to the Court their knowledge **[*431]** of the facts and law relevant to this case. Settlement was reached by knowledgeable counsel, and it was arrived at after much negotiation as is evidenced by the time it took the parties to reach an agreement.

Plaintiffs contend that the economic terms of the settlement are fair because the settlement brings Plaintiffs value from a source (Bresea) that has limited ability to pay anything at all. Plaintiffs cite the differences between the original settlement and the 2002 Settlement in support of their fairness claims. The $ 4.48 million of actual settlement dollars will be distributed directly to shareholders, unlike in the original settlement where the settlement money would have been distributed to the Bre-X trustee who could have used that money at his discretion before any money **[**23]** went to the class member. Plaintiffs estimate that class members will receive approximately 4 cents per share. Considering Bresea's strained financial conditions, the Court finds that this settlement amount is fair and that although it is possible that a larger verdict might be awarded at trial, Plaintiffs run a substantial risk of being unable to collect a verdict.

Additionally, Plaintiffs' attorneys have reduced fees and expenses from $ 480,000 in the original proposed settlement to $ 373,333 in the 2002 settlement. Class counsel in the Ontario Class Action will receive $ 746,666 under the 2002 settlement (down from $ 960,00 in the original settlement), and Ontario Bresea action attorneys will receive $ 128,000. HN12[] The PSLRA expressly provides that the, "total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *15 U.S.C. § 78u-4(a)(6)*. Courts assess the reasonableness of attorneys' fees to protect class members from unfair settlements, to minimize conflicts of interest between class members and their representatives, **[**24]** and to prevent perpetuating a public perception that attorneys exploit class members for hefty fees. *See Strong v. Bellsouth Telecomm. Inc., 137 F.3d 844, 849-50 (5th Cir. 1998)*. The Court must make an independent review of the reasonableness of fees sought in a class settlement. *Id.* The Court finds that the attorneys' fees assessed in the current settlement (totaling roughly 25% of the settlement amount) do not exceed a reasonable proportion of the total settlement.

Next, Defendants attempt to establish several conflicts of interest and first take issue with the fact that one Plaintiffs' attorney was appointed as a trustee of Bre-X. Defendants claim that this trustee position created a conflict of interest for Plaintiffs' attorney; however, the attorney's appointment as a trustee was in the capacity of representative of U.S. share purchaser claimants. Such an appointment is for the benefit of potential claim holders, not for the betterment of Bre-X. Furthermore, the trustee "never consulted with the inspectors" regarding settlement. (Robinson Aff. at P 3). Second, Defendants allege that different recovery for Bre-X and Bresea stockholders creates conflict; however, **[**25]** the Court finds no harm in allowing different recovery for persons who held different stock so long as the settlement is fair. At the formal fairness hearing, any class member who desires may object to the settlement. Third, Defendants claim that because the class representatives for settlement purposes are the same as the proposed NASDAQ class representatives, their duties to the settlement class and the NASDAQ class conflict. The Court does not agree that a conflict exists as the class representatives have incentive to make the maximum recovery, and in deciding if a settlement was fair would have to take into account the effect that the Bresea settlement would have on the NASDAQ litigation. Additionally, any challenge to the fairness that resulted from the class representatives actions can be addressed by class members at the fairness hearing.

Having reached the above conclusions, the Court finds that the settlement class meets the requirements for preliminary approval and that notice should therefore be issued to potential class members.

C. Notice to Class Members

1. Rule

Having found that issuance of notice is appropriate, the Court must now examine the actual notice. **[**26]** ***HN13***[] Purported members of a class must receive, "the best notice practicable under the circumstances." *Fed. Rule Civ. Proc. 23(c)(2)*. **[*432]** The notice must, "contain an adequate description of the proceedings written in objective, neutral terms that, insofar as possible, may be understood by the average absentee class member." *In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1103 (5th Cir. 1977)*. The notice must "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *Id. at 1105*. Under the PSLRA, notice must conform to certain additional articulated standards. The notice must include a statement of Plaintiff recovery, "determined in an aggregate and on an average per share basis." *15 U.S.C. § 78u-4(a)(7)(A)*. The notice must provide a statement of potential outcome of the case. *15 U.S.C. § 78u-4(a)(7)(B)*. The notice must supply a statement of attorneys' fees or costs sought. *15 U.S.C. § 78u-4(a)(7)(C)*.

2. Analysis

Plaintiffs **[**27]** and Bresea claim they have submitted to the Court the best notice practicable. The Plaintiffs also state that the notice will inform class members whose claims arose after March 26, 1997 of the Court's order regarding them. The notice provided to the Court appears to meet the requirements of the PSLRA. Defendants presented no arguments opposing the notice in their responsive briefing, but at the settlement hearing, Defendants claimed that the notice was deficient on several grounds: the notice states that a 4 cent per share recovery is inaccurate; the cover page is actually two pages instead of one; the notice fails to disclose conflicts of U.S. Counsel; and the notice doesn't state what the United States class members will receive from the settlement.

Considering these objects in light of the notice submitted, the Court finds that the objections are without merit as the notice provided by Plaintiffs and Bresea is the best notice possible under the circumstances of the case. As stated earlier, this case is an incredibly complex securities fraud case with hundreds of class plaintiffs, many defendants, and even more attorneys. The briefing in the case has been monstrous, and the issues **[**28]** are hotly contested. Plaintiffs and Bresea have condensed the case to its essence and have memorialized that in the settlement notice. The fact that the cover sheet is actually two sheets is not remarkable. The Court found above that attorney conflict is not an issue in this settlement, and the other complaints by Defendants request that Plaintiffs and Bresea include items not required by the PSLRA or the Federal Rules. Defendants only seek to make an already complex notice more cumbersome. Having thoroughly reviewed the proposed notice, the Court finds that it is adequate and will provide potential class members with the information necessary to make an informed decision on whether to opt out of the class.

V. CONCLUSION

Having concluded that the settlement class meets the *Rule 23* requirements as a preliminary matter, having concluded that the settlement meets the preliminary fairness requirements, and having concluded that the notice is the best practicable under the circumstances, the Court hereby

ORDERS that Plaintiffs' and Bresea's Motion for Preliminary Approval of Settlement is **GRANTED.** The Court will issue a schedule regarding settlement notice and a fairness **[**29]** hearing by separate order.

Signed this 3rd day of July, 2002.

DAVID FOLSOM

UNITED STATES DISTRICT JUDGE

Tassy v. Brunswick Hosp. Ctr.

United States Court of Appeals for the Second Circuit

February 12, 2002, Argued ; July 8, 2002, Decided

Docket No. 01-7675

Reporter
2002 U.S. App. LEXIS 22600 *

EUGENIO TASSY, Doctor, Plaintiff-Counter-Defendant-Appellant, -v.- BRUNSWICK HOSPITAL CENTER, INC., MORTON GOLDFARB, Medical Director, Defendants-Counter-Claimants-Appellees.

Subsequent History: **[*1]** As Amended July 12, 2002.

Prior History: Plaintiff Dr. Eugenio Tassy appeals from a judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge), dismissing his complaint pursuant to the doctrine of primary jurisdiction.

Original Opinion Previously Reported at: *296 F.3d 65, 296 F.3d 65, 2002 U.S. App. LEXIS 13850*.

Disposition: Vacated and remanded.

Core Terms

privileges, doctrine of primary jurisdiction, expertise, suspended, primary jurisdiction, district court, allegations, questions, courts, cases, sexual harassment, federal court, patient, reinstatement, competence, medical expertise, file a complaint, factual issue, suspension, judicial economy, antitrust, purposes, reasons, rates, national origin, consistency, specialized, termination, resolving, disputes

LexisNexis® Headnotes

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

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

On a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, accepting all the allegations in the complaint as true.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN3[] **Reviewability, Jurisdiction & Venue**

Primary jurisdiction is a judge-made doctrine.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Administrative Law > Separation of Powers > Primary Jurisdiction

HN4[] **Reviewability, Jurisdiction & Venue**

The United States Supreme Court has defined the primary jurisdiction doctrine as: a principle, now firmly established, that in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN5[] **Reviewability, Jurisdiction & Venue**

With regard to the primary jurisdiction doctrine, it is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN6[] **Reviewability, Jurisdiction & Venue**

Since the inception of the primary jurisdiction doctrine, courts have resisted creating any fixed rules or formulas for its application. Rather, in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN7[] **Reviewability, Jurisdiction & Venue**

As the origin and evolution of the primary jurisdiction doctrine demonstrate, the reasons for its existence and the purposes it serves are twofold: the desire for uniformity and the reliance on administrative expertise.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

HN8[] **Reviewability, Jurisdiction & Venue**

With regard to the primary jurisdiction doctrine, the concern for consistency and uniformity is more prevalent in cases involving issues of broad applicability such as the reasonableness of rates or tariffs.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN9[] **Reviewability, Jurisdiction & Venue**

If a case presents a unique and narrow factual dispute that poses no risk of inconsistent interpretations of any broadly applicable rule or policy, the desire for uniformity does not support the application of the primary jurisdiction doctrine.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Labor & Employment Law > ... > Sexual Harassment > Employment Practices > Discharges & Failures to Hire

HN10[] **Business Administration & Organization, Facility & Personnel Licensing**

In New York, the New York Public Health Council (PHC) is a 15-member body within the New York State Department of Health, *N.Y. Pub. Health Law § 220* (McKinney 2001), whose duty is to consider any matter relating to the preservation and improvement of public health. *N.Y. Pub. Health Law § 225(1)* (McKinney 2001). A primary function of the PHC is to determine whether there is a medical justification for the withdrawal of a doctor's privileges.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Torts > ... > Standards of Care > Special Care > Highly Skilled Professionals

HN11[] **Business Administration & Organization, Hospital Privileges**

In New York, *N.Y. Pub. Health Law § 2801-b(1)* states that a hospital may suspend a physician's privileges only because of standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant, and *§ 2801-b(2)*, which states that any person claiming to be aggrieved by a violation of § 2801 b(1) may file a complaint with the New York Public Health Council.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN12[] **Reviewability, Jurisdiction & Venue**

Primary jurisdiction applies where an agency's expertise may prove helpful to the court in resolving difficult factual issues.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN13[] **Reviewability, Jurisdiction & Venue**

The primary jurisdiction is a discretionary doctrine whose applicability in any given case depends on whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. The doctrine cannot be applied mechanically.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN14[] **Reviewability, Exhaustion of Remedies**

"Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN15[] **Agency Adjudication, Alternative Dispute Resolution**

The United States Court of Appeals for the Second Circuit holds that where a party prefers not to litigate before an administrative agency in the first instance, he cannot be forced to do so pursuant to the primary jurisdiction doctrine unless the purposes behind the existence of the doctrine are present.

Administrative Law > Separation of Powers > Jurisdiction

Governments > Native Americans > Authority & Jurisdiction

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN16[] **Separation of Powers, Jurisdiction**

In the primary jurisdiction context, whether an agency is statutorily authorized to resolve a particular issue is not itself determinative of whether to apply the doctrine. Rather, the pertinent questions are whether referral to the agency is necessary to promote uniformity and whether the agency's expertise would assist the court in resolving difficult factual issues. Rather than simply asking whether an administrative agency is statutorily authorized to hear a particular dispute, the primary jurisdiction doctrine asks whether an agency's review of the facts "will be a material aid" to the court ultimately charged with applying those facts to the law.

Counsel: MICHAEL H. SUSS MAN, Law Offices of Michael H. Sussman, Goshen, NY, (Stephen Bergstein, on the brief),for Plaintiff-Counter-Defendant-Appellant.

ROBERT J. FARLEY, Farley, Holohan, Glockner & Toto, LLP, Mineola, NY, for Defendants-Counter-Claimants-Appellees.

Judges: Before: WALKER, Chief Judge, SACK, and B.D. PARKER, JR., Circuit Judges. Chief Judge Walker dissents in a separate opinion.

Opinion by: B.D. PARKER, JR.

Opinion

Plaintiff Dr. Eugenio Tassy, a psychiatrist, brought this action for damages and for reinstatement of his medical privileges at defendant Brunswick Hospital Center, Inc. ("Brunswick"). According to Tassy's complaint, Brunswick revoked his privileges following allegations of sexual harassment. Tassy, a black Haitian-American, denies the sexual harassment allegations and **[*2]** asserts that Brunswick discriminated against him on the basis of his race and national origin. Defendants moved to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, arguing that the doctrine of primary jurisdiction requires Tassy to pursue his claims with the New York Public Health Council (the "PHC") before suing in federal court. The District Court (Denis R. Hurley, *Judge)* granted the motion, dismissing Tassy's complaint without prejudice to refiling after review by the PHC (Hearing Transcript, May 4, 2001 ("Tr."), at 12), and Tassy appealed. Because we find the primary jurisdiction doctrine inapplicable, we vacate and remand.

BACKGROUND

According to the allegations of the complaint, which we accept as true for purposes of this appeal, Tassy received privileges to practice medicine at Brunswick in 1994. In April 1998, Jovita Crasta, a psychiatrist at Brunswick, alleged that Tassy had sexually harassed her. In July 1998, a Brunswick employee alleged that Tassy had verbally abused her. In October 1998, another Brunswick doctor complained of improper behavior on the part of Tassy. [1] As a result of these allegations, Brunswick suspended Tassy's **[*3]** privileges. In November 1998, Brunswick reinstated Tassy's privileges in exchange for his agreement to submit to and pay for a psychiatric evaluation by the Medical Society of the State of New York's Committee for Physicians' Health. In March 1999, Crasta again accused Tassy of inappropriate behavior. Shortly after Crasta's second allegation, Brunswick suspended Tassy's privileges a second time. Tassy then requested a hearing. The parties scheduled and adjourned the hearing several times, but the hearing was never convened. In March 2000, Tassy requested that his privileges be reinstated. Brunswick

[1] The complaint does not specify the nature of this allegation.

never responded to this request, and Tassy remains suspended from practicing medicine at Brunswick. Tassy alleges that Brunswick and its medical director, defendant Dr. Morton Goldfarb, discriminated against him on account of his race and his national origin. In particular, Tassy alleges that Brunswick and Goldfarb have taken less draconian measures against white doctors accused of more serious misconduct.

[*4] Tassy filed his complaint in the Eastern District of New York on June 15, 2000, asserting claims for discrimination on the basis of race and national origin under *42 U.S.C. § 1981* and common law breach of contract. He seeks damages, reinstatement of his privileges, and other equitable remedies. Goldfarb answered and counterclaimed for breach of contract, alleging that Tassy had not paid the rent due on his office space. Tassy denied the allegations of the counterclaim. Brunswick then moved to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* on the ground that Tassy was required to file a claim with the PHC before suing in federal court. The District Court, relying on the doctrine of primary jurisdiction and our decision in *Johnson v. Nyack Hospital, 964 F.2d 116 (2d Cir. 1992)*, dismissed the complaint without prejudice to its reinstatement after review by the PHG. (Tr. at 9, 12.) Tassy appealed.

DISCUSSION

HN1[] We review de novo a district court's dismissal pursuant to *Rule 12(b)(6)*. *Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)*. ***HN2***[] On a *Rule 12(b)(6)* motion to dismiss, we must construe the complaint in **[*5]** the light most favorable to the plaintiff, accepting all the allegations in the complaint as true. *Chambers v. Time Warner. Inc., 282 F.3d 147, 152 (2d Cir. 2002)*; *Connolly v. McCall, 254 F.3d 36, 40 (2d Cir. 2001)*.

The sole issue on appeal is whether the doctrine of primary jurisdiction requires Tassy to file a complaint with the PHC before suing in federal court. To determine whether the doctrine applies, we first examine its origin and evolution.

HN3[] Primary jurisdiction is a judge-made doctrine, created by Justice Edward White's opinion for a unanimous Supreme Court in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907)* See *United States v. Radio Corp. of Am., 358 U.S. 334, 346, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*; Louis L. Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1042 (1964). In Abilene, the plaintiff oil company sued the defendant railroad in state court, alleging that it had charged unreasonable and discriminatory rates for interstate shipments of cotton seed. *204 U.S. at 430*. The Supreme Court held that the plaintiff was required to pursue its **[*6]** claims with the Interstate Commerce Commission (the "ICC") in the first instance *id at 448*, and the doctrine of primary jurisdiction was born. The Supreme Court's decision in Abilene was motivated by the uniformity that would obtain if the ICC were permitted to resolve questions about the reasonableness of the rates that it had the responsibility to set and enforce:

> For if, without previous action by the [ICC], power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.

Id. at 440. Following Abilene, early primary jurisdiction cases involved technical questions relating to regulated industries such as railroads, water and air transportation, electricity, and communications. See Robert B. von Mehren, The Antitrust Laws and Regulated Industries: The **[*7]** Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929, 935-36 (1954).

Justice Brandeis identified a second rationale for the doctrine in *Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285, 66 L. Ed. 943, 42 S. Ct. 477 (1922)*, which involved a dispute over the tariff charged on interstate corn shipments. For the first time the Supreme Court cited administrative expertise, as well as uniformity, as a potential basis for invoking the doctrine:

> [Resort to the ICC] is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the [ICC]. Moreover, that determination

> is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts.

Id. at 291. Although the Court declined to apply the primary jurisdiction doctrine in Great Northern Railway, the case signaled a shift in the predominant rationale that would support the **[*8]** doctrine's application in future cases. Several decades later the Supreme Court stated that, while "earlier cases" relied on "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions,... more recently the expert and specialized knowledge of the agencies involved has been particularly stressed." United States v. W. Pac. R.R. Co., 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161, 135 Ct. Cl. 997 (1956) (citations omitted).

While the doctrine has often been applied in cases involving difficult legal questions that must ultimately be resolved by the courts, the presence of such legal issues has not prevented the Supreme Court from concluding that primary jurisdiction lay in an administrative agency. In these cases, the Court has highlighted the separate roles of court and agency, as well as the importance of the primary jurisdiction doctrine in maintaining a proper balance between the two. In Far East Conference v. United States, 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492 (1952), for example, the Court held that primary jurisdiction lay in the United States Shipping Board, rather than in the federal courts, despite the questions **[*9]** of ***antitrust law*** involved in the case. The Far East Court ***HN4***[] defined the primary jurisdiction doctrine as:

> a principle, now firmly established, that in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 574-75. The Supreme Court later reiterated this principle in discussing the role of the Federal Maritime Board in another antitrust case: "***HN5***[] It is recognized that the courts, while retaining the final **[*10]** authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 498, 2 L. Ed. 2d 926, 78 S. Ct. 851 (1958).

HN6[] Since the inception of the doctrine, courts have resisted creating any fixed rules or formulas for its application. See W. Pac. R.R. Co., 352 U.S. at 64. Rather, "in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Id. ***HN7***[] As the origin and evolution of the primary jurisdiction doctrine demonstrate, the reasons for its existence and the purposes it serves are twofold: the desire for uniformity and the reliance on administrative expertise. See id. Thus, in determining whether to apply the primary jurisdiction doctrine, we must examine whether doing so would serve either of these purposes. [2]

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[2] The dissent argues that we should also consider a third purpose, judicial economy. Dissenting Opinion, infra, at [3]. However, the Supreme Court has consistently held that there are only two purposes to consider in determining whether to apply the primary jurisdiction doctrine - uniformity and expertise. See W. Pac. R.R. Co., 352 U.S. at 64. Despite ample opportunity during the ninety-five years since it created the doctrine, see supra at [4-7], the Supreme Court has never identified judicial economy as a relevant factor. No doubt the reason is that considerations of judicial economy cannot assist a primary jurisdiction analysis, as it will always be more economical, from a judge's point of view, to dismiss a case or quickly refer it to an administrative agency, instead of adjudicating it himself. We are enjoined to resist this temptation because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Cob. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976) (citations omitted).

[*11] With respect to the first purpose, Brunswick does not argue that applying the doctrine here would promote consistency and uniformity, and we do not see how it could. ***HN8***[] The concern for consistency and uniformity is more prevalent in cases involving issues of broad applicability such as the reasonableness of rates or tariffs. See *Nat'l Communications Ass'n. Inc. v. Am. Tel. & Tel. Co., 46 F.3d 220, 224-25 (2d Cir. 1995)*. *United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*, for example, was an antitrust action arising out of an attempt by NBC, a subsidiary of Radio Corp. of America, to exchange the television station that it owned in Cleveland for one in Philadelphia. *Id. at 335-36*. In discussing the history of the primary jurisdiction doctrine, the Court noted that

> this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt **[*12]** an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

Id. at 348. Because application of the primary jurisdiction doctrine would not promote uniformity, the Court declined to apply it: "Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." *Id. at 350*.

Like Radio Corp., this case involves neither a regulatory scheme nor a rate structure. Because this ***HN9***[] case "presents a unique and narrow factual dispute that poses no risk of inconsistent interpretations" of any broadly applicable rule or policy, *Am. Tel. & Tel., 46 F.3d at 225*, the desire for uniformity does not support the application of the primary jurisdiction doctrine.

The more significant question is whether deferring to the PHC would promote "the resolution of technical questions of facts through the agency's specialized expertise." *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 59 (2d Cir. 1994)*. ***HN10***[] The PHC is a fifteen-member **[*13]** body within the New York State Department of Health, see *N.Y. Pub. Health Law § 220* (McKinney 2001), whose duty is to "consider any matter relating to the preservation and improvement of public health." *N.Y. Pub. Health Law § 225(1)* (McKinney 2001). "A primary function of the PHC is to determine whether there is a medical justification for the withdrawal of [a] doctor's privileges." *Johnson, 964 F.2d at 121*.

Tassy argues that there are no technical questions for the PHC to review, as Brunswick suspended his privileges because of his alleged sexual harassment, his race, and his national origin, all of which are non-medical issues that are unrelated to the PHC's expertise. In response, Brunswick relies on ***HN11***[] *New York Public Health Law section 2801-b(1)*, which states that a hospital may suspend a physician's privileges only because of "standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant[,]" and *section 2801-b(2)*, which states that any person claiming to be aggrieved by a violation of section 2801 b(1) may file a complaint with the PHC. The gravamen of Brunswick's argument is that it suspended **[*14]** Tassy's privileges on the basis of his character and, because *section 2801-b(1)* lists character as a permissible basis for suspension and *section 2801-b(2)* authorizes the PHC to redress violations of *section 2801-b(1)*, the PHC has the expertise to determine whether Tassy's character rendered him unfit to practice medicine.

In support of its argument that we should apply the primary jurisdiction doctrine, Brunswick places substantial reliance on Johnson, in which we held that the doctrine required the plaintiff physician to pursue his claims arising out of the termination of his hospital privileges before the PHC. As a brief discussion of Johnson demonstrates, however, that case is distinguishable. The plaintiff in Johnson was a thoracic and vascular surgeon whose hospital privileges had been revoked after the hospital determined that "Johnson's surgical performance posed a peril to Nyack's patients." *Id. at 118*. A hospital investigation concluded that he had employed unsatisfactory surgical procedures and had insufficiently documented his work. Id. Placing particular emphasis on the relevant expertise of the PHC, we concluded:

> Primary jurisdiction **[*15]** demands that Johnson resort to the PHC before seeking redress in federal court. The question whether defendants had a proper medical reason to terminate Johnson's privileges requires a skilled evaluation of whether Johnson provided inadequate treatment to Nyack's patients. This decision necessitates examination of various medical data concerning Johnson's cases. The medical expertise of the PHC will prove extremely helpful in sorting through these complex records, and resolving the factual questions at stake.

Id. at 122.

In stark contrast to Johnson, this case does not involve allegations of technical incompetence or inadequate patient care, does not implicate any medical data or complex records, and would not benefit from the medical expertise of the PHC. The primary factual issue is whether Tassy committed the alleged sexual harassment, the resolution of which does not require the PHC's expertise. See *964 F.2d at 122* (noting that ***HN12***[] primary jurisdiction applies where an "agency's expertise may… prove helpful to the court in resolving difficult factual issues") (emphasis in original). The PHC has no expertise in determining whether a doctor committed sexual **[*16]** harassment or other acts of non-medical misconduct. Nor is medical expertise necessary to determine that one who sexually harasses his colleagues is lacking in character. We deem it significant that, according to Tassy's allegations, Brunswick has not made any charges regarding Tassy's treatment of his patients or his competence as a physician, and Brunswick did not review any patient charts or medical data in deciding to suspend Tassy's privileges. In short, Brunswick's decision to suspend Tassy's privileges does not invoke the particular expertise of the PHC. While there may well be cases in which issues surrounding a physician's character fall within the PHC's expertise, this is not such a case. Because the issues involved here "are neither beyond the conventional expertise of judges nor within the special competence of" the PHC, the primary jurisdiction doctrine does not apply. See *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp., 84 F.3d 91, 97 (2d Cir. 1996)*. [3]

[*17] Brunswick argues that Johnson stands for the proposition that any physician challenging the termination of privileges on any basis must file a complaint with the PHC before suing in federal court. Johnson did not establish such a broad rule; rather, the Court merely found that the PHC's medical expertise would be of assistance: "Because the PHC has the peculiar expertise to assess whether a hospital had a sound medical reason for terminating a physician's privileges, we conclude that a physician who asserts a damages claim that turns on whether the hospital legitimately terminated his privileges must first file a complaint with the PHC." *Johnson, 964 F.2d at 121* (internal citation omitted). Unlike the defendant in Johnson, Brunswick does not assert that it had a medical reason for suspending Tassy's privileges, and the PHC does not have the "peculiar expertise" to assess whether Tassy committed sexual harassment.

The Supreme Court's decision in *Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976)*, is particularly apt. The plaintiff in Nader had brought a common law fraudulent misrepresentation **[*18]**

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[3] The dissent argues that reliance on agency expertise favors dismissal. Dissenting Opinion, infra, at [1-3]. The dissent relies on the fact that, because Tassy has brought a discrimination claim, the District Court will have to compare Brunswick's treatment of him to its treatment of similarly situated physicians of other races and national origins, a comparison that would be better made by the PHC. This argument, we suggest, suffers from two flaws. First, there is no reason to believe that the PHC would even be able to conduct the comparative analysis to which the dissent alludes. While *New York Public Health Law § 2801-b(2)* authorizes the PHC to determine whether Brunswick properly suspended Tassy's privileges under *New York Public Health Law § 2801-b(1)* (i.e., whether Brunswick suspended Tassy's privileges on the basis of his character), we are not aware of any statute or regulation that authorizes the PHC to determine whether Brunswick properly suspended Tassy's privileges under *42 U.S.C. § 1981* (i.e., whether Brunswick denied Tassy "the same right. . . to make and enforce contracts. . . as is enjoyed by white citizens"). Second, even if the PHC were able - and willing - to conduct this analysis, it still would not implicate the PHC's medical expertise. As the dissent points out, Tassy's *§ 1981* claim is based on his allegation that Brunswick has taken measures against him "which have not been taken against white doctors accused of much more serious indiscretions and much more significant misconduct." Dissenting Opinion, infra, at [1-2]. For the reasons discussed in the text supra, an examination of "indiscretions" and "misconduct" directed at a co-worker does not implicate the PHC's medical expertise, regardless of who is alleged to have committed the indiscretions and misconduct.

claim based on the defendant airline's policy of overbooking its flights. Declining to apply the primary jurisdiction doctrine, the Court held:

> Referral of the misrepresentation issue to the [Civil Aeronautics] Board cannot be justified by the interest in informing the court's-ultimate decision with "the expert and specialized knowledge" of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice[,] a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

Id. at 305-06 (internal citation and footnote omitted). The same is true here. We fail to see how the PHC's medical expertise would aid the determination of whether Tassy committed the sexual harassment that has been alleged.

Nor are we convinced that the inclusion of "character" in *section 2801-b(1)* **[*19]** as a permissible basis for suspending privileges requires that we defer to the PHC on all issues relating to character. In applying the primary jurisdiction doctrine, the District Court seems to have found dispositive the fact that character is a permissible basis for suspension under *section 2801-b(1)*:

> It may be that in enacting 2801-b and not limiting the Public Health Council's review powers to purely instances of medical incompetence, the [New York] legislature felt that character flaws may have to be factored into the determination by a hospital as to whether the individual involved should continue to dispense medical services at the facility. That may be debatable, but the legislation is clear. Why they did it may be debatable.

(Tr. at 10.) The fact that the New York legislature permits hospitals to revoke privileges based on character flaws, however, does not mean that the PHC has expertise in determining whether a particular physician's character is flawed. Indeed, the District Court did not find that the PHC's expertise would be useful in resolving any factual dispute. To the contrary, the District Court found, "I think it is probably true that whether sexual **[*20]** harassment occurred certainly could be decided as well by this Court as [by] the Public Health Council." (Tr. at 10.)

We emphasize that ***HN13***[] primary jurisdiction is a discretionary doctrine whose applicability in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co., 352 U.S. at 64*. [4] The doctrine cannot be applied mechanically. In finding that the inclusion of "character" in *section 2801-b(1)* required Tassy to proceed before the PHC in the first instance, the District Court seems to have incorrectly equated primary jurisdiction with the related - but distinct - doctrine of exhaustion of administrative remedies. The Supreme Court has explained the difference between these two doctrines:

> ***HN14***[] "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever **[*21]** enforcement of the claim requires the resolution of issues which, under a regulatory scheme,

[4] The dissent's suggestion that the courts should "welcome the opportunity for… pre-litigation dispute resolution in a case such as this," Dissenting Opinion, infra, at [4], we believe, misconceives the nature of the primary jurisdiction doctrine. While courts may often prefer that the parties engage in pre-litigation dispute resolution, we cannot require them to do so absent a sound legal basis. However "distasteful" or "counter-productive" a lawsuit may be, id., we cannot dismiss it pursuant to the doctrine of primary jurisdiction, and require the parties to litigate before an administrative agency, unless doing so would promote consistency and uniformity or unless the agency has some relevant expertise. As for the dissent's statement that parties often prefer an opportunity for pre-litigation dispute resolution before an administrative agency, id., nothing in our opinion precludes parties who choose to take advantage of such administrative procedures from doing so. Rather, we simply hold that, ***HN15***[] where a party prefers not to litigate before an administrative agency in the first instance, he cannot be forced to do so pursuant to the primary jurisdiction doctrine unless the purposes behind the existence of the doctrine are present.

> have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64.

[*22] ***HN16***[] In the primary jurisdiction context, whether an agency is statutorily authorized to resolve a particular issue is not itself determinative of whether to apply the doctrine. Rather, the pertinent questions are whether referral to the agency is necessary to promote uniformity and whether the agency's expertise would assist the court in resolving difficult factual issues. See *Gen. Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1027 (2d Cir. 1987)* (refusing to apply doctrine of primary jurisdiction because agency "experience is not needed to determine" the relevant issue); cf. *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60 (2d Cir. 1994)* (applying primary jurisdiction doctrine because "the [Bureau of Indian Affairs'] resolution of… factual issues regarding tribal status will be of considerable assistance to the district court in ultimately deciding Golden Hill's Nonintercourse Act claims"); *Danna v. Air France, 463 F.2d 407, 412 (2d Cir. 1972)* (applying primary jurisdiction doctrine to case involving reasonableness of airline fares because "the examination of these fare systems requires the exercise of an expertise **[*23]** more heavily concentrated in the Administrative and Executive branches than in the federal judiciary"). Rather than simply asking whether an administrative agency is statutorily authorized to hear a particular dispute, the primary jurisdiction doctrine asks whether an agency's review of the facts "will be a material aid" to the court ultimately charged with applying those facts to the law. *Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 305, 34 L. Ed. 2d 525, 93 S. Ct. 573 (1973)*. Here, as the District Court itself noted, the PHC's review of the facts would not be a material aid to the court.

CONCLUSION

Neither of the purposes of the primary jurisdiction doctrine would be served by applying the doctrine in this case: deferring to the PHC would not promote consistency or uniformity, and there are no questions of fact whose resolution would be aided by the PHC's expertise. Rather, the issues involved in this case are squarely "within the traditional realm of judicial competence." *Goya Foods, Inc. v. Tropicana Prods., Inc., 846 F.2d 848, 851 (2d Cir. 1988)* (noting the "relatively narrow scope of the doctrine of primary jurisdiction"). Given "the **[*24]** virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)* (citations omitted), we decline to apply the primary jurisdiction doctrine. Accordingly, Tassy need not file a complaint with the PHC, and his claims may proceed in the District Court. For these reasons, we vacate the judgment of the District Court and remand for proceedings consistent with this opinion.

Dissent by: JOHN M. WALKER, JR.

Dissent

JOHN M. WALKER, JR., Chief Judge, dissenting:

Because I would affirm the district court's dismissal based on the doctrine of primary jurisdiction, I respectfully dissent.

The majority, faulting the district court for dismissing the complaint on the basis that the PHC has primary jurisdiction, cites two rationales for primary jurisdiction--consistency of rulings and agency expertise--and concludes that neither applies here. I agree that the first rationale does not apply, but believe that the second does. Moreover, a third reason not discussed by the majority, judicial economy, supports invocation of the doctrine.

At **[*25]** its core, Tassy's complaint is that the hospital has wrongly suspended his privileges and, accordingly, he seeks the reinstatement of his privileges as well as monetary damages. The hospital's authority to suspend Tassy's privileges is governed by *N.Y. Pub. Health Law § 2801-b(1)*. *Section 2801-b(2)* provides that a person claiming that a suspension of his privileges was in violation of subsection (b)(1) may file a complaint with the PHC. Were Tassy to do so, as I think should be required, the PHC would have to decide whether "standards of patient care, patient welfare, the objectives of the institution or [Tassy's] character or competency" warranted suspension or reinstatement. See *N.Y. Pub. Health Law § 2801-b(1)*. Tassy would argue, presumably, that they did not warrant suspension; that, because of discrimination, others similarly situated were not so disciplined; and that, given his medical expertise and record of performance relative to I others, he should be reinstated. The hospital would have to defend these charges. All of this is squarely within the PHC's jurisdiction.

There are three likely outcomes of the proceedings before the PHC: (1) a determination in Tassy's **[*26]** favor; (2) a determination in the hospital's favor; and (3) a mediated settlement. Only in the event of outcome (2) would it be necessary for Tassy to proceed with his federal action. And, if that were to occur, the federal court would have the benefit of the answers to fact questions from the agency charged with disputes of this sort among professionals. Such answers would be of great assistance in resolving the federal claims that Tassy has presented in his complaint and in determining whether his privileges should be restored.

The majority disputes this point. It reasons that the PHC's medical expertise would not avail the court in this case because I the "primary factual issue is whether Tassy committed the sexual harassment of which he was accused." Maj. Op., supra, at [10]. I do not think the factual inquiry invoked by Tassy's discrimination claims will be so limited.

Tassy claims that the harassment charges, even if true, were a pretext for the hospital's suspension of his privileges, which was in fact motivated by discriminatory animus. Central to this question, of course, is how the hospital disciplined other similarly situated doctors. In his complaint, Tassy alleges **[*27]** that appellees violated *§ 1981* and discriminated against him on the basis of his race and national origin by "act[ing] in a malicious manner, fostering baseless charges and taking draconian measures against plaintiff, a black Haitian, which have not been taken against white doctors accused of much more serious indiscretions and much more significant misconduct." (Emphasis added) Similarly, in his reply brief, Tassy states that his claim of racial discrimination is shown in part by the "frivolous nature of the charges against Dr. Tassy, his excellent job performance and the studied neglect of medical incompetence of Caucasians." (Emphasis added).

Thus, as is apparent from Tassy's own allegations of pretext, the factual issues in this case will go beyond whether Tassy harassed his co-workers. The factual issues will embrace the question whether, even if the hospital had a legitimate reason to suspend Tassy's privileges, the hospital has treated similarly situated physicians in the same way and whether the medical incompetence of other doctors was overlooked. More precisely, adjudication of Tassy's claims by this court will entail at least two inquiries that, given **[*28]** their fact-intensive character in the peculiar context of the practice of medicine, could be aided by the expertise of the state agency: (1) whether Tassy, a psychiatrist accused of abusive and harassing conduct, is similarly situated with other physicians who have different specialties, committed different acts of misconduct, or have different employment histories and characters; and (2) whether, in its employment decisions, the hospital has consistently applied the statutorily defined reasons for the suspension of privileges, which are "based on specialized medical considerations." See *Gelbard v. Genesee Hosp., 87 N.Y.2d 691, 696, 664 N.E.2d 1240, 1241, 642 N.Y.S.2d 178 (1996)* [1] For example, in determining whether Tassy's privileges were wrongfully suspended, the PHC would likely shed light on questions such as, for example, whether the hospital might have had a legitimate non discriminatory reason to act more

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[1] In making this point, I do not mean to suggest, as the majority states, Maj. Op., supra, at [11 n.3], that the PHC will analyze Tassy's *§ 1981* claim. Rather, my point is that the agency's investigation of whether Tassy' s privileges were wrongfully suspended, which the PHC is authorized under New York law to perform, would produce factual determinations that would aid this court's analysis of Tassy's *§ 1981* claim in the ways described above. Given the inevitable overlap of Tassy's wrongful suspension and *§ 1981* claims, the PHC would consider many of the same factual, if not legal, issues as this court would. Nor is there any requirement that the same claims must be brought before both this court and the PHC. See *Johnson v. Nyack Hosp., 964 F.2d 116 (2d Cir. 1992)*(affirming dismissal of plaintiff-physician's antitrust claims for plaintiff-physician's failure to file a complaint with the PHC first).

vigorously against accusations of abusive conduct by a psychiatrist, who counsels vulnerable individuals, than against a surgeon or pathologist.

[*29] Finally, the majority does not address judicial economy, a third factor that, in addition to consistency in rulings and technical expertise, supports invocation of the doctrine of primary jurisdiction. Although the Supreme Court has yet to rely on this factor, we have done so and, in this case, judicial economy militates in favor of invoking the doctrine. As we noted in a case involving the same state agency, "we also believe that judicial economy will be best served by requiring [plaintiff] to file a complaint with the PHC before seeking judicial relief." *Johnson v. Nyack Hosp., 964 F.2d 116, 123 (2d Cir. 1992)*. Moreover, considerations of judicial economy overlap to a certain extent with those of agency expertise: the expertise of the PHC, particularly in the area of mediating disputes between health-care professionals, could prove helpful to the court in addition to promoting judicial economy. As we stated in Johnson, the "PHC may yet propose a solution that will end the current hostilities between [the parties] without judicial intervention. At the very least, the PHC should be given a chance to try." *964 F.2d at 123*. The New York Court of **[*30]** Appeals has similarly "recognized the vital mediation role served by the PHC in providing a professionally competent forum in which to resolve disputes at any early state." *Gelbard, 87 N.Y.2d at 697, 664 N.E.2d at 1242* (citation and internal quotation marks omitted). One might think that the courts would welcome the opportunity for such pre-litigation dispute resolution in a case such as this.

I also think that in many cases the parties would as well. To be sure, it is essential that the courts should be available to hear serious and important claims, such as those raised by Tassy. However, it is also important to remember that a lawsuit frequently is a distasteful and needlessly counter-productive way to resolve a dispute. This is particularly so when the dispute is between professionals and involves questions of professional reputation, a professional's lifeblood. Under such circumstances, the proceeding before the PHC may "often avoid[] the unpleasant task of besmirching a physician's reputation by[] 'using its professional expertise to identify and discourage groundless claims, [and] to mediate and to conciliate disputes between health-care professionals. **[*31]** '" *Johnson, 964 F.2d at 123* (quoting *Cohoes Mem'l Hosp. v. Dep't of Health, 48 N.Y.2d 583, 589, 399 N.E.2d 1132, 1135, 424 N.Y.S.2d 110 (N.Y. 1979))*.

With respect, I dissent.

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Tassy v. Brunswick Hosp. Ctr., Inc.

United States Court of Appeals for the Second Circuit

February 12, 2002, Argued ; July 9, 2002, Decided

Docket No. 01-7675

Reporter

296 F.3d 65 *; 2002 U.S. App. LEXIS 13850 **; 89 Fair Empl. Prac. Cas. (BNA) 529; 83 Empl. Prac. Dec. (CCH) P41,160

EUGENIO TASSY, Doctor, Plaintiff-Counter-Defendant-Appellant, v. BRUNSWICK HOSPITAL CENTER, INC., MORTON GOLDFARB, Medical Director, Defendants-Counter-Claimants-Appellees.

Prior History: **[**1]** Plaintiff Dr. Eugenio Tassy appeals from a judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge), dismissing his complaint pursuant to the doctrine of primary jurisdiction. Vacated and remanded.

Disposition: Vacated and remanded.

Core Terms

privileges, doctrine of primary jurisdiction, expertise, suspended, primary jurisdiction, district court, allegations, questions, courts, cases, sexual harassment, federal court, patient, reinstatement, competence, medical expertise, file a complaint, factual issue, suspension, judicial economy, antitrust, purposes, reasons, rates, national origin, consistency, specialized, termination, resolving, disputes

LexisNexis® Headnotes

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

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

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

On a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, accepting all the allegations in the complaint as true.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Administrative Law > Separation of Powers > Primary Jurisdiction

HN3[] Reviewability, Jurisdiction & Venue

The primary jurisdiction doctrine is defined as a principle that in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN4[] Reviewability, Jurisdiction & Venue

The courts, while retaining the final authority to expound a statute, should avail themselves of the aid implicit in an administrative agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN5[] Reviewability, Jurisdiction & Venue

Courts have resisted creating any fixed rules or formulas for the application of the primary jurisdiction doctrine. Rather, in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN6[] Reviewability, Jurisdiction & Venue

The reasons for the existence of the primary jurisdiction doctrine and the purposes it serves are twofold: the desire for uniformity and the reliance on administrative expertise. Thus, in determining whether to apply the primary jurisdiction doctrine, a court must examine whether doing so would serve either of these purposes.

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN7[] Separation of Powers, Primary Jurisdiction

The federal courts have a virtually unflagging obligation to exercise the jurisdiction given them.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN8[] **Reviewability, Jurisdiction & Venue**

Where a case presents a unique and narrow factual dispute that poses no risk of inconsistent interpretations of any broadly applicable rule or policy, the desire for uniformity does not support the application of the primary jurisdiction doctrine.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN9[] **Business Administration & Organization, Hospital Privileges**

The New York Public Health Council (PHC) is a 15-member body within the New York State Department of Health, *N.Y. Pub. Health Law § 220* (McKinney 2001), whose duty is to consider any matter relating to the preservation and improvement of public health. *N.Y. Pub. Health Law § 225(1)* (McKinney 2001). A primary function of the PHC is to determine whether there is a medical justification for the withdrawal of a doctor's privileges.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Labor & Employment Law > ... > Sexual Harassment > Employment Practices > Discharges & Failures to Hire

Torts > ... > Standards of Care > Special Care > Highly Skilled Professionals

HN10[] **Business Administration & Organization, Hospital Privileges**

N.Y. Pub. Health Law § 2801-b(1) states that a hospital may suspend a physician's privileges only because of standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant, and *§ 2801-b(2)* states that any person claiming to be aggrieved by a violation of *§ 2801-b(1)* may file a complaint with the New York Public Health Council.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN11[] **Reviewability, Jurisdiction & Venue**

Primary jurisdiction applies where an agency's expertise may prove helpful to a court in resolving difficult factual issues.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN12[] **Reviewability, Jurisdiction & Venue**

Where the issues involved are neither beyond the conventional expertise of judges nor within the special competence of an administrative agency, the primary jurisdiction doctrine does not apply.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Healthcare Law > Business Administration & Organization > General Overview

Labor & Employment Law > ... > Sexual Harassment > Employment Practices > Discharges & Failures to Hire

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN13[] **Reviewability, Jurisdiction & Venue**

Because the New York Public Health Council (PHC) has the peculiar expertise to assess whether a hospital had a sound medical reason for terminating a physician's privileges, a physician who asserts a damages claim that turns on whether the hospital legitimately terminated his privileges must first file a complaint with the PHC.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN14[] **Reviewability, Jurisdiction & Venue**

Primary jurisdiction is a discretionary doctrine whose applicability in any given case depends on whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. The doctrine cannot be applied mechanically.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN15[] **Reviewability, Exhaustion of Remedies**

"Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Jurisdiction

Administrative Law > Separation of Powers > Primary Jurisdiction

HN16[] Agency Adjudication, Alternative Dispute Resolution

While courts may often prefer that parties engage in pre-litigation dispute resolution, courts cannot require them to do so absent a sound legal basis. However "distasteful" or "counter-productive" a lawsuit may be, a court cannot dismiss it pursuant to the doctrine of primary jurisdiction, and require the parties to litigate before an administrative agency, unless doing so would promote consistency and uniformity or unless the agency has some relevant expertise. Where a party prefers not to litigate before an administrative agency in the first instance, he cannot be forced to do so pursuant to the primary jurisdiction doctrine unless the purposes behind the existence of the doctrine are present.

Administrative Law > Separation of Powers > Jurisdiction

Governments > Native Americans > Authority & Jurisdiction

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN17[] Separation of Powers, Jurisdiction

In the primary jurisdiction context, whether an agency is statutorily authorized to resolve a particular issue is not itself determinative of whether to apply the doctrine. Rather, the pertinent questions are whether referral to the agency is necessary to promote uniformity and whether the agency's expertise would assist the court in resolving difficult factual issues. Rather than simply asking whether an administrative agency is statutorily authorized to hear a particular dispute, the primary jurisdiction doctrine asks whether an agency's review of the facts "will be a material aid" to the court ultimately charged with applying those facts to the law.

Counsel: MICHAEL H. SUSSMAN, Law Offices of Michael H. Sussman, Goshen, NY (Stephen Bergstein, on the brief), for Plaintiff-Counter-Defendant-Appellant.

ROBERT J. FARLEY, Farley, Holohan, Glockner & Toto, LLP, Mineola, NY, for Defendants-Counter-Claimants-Appellees.

Judges: Before: WALKER, Chief Judge, SACK, and B. D. PARKER, JR., Circuit Judges. Chief Judge Walker dissents in a separate opinion.

Opinion by: Barrington D. Parker

Opinion

[*65] B. D. PARKER, JR., *Circuit Judge*:

Plaintiff Dr. Eugenio Tassy, a psychiatrist, brought this action for damages and **[*66]** for reinstatement of his medical privileges at defendant Brunswick Hospital Center, Inc. ("Brunswick"). According to Tassy's complaint, Brunswick revoked his privileges following allegations of sexual harassment. Tassy, a black Haitian-American, denies the sexual harassment allegations and asserts that Brunswick discriminated against him on the basis of his race and national origin. Defendants moved **[**2]** to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, arguing that the doctrine of primary jurisdiction requires Tassy to pursue his claims with the New York Public Health Council (the "PHC") before suing in federal court. The District Court (Denis R. Hurley, *Judge*) granted the motion, dismissing Tassy's complaint without prejudice to refiling after review by the PHC

(Hearing Transcript, May 4, 2001 ("Tr."), at 12), and Tassy appealed. Because we find the primary jurisdiction doctrine inapplicable, we vacate and remand.

BACKGROUND

According to the allegations of the complaint, which we accept as true for purposes of this appeal, Tassy received privileges to practice medicine at Brunswick in 1994. In April 1998, Jovita Crasta, a psychiatrist at Brunswick, alleged that Tassy had sexually harassed her. In July 1998, a Brunswick employee alleged that Tassy had verbally abused her. In October 1998, another Brunswick doctor complained of improper behavior on the part of Tassy. [1] As a result of these allegations, Brunswick suspended Tassy's privileges. In November 1998, Brunswick reinstated Tassy's privileges in exchange for his agreement to submit to **[**3]** and pay for a psychiatric evaluation by the Medical Society of the State of New York's Committee for Physicians' Health. In March 1999, Crasta again accused Tassy of inappropriate behavior. Shortly after Crasta's second allegation, Brunswick suspended Tassy's privileges a second time. Tassy then requested a hearing. The parties scheduled and adjourned the hearing several times, but the hearing was never convened. In March 2000, Tassy requested that his privileges be reinstated. Brunswick never responded to this request, and Tassy remains suspended from practicing medicine at Brunswick. Tassy alleges that Brunswick and its medical director, defendant Dr. Morton Goldfarb, discriminated against him on account of his race and his national origin. In particular, Tassy alleges that Brunswick and Goldfarb have taken less draconian measures against white doctors accused of more serious misconduct.

Tassy filed his complaint in the Eastern District of New **[**4]** York on June 15, 2000, asserting claims for discrimination on the basis of race and national origin under *42 U.S.C. § 1981* and common law breach of contract. He seeks damages, reinstatement of his privileges, and other equitable remedies. Goldfarb answered and counterclaimed for breach of contract, alleging that Tassy had not paid the rent due on his office space. Tassy denied the allegations of the counterclaim. Brunswick then moved to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* on the ground that Tassy was required to file a claim with the PHC before suing in federal court. The District Court, relying on the doctrine of primary jurisdiction and our decision in *Johnson v. Nyack Hospital, 964 F.2d 116 (2d Cir. 1992)*, dismissed the complaint without prejudice to its reinstatement after review by the PHC. (Tr. at 9, 12.) Tassy appealed.

DISCUSSION

HN1[] We review de novo a district court's dismissal pursuant to *Rule 12(b)(6)*. *Bernheim* ***[*67]*** *v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)*. ***HN2***[] On a *Rule 12(b)(6)* motion to dismiss, we must construe the complaint in the light most favorable to the plaintiff, accepting all the allegations **[**5]** in the complaint as true. *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*; *Connolly v. McCall, 254 F.3d 36, 40 (2d Cir. 2001)*.

The sole issue on appeal is whether the doctrine of primary jurisdiction requires Tassy to file a complaint with the PHC before suing in federal court. To determine whether the doctrine applies, we first examine its origin and evolution.

Primary jurisdiction is a judge-made doctrine, created by Justice Edward White's opinion for a unanimous Supreme Court in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907)*. See *United States v. Radio Corp. of Am., 358 U.S. 334, 346, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*; Louis L. Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1042 (1964). In Abilene, the plaintiff oil company sued the defendant railroad in state court, alleging that it had charged unreasonable and discriminatory rates for interstate shipments of cotton seed. *204 U.S. at 430*. The Supreme Court held that the plaintiff was required to pursue its claims with the Interstate Commerce Commission (the "ICC") in the first **[**6]** instance, *id. at 448*, and the doctrine of primary jurisdiction was born. The Supreme Court's decision in Abilene was motivated by the uniformity that would obtain if

[1] The complaint does not specify the nature of this allegation.

the ICC were permitted to resolve questions about the reasonableness of the rates that it had the responsibility to set and enforce:

> For if, without previous action by the [ICC], power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.

Id. at 440. Following Abilene, early primary jurisdiction cases involved technical questions relating to regulated industries such as railroads, water and air transportation, electricity, and communications. See Robert B. von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929, 935-36 (1954). **[**7]**

Justice Brandeis identified a second rationale for the doctrine in *Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285, 66 L. Ed. 943, 42 S. Ct. 477 (1922)*, which involved a dispute over the tariff charged on interstate corn shipments. For the first time the Supreme Court cited administrative expertise, as well as uniformity, as a potential basis for invoking the doctrine:

> [Resort to the ICC] is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the [ICC]. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts.

Id. at 291. Although the Court declined to apply the primary jurisdiction doctrine in Great Northern Railway, the case signaled a shift in the predominant rationale that would support the doctrine's application in future cases. Several **[*68]** decades later the Supreme Court stated **[**8]** that, while "earlier cases" relied on "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions[, . . .]More recently the expert and specialized knowledge of the agencies involved has been particularly stressed." *United States v. W. Pac. R.R. Co., 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161, 135 Ct. Cl. 997 (1956)* (citations omitted).

While the doctrine has often been applied in cases involving difficult legal questions that must ultimately be resolved by the courts, the presence of such legal issues has not prevented the Supreme Court from concluding that primary jurisdiction lay in an administrative agency. In these cases, the Court has highlighted the separate roles of court and agency, as well as the importance of the primary jurisdiction doctrine in maintaining a proper balance between the two. In *Far East Conference v. United States, 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492 (1952)*, for example, the Court held that primary jurisdiction lay in the United States Shipping Board, rather than in the federal courts, despite the questions of ***antitrust law*** involved in the case. ***HN3***[] The Far East Court defined the primary **[**9]** jurisdiction doctrine as:

> a principle, now firmly established, that in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 574-75. The Supreme Court later reiterated this principle in discussing the role of the Federal Maritime Board in another antitrust case: ***HN4***[] "It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in **[**10]** the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 498, 2 L. Ed. 2d 926, 78 S. Ct. 851 (1958)*.

Since the inception of the doctrine, ***HN5***[] courts have resisted creating any fixed rules or formulas for its application. See *W. Pac. R.R. Co., 352 U.S. at 64*. Rather, "in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Id. As the origin and evolution of the primary jurisdiction doctrine demonstrate, ***HN6***[] the reasons for its existence and the purposes it serves are twofold: the desire for uniformity and the reliance on administrative expertise. See id. Thus, in determining whether to apply the primary jurisdiction doctrine, we must examine whether doing so would serve either of these purposes. [2]

[11] [*69]** With respect to the first purpose, Brunswick does not argue that applying the doctrine here would promote consistency and uniformity, and we do not see how it could. The concern for consistency and uniformity is more prevalent in cases involving issues of broad applicability such as the reasonableness of rates or tariffs. See *Nat'l Communications Ass'n, Inc. v. Am. Tel. & Tel. Co., 46 F.3d 220, 224-25 (2d Cir. 1995)*. *United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*, for example, was an antitrust action arising out of an attempt by NBC, a subsidiary of Radio Corp. of America, to exchange the television station that it owned in Cleveland for one in Philadelphia. *Id. at 335-36*. In discussing the history of the primary jurisdiction doctrine, the Court noted that

> this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt **[**12]** an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

Id. at 348. Because application of the primary jurisdiction doctrine would not promote uniformity, the Court declined to apply it: "Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." *Id. at 350*.

Like Radio Corp., this case involves neither a regulatory scheme nor a rate structure. ***HN8***[] Because this case "presents a unique and narrow factual dispute that poses no risk of inconsistent interpretations" of any broadly applicable rule or policy, *Am. Tel. & Tel., 46 F.3d at 225*, the desire for uniformity does not support the application of the primary jurisdiction doctrine.

The more significant question is whether deferring to the PHC would promote "the resolution of technical questions of facts through the agency's specialized expertise." *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 59 (2d Cir. 1994)*. ***HN9***[] The PHC is a fifteen-member **[**13]** body within the New York State Department of Health, see *N.Y. Pub. Health Law § 220* (McKinney 2001), whose duty is to "consider any matter relating to the preservation and improvement of public health." *N.Y. Pub. Health Law § 225(1)* (McKinney 2001). "A primary function of the PHC is to determine whether there is a medical justification for the withdrawal of [a] doctor's privileges." *Johnson, 964 F.2d at 121*.

Tassy argues that there are no technical questions for the PHC to review, as Brunswick suspended his privileges because of his alleged sexual harassment, his race, and his national origin, all of which are non-medical issues that

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[2] The dissent argues that we should also consider a third purpose, judicial economy. Dissenting Opinion, infra, at [3]. However, the Supreme Court has consistently held that there are only two purposes to consider in determining whether to apply the primary jurisdiction doctrine - uniformity and expertise. See *W. Pac. R.R. Co., 352 U.S. at 64*. Despite ample opportunity during the ninety-five years since it created the doctrine, see supra at [4-7], the Supreme Court has never identified judicial economy as a relevant factor. No doubt the reason is that considerations of judicial economy cannot assist a primary jurisdiction analysis, as it will always be more economical, from a judge's point of view, to dismiss a case or quickly refer it to an administrative agency, instead of adjudicating it himself. We are enjoined to resist this temptation because of ***HN7***[] "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)* (citations omitted).

are unrelated **[*70]** to the PHC's expertise. In response, Brunswick relies on ***HN10***[] *New York Public Health Law section 2801-b(1)*, which states that a hospital may suspend a physician's privileges only because of "standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant[,]" and *section 2801-b(2)*, which states that any person claiming to be aggrieved by a violation of *section 2801-b(1)* may file a complaint with the PHC. The gravamen of Brunswick's argument is that it suspended **[**14]** Tassy's privileges on the basis of his character and, because *section 2801-b(1)* lists character as a permissible basis for suspension and *section 2801-b(2)* authorizes the PHC to redress violations of *section 2801-b(1)*, the PHC has the expertise to determine whether Tassy's character rendered him unfit to practice medicine.

In support of its argument that we should apply the primary jurisdiction doctrine, Brunswick places substantial reliance on Johnson, in which we held that the doctrine required the plaintiff physician to pursue his claims arising out of the termination of his hospital privileges before the PHC. As a brief discussion of Johnson demonstrates, however, that case is distinguishable. The plaintiff in Johnson was a thoracic and vascular surgeon whose hospital privileges had been revoked after the hospital determined that "Johnson's surgical performance posed a peril to Nyack's patients." *Id. at 118*. A hospital investigation concluded that he had employed unsatisfactory surgical procedures and had insufficiently documented his work. Id. Placing particular emphasis on the relevant expertise of the PHC, we concluded:

> Primary jurisdiction **[**15]** demands that Johnson resort to the PHC before seeking redress in federal court. The question whether defendants had a proper medical reason to terminate Johnson's privileges requires a skilled evaluation of whether Johnson provided inadequate treatment to Nyack's patients. This decision necessitates examination of various medical data concerning Johnson's cases. The medical expertise of the PHC will prove extremely helpful in sorting through these complex records, and resolving the factual questions at stake.

Id. at 122.

In stark contrast to Johnson, this case does not involve allegations of technical incompetence or inadequate patient care, does not implicate any medical data or complex records, and would not benefit from the medical expertise of the PHC. The primary factual issue is whether Tassy committed the alleged sexual harassment, the resolution of which does not require the PHC's expertise. See *id. at 122* (noting that ***HN11***[] primary jurisdiction applies where an "agency's expertise may . . . prove helpful to the court in resolving difficult *factual* issues") (emphasis in original). The PHC has no expertise in determining whether a **[**16]** doctor committed sexual harassment or other acts of non-medical misconduct. Nor is medical expertise necessary to determine that one who sexually harasses his colleagues is lacking in character. We deem it significant that, according to Tassy's allegations, Brunswick has not made any charges regarding Tassy's treatment of his patients or his competence as a physician, and Brunswick did not review any patient charts or medical data in deciding to suspend Tassy's privileges. In short, Brunswick's decision to suspend Tassy's privileges does not invoke the particular expertise of the PHC. While there may well be cases in which issues surrounding a physician's character fall within the PHC's expertise, this is not such a case. ***HN12***[] Because the issues involved here "are neither beyond the conventional expertise of judges nor within the special **[*71]** competence of" the PHC, the primary jurisdiction doctrine does not apply. See *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp., 84 F.3d 91, 97 (2d Cir. 1996)*. [3]

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[3] The dissent argues that reliance on agency expertise favors dismissal. Dissenting Opinion, infra, at [1-3]. The dissent relies on the fact that, because Tassy has brought a discrimination claim, the District Court will have to compare Brunswick's treatment of him to its treatment of similarly situated physicians of other races and national origins, a comparison that would be better made by the PHC. This argument, we suggest, suffers from two flaws. First, there is no reason to believe that the PHC would even be able to conduct the comparative analysis to which the dissent alludes. While *New York Public Health Law § 2801-b(2)* authorizes the PHC to determine whether Brunswick properly suspended Tassy's privileges under *New York Public Health Law § 2801-b(1)* (i.e., whether Brunswick suspended Tassy's privileges on the basis of his character), we are not aware of any statute or regulation that authorizes the PHC to determine whether Brunswick properly suspended Tassy's privileges under *42 U.S.C. § 1981* (i.e., whether Brunswick denied Tassy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"). Second, even if the PHC were able - and willing - to conduct this analysis, it still would not implicate the PHC's

[17]** Brunswick argues that Johnson stands for the proposition that any physician challenging the termination of privileges on any basis must file a complaint with the PHC before suing in federal court. Johnson did not establish such a broad rule; rather, the Court merely found that the PHC's medical expertise would be of assistance: ***HN13***[] "Because the PHC has the peculiar expertise to assess whether a hospital had a sound medical reason for terminating a physician's privileges, we conclude that a physician who asserts a damages claim that turns on whether the hospital legitimately terminated his privileges must first file a complaint with the PHC." *Johnson, 964 F.2d at 121* (internal citation omitted). Unlike the defendant in Johnson, Brunswick does not assert that it had a medical reason for suspending Tassy's privileges, and the PHC does not have the "peculiar expertise" to assess whether Tassy committed sexual harassment.

The Supreme Court's decision in *Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976)*, is particularly apt. The plaintiff in Nader had brought a common law fraudulent misrepresentation **[**18]** claim based on the defendant airline's policy of overbooking its flights. Declining to apply the primary jurisdiction doctrine, the Court held:

> Referral of the misrepresentation issue to the [Civil Aeronautics] Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge" of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice[,] a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

[*72] *Id. at 305-06* (internal citation and footnote omitted). The same is true here. We fail to see how the PHC's medical expertise would aid the determination of whether Tassy committed the sexual harassment that has been alleged.

Nor are we convinced that the inclusion of "character" in *section 2801-b(1)* **[**19]** as a permissible basis for suspending privileges requires that we defer to the PHC on all issues relating to character. In applying the primary jurisdiction doctrine, the District Court seems to have found dispositive the fact that character is a permissible basis for suspension under *section 2801-b(1)*:

> It may be that in enacting 2801-b and not limiting the Public Health Council's review powers to purely instances of medical incompetence, the [New York] legislature felt that character flaws may have to be factored into the determination by a hospital as to whether the individual involved should continue to dispense medical services at the facility. That may be debatable, but the legislation is clear. Why they did it may be debatable.

(Tr. at 10.) The fact that the New York legislature permits hospitals to revoke privileges based on character flaws, however, does not mean that the PHC has expertise in determining whether a particular physician's character is flawed. Indeed, the District Court did not find that the PHC's expertise would be useful in resolving any factual dispute. To the contrary, the District Court found, "I think it is probably true that whether sexual **[**20]** harassment occurred certainly could be decided as well by this Court as [by] the Public Health Council." (Tr. at 10.)

We emphasize that ***HN14***[] primary jurisdiction is a discretionary doctrine whose applicability in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co., 352 U.S. at 64*. [4] The doctrine cannot

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medical expertise. As the dissent points out, Tassy's *§ 1981* claim is based on his allegation that Brunswick has taken measures against him "which have not been taken against white doctors accused of much more serious indiscretions and much more significant misconduct." Dissenting Opinion, infra, at [1-2]. For the reasons discussed in the text supra, an examination of "indiscretions" and "misconduct" directed at a co-worker does not implicate the PHC's medical expertise, regardless of who is alleged to have committed the indiscretions and misconduct.

be applied mechanically. In finding that the inclusion of "character" in *section 2801-b(1)* required Tassy to proceed before the PHC in the first instance, the District Court seems to have incorrectly equated primary jurisdiction with the related - but distinct - doctrine of exhaustion of administrative remedies. The Supreme Court has explained the difference between these two doctrines:

> ***HN15***[] "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary **[*73]** jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever **[**21]** enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64.

[22]** ***HN17***[] In the primary jurisdiction context, whether an agency is statutorily authorized to resolve a particular issue is not itself determinative of whether to apply the doctrine. Rather, the pertinent questions are whether referral to the agency is necessary to promote uniformity and whether the agency's expertise would assist the court in resolving difficult factual issues. See *Gen. Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1027 (2d Cir. 1987)* (refusing to apply doctrine of primary jurisdiction because agency "experience is not needed to determine" the relevant issue); cf. *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60 (2d Cir. 1994)* (applying primary jurisdiction doctrine because "the [Bureau of Indian Affairs'] resolution of . . . factual issues regarding tribal status will be of considerable assistance to the district court in ultimately deciding Golden Hill's Nonintercourse Act claims"); *Danna v. Air France, 463 F.2d 407, 412 (2d Cir. 1972)* (applying primary jurisdiction doctrine to case involving reasonableness of airline fares because "the examination of these fare systems requires the exercise of an expertise **[**23]** more heavily concentrated in the Administrative and Executive branches than in the federal judiciary"). Rather than simply asking whether an administrative agency is statutorily authorized to hear a particular dispute, the primary jurisdiction doctrine asks whether an agency's review of the facts "will be a material aid" to the court ultimately charged with applying those facts to the law. *Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 305, 34 L. Ed. 2d 525, 93 S. Ct. 573 (1973)*. Here, as the District Court itself noted, the PHC's review of the facts would not be a material aid to the court.

CONCLUSION

Neither of the purposes of the primary jurisdiction doctrine would be served by applying the doctrine in this case: deferring to the PHC would not promote consistency or uniformity, and there are no questions of fact whose resolution would be aided by the PHC's expertise. Rather, the issues involved in this case are squarely "within the traditional realm of judicial competence." *Goya Foods, Inc. v. Tropicana Prods., Inc., 846 F.2d 848, 851 (2d Cir. 1988)* (noting the "relatively narrow scope of the doctrine of primary jurisdiction"). Given "the **[**24]** virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)* (citations omitted), we decline to apply the primary jurisdiction doctrine. Accordingly, Tassy need not file a complaint with the PHC, and his claims

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[4] The dissent's suggestion that the courts should "welcome the opportunity for . . . pre-litigation dispute resolution in a case such as this," Dissenting Opinion, infra, at [4], we believe, misconceives the nature of the primary jurisdiction doctrine. ***HN16***[] While courts may often prefer that the parties engage in pre-litigation dispute resolution, we cannot require them to do so absent a sound legal basis. However "distasteful" or "counter-productive" a lawsuit may be, id., we cannot dismiss it pursuant to the doctrine of primary jurisdiction, and require the parties to litigate before an administrative agency, unless doing so would promote consistency and uniformity or unless the agency has some relevant expertise. As for the dissent's statement that parties often prefer an opportunity for pre-litigation dispute resolution before an administrative agency, id., nothing in our opinion precludes parties who choose to take advantage of such administrative procedures from doing so. Rather, we simply hold that, where a party prefers not to litigate before an administrative agency in the first instance, he cannot be forced to do so pursuant to the primary jurisdiction doctrine unless the purposes behind the existence of the doctrine are present.

may proceed in the District Court. For these reasons, we vacate the judgment of the District Court and remand for proceedings consistent with this opinion.

Dissent by: JOHN M. WALKER, JR.

Dissent

JOHN M. WALKER, JR., Chief Judge, dissenting:

Because I would affirm the district court's dismissal based on the doctrine of primary jurisdiction, I respectfully dissent.

The majority, faulting the district court for dismissing the complaint on the basis that the PHC has primary jurisdiction, **[*74]** cites two rationales for primary jurisdiction--consistency of rulings and agency expertise--and concludes that neither applies here. I agree that the first rationale does not apply, but believe that the second does. Moreover, a third reason not discussed by the majority, judicial economy, supports invocation of the doctrine.

[25]** At its core, Tassy's complaint is that the hospital has wrongly suspended his privileges and, accordingly, he seeks the reinstatement of his privileges as well as monetary damages. The hospital's authority to suspend Tassy's privileges is governed by *N.Y. Pub. Health Law § 2801-b(1)*. *Section 2801-b(2)* provides that a person claiming that a suspension of his privileges was in violation of subsection (b)(1) may file a complaint with the PHC. Were Tassy to do so, as I think should be required, the PHC would have to decide whether "standards of patient care, patient welfare, the objectives of the institution or [Tassy's] character or competency" warranted suspension or reinstatement. See *N.Y. Pub. Health Law § 2801-b(1)*. Tassy would argue, presumably, that they did not warrant suspension; that, because of discrimination, others similarly situated were not so disciplined; and that, given his medical expertise and record of performance relative to others, he should be reinstated. The hospital would have to defend these charges. All of this is squarely within the PHC's jurisdiction.

There are three likely outcomes of the proceedings before the PHC: (1) a determination in Tassy's **[**26]** favor; (2) a determination in the hospital's favor; and (3) a mediated settlement. Only in the event of outcome (2) would it be necessary for Tassy to proceed with his federal action. And, if that were to occur, the federal court would have the benefit of the answers to fact questions from the agency charged with disputes of this sort among professionals. Such answers would be of great assistance in resolving the federal claims that Tassy has presented in his complaint and in determining whether his privileges should be restored.

The majority disputes this point. It reasons that the PHC's medical expertise would not avail the court in this case because the "primary factual issue is whether Tassy committed the alleged sexual harassment, the resolution of which does not require the PHC's expertise." Maj. Op., supra, at **[10].** I do not think the factual inquiry invoked by Tassy's discrimination claims will be so limited.

Tassy claims that the harassment charges, even if true, were a pretext for the hospital's suspension of his privileges, which was in fact motivated by discriminatory animus. Central to this question, of course, is how the hospital disciplined other similarly situated doctors. In his complaint, Tassy **[**27]** alleges that appellees violated *§ 1981* and discriminated against him on the basis of his race and national origin by "acting in a malicious manner, fostering baseless charges and taking draconian measures against plaintiff, a black Haitian, which have not been taken against white doctors accused of much more serious indiscretions and much more significant misconduct." (Emphasis added). Similarly, in his reply brief, Tassy states that his claim of racial discrimination is shown in part by the "frivolous nature of the charges against Dr. Tassy, his excellent job performance and the studied neglect of medical incompetence of Caucasians." (Emphasis added).

Thus, as is apparent from Tassy's own allegations of pretext, the factual issues in this case will go beyond whether Tassy harassed his co-workers. The factual issues will embrace the question whether, even if the hospital had a legitimate reason to suspend Tassy's privileges, the hospital **[*75]** has treated similarly situated physicians in the same way and whether the medical incompetence of other doctors was overlooked. More precisely, adjudication of Tassy's claims by this court will entail at least two inquiries that, **[**28]** given their fact-intensive character in the peculiar context of the practice of medicine, could be aided by the expertise of the state agency: (1) whether Tassy, a psychiatrist accused of abusive and harassing conduct, is similarly situated with other physicians who have different specialties, committed different acts of misconduct, or have different employment histories and characters; and (2) whether, in its employment decisions, the hospital has consistently applied the statutorily defined reasons for the suspension of privileges, which are "based on specialized medical considerations." See *Gelbard v. Genesee Hosp., 87 N.Y.2d 691, 696, 664 N.E.2d 1240, 1241, 642 N.Y.S.2d 178 (1996)*. [1] For example, in determining whether Tassy's privileges were wrongfully suspended, the PHC would likely shed light on questions such as, for example, whether the hospital might have had a legitimate non-discriminatory reason to act more vigorously against accusations of abusive conduct by a psychiatrist, who counsels vulnerable individuals, than against a surgeon or pathologist.

[29]** Finally, the majority does not address judicial economy, a third factor that, in addition to consistency in rulings and technical expertise, supports invocation of the doctrine of primary jurisdiction. Although the Supreme Court has yet to rely on this factor, we have done so and, in this case, judicial economy militates in favor of invoking the doctrine. As we noted in a case involving the same state agency, "we also believe that judicial economy will be best served by requiring [plaintiff] to file a complaint with the PHC before seeking judicial relief." *Johnson v. Nyack Hosp., 964 F.2d 116, 123 (2d Cir. 1992)*. Moreover, considerations of judicial economy overlap to a certain extent with those of agency expertise: the expertise of the PHC, particularly in the area of mediating disputes between health-care professionals, could prove helpful to the court in addition to promoting judicial economy. As we stated in Johnson, the "PHC may yet propose a solution that will end the current hostilities between [the parties] without judicial intervention. At the very least, the PHC should be given a chance to try." *964 F.2d at 123*. The New York Court of **[**30]** Appeals has similarly "recognized the vital mediation role served by the PHC in providing a professionally competent forum in which to resolve disputes at any early state." *Gelbard, 87 N.Y.2d at 697, 664 N.E.2d at 1242* (citation and internal quotation marks omitted). One might think that the courts would welcome the opportunity for such pre-litigation dispute resolution in a case such as this.

I also think that in many cases the parties would as well. To be sure, it is **[*76]** essential that the courts should be available to hear serious and important claims, such as those raised by Tassy. However, it is also important to remember that a lawsuit frequently is a distasteful and needlessly counter-productive way to resolve a dispute. This is particularly so when the dispute is between professionals and involves questions of professional reputation, a professional's lifeblood. Under such circumstances, the proceeding before the PHC may "often avoid[] the unpleasant task of besmirching a physician's reputation by[] 'using its professional expertise to identify and discourage groundless claims, [and] to mediate and to conciliate disputes between health-care professionals. **[**31]** '" *Johnson, 964 F.2d at 123* (quoting *Cohoes Mem'l Hosp. v. Dep't of Health, 48 N.Y.2d 583, 589, 399 N.E.2d 1132, 1135, 424 N.Y.S.2d 110 (N.Y. 1979))*.

With respect, I dissent.

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[1] In making this point, I do not mean to suggest, as the majority states, Maj. Op., supra, at **[11 n.3]**, that the PHC will analyze Tassy's *§ 1981* claim. Rather, my point is that the agency's investigation of whether Tassy's privileges were wrongfully suspended, which the PHC is authorized under New York law to perform, would produce factual determinations that would aid this court's analysis of Tassy's *§ 1981* claim in the ways described above. Given the inevitable overlap of Tassy's wrongful suspension and *§ 1981* claims, the PHC would consider many of the same factual, if not legal, issues as this court would. Nor is there any requirement that the same claims must be brought before both this court and the PHC. See *Johnson v. Nyack Hosp., 964 F.2d 116 (2d Cir. 1992)* (affirming dismissal of plaintiff-physician's antitrust claims for plaintiff-physician's failure to file a complaint with the PHC first).

ACT, Inc. v. Sylvan Learning Sys.

United States Court of Appeals for the Eighth Circuit

February 12, 2002, Submitted ; July 11, 2002, Filed

No. 01-2775, No. 01-3583

Reporter

296 F.3d 657 *; 2002 U.S. App. LEXIS 13905 **; 2002-2 Trade Cas. (CCH) P73,741

ACT, Inc., Appellant, v. Sylvan Learning Systems, Inc., Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Iowa.

ACT, Inc. v. Sylvan Learning Sys., 104 F. Supp. 2d 1096, 1999 U.S. Dist. LEXIS 21879 (N.D. Iowa 1999).

Core Terms

centers, letter agreement, testing, summary judgment, terms, district court, interim agreement, damages, tortious interference, antitrust, bid, injure, matter of law, computer-based, memorandum, undisputed, employees, destroy, board approval, Deposition, interfered, motivation, preparing, contends, acquire, network, genuine issue of material fact, contractual relationship, business relationship, light most favorable

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

Summary judgment shall be granted on motion of a party if the record shows there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. An appellate court reviews de novo, applying that same standard. The appellate court considers the record in the light most favorable to the non-moving party and gives the non-moving party the benefit of all reasonable inferences that may be drawn from the evidence.

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN2[] Self-Regulating Entities, National Association of Securities Dealers

To be successful under Iowa law on its claim for tortious interference with contractual relations, a plaintiff must be able to prove five elements: (1) that the plaintiff had a contract with a third party; (2) that the defendant knew of the contract; (3) that the defendant intentionally and improperly interfered with the contract; (4) that the interference caused the third party not to perform, or made performance more burdensome or expensive; and (5) that the plaintiff was damaged as a result.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Torts > ... > Commercial Interference > Contracts > General Overview

HN3[] Jury Trials, Jury Instructions

It is not necessary under Iowa law that a defendant knew of the existence of specific agreements in order for liability for tortious interference with contractual relations to attach. All that is required is proof of knowledge of facts which, if followed by reasonable inquiry, would have led to the disclosure of the contractual relationship between the plaintiff and a third party.

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN4[] Summary Judgment, Appellate Review

An appellate court may affirm a summary judgment on any ground supported by the record.

Torts > ... > Commercial Interference > Contracts > General Overview

HN5[] Commercial Interference, Contracts

Under Iowa law, if there is no contract, there can be no interference with a contract.

Contracts Law > Contract Formation > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN6[] Contracts Law, Contract Formation

Under Iowa law, all contracts must contain mutual assent.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Contracts Law > Contract Conditions & Provisions > General Overview

HN7[] **Contract Conditions & Provisions, Conditions Precedent**

Under Iowa law, conditions precedent are those facts and events, occurring subsequent to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, and before the usual judicial remedies are available.

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

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN8[] **Intentional Interference, Elements**

Under Iowa law, substantial proof that the defendant acted with the sole or predominant purpose to financially injure or destroy the plaintiff is required for a plaintiff to sustain its claim of tortious interference with a prospective business relationship.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN9[] **Summary Judgment, Entitlement as Matter of Law**

When an appellate court is reviewing a decision granting a motion for summary judgment, the non-moving party is entitled to the benefit of all reasonable inferences that may be drawn from the evidence. It is not entitled, however, to the benefit of unreasonable inferences, those that amount to nothing more than mere conjecture.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

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

Civil Procedure > Pretrial Matters > Motions in Limine > General Overview

HN10[] **Standards of Review, Abuse of Discretion**

Ordinarily, an appellate court reviews a district court's ruling on a motion in limine for abuse of that court's discretion.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN11[] **Actual Monopolization, Anticompetitive & Predatory Practices**

When a valid business reason exists for conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a *15 U.S.C.S. § 2* violation.

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

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN12[] **Private Actions, Remedies**

If a plaintiff has suffered financial loss from the lawful activities of a competitor, then no damages may be recovered under the antitrust laws.

Admiralty & Maritime Law > Maritime Personal Injuries > Maritime Tort Actions > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN13[] **Maritime Personal Injuries, Maritime Tort Actions**

Antitrust injury, causation, and damages all are necessary parts of the proof of liability under *section 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN14[] **Costs & Attorney Fees, Costs**

A court of appeals lacks jurisdiction to hear an appeal where the sole issue is that the district court abused its discretion as to the amount of costs awarded.

Counsel: For ACT, INC., Plaintiff - Appellant: Patrick M. Roby, ELDERKIN & PIRNIE, Cedar Rapids, IA, Robert A. Burgoyne, Stephen M. McNabb, FULBRIGHT & JAWORSKI, Washington, DC.

For SYLVAN LEARNING SYSTEMS INC., Defendant - Appellee: Stephen J. Holtman, SIMMONS & PERRINE, Cedar Rapids, IA, David H. Bamberger, PIPER & MARBURY, Washington, DC, Michael F. Brockmeyer, PIPER & MARBURY, Baltimore, MD.

Judges: Before BOWMAN, RICHARD S. ARNOLD, and WOLLMAN, Circuit Judges. RICHARD S. ARNOLD, Circuit Judge, concurring in part and dissenting in part.

Opinion by: BOWMAN

Opinion

[*660] BOWMAN, Circuit Judge.

This case arises from agreements entered into by Sylvan Learning Systems, Inc., and the National Association of Securities Dealers, Inc. (NASD), concerning the operation and transfer of computer-based testing (CBT) centers owned by NASD. ACT, Inc., contends that its own dealings with NASD before Sylvan came on the scene and Sylvan's behavior in doing business with NASD provide the basis for its claims under Iowa state law for tortious interference with contractual and prospective business relations and for its federal antitrust **[**2]** claim. ACT appeals from the final judgment of the District Court [1] in favor of Sylvan on all of ACT's claims and from a later order awarding costs to Sylvan. We affirm.

I.

At the time of the events leading up to this lawsuit, ACT was a non-profit corporation providing clients with, among other things, standardized testing for academic and professional purposes. Sylvan was furnishing high-security computer-based testing and other educational services to its customers. In 1993, NASD owned and operated a network of CBT centers providing certification testing to stock brokers. In the early 1990's, ACT became interested in the CBT market and to that end entered into two agreements with NASD.

The first agreement was a Memorandum of Understanding (MOU) executed by both parties in August 1993 **[**3]** stating that ACT and NASD were entering into "a non-exclusive relationship that facilitates mutual development of business opportunities involving computer testing services." 1993 Memorandum of Understanding between American College Testing and National Association of Securities Dealers (hereinafter MOU) at 1, P A.1. The agreement recognizes that ACT wished to provide CBT services to some of its clients and that NASD already was providing such services through the nationwide testing centers it operated. The agreement says nothing about ACT acquiring NASD's testing centers, indicating only that "ACT's corporate plan calls for it to eventually administer computerized testing through its own network **[*661]** of centers," without suggesting how ACT would establish those centers. Id. at 2, P A.4.

In May 1995, NASD and ACT jointly executed an interim letter agreement (Interim Agreement). The letter's purpose was to "supplement the parties' MOU and govern their relationship" until negotiations "for the joint delivery of computer-based assessment services" resulted in the execution of a "final" agreement. Letter of May 3, 1995, from Gerard F. Foley, NASD senior vice-president, to RickiAnn Saylor, **[**4]** ACT vice-president, Re: Interim Test Assessment Services Agreement (hereinafter Interim Agreement) at 1. The Interim Agreement was to terminate August 1, 1995, unless "ACT continue[d] to provide assessment services to NASD after August 1, 1995, without the parties' having executed the" final agreement. Id. at 3, P 9. In that event, the parties were to continue to be bound by the terms of the Interim Agreement until terminated by written agreement of ACT and NASD. As with the MOU,

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[1] The Honorable Michael J. Melloy, United States District Judge for the Northern District of Iowa. Judge Melloy has since been appointed United States Circuit Judge for the Eighth Circuit and currently serves in that capacity.

the agreement was not exclusive, clearly was expected to be short term, and did not involve the transfer of NASD's CBT centers to ACT.

A third proposed agreement between ACT and NASD, which never was executed by NASD, was in the form of a letter dated December 4, 1995, from ACT to NASD. Under the terms of this Proposed Letter Agreement, ACT was to provide "technology-based assessment services" to NASD from January 1996 through December 2003. Letter of Dec. 4, 1995, from Richard L. Ferguson, ACT president, to James P. O'Donnell, NASD executive vice-president, Re: Letter Agreement (hereinafter Proposed Letter Agreement) at 1. Subject to certain conditions, NASD was to "assign all of its testing **[**5]** centers to ACT on January 1, 1998." Id. at 2, P 5. But instead of entering into this agreement with ACT, NASD decided to accept a last-minute offer made by Sylvan. Under the terms of that offer, Sylvan initially would manage NASD's CBT centers and eventually NASD would transfer the centers to Sylvan. The Sylvan-NASD agreements were executed in March 1996.

After closing the deal with Sylvan, NASD reached a settlement with ACT on the termination of the MOU and the Interim Agreement. ACT then sued Sylvan in November 1996. The complaint included allegations in five counts: Count I, Sylvan tortiously interfered with ACT's contractual relations with NASD; Count II, Sylvan tortiously interfered with ACT's prospective business advantage with NASD; Count III, Sylvan tortiously interfered with ACT's current and prospective contractual relations with Regents College; Count IV, Sylvan monopolized the relevant market in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*; and Count V, Sylvan attempted to monopolize the relevant market. Sylvan sought summary judgment on all counts; the District Court granted Sylvan's motion on Counts I, II, and III and initially denied **[**6]** judgment on Counts IV and V. After granting Sylvan's motion in limine on the issue of antitrust damages, the court granted Sylvan's renewed motion for summary judgment on Counts IV and V. [2]

II.

HN1[] Summary judgment shall be granted on motion of a party if the record shows "there is no genuine issue as to any material fact and . . . the moving party is entitled **[*662]** to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. We review de novo, applying that same standard. We consider the record in the light most favorable to ACT and give ACT the benefit of all reasonable inferences that may be drawn from the evidence. See *Netland v. Hess & Clark, Inc., 284 F.3d 895, 898 (8th Cir. 2002)* (standard of review).

HN2[] To be successful under Iowa law on its claim for tortious interference with contractual relations, ACT must be able to prove five elements: (1) that it had a contract with NASD; (2) **[**7]** that Sylvan knew of the contract; (3) that Sylvan "intentionally and improperly interfered with the contract"; (4) that the interference caused NASD "not to perform, or made performance more burdensome or expensive"; and (5) that ACT was damaged as a result. *Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 399 (Iowa 2001)* (citations to quoted cases omitted). The District Court held that ACT could not prove that Sylvan knew about the MOU and the Interim Agreement. Viewing the evidence in the light most favorable to ACT, the court further determined that the Proposed Letter Agreement did not amount to a contract. On appeal, ACT contends that summary judgment was improper because genuine issues of material fact remain on these issues.

A.

We consider first Sylvan's knowledge of the MOU and the Interim Agreement. As ACT points out, ***HN3***[] it is not necessary under Iowa law that Sylvan knew of the existence of the specific agreements in order for liability to attach. All that is required is proof of "knowledge of facts which, if followed by reasonable inquiry, would have led to the disclosure of the contractual relationship between" ACT and NASD. *Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 764 (Iowa 1999)* **[**8]** (quoting as a correct statement of the law a jury instruction from the case on appeal). But even though only inquiry notice is required, we conclude that ACT cannot prove the necessary knowledge on the part of Sylvan.

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[2] ACT did not oppose Sylvan's motion for summary judgment on Count III, and that judgment is not before us on appeal.

ACT directs our attention to several parts of the record to support its position that the question of Sylvan's knowledge of the MOU and the Interim Agreement should be decided by a jury. [3] **[**10]** First, ACT points out that Sylvan's chief financial officer testified that he knew that ACT and NASD had a business relationship. The witness's undisputed testimony, however, was that he was unaware that ACT was making a competing bid for a long-term contract with NASD and that he did not know of any relationship between NASD and ACT until NASD had told Sylvan that it could submit a bid for the CBT business. As ACT notes, Sylvan's co-CEO also was asked at his deposition if he knew "that NASD had some sort of a business relation with ACT." Deposition of R. Christopher Hoehn-Saric at 332 (May 13, 1999). He **[*663]** answered that he was aware NASD and ACT had done some co-marketing and in a later deposition said that he had seen them sharing space at trade shows, but he said he was not familiar **[**9]** with the specifics of the relationship. There also is some evidence that Sylvan employees who were involved in the NASD bid became aware that ACT and NASD were sharing some CBT centers. But they were told about that only after Sylvan and NASD were well into discussions on a long-term agreement between them and only because some parts of the short-term agreements with ACT might have needed to be accommodated in any Sylvan-NASD agreement. This evidence is insufficient to prove that Sylvan was on notice that it should have investigated further to see if the long-term operating and transfer agreements it was proposing to NASD would interfere with standing short-term co-marketing agreements NASD already had with ACT. [4]

[11]** ACT further points out that Sylvan became aware that ACT was making a competing bid for the operation and eventual acquisition of NASD's CBT centers at the same time Sylvan itself was preparing a bid. ACT's evidence does show that Sylvan knew, as it was preparing its proposal, that NASD was in discussions with ACT to reach a similar agreement and that NASD staff were making recommendations in support of ACT's proposal. Evidence that Sylvan knew ACT was in discussions with NASD on a long-term contract is not equivalent, however, to evidence that would have put Sylvan on notice that ACT already had interim agreements with NASD.

We conclude that the evidence in the summary judgment record of Sylvan's knowledge of the MOU and the Interim Agreement, even viewed in the light most favorable to ACT's position, is insufficient as a matter of law to create a jury question on an essential element of ACT's claim: was Sylvan on notice that it should investigate whether ACT already had contracts that would be breached if Sylvan successfully closed a deal with NASD to operate and eventually acquire NASD's CBT centers? Summary judgment on ACT's claim for tortious interference with the MOU and the **[**12]** Interim Agreement is affirmed.

B.

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[3] ACT also contends that Sylvan did not move for summary judgment on the basis of Sylvan's lack of knowledge of the MOU and the Interim Agreement. But Sylvan did note the existence of the MOU and the Interim Agreement in its memorandum in support of its motion for summary judgment. It is true that Sylvan focused primarily on the Proposed Letter Agreement, but then so did ACT's complaint. We conclude that ACT was sufficiently on notice that it should defend the summary judgment motion on all five elements of tortious interference with contract and address the knowledge question as to all the purported agreements on which it was basing its claim. In any event, this Court has indicated that ***HN4***[] we may affirm a summary judgment on any ground supported by the record. Ozark Heartland *Elecs., Inc. v. Radio Shack, 278 F.3d 759, 763 (8th Cir. 2002)*.

[4] It is arguable that ACT brought the wrong cause of action on the MOU and the Interim Agreement. Both of these agreements were non-exclusive, short-term agreements, intended to be temporary. Neither involved the transfer of the CBT centers from NASD to ACT -- unlike Sylvan's ultimate agreements with NASD, the transactions which allegedly interfered with ACT's purported contracts with NASD. It is true that NASD, after failing to reach a long-term agreement with ACT, compensated ACT and agreed to other terms and conditions to resolve differences that arose upon termination of the MOU and the Interim Agreement. But it appears that ACT's recovery of expenses was contemplated by the terms of the agreements because the agreements were terminable at will. Under Iowa law, "contracts terminable at will are more properly protected as a prospective business advantage rather than as a contract. Consequently the higher standard of proof requiring substantial evidence that the defendant's predominant or sole motive was to damage the plaintiff was required." *Compiano v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 462, 464 (Iowa 1999)* (citation omitted); see also infra pt. III (discussing Iowa cause of action for tortious interference with prospective business advantage). We also note, as to the damages element of ACT's cause of action, that the record does not reflect that ACT sought to prove and recover damages based on the termination of these short-term agreements. With the decision we reach today, however, it is unnecessary for us to address either of these issues.

As for the Proposed Letter Agreement, Sylvan's knowledge of it is **[*664]** immaterial because ACT's evidence is insufficient as a matter of law to prove that the letter was indeed a contract. ***HN5***[] "If there is no contract, there can be no interference." *Tredrea v. Anesthesia & Analgesia, P.C., 584 N.W.2d 276, 287 (Iowa 1998)*.

The purported agreement opened with these sentences:

> Pursuant to our recent meetings and conversations, this letter sets forth terms to which [ACT] is prepared to agree with respect to ACT's providing technology-based assessment services to [NASD]. *If the NASD agrees to these terms*, please sign one of the copies of this letter and return it to me for ACT's files.

Proposed Letter Agreement at 1 (emphasis added). Included in the TERMS section of the letter was this recitation:

> 1. *Subject to approval* of the terms reflected in this letter by NASD's Board of Directors at its January 1996 meeting, the parties will enter into an agreement . . . in January 1996 that implements this letter agreement and supplements the basic terms provided for herein.

Id. (emphasis added).

[13]** No NASD representative signed the agreement on behalf of the organization, and the NASD board never approved it. Notwithstanding this undisputed evidence, ACT argues there is a genuine issue of material fact on whether there was a contract. According to ACT, there was a meeting of the minds between NASD and ACT as a result of discussions that preceded the drafting of the proposed letter agreement, with ACT believing it was the only entity contending for the sort of long-term operation and asset-transfer agreement that its proposal contemplated. Nevertheless, when NASD did tell ACT that it would be considering a proposal from Sylvan, ACT's president did not cry "breach" but instead went to work on a counterproposal, stating in a memorandum to two of his employees, "Jim [O'Donnell, NASD executive vice-president] indicated that he continues to favor ACT but that he must entertain the Sylvan proposal. Even so, I don't believe that we can or should underestimate the potential of a reversal in NASD's position." Memo. from Dick Ferguson to Joe Pugh and Ricki Saylor (Dec. 22, 1995) at 1, P 7. Ferguson also wrote, "I believe that ACT is still the 'favored' partner for NASD, but, *until* **[**14]** *we have a written commitment*, we can't be certain that the relationship as laid out in recent weeks will proceed." Id. at 2 (emphasis added). These are not the words of someone who believes he has cinched a deal. Notwithstanding his deposition testimony that he thought an "agreement" had been reached, his contemporaneous writing clearly demonstrates that ACT's president did not believe the parties had a legally binding contract. In any event, on its face the letter acknowledges that the terms therein are those to which ACT -- not NASD -- was prepared to agree. The use of the conjunction "if" in the opening paragraph of the letter demonstrates that NASD's agreement with those terms was not a foregone conclusion, at least not in the mind of ACT's president, who sent NASD the Proposed Letter Agreement on behalf of ACT. And, as we have said, no NASD representative ever manifested agreement with the terms that ACT was proposing because no NASD representative ever signed a copy of the letter. See *Magnusson Agency v. Pub. Entity Nat'l Co.- Midwest, 560 N.W.2d 20, 26 (Iowa 1997)* ***HN6***[] ("All contracts must contain mutual assent.").

ACT contends that proof of the existence **[**15]** of a contract can be found in the "extensive evidence demonstrating that **[*665]** ACT and NASD . . . had begun implementing" the purported agreement. Br. of Appellant at 26. While we think ACT's characterization of the evidence is hyperbolic, there is evidence in the record that both ACT and NASD had made staff assignments to effectuate the transfer; that NASD employees were told they would soon be working for ACT; and that employees from NASD had meetings and video conferences to discuss the transfer. This is not, however, as ACT suggests, evidence of performance that would prove the formation of the contract. Instead, it is evidence that employees were taking preliminary steps to plan for the logistics of the transfer if and when the agreement actually was finalized. As the president of ACT wrote in the December 22 internal memorandum, it had been his position "all along" that "no hiring should occur until we have a written agreement in hand" and no third-party contracts involving implementation of the agreement as negotiated to date should be entered into "until we have a signed agreement in hand." Memo. from Dick Ferguson to Joe Pugh and Ricki Saylor (Dec. 22, 1995) at 2. By his own **[**16]** words, ACT's president admitted his belief that the unsigned letter agreement was not an enforceable contract.

Further, it is undisputed that the NASD board of directors never approved the terms of the letter as required by the language of the letter itself, and so the follow-up January 1996 agreement that ACT proposed would implement and supplement the Proposed Letter Agreement never happened. Notwithstanding the clear language in the letter, ACT questions whether board approval was really necessary. By ACT's reckoning, its president's December 22 memorandum supports its statement that "NASD informed ACT that it was not certain that board approval was even required." Br. of Appellant at 27. Whatever NASD's vice-president may have said on the matter in a telephone conversation with ACT's president is irrelevant here because the Proposed Letter Agreement -- by its own terms -- indicated that the final implementing and supplementing agreement would be negotiated only after the NASD board approved the Proposed Letter Agreement. ACT also suggests that its "personnel understood that the board's approval was essentially a 'formality.'" Br. of Appellant at 27. Be that as it may, the Proposed **[**17]** Letter Agreement -- drafted by ACT -- required such approval, however much a foregone conclusion the ACT employees may have thought it was. The testimony of everyone involved in the negotiations was to the same effect: NASD board approval, however nominal, was required, and it was not forthcoming.

Citing a case from a California state court, ACT argues that NASD board approval was a condition precedent to performance of the contract but not to contract formation. ***HN7***[] Under Iowa law, "conditions precedent are those facts and events, occurring subsequent to the making of a *valid contract*, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, and before the usual judicial remedies are available." Employee Benefits Plus, *Inc. v. Des Moines Gen. Hosp., 535 N.W.2d 149, 154 (Iowa Ct. App. 1995)* (emphasis added). Here, of course, NASD did not execute the agreement, so there was no "valid contract." In any event, the plain language of the agreement belies ACT's claim that NASD board approval was a condition precedent: it is the final agreement, that is, the future formation of a contract to implement the **[**18]** Proposed Letter Agreement, that hinged upon NASD board approval of the Proposed Letter Agreement. As ACT itself notes, the letter "provided that the parties would enter **[*666]** into a **further** agreement that **implemented** the parties' agreement if the NASD board approved the terms" of the Proposed Letter Agreement. Br. of Appellant at 29. There was no board approval and consequently there was never either an "agreement" or a "further agreement." In short, there was no contract to perform, with or without conditions.

We hold that ACT cannot prove, on this record, that the Proposed Letter Agreement was a contract. That writing therefore cannot be the basis of ACT's cause of action against Sylvan for tortious interference with contract. The District Court properly granted summary judgment to Sylvan on ACT's claim under Iowa law for tortious interference with the Proposed Letter Agreement.

III.

ACT contends that the District Court erred in granting summary judgment to Sylvan on ACT's claim that Sylvan tortiously interfered with ACT's prospective business relationship with NASD. The District Court held that ACT was unable to demonstrate any genuine issue of material fact on whether **[**19]** Sylvan, in submitting its bid to NASD, intentionally and improperly interfered with ACT's relationship with NASD. See *Tredrea, 584 N.W.2d at 283-84* (listing and explaining the elements of a claim of tortious interference with a prospective business contract). That is, the court concluded that ACT cannot prove, on this record, that Sylvan acted with the "sole or predominant purpose . . . to financially injure or destroy" ACT, ***HN8***[] substantial proof of which was required for ACT to sustain its claim. *Id. at 283* (citations to quoted cases omitted). "In a competitive business setting, this rule of strict proof operates 'to avoid opening the door to virtually limitless suits of a highly speculative and remote nature.'" *Id. at 287* (citations to quoted cases omitted).

HN9[] Because we are reviewing a decision granting summary judgment to Sylvan, ACT is entitled to the benefit of all reasonable inferences that may be drawn from the evidence. It is not entitled, however, to the benefit of unreasonable inferences, those that amount to nothing more than mere conjecture. See *Mathes v. Furniture Brands Int'l, Inc., 266 F.3d 884, 885-86 (8th Cir. 2001)*. **[**20]** After de novo review of the summary judgment record, we conclude that ACT does not have substantial proof that Sylvan's proposal to NASD was made solely or predominantly to financially injure or destroy ACT.

In support of its argument that factual issues remain that should be decided by a jury, ACT relies primarily on a document to which the District Court gave short shrift in reaching its decision. ACT quotes for us "explicit admissions" from what it calls "Sylvan's own documents":

> Sylvan was compelled to intervene [in the NASD/ACT contract] for two reasons. For one, Sylvan naturally loathes the prospect of competition in CBT delivery from any corner. Second [the Educational Testing Service ("ETS")] loathes the prospect of its arch-rival ACT in control of a testing network. ETS is Sylvan's most influential customer in the academic market and numbers among its top three customers across all markets. When ETS is unhappy, Sylvan too is unhappy.

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> . . . Sylvan was willing to accept [the] unfavorable terms [of the NASD deal] to keep out the competition and appease ETS.

And:

> Sylvan gave NASD a sweetheart deal to gain control of its sites, just **[**21]** to keep ACT out of the CBT market.

[*667] Br. of Appellant at 34, 35 (quoting M. Ford, Sylvan Prometric: An Account of its Business Lines, vol. I (Aug. 1997) (draft) at 27-28; M. Ford, Sylvan Prometric: An Analysis of its Competitive Position, vol. II (Aug. 1997) (draft) at 37 (alterations by ACT)). In its main brief, ACT neglects to explain the genesis of these statements. In fact, the quoted language is from drafts of documents prepared by Michelle Ford, a graduate student in business whom Sylvan hired as a summer intern in 1997 for the purpose of preparing background reports on computer-based testing. Ford had no experience in computer-based testing and little knowledge of the business when she went to work for Sylvan. It is undisputed that neither Ford nor Nicholas Kouwenhoven, the Sylvan employee who was Ford's supervisor for the summer, had personal knowledge of Sylvan's decision to bid for the NASD business or the mechanics of preparing that bid. The same is true of every Sylvan employee Ford interviewed in preparing the reports. Indeed, Ford agreed that the language in the reports suggesting that Sylvan did not like competition in the CBT market was her own **[**22]** and that she did not discuss her speculation with any other Sylvan employee. Deposition of Michelle Ford at 228 (Jan. 14, 1999).

After considering the background of these documents (but without going so far as to declare them inadmissible), the District Court in reaching its decision gave "little, if any weight" to the statements cited by ACT. Order of Dec. 30, 1999, at 19. ACT charges that this demonstrates that the court improperly weighed the evidence and made credibility determinations. We disagree. Putting aside the questionable admissibility of these documents, we conclude that the statements taken from the reports are not evidence, much less substantial evidence, that Sylvan acted with the predominant purpose to financially injure or destroy ACT. They are not admissions of a Sylvan agent but merely the conjecture of a summer intern who lacked any personal knowledge of Sylvan's motivations in submitting its proposal to NASD a year and a half before and who did not even interview any Sylvan employees who might have had such knowledge. This speculation by a temporary employee is not, as a matter of law, substantial proof that Sylvan's primary purpose in pitching a deal to NASD **[**23]** was to financially injure or destroy ACT.

Even so, according to ACT, it came forward with sufficient evidence to create a genuine issue on whether Sylvan's business justifications for wanting to do a deal with NASD were pretextual, so summary judgment was improper. Sylvan's co-CEO testified that the company had four reasons for submitting its proposal, as written, to NASD: NASD's test volume would help fill Sylvan's excess testing capacity; NASD was a prestigious and desirable business partner; NASD made it clear it was seeking to get its CBT centers off its books, and that is why the asset transfer was included in Sylvan's proposal even though Sylvan did not have need for some of the testing centers; and NASD had CBT centers in areas where Sylvan could use additional testing capacity. ACT attempts to construe the record so as to show a genuine issue on whether the claimed business purposes are legitimate. But the supposed evidence to which ACT points requires us to draw inference upon inference in order to conclude there might be a material fact issue lurking somewhere. We decline to do so, as did the District Court.

ACT argues that the necessary evidence of pretext is found in **[**24]** Sylvan's admitted goal of underbidding ACT on the NASD contract in order "to blow the doors off" **[*668]** ACT's pending proposal, and doing so at financial risk to itself. Deposition of Derek W. Linden at 43 ("The one line I recall from the meeting is Doug Becker [Sylvan's co-CEO] saying that they would submit a proposal to us that would blow the doors off any other proposal we may have received."). Again, we seriously question the soundness of the inferences that we must draw from the evidence in order to agree with ACT's assessment. See *Nat'l Parcel Servs., Inc. v. J.B. Hunt Logistics, Inc., 150 F.3d 970, 971 (8th Cir. 1998)* ("The passing remark by [defendant] that it could 'take you out' is not the kind of competitive threat that will support a prima facie case of tortious interference.") (applying Iowa law in case where defendant cut prices so low it lost money). Making a bid below cost is not, on its face, a bad business move, particularly when Sylvan had numerous other customers who were paying cost-plus. Cf. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* ("Cutting prices in order **[**25]** to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.") (predatory pricing case under federal ***antitrust law***). Likewise, as Sylvan acknowledged to NASD from the beginning, some of the test centers were expected to be (and in fact were) closed after Sylvan acquired them. As Sylvan explained, however, with no contrary evidence from ACT, NASD had made it clear that it wanted the CBT centers off its books and that an offer for the centers was a necessary part of doing a deal. Duplicative centers indeed were closed, but it is undisputed that NASD centers remained open in those locations where the extra capacity was needed.

It may well be, as ACT argues, that "Sylvan did not want ACT to acquire the NASD test business and test centers and thereby become a competitor." Reply Br. of Appellant at 17; see also Br. of Appellant at 34 ("Substantial evidence demonstrates that Sylvan was motivated by a desire to ensure that ACT did not acquire the NASD centers and thereby became [sic] a competitor."). If ACT had won NASD's business, **[**26]** Sylvan could not. Keeping one step ahead of the competition -- whoever it might be -- was in Sylvan's self-interest as a for-profit business and does not automatically translate into a motive to injure or destroy the competitor. See *Fin. Mktg. Servs., Inc. v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 450, 459 (Iowa 1999)* (noting "nothing improper" where a bank was acting to improve its own financial position). ACT cannot show there is a genuine issue of material fact on the intent element of its claim simply by presenting evidence that Sylvan preferred to avoid competing with ACT in offering CBT services. Legitimate business practice should not be converted by the courts into an intentional tort. Moreover, we see no evidence to support ACT's intentional tort claim in this record, where evidence of a motivation to acquire the NASD CBT centers before ACT acquired them is the evidence ACT claims to be substantial proof that Sylvan's declared business reasons for doing the deal were pretext for its true goal -- to financially destroy or injure ACT. Even giving ACT the benefit of all the reasonable inferences that may be drawn from the evidence, those inferences **[**27]** do not, even in the aggregate and without considering Sylvan's evidence to the contrary, amount to substantial proof that Sylvan was motivated to do anything other than to win the contract for NASD's business and CBT network, which would result in ACT losing the deal. "Any harm to [ACT] was merely incidental to **[*669]** the accomplishment of [Sylvan's] primary goal": to close the deal with NASD. *Id. at 460*. As a matter of law, ACT cannot show, on the record before the Court, that Sylvan's purpose in making its proposal to NASD was to financially injure or destroy ACT -- much less that such was Sylvan's primary purpose. ACT therefore cannot prove an essential element of its claim.

Viewing the undisputed facts in this record in the light most favorable to ACT, we hold that summary judgment on ACT's claim against Sylvan for tortious interference with prospective contractual relations was properly granted to Sylvan.

IV.

ACT also appeals the decision of the District Court granting the part of Sylvan's motion in limine that challenged the admissibility of evidence of ACT's claimed antitrust damages. The court concluded that ACT could not prove its alleged damages flowed from **[**28]** monopolistic actions illegal under *§ 2* of the Sherman Act, and so ACT would not be permitted to present evidence of such damages.

HN10[] Ordinarily, we review a district court's ruling on a motion in limine for abuse of that court's discretion. See, e.g., *Glastetter v. Novartis Pharms. Corp., 252 F.3d 986, 989 (8th Cir. 2001)* (reviewing decision to exclude expert testimony for abuse of discretion, notwithstanding that the decision resulted in summary judgment for the defendant); *Jauregui v. Carter Mfg. Co., 173 F.3d 1076, 1081 (8th Cir. 1999)* (same). Not until its reply brief did ACT suggest that the standard should be otherwise, contending that the court's "exclusion order was based on a pure error of law" and we should therefore review it de novo. Reply Brief at 19 (citing *United States v. Johansen, 93 F.3d 459, 468 (8th Cir. 1996))*. It is unnecessary for us to decide if ACT properly raised the issue or to determine the appropriate standard, however, because we already have conducted a de novo review of the underlying question: is Sylvan entitled to judgment as a matter of law on the question of whether Sylvan's business justifications **[**29]** for doing the deal with NASD, the conduct claimed by ACT to be in violation of antitrust laws, were pretextual? We have concluded that the answer to that question is "yes." See supra pt. III.

ACT has referred in its brief to Sylvan's large market share in computer-based testing and to Sylvan's acquisition of its potential competitors but has claimed antitrust damages, in the form of lost profits, only from the transaction between Sylvan and NASD. "Liability turns, then, on whether 'valid business reasons' can explain [Sylvan's] actions" in its business dealings with NASD. *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

As we have explained, ACT cannot prove on this record that Sylvan's four business justifications for structuring the transaction with NASD as it did were not legitimate. See supra 14-16. First, it is undisputed that Sylvan's testing capacity was significantly underutilized in some areas and that NASD clients would fill some of the excess capacity. Second, the desirability of partnering with an organization of NASD's prestige is unquestioned. Third, it is also without dispute **[**30]** that Sylvan knew it would have to acquire NASD's CBT network, including some centers that would be redundant to Sylvan's own centers, because NASD made it clear that it wanted those facilities off its books. And finally, it is uncontroverted that some of the gaps in Sylvan's own testing network were closed by the acquisition of NASD's centers. Sylvan's pursuit of an agreement **[*670]** with NASD cannot be characterized as "conduct [that] makes sense only because it eliminates competition." *Trace X Chem., Inc. v. Canadian Indus., Ltd., 738 F.2d 261, 266 (8th Cir. 1984)*, cert. denied, *469 U.S. 1160, 83 L. Ed. 2d 925, 105 S. Ct. 911 (1985)*. ACT's evidence does not create a triable jury question on whether Sylvan's proffered business reasons for doing the deal were legitimate, and ***HN11***[] "when a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a *section 2* violation." *Midwest Radio Co. v. Forum Publ'g Co., 942 F.2d 1294, 1297-98 (8th Cir. 1991)* (citing Aspen Skiing *Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985))*. **[**31]** In these circumstances, it was correct for the District Court to grant Sylvan's motion in limine, as the damages ACT claims from its failure to close a deal with NASD did not flow from conduct by Sylvan that violated *§ 2*. See *Amerinet Inc. v. Xerox Corp., 972 F.2d 1483, 1494 (8th Cir. 1992)* ***HN12***[] ("If a plaintiff has suffered financial loss from the *lawful* activities of a competitor, then no damages may be recovered under the antitrust laws.") (citation to quoted case omitted)), cert. denied, *506 U.S. 1080, 122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993)*.

V.

Relying on the District Court's decision granting the motion in limine, Sylvan renewed its motion for summary judgment on ACT's claims that Sylvan was liable under *§ 2* of the Sherman Act. The court granted the motion and ACT appeals. [5]

[32]** ***HN13***[] "Antitrust injury, causation, and damages all are necessary parts of the proof" of liability under *§ 2* of the Sherman Act. *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055* (8th Cir.), cert. denied, *531 U.S. 979, 148 L. Ed. 2d 436, 121 S. Ct. 428 (2000)*. As we have explained, any evidence ACT may have of damages it incurred as a result of Sylvan's deal with NASD was properly excluded from the summary judgment record because the alleged damages were not caused by unlawful acts of Sylvan. ACT therefore is unable to prove either causation

[5] The court initially denied Sylvan's renewed motion for summary judgment, noting that ACT had sought not only damages but also injunctive relief and that ACT might be entitled to the equitable relief. The court certified its order granting Sylvan's motion in limine for interlocutory appeal; this Court denied leave to file such an appeal. ACT then dismissed its claim for injunctive relief so that the court would resolve the summary judgment question.

or antitrust injury. It follows that summary judgment was properly granted to Sylvan on ACT's claim of a *§ 2* violation.

VI.

In case number 01-3583, ACT appeals from the order of the District Court denying ACT's motion for review of taxation of costs. ACT moved to dispense with briefing on the issue, so we do not know if ACT has a quarrel with the amount of costs awarded or is challenging the court's authority to award costs as it did. As to the amount of costs, ***HN14***[] "[a] court of appeals lacks jurisdiction to hear an appeal where the sole issue is that the district court abused its discretion as to the amount **[**33]** of costs awarded." *Poe v. John Deere Co., 695 F.2d 1103, 1109 (1982)*. And to the extent ACT is challenging whether the award was necessary and otherwise proper, we see no abuse of discretion. *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 347 (8th Cir. 1995)* (standard of review).

[*671] VII.

The judgments of the District Court are affirmed in all respects.

Concur by: RICHARD S. ARNOLD (In Part)

Dissent by: RICHARD S. ARNOLD (In Part)

Dissent

RICHARD S. ARNOLD, Circuit Judge, concurring in part and dissenting in part.

I agree that summary judgment was properly entered for defendant on the claim for tortious interference with contract, and I therefore join parts I and II of the Court's opinion.

I also join part VI of the Court's opinion, having to do with taxation of costs.

As to the claim for tortious interference with a prospective business relationship, however, I respectfully dissent. In my view, when this record is considered in the light most favorable to ACT, as it must be on this appeal, there is a genuine issue of material fact as to Sylvan's motivation. Questions of motive are particularly delicate, and summary judgment should be used more sparingly **[**34]** on such questions than on most others. The memorandum prepared by Michelle Ford, which the Court does not hold inadmissible, is sufficient evidence to support ACT's position at this preliminary stage of the case. Ms. Ford was instructed to prepare a document describing the history of Sylvan's dealings with NASD. She did what she was told to do. That she was a summer intern, had little knowledge of the business, and had no experience in computer-based testing, ante at 13, are considerations going to the weight of her evidence, not its admissibility. Certainly there is evidence to the contrary, and a jury could have chosen to disregard Ms. Ford's conclusions. Indeed, one may go so far as to say, if one wishes, that ACT would probably lose this case, were it tried to a jury. But that is not the standard we are to apply at this juncture. I cannot say it would have been irrational, when all of this record, including Ms. Ford's memorandum, is considered, for a jury to find that Sylvan was predominantly motivated by a desire to injure ACT. Among other things, the deal made with NASD was below Sylvan's cost, certainly a potent fact. The directed-verdict standard, or, as we have learned **[**35]** to say, the standard on motions for judgment as a matter of law, is the same as the standard to be applied on motions for summary judgment. This case should have gone to trial on the issue of motivation.

For many of the same reasons, I also dissent from the Court's affirmance of summary judgment for the defendant on the claim under *§ 2* of the Sherman Act. Again, Sylvan puts forward plausible business justifications, but there is evidence to the contrary, and a jury could rationally decide in favor of ACT on this issue.

Holiday Wholesale, et al v. Philip Morris, et al.

United States District Court for the Northern District of Georgia, Atlanta Division

July 11, 2002, Decided ; July 11, 2002, Opinion Filed

Civil Action No. 1:00-cv-0447-JOF

Reporter

231 F. Supp. 2d 1253 *; 2002 U.S. Dist. LEXIS 14254 **; 2002-2 Trade Cas. (CCH) P73,798

WILLIAMSON OIL COMPANY, INC., on behalf of itself and all others similarly situated; HOLIDAY WHOLESALE GROCERY CO.; SUWANEE SWIFTY STORES, INC., D.I.P.; WICHITA TOBACCO & CANDY CO.; BUFFALO TOBACCO PRODUCTS, INC.; F&F VENDING SERVICE, INC.; ROG-GLO, LTD., d/b/a Sherburne Big M Supermarket; AMSTERDAM TOBACCO CORPORATION; BORO PARK TOBACCO COMPANY, INC.; SUNRISE CANDY & TOBACCO CORPORATION; I. GOLDSHLACK CO.; MARCUS DISTRIBUTORS, INC.; HARTZ FOODS, Plaintiffs, v. PHILIP MORRIS COMPANIES, INC.; PHILIP MORRIS, INC.; R.J.R. NABISCO HOLDINGS CORP.; R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO CO.; B.A.T. INDUSTRIES, PLC.; BRITISH AMERICAN TOBACCO CO., LTD.; BATUS HOLDINGS, INC.; BROWN & WILLIAMSON TOBACCO CORP.; LORILLARD TOBACCO COMPANYL KIEWS CORPORATION; LIGGETT GROUP, INC.; BROOKE GROUP, LTD., Defendants.

Subsequent History: *Affirmed by Williamson Oil Co. v. Philip Morris USA, 2003 U.S. App. LEXIS 19530 (11th Cir. Ga., Sept. 22, 2003)*

Disposition: [1]** Defendant R.J. Reynolds' motion for summary judgment GRANTED; Defendant Brown & Williamson's motion for summary judgment GRANTED; Defendant Lorillard Tobacco Company's motion for summary judgment GRANTED and Defendant Philip Morris' motion for summary judgment GRANTED.

Core Terms

prices, cigarette, conspiracy, increased price, Plaintiffs', discount, wholesalers, brands, market share, retail, Defendants', permanent, signaling, competitors, announcement, facilitating, premium, alleged conspiracy, collusion, parallelism, conscious, volume, list price, programs, factors, summary judgment motion, Tobacco, cartel, coordination, documents

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Scope**

Contracts or conspiracies to fix prices are illegal per se under *§ 1* of the Sherman Act. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN2[] **Actual Monopolization, Anticompetitive & Predatory Practices**

There is no dispute that the cigarette industry in the United States is an oligopoly.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Summary Judgment, Entitlement as Matter of Law**

On a motion for summary judgment, courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. Thus, if the factual context renders a nonmovants' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. Conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

It is settled law that a threshold requirement of every antitrust conspiracy claim, whether brought under § 1 or § 2 of the Sherman Act, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. It is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

Conduct which is as equally consistent with permissible competition as it is with an illegal conspiracy does not, without more, support even an inference of conspiracy.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN7[] Actual Monopolization, Anticompetitive & Predatory Practices

An oligopolistic market is a market in which the dominant participants engage in interdependent or parallel behavior and have the capacity effectively to determine price and total output of goods or services. Conscious parallelism is a process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Actual Monopolization, Anticompetitive & Predatory Practices

It is well settled in the Eleventh Circuit that evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest or offers other plus factors tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

The Eleventh Circuit has determined that even when a plaintiff proffers evidence of plus factors, these only create a rebuttable presumption of a conspiracy which the defendant may defeat with his own evidence; this further ensures that unilateral or procompetitive conduct is not punished or deterred. A court must also consider the evidence presented by plaintiffs as a whole and that plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

Civil Procedure > Remedies > Damages > Monetary Damages

Evidence > Inferences & Presumptions > General Overview

HN10[] **Damages, Monetary Damages**

In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Conduct which is as equally consistent with permissible competition as it is with an illegal conspiracy does not, without more, support even an inference of conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

To survive a motion for summary judgment, a plaintiff seeking damages for a violation of *15 U.S.C.S. § 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN13[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The law specifically recognizes that interdependent oligopolistic behavior is not prohibited by antitrust laws. In fact, the law is careful in the proof it requires in a circumstantial case precisely because it wants to ensure that unilateral or procompetitive conduct is not punished or deterred.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

HN14[] **Antitrust & Trade Law, Sherman Act**

The inferences that can be drawn on summary judgment are limited in the antitrust context.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN15[] Summary Judgment, Entitlement as Matter of Law

A court has an obligation to consider summary judgment as it relates to a case in light of the traditional summary judgment standards.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN16[] Antitrust & Trade Law, Sherman Act

More is required of inferences in antitrust cases than in run-of-the-mill cases.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN17[] Entitlement as Matter of Law, Appropriateness

If a plaintiff's theory is economically senseless, no reasonable jury can find in its favor, and summary judgment should be granted.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

HN18[] Summary Judgment, Entitlement as Matter of Law

On a motion for summary judgment, to create an issue of fact the inference must be allowable or reasonable.

Evidence > Inferences & Presumptions > General Overview

Evidence > Relevance > Relevant Evidence

HN19[] Evidence, Inferences & Presumptions

To assure itself and the parties that the court's judgment on whether a piece of evidence can be admitted as relevant because it creates a reasonable inference, the import of the piece of circumstantial evidence must actually be of the import that is ascribed to it by plaintiffs. If, when considered in its entirety, it is totally ambiguous or to the opposite effect, it is not relevant and may not be relied upon by the jury.

Evidence > Inferences & Presumptions > General Overview

Evidence > Relevance > Relevant Evidence

HN20[] Evidence, Inferences & Presumptions

In dealing with allowable inferences, a court to a large degree is concerned with relevancy -- that is, whether it makes a fact of consequence more or less likely. *Fed. R. Evid. 401*.

Evidence > Admissibility > Circumstantial & Direct Evidence

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Relevance > Relevant Evidence

HN21[] Admissibility, Circumstantial & Direct Evidence

Circumstantial evidence does not become relevant simply because it can be used by a skilled advocate to persuade a jury that there was an agreement.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > Inferences & Presumptions > General Overview

Evidence > Inferences & Presumptions > Inferences

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > Relevance > Relevant Evidence

HN22[] Preliminary Questions, Admissibility of Evidence

It is a court's responsibility to determine the admissibility of evidence. *Fed. R. Evid. 104(a)*. In making this determination, the existence of certain conditions must be found by the judge. *Fed. R. Evid. 104(a)* advisory committee's note. Whether an inference is allowable is really a question of whether it is admissible under *Rule 401*. To determine its admissibility, the court may have to act as a fact finder. *Fed. R. Evid. 104(a)* advisory committee's note. As a fact finder, the court must determine, for example, whether an inference is a product of legitimate methodology or whether the evidence tends to make the existence of a fact that is of consequence more or less probable. *Fed. R. Evid. 401*.

Evidence > Inferences & Presumptions > General Overview

HN23[] Evidence, Inferences & Presumptions

It is said that an inference is unreasonable if a jury must engage in speculation and conjecture to such a degree as to render its finding a guess or mere possibility. The inference must directly and necessarily follow in the context of the case.

Evidence > Inferences & Presumptions > General Overview

HN24[] Evidence, Inferences & Presumptions

An inference will be unreasonable if it is reached through fallacious reasoning.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] Actual Monopolization, Anticompetitive & Predatory Practices

Conscious parallelism and plus factors can be a formulistic expression which does not capture the reality of a case. A plus factor, therefore, needs to have some substance in order to tilt the balance. Merely labeling something a plus factor does not make it so, and a weak plus factor is not sufficient to withstand a motion for summary judgment because the plus factor analysis is really a surrogate for looking at a case in its entirety.

Evidence > Admissibility > Circumstantial & Direct Evidence

HN26[] Admissibility, Circumstantial & Direct Evidence

Direct evidence must be explicit and requires no inferences to establish the proposition or conclusion being asserted.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN27[] Antitrust & Trade Law, Sherman Act

In order to survive a motion for summary judgment, plaintiffs must first produce evidence that defendants engaged in consciously parallel behavior. Then, plaintiffs must show plus factors that tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism.

Antitrust & Trade Law > Sherman Act > General Overview

HN28[] Antitrust & Trade Law, Sherman Act

In the context of *15 U.S.C.S. § 1*, facilitating devices are not necessarily sufficient under the law to constitute a plus factor.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN29[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Facilitating practices are not customarily listed in the cases as a plus factor, but they bear on the economic consequences of oligopoly.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN30[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In order to constitute a plus factor, an activity must tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN31[] **Per Se Rule & Rule of Reason, Per Se Violations**

Because in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions, ***antitrust law*** permits such discussions even when they relate to pricing because the dissemination of price information is not itself a per se violation of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

HN32[] **Antitrust & Trade Law, Sherman Act**

Numerous courts have recognized the difficulty involved in using signaling to form an agreement to fix prices where list prices are not the prices paid by individual customers.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN33[] **Antitrust & Trade Law, Sherman Act**

Courts generally reject conspiracy claims that seek to infer an agreement from communications despite a lack of independent evidence tending to show an agreement.

Antitrust & Trade Law > Sherman Act > General Overview

HN34[] **Antitrust & Trade Law, Sherman Act**

A hope by one company that it can create a disincentive for its competitors to engage in price competition to the detriment of profitability is not evidence of a collusive agreement to fix prices.

Antitrust & Trade Law > Sherman Act > General Overview

HN35[] **Antitrust & Trade Law, Sherman Act**

Where there is an independent business justification for defendant's behavior, an inference of conspiracy is not easily drawn.

Antitrust & Trade Law > Sherman Act > General Overview

HN36[] **Antitrust & Trade Law, Sherman Act**

The logic of any conspiracy argument is that an apparently unprofitable act must reflect some additional cause, such as conspiracy. But the additional cause is needed to explain the challenged behavior only if the defendant believes that his act would be unprofitable. To satisfy this standard, the judge must conclude not only that the defendants were wrong but so very wrong that their explanations should be disbelieved, or that it would be incredible that all the alleged conspirators could be similarly mistaken as to their true interests. The point is that the court's business judgment should not control.

Antitrust & Trade Law > Sherman Act > General Overview

HN37[] **Antitrust & Trade Law, Sherman Act**

It is clearly established that actions taken against economic interest may be a plus factor. However, in analyzing such allegations, the court must be mindful not to engage in second-guessing of companies' business decisions. In the Eleventh Circuit, to show that an act is against economic self-interest the plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN38[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The fact that price changes by one producer are quickly met by others establishes only that the producers consciously paralleled each other's prices.

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > Relevance > Relevant Evidence

HN39[] **Procedural Matters, Preliminary Questions**

The law generally disfavors the use of "historical" evidence.

Antitrust & Trade Law > Sherman Act > General Overview

HN40[] **Antitrust & Trade Law, Sherman Act**

Conspiratorial motivation in the sense of a reasonable prospect of increasing profits through collective action is a logical corollary of interdependence. Motivation is thus synonymous with interdependence and therefore adds nothing to it.

Antitrust & Trade Law > Sherman Act > General Overview

HN41[] **Antitrust & Trade Law, Sherman Act**

The presence or absence of a strong motive to enter into an alleged conspiracy could be a plus factor under certain circumstances.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN42[] **Antitrust & Trade Law, Sherman Act**

The mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN43[] **Antitrust & Trade Law, Sherman Act**

When considering opportunities to conspire it remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative that no conspiracy occurred.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN44[] **Testimony, Expert Witnesses**

Under *Fed. R. Evid. 703*, there must be sufficient facts already in evidence or disclosed by the witness as a result of his or her investigation to take such expert testimony out of the realm of guesswork and speculation.

Civil Procedure > ... > Discovery > Methods of Discovery > Foreign Discovery

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN45[] Methods of Discovery, Foreign Discovery

Fed. R. Evid. 404(b) allows jury inferences only where the compared conduct is closely analogous to the conduct at issue in the instant suit.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN46[] Antitrust & Trade Law, Sherman Act

In the context of the Sherman Act, the "slight evidence" rule is not favored in the Eleventh Circuit.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN47[] Actual Monopolization, Anticompetitive & Predatory Practices

Rising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing.

Antitrust & Trade Law > Sherman Act > General Overview

HN48[] Antitrust & Trade Law, Sherman Act

All plus factors are not created equal. A plus factor must tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Evidence > Inferences & Presumptions > General Overview

HN49[] Antitrust & Trade Law, Sherman Act

Even if a plaintiff can demonstrate a plus factor, that only creates a rebuttable presumption of a conspiracy that a defendant could defeat with his own evidence.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN50[] Actual Monopolization, Anticompetitive & Predatory Practices

Parallel pricing is not sufficient to establish a price-fixing scheme in an oligopoly.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN51[] Actual Monopolization, Anticompetitive & Predatory Practices

An oligopolist raising his price with knowledge that he will have to retract it if significant rivals do not follow is, in a sense, inviting his rivals to follow. Following the leader is a conscious acceptance of that invitation to the end that market prices will be higher than before. Nevertheless, tacit price coordination through recognized interdependence is not deemed to be an agreement under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN52[] Actual Monopolization, Anticompetitive & Predatory Practices

Antitrust law should not punish competitive acts of reducing prices. Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut. The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

Counsel: For PLAINTIFF: Mark Reinhardt, Garrett D. Blanchfield, Jr., Reinhardt & Anderson, St. Paul, MN.

For PLAINTIFF: Martin D. Chitwood, Craig Gordon Harley, Nikole M. Davenport, Chitwood & Harley, Atlanta, GA.

For PLAINTIFF: Michael Straus, Bainbridge & Straus, Birmingham, AL.

For PLAINTIFF: E. Allen Dodd, Scruggs, Dodd, Dodd & Bazemore, Fort Payne, AL.

For PLAINTIFF: Dianne M. Nast, Roda & Nast, Lancaster, PA.

For PLAINTIFF: Stanley M. Chesley, Waite, Schneider, Bayless & Chesley, Cincinnati, OH.

For DEFENDANT: Stuart H. Singer, Boies, Schiller & Flexner, Hollywood, FL.

For DEFENDANT: Matthew James Calvert, Hunton & Williams, Atlanta, GA.

For DEFENDANT: Ann Moriarty Galvani, Robert Jeffey Dwyer, Boies Schiller & Flexner, Armonk, NY.

For DEFENDANT: Kenneth L. Chernof, Monica P. Medina, Heller, Ehrman, White & McAuiffe, Washington, DC.

[2]** For DEFENDANT: Michael T. Williams, Carlos Solis, Darryl L. Snider, Heller, Ehrman, White & McAuliffe, Los Angeles, CA.

For DEFENDANT: David J. Bailey, Jones, Day, Reavis & Pogue, Atlanta, GA.

For DEFENDANT: Joseph Bernard Haynes, Cheri A. Grosvenor, King & Spalding, Atlanta, GA.

For DEFENDANT: Barack S. Echols, Colin R. Kass, Kirkland & Ellis, Chicago, IL.

For DEFENDANT: Emmet J. Bondurant, II, Edward Bryan Krugman, Timothy S. Rigsbee, Bondurant, Mixson & Elmore, Atlanta, GA.

For DEFENDANT: David H. Flint, Alexander Jackson Simmons, Jr., Jason Wayne Graham, Schreeder, Wheeler & Flint, Atlanta, GA.

For DEFENDANT: Robert L. Goldstucker, Nall & Miller, Atlanta, GA.

Judges: J. OWEN FORRESTER, UNITED STATES DISTRICT JUDGE.

Opinion by: J. OWEN FORRESTER

Opinion

[*1262] **ORDER**

This matter is before the court on Defendant R.J. Reynolds' motion for summary judgment [170-1]; Defendant Brown & Williamson's motion for summary judgment [171-1]; Defendant Lorillard Tobacco Company's motion for summary judgment [173-1]; and Defendant Philip Morris' motion for summary judgment [174-1].

I. BACKGROUND

A. Plaintiffs' Complaint

Plaintiffs are wholesalers **[**3]** and/or distributors that purchase cigarettes directly from Defendants Philip Morris, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co. ("RJR"), Brown & Williamson Tobacco Corp. ("B&W"), and Lorillard Tobacco Co. ("Lorillard"). In 1994, B&W acquired most of the brands of American Tobacco Co. For the purposes of this litigation, the court refers to both as "B&W." Although not named as a Defendant in this litigation, Plaintiffs allege that Liggett Group, Inc., also participated with Defendants in the alleged conspiracy. *See* Second Amended Complaint, P 27. Named Plaintiffs are Buffalo Tobacco Products, Inc.; F&F Vending Service, Inc.; Holiday Wholesale Grocery Co.; Amsterdam Tobacco Corp.; Boro Park Tobacco; Sunrise Candy & Tobacco Corp.; I. Goldshlack Company; Suwanee Swifty Stores, Inc. D.I.P.; Marcus Distributors, Inc.; Hartz Foods; and Wichita Tobacco and Candy Co. [1] Plaintiffs' complaint alleges **[*1263]** that from a period beginning as early as November 1, 1993, Defendants engaged in a conspiracy to raise, fix, stabilize, and maintain the price of cigarettes in the United States at artificially high and non-competitive levels.

[1] Named Plaintiff ROG-GLO, Ltd. was voluntarily dismissed without prejudice because it no longer met the criteria to be a class representative. *See* Order, June 20, 2001.

[4] B. Procedural History**

On February 18, 2000, a lawsuit was filed in this court alleging antitrust violations against several tobacco companies. After several additional suits were filed, the Judicial Panel on Multidistrict Litigation transferred four additional similar actions to this court. Plaintiffs filed an amended consolidated class action complaint on June 28, 2000 ("First Amended Complaint"). In sum, the First Amended Complaint alleged that Defendants conspired illegally to fix the wholesale prices of cigarettes in the United States during the period from November 1, 1993, to the present. Plaintiffs based the First Amended Complaint on section 4 and section 16 of the Clayton Act, and the alleged conspiracy was said to violate *section 1* of the Sherman Act. The First Amended Complaint also asserted that Defendants fraudulently concealed their price-fixing conspiracy, thereby tolling the four-year statute of limitations generally applicable to federal antitrust actions.

Thereafter, Defendants moved to dismiss Plaintiffs' allegations of fraudulent concealment. In an order dated November 29, 2000, the court dismissed without prejudice Plaintiffs' allegations of fraudulent **[**5]** concealment for failure to satisfy the pleading requirements. The court also struck from the complaint as "evidence pleading" Plaintiffs' foreign market allegations pursuant to *Federal Rule of Civil Procedure 12(f)*. Finally, the court dismissed Plaintiffs' allegations of non-price collusion to the extent they occurred prior to the initiation of the instant conspiracy.

On January 23, 2001, the court granted Plaintiffs' motion for class certification for the following class:

> All persons in the United States (excluding federal, state and local government entities and political subdivisions, and Defendants and their co-conspirators and their respective parents, subsidiaries and affiliates) that purchased cigarettes directly from one or more of the Defendants, or any parent, subsidiary or affiliate thereof, at any time from February 8, 1996 to February 8, 2000.

Order, January 23, 2001, at 13.

On February 22, 2001, the court granted Plaintiffs' motion for leave to file an amended complaint, the "Second Amended Complaint." Defendants again moved to dismiss Plaintiffs' allegations of fraudulent concealment and any claims for relief outside the four-year limitations period. **[**6]** The court dismissed those of Plaintiffs' claims in the Second Amended Complaint barred by the four-year limitations period. *See* Order, June 20, 2001. On February 8, 2002, all Defendants filed motions for summary judgment. The court heard oral arguments on Defendants' motions for summary judgment on April 23, 2002, and permitted the parties additional, limited briefing after oral argument.

C. Facts Relevant to Motions for Summary Judgment

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Defendants sell cigarettes to direct customers, most often wholesalers, who then sell them to retail outlets. Facts, P 7. Defendants' wholesale price lists are published to direct customers and are quickly a matter of public knowledge. *Id.*, P 8. Wholesalers set the prices for their sales **[*1264]** of cigarettes to retailers, and retailers set the prices for their sales of cigarettes to consumers. *Id.*, **[**7]** P 9 and Resp., P 9.

Generally, there are several "tiers" of cigarettes sold in the United States, including premium and discount cigarettes. *See* Expert Report (Defendants') of Dr. Kenneth G. Elzinga ("Elzinga Report"), at 30. [3] Discount cigarettes are priced below premium brands. *Id.* Cigarette companies also manufacture "deep discount" cigarettes, including private label or generic cigarettes, which are priced lower than discount cigarettes. *Id.* Prior to the

[2] Unless otherwise noted, the facts are taken from those presented in Defendants' Joint Statement of Undisputed Material Facts ("Facts") and admitted by Plaintiffs.

[3] Premium brand cigarettes are sometimes called "full revenue" or "FR" brands, while discount cigarettes are referred to as "value for money" or "VFM" brands.

beginning of 1993, the market share of discount and deep discount cigarettes increased from less than 1% of all cigarettes sold in the United States in 1980 to 33.0% in late 1992 and early 1993. Facts, P 10. In particular, the market share of Marlboro, Philip Morris' premium brand, dropped from 27% in the middle of 1992 to 24% at the end of the same year. Marlboro's share further declined to 21% at the beginning of 1993. *Id.*, P 11. On April 2, 1993, Philip Morris announced a nationwide promotion on Marlboro cigarettes that reduced prices at retail by approximately 40 [cent] per pack. *Id.*, P 13. This announcement became known in the industry as "Marlboro Friday." *Id.* RJR, B&W, and Lorillard responded **[**8]** by initiating similar promotions. *Id.*, P 14. Philip Morris announced further decreases in price to take effect on August 9, 1993. *Id.*, P 15 and Resp., P 15. As a result of Philip Morris' price decreases, the "price gap" between its premium and discount brands was reduced. *Id.*, P 17. RJR matched Philip Morris' August 1993 price reductions and eliminated the price differential between its 85 millimeter and 100 millimeter cigarettes. *Id.*, P 16 and Resp., P 16. B&W and Lorillard instituted similar list price decreases. *Id.*, P 18.

Thereafter, during the time of alleged conspiracy, the following price increases took place:

Date of First Announcement	Amount of Increase
November 8, 1993	$ 2.00 per thousand (4 [cents] per pack)
May 4, 1995	$ 1.50 per thousand (3 [cents] per pack)
April 8, 1996	$ 2.00 per thousand (4 [cents] per pack)
March 6-20, 1997 [4]	$ 2.50 per thousand (5 [cents] per pack)
August 29, 1997	$ 3.50 per thousand (7 [cents] per pack)
January 23, 1998	$ 1.25 per thousand (2.5 [cents] per pack)
April 3, 1998	$ 2.50 per thousand (5 [cents] per pack)
May 8, 1998	$ 2.50 per thousand (5 [cents] per pack)
July 31, 1998	$ 3.00 per thousand (6 [cents] per pack)
November 23, 1998	$ 22.50 per thousand (45 [cents] per pack)
August 27, 1999	$ 9.00 per thousand (18 [cents] per pack)
January 14, 2000	$ 6.50 per thousand (13 [cents] per pack)

[9]** *Id.*, P 26.

D. Plaintiffs' Theory of Conspiracy

Plaintiffs assert that the "economic market **[*1265]** structure of the cigarette industry is highly conducive to collusion" because four companies control 95% of the market and cigarettes are fungible and highly inelastic. Plaintiffs also contend that the industry has faced the "increasingly-desperate" times in the past several decades. Plaintiffs' Response to Defendants' Motions for Summary Judgment ("Pls.' Resp.") at 67. With this context in mind, Plaintiffs note that the popularity of discount cigarettes rose in the early 1990s, resulting in RJR and B&W gaining market share by focusing on the discount **[**10]** market.

In response, Philip Morris drastically reduced the prices of its cigarettes on Marlboro Friday in April 1993. Plaintiffs contend this reduction was taken in order to "restructure the market to make it more conducive to a collusive arrangement." *Id.* Plaintiffs assert that the remaining Defendants ultimately decided to end the price war and agree to increase all prices. Plaintiffs argue that the most significant anti-competitive acts occurred during the formation of the cartel in 1993 and 1994.

Plaintiffs contend Defendants formed the cartel by "signaling" their willingness to accept an offer made by Philip Morris. Through Gary Black, an industry analyst, Defendants communicated the specific conditions necessary for a price increase, who would be the price leader, and Philip Morris' final signal that its conditions for the cartel had

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[4] On March 6, 1997, RJR announced a list price increase of $ 2.00 per thousand (4 [cents] per pack). Shortly thereafter, Lorillard, Liggett, and B&W matched that increase. On March 20, 1997, Philip Morris announced a price increase of $ 2.50 per thousand (5 [cents] per pack). The other manufacturers then met Philip Morris' higher increase. *Id.*, P 26 n.4.

been met. Plaintiffs further assert that Defendants consolidated the price tiers between premium and discount cigarettes in order to make the conspiracy easier to form and monitor. Plaintiffs argue that Defendants had numerous opportunities to conspire through Committee of Counsel meetings at the Tobacco Institute and negotiations in 1997 and **[**11]** 1998 leading to settlements of the individual state healthcare lawsuits against the cigarette manufacturers and the Master Settlement Agreement ("MSA") covering multistate lawsuits. Plaintiffs also contend that the restriction of pricing authority to the highest ranking officers of the companies facilitated Defendants' conspiracy. Plaintiffs argue that these officials were able to discuss the future pricing of cigarettes during settlement negotiations. [5]

[12]** Plaintiffs also argue that in the fall of 1993, three of the four Defendants implemented a "permanent allocation" system **[*1266]** that was intended to stabilize cigarette prices by limiting supply. Plaintiffs contend that Defendants agreed to exchange information about the quantity of cigarettes sold by brand, size, type, discount, and geographic information in order to monitor that all Defendants were complying with the agreement to fix prices. Plaintiffs aver that the collecting and sharing of such information are against the economic self-interest of each company. As part of the cartel agreement, Plaintiffs contend that RJR and B&W abandoned their strategy of focusing on the discount market, acts also inconsistent with their economic self-interest.

Plaintiffs point to other actions taken by Defendants that were against their economic self-interest. For example, Plaintiffs note there was little internal analysis done by each company about whether to follow a competitor's price increase. Similarly, Plaintiffs contend that Defendants employed "credit memos" when making price increase announcements which Plaintiffs aver delayed the impact of the price increase, so that all other Defendants **[**13]** could "accept" the price increase "offered" by the price leader. Plaintiffs argue that Philip Morris and RJR raised prices in May 1995 after internal recommendations by both companies indicated that they should not raise prices. Finally, Plaintiffs argue that Philip Morris took actions against its economic self-interest by agreeing to pay settlement costs in the MSA based on market capitalization rather than market share.

II. STANDARDS FOR SUMMARY JUDGMENT [6]

HN1[] Contracts or conspiracies to fix prices are illegal *per se* under *section 1* of the Sherman Act. *See* *15 U.S.C. § 1*; **[**14]** *United States v. Socony Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. Although Plaintiffs and Defendants dispute the subtleties of the standards for summary judgment in an antitrust case involving an oligopoly, [7] **[**15]** the court finds that *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,*

[5] In their Second Amended Complaint, Plaintiffs asserted that the testimony of Lawrence Meyer, an outside counsel for Liggett, in litigation in the state of Washington would show that Defendants implemented the conspiracy through the Committee of Counsel. *See* Second Amended Complaint, P 78c, at 34-35. Plaintiffs also contended that Mr. Meyer testified that the timing and level of price increases was discussed at Committee of Counsel meetings. *Id.*, P 79, at 41.

Plaintiffs do not discuss Mr. Meyer's Washington state deposition testimony in their response to Defendants' motions for summary judgment, and, thus, its present relevance to this litigation is unclear. Plaintiffs, however, do cite this testimony in response to one of Defendants' Statement of Undisputed Material Facts. *Id.*, P 37 and Resp., P 37. There, Plaintiffs argue that Mr. Meyer testified he attended a Committee of Counsel meeting where there was a discussion of whether there had been a price increase and of how to respond to wholesalers who engaged in "trade loading." Regardless of what Mr. Meyer testified to in the Washington state litigation, such testimony could not support Plaintiffs' claims here because Mr. Meyer testified in this litigation that he stopped attending Committee of Counsel meetings in 1983, prior to the alleged initiation of the conspiracy at issue in this litigation. *See* Meyer Depo., at 79. The discussions about allocations Mr. Meyer recalled in his Washington state deposition occurred in the late 1970s. *Id.* at 112. Mr. Meyer also testified that there were never any discussions of setting prices at the Committee of Counsel meetings. *Id.* at 68-70. Nor was there a discussion among representatives of the cigarette companies to agree to impose allocations on wholesalers. *Id.* at 82.

[6] The court is very mindful that this case is before it on motions for summary judgment and that it may not supplant a jury's function if it finds a dispute of material fact in the admissible evidence. Although there is much discussion herein of the evidence, the court has been careful to limit its evaluation of the evidence to whether allowable inferences are or are not created under the various standards.

475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548 (11th Cir. 1998), clearly establish the standards in this circuit. Plaintiffs assert that "the understanding [among the conspirators] may consist of little more than shared expectations of conduct by persons with common objectives." Pls.' Resp., at 17. The court finds this speaks far too broadly for the law and focuses instead on the analysis in *Matsushita* and *Harcros*. [8]

[*1267] A. *Matsushita*

In Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), the Supreme Court addressed the standards governing motions for summary judgment in the antitrust context. There, the Supreme Court instructed:

> ***HN3***[] On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion. **[**16]** But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment . . ., a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

475 U.S. at 587-88 (internal quotations and citations omitted).

The Court further stated that ***HN4***[] "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." 475 U.S. at 593. Thus, "if the factual context renders [the nonmovants'] claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587. The Court recognized that "lack **[**17]** of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." 475 U.S. at 596-97. The Court went on to state that "we do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." 475 U.S. at 597 n.21.

B. *Harcros*

In City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548 (11th Cir. 1998), the Eleventh Circuit extensively discussed the application of *Matsushita* to alleged conspiracies in an oligopolistic context. First, the court described the nature of evidence at the summary judgment stage:

> ***HN5***[] It is settled law that a threshold **[**18]** requirement of every antitrust conspiracy claim, whether brought under section 1 or section 2 of the Sherman Act, is "an agreement to restrain trade. To prove that such

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[7] ***HN2***[] There is no dispute that the cigarette industry in the United States is an oligopoly. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227-30, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993); Expert Report (Plaintiffs') of Dr. Franklin Fisher ("Fisher Report"), P 137.

[8] Plaintiffs' proposition of the law would encompass the activities of even lawfully operating oligopolies. Plaintiffs cite American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946), to support this proposition, but *American Tobacco* speaks far more narrowly. There, the Court held that "no formal agreement is necessary" because a conspiracy could be shown by demonstrating "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* Even under this statement of the law, Plaintiffs still must show some kind of agreement.

> an agreement exists between two or more persons, a plaintiff must demonstrate 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" . . . "We recognize that it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators . . . and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions."

[*1268] *Id. at 569* (quoting *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991))*. The court then reiterated the instructions of *Matsushita* described above. While rejecting a reading of *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 n.4 (11th Cir. 1987)*, that would require a plaintiff to "exclude the possibility of independent action on the part of the defendants," the court reaffirmed **[**19]** *Matsushita*'s requirement that the plaintiff must show "that an inference of conspiracy is reasonable." *158 F.3d at 571 n.35* (citations omitted). *See also In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999)* ("in drawing favorable inferences from underlying facts, a court must remember that often a fine line separates unlawful concerted action from legitimate business practices") (citation omitted). Thus, ***HN6***[] "conduct which is as equally consistent with permissible competition as it is with an illegal conspiracy does not, without more, support even an inference of conspiracy." *Harcros, 158 F.3d at 571 n.35* (citation omitted).

Applying these standards to the economic circumstances presented in *Harcros*, the court defined ***HN7***[] an oligopolistic market as "a market in which the dominant participants . . . engage in interdependent or parallel behavior and [have] the capacity effectively to determine price and total output of goods or services." *Id. at 570 n.32* (citation omitted). "Conscious parallelism" is a "process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting **[**20]** their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Id. at 570* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993))*.

Then the court noted:

> ***HN8***[] It is well settled in this circuit that evidence of conscious parallelism [alone] does not permit an inference of conspiracy unless the plaintiff [either] establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest . . . or offers other "plus factors" tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade.

158 F.3d at 570-71. In sum, the court found that "the plaintiffs first must produce evidence showing that the defendants engaged in consciously parallel action. Second, the plaintiffs must show 'plus factors' that tend to exclude the possibility that the defendants merely **[**21]** were engaged in lawful conscious parallelism." *158 F.3d at 572*.

Additionally, ***HN9***[] the Eleventh Circuit has determined that even when a plaintiff proffers evidence of "plus factors," these "only create a rebuttable presumption of a conspiracy which the defendant may defeat with his own evidence; this further ensures that unilateral or procompetitive conduct is not punished or deterred." *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n.30 (11th Cir. 1991)*. The court is also mindful that it must consider the evidence presented by Plaintiffs as a whole and that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.

Plaintiffs misapprehend the standards for summary judgment in the antitrust context on several occasions. Plaintiffs contend that "Defendants bear the burden **[*1269]** of proving that there is no set of facts from which a reasonable juror could find that defendants engaged in a conspiracy to raise, maintain and/or stabilize **[**22]** prices in the cigarette industry." *See* Plaintiffs' Reply to Defendants' Joint Post-Argument Memorandum ("Pls.' Post-Argument Reply"), at 11. It is unsurprising that Plaintiffs offer no citation for this "standard." As an initial matter, Defendants generally do not bear the burden of proof in a civil suit. *See Herman & MacLean v. Huddleston, 459 U.S. 375, 387, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983)* ***HN10***[] ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence."). Furthermore, even if Plaintiffs are referring to the proof that must be presented at the summary judgment stage, their assertion still misses the mark. *Harcros* specifically holds that ***HN11***[] "conduct which is as equally consistent with permissible competition as it is with an illegal conspiracy does not, without more, support even an inference of conspiracy." *158 F.3d at 571 n.35* (citation omitted). This is directly contrary to Plaintiffs' statement of the law. *See also Matsushita, 475 U.S. at 588* ***HN12***[] ("To survive a motion for summary judgment . . ., a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends **[**23]** to exclude the possibility that the alleged conspirators acted independently.") (internal citation omitted).

Plaintiffs also contend that "contrary to Defendants' implications, interdependent oligopolistic behavior is not what the antitrust laws were designed to protect . . . ." *See* Plaintiffs' Post-Argument Reply, at 2 n.2 (noting that antitrust laws were written to protect competition which benefits consumers). The court finds this to be an incorrect statement of the law. ***HN13***[] The law specifically recognizes that interdependent oligopolistic behavior is *not* prohibited by antitrust laws. *See Harcros, 158 F.3d at 571* ("The requirement of 'plus factors' is necessary because evidence of consciously parallel behavior alone leaves the circumstantial evidence of collusion in equipoise; consciously parallel behavior by oligopolists does not in itself support an inference of agreement, of 'a meeting of the minds,' any more strongly than it supports an inference of legal price maintenance or leadership."). In fact, the law is careful in the proof it requires in a circumstantial case precisely because it wants to "ensure[] that unilateral or procompetitive conduct is **[**24]** not punished or deterred." *Todorov, 921 F.2d at 1456 n.30*; *see also Matsushita, 475 U.S. at 594* ("mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect").

Finally, at oral argument and in subsequent briefing, Plaintiffs argued that summary judgment in this case is governed by "boiler plate" provisions used by courts in all summary judgment contexts. *See* Transcript of Oral Argument, April 23, 2002 ("Oral Argument"), at 41-42. *Matsushita* and *Harcros*, however, demonstrate conclusively that ***HN14***[] the inferences that can be drawn on summary judgment are limited in the antitrust context. *See Matsushita, 475 U.S. at 588*; *Harcros, 158 F.3d at 570-71*. For the same reason, Plaintiffs' citation to *WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988)*, and *Augusta Iron & Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988)* (per curiam), are inapposite. *See* Plaintiffs' Post-Argument Reply, at 4 & n.3. Although Plaintiffs rely on *In re Coordinated Pretrial Proceedings* **[**25]** *in Petroleum Products Antitrust Litigation, 906 F.2d 432, 438-39 (9th Cir. 1990)*, to support their contention that summary judgment is inappropriate, the Ninth Circuit has held that particular analysis in *Petroleum Products* to be dicta. *See In re Citric Acid Litigation, 191 F.3d 1090, 1096 (9th Cir. 1999)* ("[Plaintiff] cites only a single **[*1270]** case, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990)*, in support of its proposed legal standard. The plaintiffs in that case, however, presented *direct* evidence of conspiracy, *see id. at 456-57, 459-60* & n.22, thus making dicta any discussion therein of the standard applicable when plaintiffs rely exclusively on circumstantial evidence.") (emphasis in original).

HN15[] The court, however, has an obligation to consider summary judgment as it relates to this case in light of the more traditional summary judgment standards. The court applied the following thoughts when considering Plaintiffs' presentation and analyzing the circumstantial evidence and plus factors" put forward by Plaintiffs. It seems to the court that **[**26]** the law has developed so as to provide very little guidance to determine when an inference is reasonable. As this circuit has said, the line is ephemeral. *See Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1325-26 (11th Cir. 1982)*. It has backed away from a rule that circumstantial evidence must exclude other hypotheses. Given the tension between a straightforward reading of *Matsushita*, which announces that ***HN16***[] more is required of inferences in antitrust cases than in run-of-the-mill cases [9] and the more standard summary

[9] *Cf. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*:

judgment analysis, the court believes it proper to consider what are allowable inferences of an "expressed, manifested agreement," *In re High Fructose Corn Syrup, 295 F.3d 651, 2002 WL 1315285*, at *1 (7th Cir., 2002) (Posner, J.), that Plaintiffs may rely upon to defeat summary judgment.

[27]** To begin with, it is clear that ***HN18***[] to create an issue of fact the inference must be "allowable" or "reasonable." *See Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 743 (11th Cir. 1996)* ("a court may grant summary judgment when it concludes that no reasonable jury may infer from the assumed facts the conclusion upon which the non-movant's claim rests"). ***HN19***[] To assure itself and the parties that the court's judgment on whether a piece of evidence can be admitted as relevant because it creates a reasonable inference, the court here sets out the principles to which it has resorted. First, the import of the piece of circumstantial evidence must actually be of the import that is ascribed to it by Plaintiffs. If, when considered in its entirety, it is totally ambiguous or to the opposite effect, it is not relevant and may not be relied upon by the jury.

HN20[] In dealing with allowable inferences, the court to a large degree is concerned with relevancy -- that is, whether it makes a fact of consequence more or less likely. *See Fed. R. Evid. 401*. [10] In this **[*1271]** case, this means that evidence is relevant to Plaintiffs' position if it makes it more likely that Defendants had an express **[**28]** agreement to fix prices. ***HN21***[] Circumstantial evidence does not become relevant simply because it can be used by a skilled advocate to persuade a jury that there was an agreement. Persuasion can sometimes be achieved by appeals to prejudice, but that utility does not make the race, ethnicity, or gender of a defendant's employees relevant in a contract dispute, for example, and any inference drawn therefrom would not be allowable.

[29]** ***HN23***[] It is said that an inference is unreasonable if a jury must engage in speculation and conjecture to such a degree as to render its finding "a guess or mere possibility." *Daniels, 692 F.2d at 1325-28*. From this statement, the court extracts the idea that the inference must directly and necessarily follow in the context of the case. Judge Posner had a variety of statements from competitors in *In re High Fructose Corn Syrup*. One was: "What are you going to tell [the president of Coca-Cola], that we gotta [i.e., have a] deal with . . . our two biggest competitors . . . ?" *See 295 F.3d 651, 2002 WL 1315285*, at *9. Among possible inferences, this statement points directly at the one of consequence, and a jury may reasonably find that is so without a high degree of conjecture. On the contrary, a statement by a Philip Morris employee that if Philip Morris raises prices, the other companies will follow does not directly and necessarily point to the existence of an express agreement. First, the statement does not itself connect the prediction to an agreement. Second, given what is known of oligopolies and conscious parallelism, the fact that the statement was made **[**30]** does not evidence a likelihood that an express agreement existed, and to reason from this statement to that point requires a guess based on mere possibility. Such an inference would be unreasonable.

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. ***HN17***[] If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Id. at 468-69 (footnote omitted).

[10] ***HN22***[] It is, of course, the court's responsibility to determine the admissibility of evidence. *See Fed. R. Evid. 104(a)* ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . .). In making this determination, the existence of certain conditions must be found by the judge. *See id.*, advisory committee's note. Whether an inference is allowable is really a question of whether it is admissible under *Rule 401*. To determine its admissibility, the court may have to act as a fact finder. *See Fed. R. Evid. 104(a)* advisory committee's note ("To the extent that these inquiries [about the existence of conditions] are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. . . . These decisions, too, are made by the judge."). As a fact finder, the court must determine, for example, whether an inference is a product of legitimate methodology or whether the evidence tends to make the existence of a fact that is of consequence more or less probable. *See Fed. R. Evid. 401*.

Finally, ***HN24***[] an inference would be unreasonable if it is reached through fallacious reasoning. For more than 2500 years, logicians have concerned themselves with sound and unsound means of reaching a truth. Over time, a number of fallacious arguments have been identified as not productive to learning the truth. One fallacy is called *ad hoc ergo propter hoc* (with this, therefore because of this); another is called hidden complexity. The inference urged from the prediction about competitors' price actions relies on the first of these fallacies and suffers from the second. From the fact that the statement was made, it might be claimed that the cause must be that there is an express agreement, of which the speaker has knowledge, to fix prices. We also know that in the context of this case, however, there are a number of other factors which might have caused the statement to have been made; yet, they are not accounted or controlled for. In *Daubert*, the Supreme Court approved a gatekeeping **[**31]** function for the court in making admissibility determinations based *inter alia* on sound methodologies. So long as the testimony was deemed admissible, the court did not draw its own conclusions about the testimony. In this context, it likewise seems appropriate **[*1272]** for the court to consider whether or not arguments are fallacious to determine whether inferences therefrom are allowable because fallacious reasoning is akin to unsound methodology. Keeping inferences reached only by logical fallacy from the jury is consistent with this understanding of the gatekeeper role of the court.

Plaintiffs have resisted Defendants' motions for summary judgment on the basis of parallel pricing and "plus factors." ***HN25***[] Conscious parallelism and "plus factors" can be a formulistic expression which does not capture the reality of the case. A "plus factor," therefore, needs to have some substance in order to tilt the balance. Merely labeling something a "plus factor" does not make it so, and a weak "plus factor" is not sufficient to withstand a motion for summary judgment because the "plus factor" analysis is really a surrogate for looking at a case in its entirety. It is well to say here that the distinct **[**32]** flavor of evidence before the court points to the absence of an agreement among Defendants and the presence of a great deal of uncertainty and anxiety about the future state of the market. *See infra.* The court also cautions that observers of this case need to know that unlike the usual case, one cannot place a great deal of faith in the fact that the *probata* will support the *allegata*.

III. DISCUSSION

A. Direct Evidence

Before reviewing the circumstantial evidence presented by Plaintiffs, the court considers Plaintiffs' allegation that they can show direct evidence that Defendants have engaged in illegal price fixing. Plaintiffs assert that in the 1990s, in response to health care lawsuits brought by various state attorneys general, Defendants conducted a joint defense and attempted to settle the cases. Plaintiffs describe a proposed settlement that would have required Congressional approval and had a provision that settlement costs be passed through to consumers as price increases. Plaintiffs further proffer that the settlement failed when Congressional approval was not received.

Plaintiffs assert the mere fact that Defendants "discussed specific price **[**33]** increases in connection with the proposed Congressional Resolution," Pls.' Resp., at 28, is direct evidence of collusive behavior. The court disagrees. As an initial matter, it is likely that Defendants' negotiations would be protected under the *Noerr-Pennington* doctrine. *See* A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239 (3d Cir. 2001) (holding that cigarette manufacturers were entitled to immunity under *Noerr-Pennington* for agreement settling tobacco tort litigation with numerous states). Furthermore, Plaintiffs' own presentation of evidence belies any notion of collusion. Plaintiffs cite deposition testimony from Geoffrey Bible, Chairman and CEO of Philip Morris Companies. In a document sent to executives of other cigarette companies describing the type of final settlement agreement sought by the industry, Mr. Bible indicated that an agreement in principle had been reached to allocate payments according to market capitalization. Mr. Bible then breaks down the annual payment of $ 15 billion into a price per pack charge of $ 0.60 for each of the companies. *See* Bible Depo., at 92, Ex. 2123. Such a payment methodology is akin to an excise **[**34]** tax, which is generally passed through to the customer, because it is based on the output level. *See* Elzinga Report, at 12. The document itself, however, reflects no price-fixing conspiracy, and Plaintiffs fail to associate it with any. As a whole, the statement merely provides a contextual understanding of the cost of the settlement on a per-pack basis.

[*1273] In fact, Mr. Bible testified that he recalled the negotiating position of the state attorneys general to be that "any payments that were made to resolve the issues would be passed on in pricing because they [state attorneys general] wanted to see cigarettes priced higher to dissuade underage youth from buying cigarettes." Bible Depo., at 87-88. Mr. Bible understood that in order to accommodate this negotiation demand, some kind of legislation would be required in order to provide antitrust immunity. *Id.* at 88. The calculation of the cents per pack increase, therefore, was in the context of those government-sanctioned settlement discussions, which ultimately failed. *Id.* at 92-93. Because these initial settlement provisions were never implemented, they cannot form the basis for direct evidence of a price-fixing conspiracy.

[35]** Furthermore, Mr. Bible testified that once the subsequent MSA was reached without a provision for antitrust immunity, the companies ceased discussing prices in relation to the MSA. *See id.* at 93-94. Plaintiffs do not dispute Mr. Bible's testimony, but rather assert that the "fix" was already in because of Mr. Bible's previous comments concerning the costs of the settlement. As the court found above, however, this statement is not direct evidence of a price fixing agreement, particularly where it was made in the context of negotiating a global settlement that considered an option of antitrust immunity. Furthermore, the court finds it illogical that a statement made in 1997, four years after the initiation of the alleged conspiracy and related to a circumstance that could not have been anticipated in 1993, would be direct evidence of an alleged conspiracy engaged in by the companies since 1993.

Moreover, even if the court were to determine that Mr. Bible's statements could support an inference of conspiracy, ***HN26***[] direct evidence must be "explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food, 166 F.3d at 118*. **[**36]** An analysis of Mr. Bible's statements would require inferences to establish the proposition Plaintiffs assert.

Plaintiffs contend that they "were denied other discovery that may have provided additional direct evidence, such as Committee of Counsel notes, both because of the Court's discovery rulings and Defendants' refusal to produce such documents." Pls.' Resp., at 27 n.11. Plaintiffs do not point the court to any particular rulings which have allegedly prejudiced them. In fact, the court notes that at a discovery hearing on November 20, 2000, Defendants agreed to produce the information requested in Plaintiffs' Interrogatory No. 18 concerning the identity of persons who attended Committee of Counsel meetings. Plaintiffs accepted that resolution of the discovery dispute. *See* Transcript of Hearing, November 20, 2000, at 65-66. Plaintiffs also agreed that certain document production would pertain only to those employees with authority to set price. Defendants averred that no one associated with the Committee of Counsel had authority to set price. Plaintiffs accepted that proffer. *Id.* at 86-88. Defendants further agreed to respond to Plaintiffs' Second Document Request Nos. **[**37]** 1 and 2, requesting any documents related to pricing discussions at the Committee of Counsel meetings. The court has located no motions to compel filed by Plaintiffs arguing that Defendants refused to produce this discovery. Accordingly, the court concludes that Plaintiffs were not hampered in their search for direct evidence by the discovery rulings of the court.

B. "Plus Factors"

Because Plaintiffs have proffered no direct evidence of price-fixing, the court **[*1274]** proceeds to an analysis of the circumstantial evidence. As described in *Harcros*, ***HN27***[] in order to survive a motion for summary judgment, Plaintiffs must first produce evidence that Defendants engaged in consciously parallel behavior. Then, Plaintiffs must show "plus factors" that "tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism." *158 F.3d at 572*. Here, no party disputes that price increases between November 1993 and January 2000 reflect conscious parallelism. [11]

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[11] Plaintiffs assert that in addition to the actual prices operating in parallel, Defendants also acted in parallel with respect to other terms of sale. Specifically, Plaintiffs argue that "credit memos" issued by Defendants at the same time as price increases were announced delayed the price increase "by allowing purchasers to continue to buy product at the old price for a period of weeks

[38] 1. Defining "Plus Factors"**

Plaintiffs assert eleven "plus factors" to support their claim that Defendants conspired to fix prices: (1) signaling of intentions; (2) permanent allocations programs; (3) monitoring of sales; (4) actions taken contrary to economic self-interest, including (a) little analysis of whether to follow price increases, (b) B&W and RJR pulling away from the discount cigarette market, (c) the May 1995 price increase lead by RJR and followed by Philip Morris, (d) Philip Morris' agreement to base the initial MSA payments on market capitalization rather than market share, and (e) "excessive" price increases after the MSA; (5) nature of the market; (6) strong motivation; (7) reduction in the number of price tiers; (8) opportunities to conspire; (9) pricing decisions made at high levels; (10) the smoking and health conspiracy; and (11) foreign conspiracies. Although the court addresses each in turn, only the first four "plus factors" merit serious consideration.

Before analyzing the "plus factors" presented by Plaintiffs, the court notes that at turns, Plaintiffs use the terms "plus factors" and "facilitating devices" interchangeably. This practice confuses **[**39]** the proper analysis because ***HN28***[] "facilitating devices" are not necessarily sufficient **[*1275]** under the law to constitute a "plus factor." Plaintiffs allege that industry use of "facilitating practices" can increase the "likelihood of anticompetitive tacit coordination." Pls.' Resp., at 19. The court has found no case law, and Plaintiffs cite to none, which analyze the significance of "facilitating practices" as circumstantial evidence of price fixing in an oligopolistic market. In his antitrust treatise, late Professor Phillip E. Areeda states that a facilitating practice is "an activity that makes it easier for parties to coordinate price or other behavior in an anticompetitive way. It increases the likelihood of a consequence offensive to antitrust policy." Phillip E. Areeda, ***Antitrust Law***, P 1407, at 29 (1st ed. 1986) (hereinafter "Areeda"). He further notes, however, that "it will often be difficult to establish causation in fact from a facilitating practice." *Id.*, at 32. ***HN29***[] "Facilitating practices" are "not customarily listed in the cases as a 'plus factor,' [but they] bear on the economic consequences of oligopoly . . . ." *Id.*, P 1434e, at 221. Significantly, Professor Areeda does **[**40]** not believe that facilitating practices should transform an otherwise immune oligopoly into a conspiracy. *See id.*, P 1436, at 248.

As discussed below, the court finds this interchange particularly significant when considering the testimony of Plaintiffs' main expert, Dr. Fisher, and whether he offered testimony that distinguished conscious parallelism from

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after the announcement." Pls.' Resp., at 26. Plaintiffs contend that the credit memos allowed each company to "offer" a price increase to the industry which rivals could accept or reject within the time allowed by the credit memo.

The only testimony Plaintiffs cite for their contention that credit memos delayed price increases fails to support this assertion. Plaintiffs assert that Carl Schoenbachler, former Chief Financial Officer of B&W, testified that the credit memos delayed the impact of the price increase for a week or more. *See* Pls.' Resp., at 26. As B&W responds, however, *see* B&W Reply, at 7 n.8, a more complete reading of Mr. Schoenbachler's testimony shows that Plaintiffs' meaning cannot be attributed to his testimony.

> Q: So, would I be correct, then, that one of the reasons for sending out the Telex price increase sooner rather than later is to let the trade know that there is some period of time until the effective date, and during that -- during which they have the opportunity to purchase at the old price?
>
> . . .
>
> A: No, that's not what I said. The practice -- more recent practice has been, when a Telex is sent out, the Telex states that the price increase is effective immediately. All goods ordered on Monday morning will carry the new price; you will be given a credit on a notional quantity that you purchased over the past six months on average, the average week's shipments over the past six months. So, there's no opportunity for the trade to order at the old price over some period of time.

Schoenbachler Depo., at 146. Furthermore, Defendants' price announcements took effect immediately, within one to two days of the announcement date. *See* PM Price Announcements, PM Reply Brief, Ex. 9; RJR Price Announcements; RJR Reply Brief, Ex. 36, at 58001 2713; Lorillard Price Announcements, Lorillard Reply Brief, Ex. 3.

illegal cartel behavior. ***HN30***[] In order to constitute a "plus factor," an activity must "tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism." *Harcros, 158 F.3d at 572*. [12]

[41] 2. Signaling**

Plaintiffs argue that (1) Defendants use signals to communicate with their competitors, (2) each Defendant knows its competitors monitor its signals, and (3) the signaling related to specific price increases. Specifically, Plaintiffs assert that each company would send a representative to its competitors' analyst presentations so that each Defendant knew such "signals" would be received. Plaintiffs further argue that Defendants used Gary Black, a tobacco industry analyst, as the conduit for these signals because Mr. Black would report on these meetings and other events in the tobacco industry. In sum, the court finds Plaintiffs' theory of signaling among the companies to be based on a combination of statements taken out of context, as well as ominous readings of typical industry reporting on strategy. To reach the inferences suggested would require the jury to engage in speculation and does not tend to exclude the possibility that Defendants acted independently.

"Signaling" is a pejorative term as used in this context. Its import is either that a competitor is inviting all to make a traditional price-fixing agreement, or that there already exists such an agreement **[**42]** and it is being carried out through indirect communications. Despite Plaintiffs' use of the word and the infusion of their brief with colorful terms of "nods" and "olive branches," Plaintiffs have done nothing more than show that in an oligopoly, each company is aware of the others' actions. This is the nature of the economic interdependence of the companies in an oligopoly. As Professor Areeda explained, in an oligopoly, **[*1276]** "competing firms may be able to achieve cartel-like results for themselves simply by observing each other's behavior":

> Each firm's pricing decision is *interdependent* with that of its rivals: each knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of his initial choice. Each knows that expanding his sales or lowering his price will reduce the sales of rivals, who will notice that fact, identify the cause, and probably respond with a matching price reduction. Unless he can somehow conceal his price reduction, or unless his own position is improved by a lower market price, he will hesitate to reduce prices at all.

Areeda, P 1410b, at 65 (emphasis in original) (footnote omitted); **[**43]** *see also* William A. McEachern, Economics: A Contemporary Introduction, at 523 (5th ed. 2000) (in an oligopoly "each firm knows that any changes in its product quality, price, output, or advertising policy may prompt a reaction from its rivals. And each firm may react if another firm alters any of these features."); *In re Baby Food, 166 F.3d at 128* ("In an oligopoly consisting of no more than three companies at one time and collectively controlling almost the entire market, there is pricing structure in which each company is likely aware of the pricing of its competitors.").

HN31[] Because in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions, ***antitrust law*** permits such discussions even when they relate to pricing because the "dissemination of price information is not itself a per se violation of the Sherman Act." *United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)*. In *In re Baby Food*, the court granted summary judgment for the defendants despite the plaintiffs' argument that the defendants had **[**44]** communicated about pricing information. There, the court determined that sales employees of one defendant were required to report to their superiors any competitive information they learned from other sales representatives in the industry. *Id. at 118-19*. Sales representatives often learned of their own company's intention to increase prices before announcements were made. Thus, the court found, price

[12] In their Post-Hearing Submission in Opposition to Defendants' Motions for Summary Judgment, Plaintiffs dramatically point to a "recently" produced document to show Defendants "clearly understood the antitrust concerns raised by many of the practices that plaintiffs have identified as 'plus factors.'" *Id.* at 12. A review of the document shows it to be a summary of ***antitrust law*** and the application of that law to the Tobacco Industry Testing Laboratory. The court finds this document has no relevance to the present litigation.

information was systematically obtained and given to high level executives of each of the defendants, often before the pricing took effect. Nonetheless, the court granted summary judgment to the defendants because there was no evidence that these information exchanges had any effect on pricing decisions. *Id. at 125*. *See also* *Blomkest Fertilizer, Inc. v. Potash Corp., 203 F.3d 1028, 1036 (8th Cir. 2000)* ("evidence that the alleged conspirators were aware of each other's prices, before announcing their own prices, is nothing more than a restatement of conscious parallelism, which is not enough to show an antitrust conspiracy"); *United States v. General Motors*, 1974 Trade Cas. P 75253 (E.D. Mich. 1974) ("The public announcement **[**45]** of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react.") (cited in Areeda, P 1435, at 228).

In contrast, the cases which have found that an inference of traditional agreement from indirect communications took place show far more detailed communications with no public purpose. *See* *In re Medical X-Ray Film Antitrust Litigation, 946 F. Supp. 209, 213 (E.D.N.Y. 1996)* (noting companies exchanged internal competitive memos and citing specific testimony that representatives of Fuji and Agfa privately met to exchange pricing information); *Petroleum Proceedings*, 906 F.2d at 460-61 **[*1277]** (noting that defendants exchanged supply and demand forecasts and internal analyses documents were found in the files of competitors). Here, Plaintiffs have documented nothing reaching the level of prohibited exchanges, but rather have described the type of information companies legitimately convey to their shareholders. Furthermore, ***HN32***[] numerous courts have recognized the difficulty involved in using "signaling" to form an agreement to fix prices where list prices are not the prices **[**46]** paid by individual customers. *See* *Brooke Group, 509 U.S. at 217-18, 236*; *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 53-54 (7th Cir. 1992)* (signals "would be, to put it mildly, an awkward facilitator of price collusion because the industry practice of providing discounts to individual customers ensured that list price did not reflect the actual transaction price" and rejecting plaintiff's claim that announcements of price increases thirty to sixty days in advance was evidence of collusion). Thus, Plaintiffs' description of "signaling" does not make it any more likely that Defendants had an agreement to fix prices and it is not relevant.

Plaintiffs first theorize that after issuing the "demand" of Marlboro Friday, Philip Morris waited to receive signals from the other Defendants that they would join the conspiracy. Plaintiffs contend that Philip Morris understood signaling because of their response to the introduction of the 99-cent cigarette category in 1992. [13] Plaintiffs cite a 1992 document to show that Philip Morris "was well aware of the use that might be made of securities analysts to signal their competitors." Pls. **[**47]** ' Resp., at 37. A full reading of this memo, however, shows that Philip Morris was looking to correct false reporting of a competitive strategy of retail rebates by sales people. [14] Accordingly, Plaintiffs' contention is without support in the record.

[48]** In any event, setting aside whether the companies understood how to "signal" one another, the court notes that it is difficult for such allegations to support an inference of conspiracy. *See* *Blomkest, 203 F.3d at 1037* (where the plaintiffs contended that defendants signaled pricing intentions by circulating advance price announcements, court concluded that such evidence did not support an inference of price fixing because the plaintiff "may not proceed by first assuming a conspiracy and then setting out to prove it" . . . only " if the [plaintiff] were to present independent evidence tending to exclude an inference that the [defendants] acted independently," could the plaintiff use the signaling evidence for additional evidence of a conspiracy); *In re Baby Food, 166 F.3d at 133* ("***HN33***[]

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[13] *See* PMAT 000072883-2888, Board Notes, Wednesday, October 28, 1992. This document however, explains a decision by Philip Morris not to enter the 99 cent category of cigarettes because "we felt this would have sent a conflicting message to our competition and damaged our chances of narrowing the price gap." *Id.* at 2884.

[14] *See* PMAT 000205367 ("False reporting of a competitive strategy of retail rebates by sales people: This could very well be the case. This happens in other industries such as the pharmaceutical industry. One president and CEO stated, 'When the sales department controls everything, the danger is that you become price driven because sales organizations look to sell things. A marketing office balances that tendency since he's responsible for profitability.' One way to resolve this problem is have sales report to an EVP of Marketing and Sales. Another suggestion is for Larry Wexler and/or Bill Campbell to increase the number and frequency of interviews with the trade press, local press (RH, Cabarrus), and security analysts, in order to send clear signals throughout the industry.").

courts generally reject conspiracy claims that 'seek to infer an agreement from . . . communications despite a lack of independent **[*1278]** evidence tending to show an agreement'").

Nevertheless, Plaintiffs assert Philip Morris "looked to the others to signal that they would play by the new rules." Pls.' Resp., at 39. Plaintiffs contend the "signals were not long in coming." **[**49]** *Id.* As discussed below, however, the allegation of Marlboro Friday as "invitation to collude," is not supported by the materials cited by Plaintiffs. Indeed, most of the incidents to which Plaintiffs refer occurred prior to the time Plaintiffs allege the conspiracy began -- November 1993.

Plaintiffs point to a statement made by BAT's CEO and Deputy Chairman, Martin Broughton, to the *Financial Times* on April 13, 1993, and argue that this is a signal that B&W would accept Philip Morris' "offer." Mr. Broughton stated, "BAT may be one of those who started the price war in the U.S., but we have no wish to escalate it." PMAT0300005506-5515, at 5510. As B&W points out, however, this excerpt is not the totality of Mr. Broughton's comments. Mr. Broughton's full comment was: "We may be one of those who started the price war, but we have no wish to escalate it. But we shall be ready to respond tactically where necessary." B&W Mot. S.J., at 21; Ex. D-3. The rest of the interview also notes that Mr. Broughton was "perplexed" by Philip Morris' tactics and that BAT "will wait to see what happens in the market before playing its own cards." *Id.* No reasonable jury could infer that B&W **[**50]** agreed to any particular future course of conduct from the entirety of this statement. [15]

[51]** Incongruously, Plaintiffs argue that "industry understanding began to coalesce" after Philip Morris *again* cut its prices on July 20, 1993. Pls.' Resp, at 40. Plaintiffs do not explain how an additional price cut by Philip Morris shows any previously existing industry-wide agreement to form a cartel to fix and raise prices. Yet some of the "signaling" contentions discussed by Plaintiffs are irrelevant unless such an agreement exists.

Similarly, Mr. Black's reporting of B&W CEO Thomas Sandefur's comments at a September 1993 BAT analyst meeting, does not support Plaintiffs' theory that Mr. Sandefur was signaling to Philip Morris **[*1279]** that B&W would agree to Philip Morris' "demand" and no longer compete on price terms. Mr. Sandefur stated:

> We believe that price cutting or discounting -- while still a factor -- will be less important than in the past. That's because gaps in the list price have narrowed between premium and V-F-M [value for money] brands. Premium brands, therefore, should regain some strength. Over time, smaller price increases coupled with state and federal tax increases, will bring premium prices up once again. This will make V-F-M brands more appealing. But **[**52]** in the near term, value-for-money brands will need to compete on some basis other than price. <u>And our company fully intends to pursue options other than price for our V-F-M brands</u>.

588113496-573, at 511 (emphasis in original). This statement does not indicate that B&W will not compete on price. It explains that with Philip Morris narrowing the price gap and forcing a return to strength for premium brands, "in

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[15] Plaintiffs' own expert seems to recognize the purpose of this kind of statement. Dr. Fisher testified that he believed there are "perfectly good reasons why [companies] would want to tell analysts, we are going to be profitable from now on." Fisher Depo., at 179. Dr. Fisher opines, however, Mr. Broughton's statements "seem to have gone somewhat beyond that." *Id.* He later testifies, however, that it would be preferable, meaning more "legitimate," for BAT to say something more akin to "we are sorry there's a price war" because "nobody likes price wars." *Id. at 180*. The court finds it is splitting hairs to conclude that Mr. Broughton's comments, read in their entirety evidence an agreement when Dr. Fisher agreed it was not surprising that Mr. Broughton would express displeasure at being caught in a price war.

Plaintiffs describe B&W's response to Marlboro Friday as an "olive branch." Pls.' Resp., at 40. Plaintiffs point to a document written on May 25, 1993, by an unnamed BAT employee asking, "Should we signal to PM that we are prepared to go up?" BAT303501037-042, at 039. It is claimed that this document refers to Philip Morris' new pricing strategy. A review of that document and Plaintiffs' brief, however, provides no context for that statement. The document is handwritten with no indication who authored it. As such, the document does not constitute admissible evidence. Furthermore, on the same page as the quote cited by Plaintiffs are possible actions BAT considers taking in France and Germany. Thus, it is likely the document does not even discuss pricing in the United States. Moreover, there is no indication that any public statement was made related to this internal memo. For all of these reasons, the document does not reflect the import ascribed to it by Plaintiffs in their "olive branch" theory.

the near term," discount brands would have to come up with another way to compete. This statement is anything but a commitment to abandon price competition, as Plaintiffs allege. It is, in fact, a declaration of an intent to do so if and when the prices of premium brands are increased.

In their briefing and at oral argument, *see* Oral Argument, at 71, Plaintiffs then contend that Philip Morris looked to signal other companies. Plaintiffs' citation for this proposition, however, is an October 25, 1993 internal Philip Morris document from Geoffrey Bible to W.I. Campbell. *See* PMAT000144681-684, at 683 ("All of the foregoing suggests a strategy of market share as opposed to profitability when in fact our current instincts are toward the latter, so why have I focused **[**53]** on share? Because I'm looking at fairly flat to modest share growth with the view towards caressing the competition into a 'profitability' mode."). As described by the court above in discussing summary judgment standards, ***HN34***[] a hope by one company that it can create a disincentive for its competitors to engage in price competition to the detriment of profitability is not evidence of a collusive agreement to fix prices. [16] Marlboro Friday taught a marketplace lesson that market share gains bought by discounting are not sustainable and that in the end, market share will be lost and profits severely shrunk if a strong competitor also engages in price cutting.

[54]** Plaintiffs point to few events of "signaling" that occurred during the alleged conspiracy period. Plaintiffs proffer that RJR signaled it would accept Philip Morris' "conditions for a price hike" on November 2, 1993, when RJR's CEO and CFO met with industry analysts. Pls.' Resp., at 44. However, Plaintiffs' assertion that RJR's CEO Charles M. Harper "was signaling that RJR would meet PM's conditions for a price hike," *id.*, is without support. On November 2, 1993 Harper stated that RJR was going to focus on earnings growth and was "willing to accept modest market share losses as the cost of improving earnings." PMAT3000005464-473, at 465. The whole objective of free enterprise is to earn a profit. This may be achieved by selling more units at a smaller profit or vice versa. Because of Philip Morris' actions, RJR lost market share **[*1280]** and, therefore, was left with but one realistic avenue to grow its profit: to raise prices. There is nothing ominous or collusive about this statement. It is typical of the statements made every day by corporate executives to industry analysts as a means of providing investors information on a company's future strategic marketings plans.

The court notes, **[**55]** furthermore, that Plaintiffs premise their theory of "conditions for a price hike" on statements made by Mr. Black, not industry executives. [17] As described below, however, Mr. Black could not have acted as a conduit for Defendants. [18]

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[16] Furthermore, the *Brooke Group* Court indicated that measures such as what Philip Morris did on Marlboro Friday should not be punished under ***antitrust law*** even if "the ultimate effect of the cut is *to induce or reestablish supracompetitive pricing." Brooke Group, 509 U.S. at 223-24* (emphasis added). The court also observes that the strategy of mutually assured destruction was directed at "caressing" the former Soviet Union into a peaceful posture but by no means would one infer that it and the United States were conspiring together.

[17] With regard to the "two conditions," Mr. Black testified that,

> This is my opinion -- this is my opinion that, as an analyst, if a price increase were going to stick, this is how it would have to be structured. This is my opinion, you know, looking at industry pricing structure in the past in other price wars, that these are the conditions that, in my opinion, as an analyst, would have to be in order to become bullish on the group.
>
> If I saw a different type of price increase, I wouldn't become bullish because I would conclude that it wasn't going to stick. *This is not something that would have come from the industry. This is my own opinion*.

Black Depo., at 140-41 (emphasis added).

[18] Plaintiffs cite document PM2023769230-232 for the proposition that "PM, too, appreciated from the clear implication of Harper's statements that RJR was willing to accept PM's conditions for a price hike." Pls.' Resp., at 44. A review of that document, however, shows it is a copy of a Gary Black industry report with some portions of the report underlined. It does not identify the "PM executive" Plaintiffs allege read these "signals" into RJR's statement, and thus, Plaintiffs' assumptions are based on mere speculation.

[56]** Plaintiffs contend that Philip Morris' "final signal" was an announcement on November 4, 1993, of allocation limits for wholesalers. Plaintiffs argue that this was an indication that Philip Morris intended to raise prices and was a "nod" to RJR that Philip Morris would agree to a price increase. Pls.' Resp., at 46. A Philip Morris internal memo dated November 3, 1993, indicates a recommendation for a price increase as of December 15, 1993 and a product allocation program effective November 5, 1993. The memo explains that "announcing the allocation program in November should curtail speculative buying and allow PM-USA to exercise some control in setting year end inventories." PM20451211128. There is nothing to suggest that Philip Morris is responding to RJR's willingness to move to a profitability mode except the temporal proximity of the two announcements. A complete review of the memo makes two things certain. First, Philip Morris had no idea that its competitors would react to a price increase and, to that end, had a competitive contingency plan. [19] Second, retail price actions were viewed by the manufacturers as a key part in competitive strategy. These varied concerns belie Plaintiffs' **[**57]** theory of an agreed-upon conspiracy. [20]

[58]** **[*1281]** Furthermore, at the time, industry analysts did not assume Philip Morris' allocation program was an indicator of a price increase. *See* Dean Witter Report, November 8, 1993, PM2023769202 (specifically rejecting notion that allocation was a "near-term indication of a pending price increase" and noting "it is our belief that [the allocation program] was driven by the behavior of wholesalers who were attempting to replenish inventories in order to maximize cash flow and minimize taxes prior to the close of their fiscal year-end (most wholesalers' fiscal year ends on November 30 or December 31")); Prudential Securities Report, November 8, 1993, PM2023769205 (rejecting assumption of price increase and noting "we believe that this mailgram was sent to appease troubled wholesalers who have been financially hurt by the price war's price cuts that lowered the value of their inventories."); Smith Barney Shearson Report, November 8, 1993, PM2023769208 ("While this move by [Philip Morris] may indeed be the prelude to a general price hike it could also be just a method of reducing some excess inventory at the wholesale level").

Plaintiffs point to other documents to show that Philip Morris **[**59]** and RJR knew how to "signal" competitors. Geoffrey Bible's notes for a meeting with Gary Black indicate, in response to a potential question about share gains by other companies, that "we consider it healthy competition when Lorillard grows Newport, or B&W grows Kool or GPC through normal promotional activities. However, we consider it provocative if share gains are sought through continuous price promotion." PMAT 000200976, Ex. 2119 to Bible Depo. As Mr. Bible testified, however, "to every action there's a market or competitive reaction. And so you always try to weigh your actions to minimize competitive reaction." Bible Depo., at 71. Mr. Bible's statement is nothing more than a recognition that Philip Morris intended to protect its market share, an intention already made clear by its actions on Marlboro Friday.

Remarkably, Plaintiffs assert that RJR learned the benefits of such market communication during a "war game" strategy session held in 1994 in response to Marlboro Friday. Such an event, however, belies Plaintiffs' illegal collusion theory. If RJR understood that Philip Morris was making an offer, as Plaintiffs contend, RJR would not need to conduct strategy games to determine **[**60]** how to respond to Philip Morris' overtures. *See* RJR 51962 5141-59, at 55-57. Thus, RJR's response does not reflect that RJR understood Marlboro Friday to be an "invitation to collude," as Plaintiffs allege. *See* Pls.' Resp., at 39-40. Plaintiffs portray the competitive event of Marlboro Friday as Philip Morris' opening "gambit" in demanding that other companies "play by the new rules." Pls.' Resp., at 39. But Plaintiffs fail to recognize that Marlboro Friday created a new competitive framework in the industry.

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[19] Significantly, far from being the final link in the conspiracy, the internal memo reflects Philip Morris' uncertainty about the market's reaction. Philip Morris determined several possible risks from its strategy: (1) a competitor would exceed Philip Morris' increase by $ 0.50 to $ 1.00, (2) a competitor would announce a price increase in advance of Philip Morris', (3) competitors could fail to raise prices in the low end of the market, and (4) in the long term, competitors could initiate a mid-year price increase. *Id.* at 2045121129.

[20] Plaintiffs contend that the amount of RJR's announced price increase in November 1993 must have been agreed upon in advance because RJR's $ 2.00 increase matched the $ 2.00 suggested in Philip Morris' internal recommendation of November 3, 1993. As RJR notes, however, $ 2.00 price increases were common in the industry. *See* RJR Reply Brief, Ex. 38, Black Memo, October 21, 1993, at 4 ("most price increases have been . . . $ 2.00-$ 2.50 per thousand").

As the last feature of their signaling theory, Plaintiffs contend that Defendants used Black to "signal" on the following occasions: (1) in early October 1993, Black reported that Philip Morris and RJR removed coupons from their deep discount products and appeared willing to cede share to the "small players" at the low end; (2) Black predicted that for RJR to lead a price increase that Philip Morris would follow, the price increase would have to be for list prices of premium and discount by the same amount and the smaller companies would follow the increase on the deep discount brands; (3) Black reported that B&W would end most forms of discounting on its low price brands; **[**61]** (4) Black reported a statement by B&W CEO, Thomas Sandefur, Jr., on September **[*1282]** 30, 1993, that the company intended to "pursue options other than price"; (5) Black reported that RJR would focus on profits rather than share; and (6) that Philip Morris was switching to a "market share strategy."

Plaintiffs place great weight on the reporting of Mr. Black in developing their "signaling" theory. For Plaintiffs to survive summary judgment on this as a "plus factor," there must be some evidence that one of the Defendants fed Mr. Black information that prices were about to rise, and it ought to appear that what he published could be relied on as a statement of intention from a conspirator.

Throughout his deposition, however, Mr. Black repeatedly denied getting any "inside" information from the cigarette companies; rather, Mr. Black used primarily his sources in the wholesale and retail market, as well as publicly-available information to make his market predictions. *See* Black Depo., at 20 ("Most of my contact with the tobacco companies was with the investor relations folks, whose job it is to talk to the analysts, talk to the investors, you know, about the stock price, about corporate **[**62]** profits, about strategies . . ."); at 40 ("I never viewed myself as being privy to anything that I was the only person seeing from the tobacco industry."); [21] **[**64]** at 40-41 ("Q: Weren't there times when you received from tobacco companies information that at least to your knowledge was being sent to you and not to others? A: No. Q: Never? A: I don't think so. That's not the way they were allowed to do business."); at 131-32 ("it was very taboo for the industry to talk about pricing, and they made that clear. Any analyst conference, anything, they would say it's taboo, we can't talk about pricing, so most of my sources were either from retail or from wholesale."); at 134-36 ("pricing was a taboo topic [with the companies]" . . . "when I got information about pricing, whether it be from a wholesaler, a retailer, I would, of course, publish it . . . [pricing information] was very much coming from the field, not the manufacturers"); [22] at 148 (testifying that his sources

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[21] Mr. Black repeatedly rejected Plaintiffs' "signaling" theory:

> Q: There is no dispute that from time to time [the companies] did talk about pricing and they did it quite openly, didn't they?
>
> MR. O'REILLY: Objection to the form. Vague.
>
> A: They would talk about pricing in the context of their cost structure, so that if costs were going up, whether it be promotional costs, litigation costs, there was obviously discussion about their economics.
>
> Q: And everybody understood what that meant, right, sir?
>
> MR. O'REILLY: Object to the form.
>
> A: I don't know what you mean.
>
> Q: Well, you understood it, didn't you? You understood, when their costs were going up and they were signaling their costs were going up, that meant they were talking about a price increase, right?
>
> A: No.

Black Depo., at 132.

[22] Mr. Black repeatedly rejected Plaintiffs' counsel's insinuation that he was privy to inside information:

> Q: My question to you, sir, is what was the source of your information that RJR would likely lead the price increase and Philip Morris would follow?
>
> . . .
>
> A: The source was my understanding of how industries work, that when you have a player like RJR that you could argue caused the price war because it was gaining so much share in discount, Philip Morris cut price, RJR was now hurting because it had debt commitments that it had to make. I felt that RJR was desperate to try to pull the industry out of the price

[*1283] were retail); at 150 ("I spent my time talking to retailers, wholesalers, that's where I got most of my information."); at 167 ("there was no little bird telling me that [BAT was going to raise prices], but the theory **[**63]** would suggest that they would follow"); at 171 (denying that RJR was signaling to him that they wanted the price war to end and testifying that it was simply his opinion as a "financial analyst, I could look at the balance sheet and see that they were in trouble"); at 219-20 (testifying that he estimated a 5 to 6% price increase not based on information he received from the industry, but from his analysis of the level of pricing necessary to hit the profit targets investors expected from Philip Morris); at 243 (testifying he did not receive price announcements from the tobacco companies). There is no other evidence that he was being fed by Defendants.

[65]** Furthermore, even though Mr. Black made a few correct calls, he was a very unreliable messenger of industry "signals." *See* Affidavit of Dr. Darrell L. Williams, Philip Morris Reply Brief. Of the 257 analyst reports authored by Mr. Black for Sanford C. Bernstein & Co., Inc., from April 1993 through May 1999, there were 43 total price projections. *See* Williams Aff., PP2-3. Only 31 of those 43 projections specified an amount and date for the price change. *Id.*, P 4. Of those 31 predictions, Mr. Black was correct on both amount and timing only 3% percent of the time; that is, only one of his 31 predictions was correct on both factors. *Id.*, P 5. Specifically, between November 1993 and November 1994, the one-year period during which Plaintiffs allege that Defendants established the conspiracy through the use of Mr. Black as a signaling medium, Mr. Black incorrectly predicted a price increase *seven* times. *See* Williams Aff., Ex. 2; RJR Reply Brief, at 13 & n.8. Prices did not increase until the following year in May 1995. *See id.* (noting additionally that even though Mr. Black predicted a May 1995 increase in March 1995, he then retracted that prediction on April **[**66]** 27 only days before the actual increase). Furthermore, even though Mr. Black retracted his March 1995 price prediction, Plaintiffs still assert that Mr. Black "read the signals" and predicted a 5% to 6% price increase in March 1995. In any event, Mr. Black's testimony makes it clear that the information he based this prediction on did not come from the industry. [23] He talked to people in "the trade," by which Mr. Black meant wholesalers and retailers, and **[*1284]** looked at the calendar while considering the history of price increases in the industry. Black Depo., at 218-19.

[67]** Because Mr. Black was so often incorrect in his predictions, Plaintiffs could not possibly show that his signals had an impact on pricing decisions, as is required to assert that "signaling" is a "plus factor." *See* Blomkest, 203 F.3d at 1034; In re Baby Food, 166 F.3d at 125. Accordingly, the court finds that the statements of Mr. Black

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> war. That's why I thought RJR would be the one that would lead it, but that was based on my own analysis as an outsider looking at the industry.
>
> Q: Isn't it true that you had additional information beyond just your own analysis, that being RJR had announced publicly its interest in raising its profits?
>
> . . .
>
> A: No. That's not correct.
>
> Q: You are sure?
>
> A: I think I'm sure. RJR, during analyst meetings, would say, We would love to get our earnings up because we can't -- we are going to have a hard time making our debt payments if this price war gets any worse. So, yes, RJR did say things like that, and RJR clearly wanted to get its earnings up, but RJR never said, Well, we are going to raise prices and Philip Morris is going to follow; that never happened.

Black Depo., at 138-39.

[23] In response to Plaintiffs' counsel's question as to whether he received information from the industry, Mr. Black testified: "Not from the industry. It would come from the trade, from backing into what number -- what level of pricing do you need to hit the profit targets that investors expected from Philip Morris." Black Depo., at 219-20. Despite Plaintiffs' counsel's exhortations, Mr. Black continued to testify that he did not receive price increase information from the industry.

> Q: Well, nobody could tell you what the price hike would be other than the industry, correct?
>
> A: That's incorrect. I could back into it myself what they needed to hit their profit targets.

Id. at 220.

cannot constitute a "plus factor" because they will not support a reasonable inference of co-conspirator "signaling." Mr. Black's reporting was typical of reporting which thousands of analysts perform on countless industries every day. In sum, the court finds that Plaintiffs' theories of "signaling" do not tend to exclude the possibility that Defendants were engaged in competitive conduct and, thus, cannot be "plus factors."

3. Imposition of Permanent Allocation Programs

Plaintiffs argue that Defendants implemented permanent allocation programs in the fall of 1993 to facilitate their conspiracy. Plaintiffs contend that such allocations programs limit product supply, an inherently anti-competitive act, and restrict output. Plaintiffs also argue that permanent allocation programs are against the independent economic **[**68]** self-interest of non-coordinating firms. Finally, Plaintiffs contend that Defendants' justifications for permanent allocation are "false."

These contentions are devoid of factual support. The conspiracy is said to have begun in November 1993. Only Philip Morris put a permanent allocation program in effect in that month. Lorillard had one in March 1990 and RJR and B&W put theirs in effect in September and October 1993. They all would have had to have been clairvoyant to foresee Philip Morris' November "signal." Further, the programs did not effectively limit the wholesale market's ability to meet demand. Finally, the admissible evidence shows that the allocation programs were in the economic self-interest of Defendants.

Defendants effectively show that permanent allocation is economically rational because the prior system of no allocation or temporary allocation made it difficult for Defendants to determine true consumer demand, made inventories difficult to manage and unpredictable, and caused high levels of product returns due to staleness. Defendants further demonstrate that permanent allocation does not prevent increased allocation due to increased supply, but rather prevents **[**69]** wholesalers from speculating on inventory profits. Accordingly, there is no reasonable inference of an express and unlawful agreement from the implementation of an allocation program.

In the late 1980s and early 1990s, Defendants' direct customers engaged in "trade loading," a practice whereby the direct customers would purchase an amount of cigarettes in excess of what they could sell either (1) in anticipation of expected list price increases or (2) in response to end-of-quarter or end-of-year manufacturer discounts and incentives. Facts, PP 52-53. Plaintiffs admit that Defendants experienced increased costs due to trade loading because that practice would distort sales results and cause excess product returns, disruptions in shipping patterns, and stale product. *Id., P 54*.

Defendants have presented testimony and contemporaneous documentation to show that permanent allocation programs were initiated in response to trade loading concerns. B&W started a permanent system of purchase allocation restrictions in October 1993 called Expected Order Quantity ("EOQ"). B&W recognized the problems of trade loading as early as 1991. *See* B&W 1991-1995 Corporate Plan, **[*1285]** dated January 1991, 682502485-627, **[**70]** at 491 (listing as a financial performance objective to "reduce anticipatory buying of B&W products" in order to "minimize the practice of trade anticipatory buying to maintain shipment quantities and wholesale/retail inventories in line with consumer purchases"); B&W 1992-1196 Corporate Plan, dated January 1992, 682502375-483, at 382 (listing as a financial plan objective to "continue to reduce the level of anticipatory buying of B&W products" and calling for "further reduction in anticipatory trade buying by one billion units in both 1992 and 1993"). Prior to the imposition of a permanent allocation system, B&W used a system that would "flag" wholesale purchases that exceeded normal amounts. *See* Baker Aff., P 11. B&W testified that it recognized the "flagging" system was not doing enough to eliminate trade loading. *Id.* Because of the financial burdens already incurred due to Marlboro Friday, B&W was not going to meet its 1993 income projections and therefore determined also to incur the financial losses associated with terminating trade loading in 1993 as well. *See id.*, P 12. As a result, B&W introduced its new allocation system in October 1993. [24]

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[24] EOQ allows wholesalers to purchase between 110% and 130% of its previous four week order average. *See* Baker Aff., P 14. Under EOQ, the field sales staff determined whether larger orders would be permitted. *See* Inventory Management Program,

[71]** In May 1993, B&W estimated that the costs of trade loading reached $ 32.9 million per year. *See* 670808014-17, at 015, Year-End Trade Loading History, dated May 26, 1993. In 1994, through its permanent allocation program, B&W reduced its product returns and the cost of those returns by $ 33.7 million between 1993 to 1994. *See* 483100328-370, at 340, 1995-1999 Company Plan, dated October 1994; 482320481-546, at 488, 1996 Financial Data Volume, dated August 29, 1996.

Plaintiffs describe B&W's allocation program as "when customers' orders . . . exceed the 4-Week Limit for a brand style . . . the order will be cut . . . ." B&W634260060-069, at 064. Plaintiffs, however, only selectively cite from documents in an attempt to support this contention. A full reading of the program shows otherwise. The same document cited by Plaintiff describes the Inventory Management Program as follows: "Maximum order quantities are designed to be liberal enough to permit full service levels for all customers. *If needed, they may be overridden or adjusted at your request to meet legitimate service needs*." B&W 634260063 (emphasis added).

Plaintiffs allege that the testimony of numerous witnesses **[**72]** supports their contention that the permanent allocation system restricted supply and that requests for exceptions to allocations were refused. Plaintiffs cite the deposition testimony of several wholesalers who testified they had to go through a chain of command to get additional product. *See* Wertheim Depo., at 34 ("to get one case of cigarettes extra, I've got to go through a chain of command which is totally ridiculous."). The court notes, however, that upon further questioning, Mr. Wertheim admitted that on the three or four occasions that he had to call Richmond, Virginia to "beg" for cases of Marlboro, he did receive the requested amount of product. *See* *id. at 37-38*. Only one wholesaler testified that he was not able to get the product he was interested **[*1286]** in selling due to allocations. *See* G. Stevens Depo., at 104-13.

The deposition testimony of Anthony Karakas; also cited by Plaintiffs, is ambiguous on this point. Mr. Karakas testified that the allocation limits could change with "the amount of business that you were doing or you were going to do." Karakas Depo., at 79-80. Mr. Karakas then testified that on several occasions, he hit his allocation limit and he requested **[**73]** additional product from Philip Morris. He would make calls to try to get it increased and "sometimes they would modestly and sometimes they wouldn't." *Id. at 80-81*. He then stated:

> Q: And what types of reasons would you give for needing an in -- to go over your limit?
> A: Extra business, getting a new account.
> Q: Did you ever ask to actually change your allocation because you had a new account?
> A: Yeah. Yes, we did.
> Q: And were any of the manufacturers ever receptive to your changing the amount?
> A: If they thought you had a bona fide reason, they would.
> Q: But sometimes you would ask to change and they would simply permit you to buy over your allocation limit for that one time but keep your limit actually the same?
> A: That's correct.

Id. at 81. It is unclear whether Mr. Karakas is testifying that he could get additional product on a one time basis but could not get his allocation number permanently increased, or whether he is testifying that he could not get additional product at all.

Plaintiffs also point to the testimony of Messrs. Whitehair, Polino and Gutlove to show the permanent allocation system restricted supply. *See* Facts, Resp., P 56, at **[**74]** 26-27. The cited testimony, however, supports precisely the opposite conclusion. Mr. Whitehair, a former B&W senior vice president for sales and marketing, testified that if a wholesaler exceeded allocation, the request was flagged. Whitehair Depo., at 57. If the customer had acquired a "new chain of supermarkets" or "absorbed a smaller customer," the manager had authority to approve the additional request. "If we thought they were trade loading, we would just cap his order." *Id.*

Mr. Polino, a wholesaler, testified that since 1993, he could only remember hitting the allocation limit perhaps five or six times. He recalled that his sales for Marlboro Light increased, and Philip Morris "did make an adjustment and

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October 14, 1993, 6334260060 (instructing field representatives to call on account and do inventory check to see if account needs additional product or to determine if account has gained business or needs product due to special promotions); *id. at 69* (during times of national promotion, quantities were automatically increased in the system).

increased our allocation for Marlboro Light box." Polino Depo., at 96. Mr. Polino also recalled that he hit allocation on Newports and called the Lorillard sales manager who increased the allocation with "no problem" at all. *Id. at 98*.

Mr. Gutlove, a wholesaler, testified that between 1993 and 1999, he "very seldom" went over allocation. Gutlove Depo., at 118. In fact, Mr. Gutlove only ran into problems with his allocation when he was trying to make additional purchases **[**75]** in anticipation of a price increase, the precise circumstance Defendants wanted to eliminate through their allocation program, and which Plaintiffs admit increased costs to Defendants. Facts, PP 52-53. Mr. Gutlove testified:

> Q: So how many times over, say, the period from when you became president in 1993 until about two years ago [1999] did you get an allocation that prevented you from making an order?
> A: Only when I expected a price increase towards the end of the year. . . .
>
> **[*1287]** Q: Did some of those involve the fact that you had a new customer and expected --
> A: No, no. Very seldom I took such a big customer that it would change my allocations.
> . . .
> Q: Had there been any occasions on which you asked for relief from an allocation for which the relief has been denied?
> A: All the time.
> Q: How many times has that happened?
> A: Two or three times a year, whenever there was a price increase.
> Q: When you say whenever there was a price increase, you mean when you anticipated that there would be a price increase?
> A: Correct, when I anticipated, towards the end of -- towards the end of December.
>
> Q: So it was before there was a price increase and you were ordering more product **[**76]** than you normally did in that period?
> A: Yes.
> Q: What was the reason you were ordering more product than you normally did?
> A: I believed that the manufacturers would raise their prices.
> Q: And so if you ordered more product at the old prices, you would make a bigger profit; is that correct?
> A: Correct.

Gutlove Depo., at 119-21. *See also id. at 123* (describing not being able to "load" stock before a New York State tax increase). Thus, while it is clear the wholesalers did not like the allocation system, the testimony presented by Plaintiffs is either ambiguous or shows the opposite of what Plaintiffs contend. As such, no reasonable inference could be drawn from Plaintiffs' evidence that Defendants used the allocation system to restrict output.

Furthermore, the testimony of other wholesalers was that they never "bumped" up on the allocation limits. For example, Paul Nelson, President of Hartz Foods, testified that after discussion, he received permission from Philip Morris to lift the allocation limit. Nelson Depo., at 129-30. Mr. Nelson further testified:

> Q: . . . Do you recall any instances beyond that time when Walt Leach called Philip Morris to get an allocation **[**77]** limit raised that Hartz Foods ordered some cigarette product from a manufacturer and was told that it could not purchase it because its limits had been reached?
> A: No, I don't know that we were ever told that our limit had been reached, but we were not allowed -- we were not open to buy. So we couldn't just purchase whatever we wanted. We called when we needed to call however many instances that was.
> Q: When you say we were not open to buy, what do you mean?
> A: I mean, we were free to buy as many as we wanted. If I want to buy ten thousand cartons of Marlboro I could not do it.

Nelson Depo., at 130. Mr. Nelson testified that B&W, RJR, and Lorillard never told Hartz Foods that they could not buy cigarettes because they reached their allocation limit. *Id. at 132*. *See also* Goldschlack Depo., at 80-81 ("We were under allocation, but we never had a problem of needing more allocation. We were always able to get what we wanted if we needed it. . . . If I had hit the limit, depending on how severely I needed the product, I could have called the district manager, requested it and got it. I never ran into a problem.") **[*1288]** and *id. at 81* (testifying that he always got the additional **[**78]** product he needed when he called the district manager).

Despite the import of this testimony, Plaintiffs also contended at oral argument that permanent allocation was an output restriction because it was a "zero sum gain." Oral Argument, at 75 ("if you went up 125%, somebody else had to go down that 25%"). There is no evidence in the record, however, to support this contention. In their Post-Hearing Submission in Opposition to Defendants' Motions for Summary Judgment, Plaintiffs point to Dr. Fisher's Report, P 95, to support the contention that permanent allocation was a "zero sum" proposition. *See id.* at 7-8 citing PMAT000166499 ("if one account allocation is increased, the other account should be decreased."). As the court described above, this provision is only relevant, however, when a retail account has moved from one wholesaler to another, not when a wholesaler acquired a completely new customer. As a result, no reasonable inference can be drawn that Defendants used permanent allocation programs as output restrictions.

Dr. Fisher, however, also contends that the permanent allocation system was used by Defendants to assure everyone involved in the conspiracy that there would **[**79]** not be "big share battles." Fisher Depo., at 142. *See also* Fisher Report, at P 98 (using permanent allocation prevents a manufacturer "itself from rapidly increasing its market share, and thereby putting a system of coordinated pricing at risk. The system instead forces any manufacturer that wishes to grow to do so only slowly, giving other firms time to detect and respond to any overly ambitious strategy of increasing share beyond the limits that they find tolerable."). As the court notes below, however, there were significant share swings among Defendants after the initiation of the permanent allocation system.

It also appears that Dr. Fisher premised his opinions concerning permanent allocations on a belief that all of the Defendants initiated their permanent allocation programs at the inception of the conspiratorial agreement. But there is no dispute that Lorillard established its permanent allocation program in 1990. *See* Fisher Depo., at 461-64, 467-70 (testifying that he had been "mistaken" about Lorillard because he did not have a basis for stating that Lorillard put its distributors on permanent allocation in 1993). As Dr. Fisher's testimony is to a major degree premised **[**80]** on an erroneous understanding of the evidence, it is not and would not be admissible and may not be relied upon to defeat a summary judgment motion.

The parties dispute when RJR undertook its system of permanent allocation. It is clear, however, that RJR had some kind of allocation system in place in August 1992. *See* Memo to All Division Managers re: Direct Account Exception Order Guidelines, dated August 20, 1992, 519947427 (noting the manner in which customers can get either "one time" or "permanent" allocation adjustment). As discussed above, B&W began setting a permanent allocation program in motion as early as 1991. Thus, Plaintiffs are unable to support their contention that permanent allocation programs were implemented to facilitate a conspiracy initiated in November 1993.

Plaintiffs also contend that the permanent allocation programs facilitated the alleged conspiracy because Defendants "closely monitor each others' allocation programs." Pls.' Resp., at 53. Plaintiffs' documentary evidence, however, does not support such a contention. In one document cited by Plaintiffs, "Competitive Review -- October 1993," Philip Morris employees engage in a ten-page detailed review **[**81]** of actions taken by each of its **[*1289]** competitors in the third quarter of 1993. In the section summarizing B&W's activities, the authors simply note that the company initiated an allocation program. *See* PMAT300005470. The other document cited by Plaintiffs is a summary prepared by Philip Morris of allocation systems in 1989 and 1990. Not only is this summary outside the alleged conspiracy period, it is also scarcely surprising that a company considering implementation of an allocation program would be interested in how its competitors handled the issues. *See* PM2048498527. [25]

In his rebuttal report, Dr. Fisher refers to a 1994 letter from McLane to Michael Szymanczyk at Philip Morris concerning McLane's LIFO transaction with RJR. *See* Fisher Rebuttal, P 100-101 (citing PMAT000166524). **[**82]** The court was unable to locate the letter to which Dr. Fisher refers in the materials presented by Plaintiffs and, thus,

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[25] The court further notes that this document is labeled as "Exhibit A," but it stands alone in Plaintiffs' compilation of exhibits. Thus, Plaintiffs have provided no context or purpose for the generation of this document.

is unable to construe the circumstances or context of the letter. In any event, the letter indicates only that McLane's end of the year LIFO purchase exceeded its weekly RJR usage. It does not support a claim that Defendants "closely monitored" each others' allocation program. This slim documentary trail hardly constitutes "close" monitoring of each others' allocation programs. Plaintiffs cannot string together three highly individualized documents and spin a conspiracy of "close monitoring" out of such a diaphanous web. No reasonable inference could be drawn from these documents that Defendants monitored each others' allocation programs.

As noted, Plaintiffs also contend that there was no economic reason for Defendants to have such programs. Although Plaintiffs characterize Defendants' justification for their permanent allocation programs as "false," Plaintiffs rely to a great degree on Dr. Fisher, who testified that he found "it hard to credit" Defendants' justifications for allocation for reasons relating to inventory control and freshness of product. Fisher **[**83]** Depo., at 144. The court has already found that an opinion by Dr. Fisher on the reason for the commencement of permanent allocation programs is inadmissible opinion evidence. Expert opinion evidence also would not be admissible on whether a statement is true or false. Making that determination is a question for the triers of fact done with the application of familiar principles, and the opinion of an expert would not help them in this task. (To be sure, an expert may be helpful in understanding the economic effect of a business decision.) Dr. Fisher's opinion that Defendants' justification is pretextual is the only basis Plaintiffs have for challenging Defendants' programs. As the court has found such an opinion inadmissible, Plaintiffs have not gone beyond the allegations in the Complaint and Defendants' explanation stands unchallenged. The court, therefore, finds that Defendants have established a bona fide reason for the allocation program. A different result is not obtained even with Dr. Fisher's testimony.

Although Dr. Fisher said wholesalers testified that freshness was not an issue with other products, such as candy, and the cigarette industry was the only industry that placed **[**84]** such emphasis on freshness, he did acknowledge that the cigarette industry did accept returns. Fisher Depo., at 145. Thus, Dr. Fisher agreed that "it would be the cigarette companies that were stuck with stale cigarettes, if that were to happen." *Id. at 145-46*. Furthermore, Dr. Fisher allowed for the **[*1290]** possibility that his skepticism of Defendants' rationale for permanent allocation would be diminished by the knowledge that Lorillard began its program in 1990. Dr. Fisher testified:

> Q: . . . Yesterday, in response to some questions of Mr. Boies, I think you indicated that you did not credit the suggestion . . . that the system of permanent allocation related in part to reasons of inventory control and concerns over freshness.
> Do you recall giving that testimony?
> A: Yes.
> Q: Does the fact that Lorillard began its permanent allocation program in a period of at least relative competitive conditions in the industry in any way cause you to reassess your rejection of the credence of that explanation?
> MR. REINHARDT: Objection as to form.
> MR. ISAKOFF: Let me rephrase the question.
>
> Q: Lorillard -- is it fair to say that Lorillard, by starting a permanent allocation program during **[**85]** a period in which competitive conditions were, I think, in your view, more unstable than they were after Marlboro Friday suggest to you that you should reconsider your rejection of the credence of the explanation that permanent allocation is related to inventory control and freshness?
> A: You mean credibility, not credence?
> Q: Credibility, fine.
> A: Well, it's -- I don't have a closed mind, so, yes, I am prepared to reconsider it, and this, it seems to me, is a reason to do that.
> It doesn't seem, to me, to be totally compelling, no.

Fisher Depo., at 467-70.

Dr. Fisher then opined that "there are much simpler ways of dealing with that than permanent allocation, and indeed, if that were the principal reason, you would have thought the permanent allocation would have occurred many years before, since the freshness problem didn't suddenly arise after Marlboro Friday." *Id. at 146*. It is not the court's role, however, to second-guess the business judgment of the cigarette companies and find that Defendants "should have" instituted the programs earlier. *Todorov* instructs that ***HN35***[] where there is an independent business justification for defendant's behavior, an inference of **[**86]** conspiracy is not easily drawn. *921 F.2d at 1456* ("When the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated."). *See also In re Citric Acid, 191 F.3d at 1101* ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute."); *Reserve Supply, 971 F.2d at 49-53* (same); Areeda, P 1415d, at 90-91 ("***HN36***[] The logic of any conspiracy argument here is that an apparently unprofitable act must reflect some additional cause, such as conspiracy. But the additional cause is needed to explain the challenged behavior *only if the defendant believes that his act would be unprofitable*. . . . To satisfy this standard, the judge must conclude not only that the defendants were wrong but so **[*1291]** very wrong **[**87]** that their explanations should be disbelieved, or that it would be incredible that all the alleged conspirators could be similarly mistaken as to their true interests. The point is that the court's business judgment should not control.") (emphasis added). Plaintiffs have presented no evidence that Defendants themselves believed their economic justifications for permanent allocation were not true.

Furthermore, it is not altogether clear that Dr. Fisher disputes the economic justifications for permanent allocation programs. It appears that Dr. Fisher does not take issue with the use of the temporary allocation system used by cigarette companies prior to Marlboro Friday. Dr. Fisher recognizes that the temporary allocation systems were put into place prior to a price increase and prevented wholesalers from "trade loading" before such an increase. Fisher Report, at PP 87-89; Fisher Depo., at 141-43. Dr. Fisher contends, however, that the "permanent allocation system is not supported by any persuasive efficiency justification." Fisher Report, at P 101. Dr. Fisher, however, does not explain the significance of a permanent, as opposed to temporary, allocation that would lead the permanent **[**88]** allocation system not to be "efficient." Dr. Fisher testified that "I don't know of any really good reason to put wholesalers on permanent allocations, as opposed to temporary allocations, except as a way of ensuring the other companies in the business that you are going to restrict the extent to which you can gain share." Fisher Depo., at 141-42. Defendants respond that they moved to permanent allocation because the temporary allocation system had alerted customers to potential increases in price, a fact the companies did not want to reveal until the actual price increase went into effect. Permanent allocations, thus, were a way to prevent public knowledge of price increases by a temporary allocation announcement. Dr. Fisher himself testified that he could "think of a reason why Philip Morris or any company might from time to time not want to let people know that the price increase was coming until they actually announced it." Fisher Depo., at 144. In sum, the evidence presented by Plaintiffs does not create a reasonable inference that permanent allocation programs increased the likelihood that there was a conspiracy. Given the clear evidence that the programs were perceived as being **[**89]** in the economic self-interests of Defendants and the fact that the system was in use by some before the alleged commencement of the conspiracy, a negative inference would be contrary to all reason.

4. Monitoring

Plaintiffs contend that Defendants "monitored" their conspiracy by sending detailed information, including pricing, to Management Sciences Associates, Inc. ("MSA/Pittsburgh"), regarding the volume of cigarettes sold by each manufacturer. [26] MSA/Pittsburgh is the self-proclaimed "world's largest processor of marketing, sales and financial data." *See http://www.msa.com*. In the consumer packaged goods category, MSA/Pittsburgh lists the following companies as clients: Adams Confections, Bongrain Cheese USA, Brown & Williamson Tobacco, Budweiser, Clairol, Coca-Cola, Fort James Corporation, Georgia-Pacific Corp., Heinz, USA, Kellogg Company, Kraft General Foods, Liggett Group Tobacco, Lorillard Tobacco Company, McLane Company Inc., Michelin Tires, Pepsi Cola Company, Philip Morris, Pinkerton Tobacco, Retail Services Inc., RJ Reynolds Tobacco, Scott Paper Company, SmithKline Beecham, Thomas J. Lipton, United States Tobacco Company, Warner Lambert, Welch Foods Inc.

[26] As with several other contentions, this one is without appreciable evidentiary support.

[*1292] Defendants **[**90]** began obtaining shipment-to-wholesale volume data from MSA/Pittsburgh beginning in the early 1970s. Facts, P 147.

Philip Morris began its Wholesaler Masters Program in 1993. This program provided incentives to wholesalers to provide MSA with wholesaler-to-retailer data in addition to shipment-to-wholesale data. RJR began attempting to collect wholesaler-to-retailers shipment data in 1992, with its own pilot program beginning in July 1993. *See* Position Paper on Developing a Retail Information System, dated November 15, 1995, 51959 4305-4309. Lorillard also started receiving information on shipments of wholesalers to retailers in 1996. *See* Affidavit of Randy Spell, P 8. B&W did not begin to receive wholesaler shipment to retailer data from MSA until November 1996. *See* Affidavit of Rick S. Baker, Division Vice President for the Trade Marketing Development, B&W, P 26. As with the permanent allocation programs, **[**91]** the varied dates upon which Defendants started to gather wholesaler-to-retailer data belies Plaintiffs' notion of a conspiracy.

In their complaint, Plaintiffs allege that pricing information was sent to MSA/Pittsburgh in furtherance of the conspiracy. *See* Second Amended Complaint, P 76. Discovery, however, revealed that no pricing information was collected and distributed. Despite the clear nature of this evidence, Plaintiffs resist Defendants' assertion that pricing information was not exchanged through the MSA/Pittsburgh arrangements. For example, in response to Defendants' Statement of Material Undisputed Fact P 48, asserting that no data provided to MSA/Pittsburgh contained pricing information, Plaintiffs state: "MSA may or may not collect price data directly." The import of this statement is unclear. Plaintiffs plainly do not deny Defendants' asserted fact. In fact, it might be difficult to do so when Plaintiffs themselves in their discovery responses admit that no pricing information was sent to MSA/Pittsburgh. *See* Supplement No. 4 to Plaintiffs' Responses and Objections to Defendants' Interrogatories, Interrogatory No. 8, at 26-28 (in response to interrogatory requesting **[**92]** Plaintiffs to "identify each type, category or field of information that you provided to or received from any 'electronic database clearinghouse' including but not limited to MSA," no Plaintiff responded that pricing information was sent to MSA/Pittsburgh). *See, e.g.*, Gutlove Depo., at 89 (testifying he sends information on number of cartons sold by UPC code, retailer's name and address, including zip code and the date of purchase, but no pricing information); Polino Depo., at 47-48 (same); Wertheim Depo., at 177-79 (same). Thus, Plaintiffs' own testimony establishes that no pricing information was directly sent to MSA/Pittsburgh by the wholesalers. [27]

[93]** Even if pricing data were not directly submitted to MSA/Pittsburgh, Plaintiffs contend that it could be derived from the detailed volume data reported. *See* Pls.' Resp., at 53-54 n.26 (citing Fisher Report, P 110). A review of that paragraph of Dr. Fisher's report does not reveal any opinion **[*1293]** by Dr. Fisher that pricing information could be gleaned from the supply data sent to MSA/Pittsburgh. In fact, Dr. Fisher's testimony seems to contradict Plaintiffs' point:

> Q: For example, as you understand it, Philip Morris would know how much each individual wholesaler sold of RJR cigarettes to each individual retailer?
> A: I believe they would know it in finer detail than that. They would know it by brand.
> Q: Do you believe they also know the prices at which their cigarettes were sold?
> A: Not from that.
> Q: From what do they know the prices, if anything?
> A: I don't know that they do know the prices.
> . . .
> Q: The MSA data does not include data with respect to prices; is that right?
> A: That's right.

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[27] Plaintiffs' citation to Liggett's description of Philip Morris' Wholesale Master's Program is not contradictory. Liggett indicates that the electronic reports include "detailed retail store information for all manufacturers' products including SKU level detail, on-hand warehouse inventories and all promotional deals." LIGG009154. It says nothing about price. Furthermore, this document, far from showing a conspiratorial purpose behind the reporting requirements, indicates Liggett's belief that Philip Morris was using its market share and the incentives provided to participants in the Wholesale Master's Program to force wholesalers to stock more Philip Morris inventory than that of competitors. *See id.*

> Q: So that the only way that you could infer that there is a price cut is if you saw a volume increase; is that correct?
> A: That's right.

Fisher Depo., at 157, 162. [28]

[94]** Defendants argue that this type of "facilitating practice" is not sufficient to constitute a "plus factor" because collection of information about volume distributed by each Defendant does not exclude the possibility that Defendants were acting lawfully. Defendants' expert contends that there are legitimate usages for the sales volume data that MSA/Pittsburgh collects. "Just as in many other markets, cigarette manufacturers use sales volume data to learn how their brands are selling relative to rivals' brands. Information like this can foster competition because it enables firms like Philip Morris to target its potential customers, adjust its prices by brand and tier to reflect changing market conditions, and evaluate the impact of retail promotions." Elzinga Report, at 17.

Dr. Elzinga concedes that a "cartel seeking to allocate and stabilize market shares might utilize share-of-market and volume information to monitor cartel compliance," but he also notes that "firms *competing* against one another also gather and analyze market share and volume information" to determine where promotions are needed. *Id.* at 17 (emphasis in original). Dr. Elzinga contends that Defendants could **[**95]** not monitor competitors' prices at retail from the data provided by MSA/Pittsburgh. To get this information, companies pay for research data from A.C. Nielson or IRI/Capstone. *Id.* at 18.

The court notes that Plaintiffs' expert seems as ambivalent about this information as Defendants'. Dr. Fisher opines that a

> cigarette company may need to know the sales of its own brands (perhaps as a share of total industry sales) to determine whether wholesalers and retailers have met its incentive program targets. A company may also find it useful to collect information about its competitors' shipments for reasons other than facilitating coordination. For example, if the data reveal that a competitor's 100 millimeter menthol lights have suddenly become extraordinarily popular in rural **[*1294]** Kentucky, a firm may wish to make sure that its own brand of this style of cigarette is readily available and even promoted in those areas. However, while there may be legitimate competitive reasons to want to know how other firms' products are selling, it is often the case that a company is much less willing to allow its own data to be provided to its rivals.

Fisher Report, P 109. *See also* **[**96]** Fisher Depo., at 459 (testifying that he understood that such data could be useful to Lorillard "in competing and brand building at retail"). This assessment does not preclude the possibility of competitive conduct. Dr. Fisher, himself, seems to recognize that such information could be used competitively by beginning the next paragraph in his report with the phrase "whatever other role it might play, . . ." such monitoring is a useful facilitating device. Fisher Report, P 110. Dr. Fisher testified:

> Q: As you understand it, are there legitimate business reasons for the companies to exchange volume data?
> A: There are legitimate reasons why each company would like to know the other's volume.
> Q: Why is that?
> A: That depends on how detailed one gets that. The example that is used in the report is, gee, if somebody is having a surge in a particular kind of cigarettes in a particular part of the country and we want to get ahead of this, because there is a change in demand, we would like to know if that's happening.
> Q: Would knowing that that is happening improve the level of competition?
> A: Yes.

Fisher Depo., at 159-60.

In addition to being ambivalent, Dr. Fisher's discussion **[**97]** of the MSA/Pittsburgh data consistently focuses primarily on its use as a "facilitating device."

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[28] Moreover, pricing information seems irrelevant to Plaintiffs' more fully articulated theory that Defendants did not use MSA/Pittsburgh to obtain pricing, but rather to monitor the conspiracy and to detect "cheaters." *See* Fisher Report, P 110; Fisher Depo., at 160 ("continual monitoring of market share data is one way to ensure that cheaters will be detected").

> Q: With respect to the exchange of market share data, in your view, can that exchange of data facilitate price coordination?
> A: Yes.
> Q: How?
> A: One of the things . . . that's required or that helps price coordination is the assurance that others are not cheating, that they are not offering secret price cuts and trying to gain share by cheating on the arrangement. A continual monitoring of market share data is one way to ensure that cheaters will be detected.

Id. at 160. Even Dr. Fisher's testimony, however, shows that volume monitoring is not a very efficient method of detecting cheaters:

> Q: Would you agree that if there are significant increases in volume that [they] are not related to price cuts because it is your testimony that there have not been price cuts, correct?
> A: Yes.
> Q: Would you agree that if there were then significant increases in volume, this would not be a good way of monitoring whether or not there were price cuts?
> A: No I wouldn't.
>
> Hold on. In the first place, there are price promotions at retail, and some increases in volume occur **[**98]** for that reason. Secondly, monitoring volume, even if there are fluctuations in volume, is a way of being sure that there isn't a -- or that people can't get **[*1295]** away with systemic large scale cheating on the agreement.
> Q: How does somebody determine whether somebody is gaining or losing market share because of systematic cheating or simply because they are doing better?
> A: Well, A, it's a lot easier to do that if you have the data than if you don't. B, you can ask the question, okay, somebody is gaining at certain wholesalers. Is there something going on that explains it? Is there a couponing promotion in place, is there a buy-some-get-some-free in place, you know, do we know what's going on here. If not, is there something we need to explain. If the thing we need to explain is large, and then the question becomes why, and as I say, it is a lot simpler -- it may not be perfect, but it is a lot simpler to sort out cheating from sort of natural fluctuations and natural from somebody just doing better if you have the data than if you don't.

Id. at 163-64. Moreover, the fact that a "facilitating device" *could* be used in furtherance of a conspiracy is not sufficient to constitute **[**99]** such a practice a "plus factor." To be a "plus factor," a practice must tend to exclude the possibility that Defendants are engaged in lawful conduct.

The documents cited by Plaintiffs also are equally subject to multiple interpretations. A PM-USA Five Year Plan Summary document illustrates that Philip Morris wanted to continue to improve its ability to monitor consumer and market trends to "flag shifts in market trends and provide information on possible causal factors. These reports will provide significant insights into competitive strategy and provide PM-USA the ability to recognize and respond to shifts in the market before they become widespread." PMAT 500103299-3300. An untitled Philip Morris document states:

> In 1993, we launched a new Wholesale Masters Program which linked trade payments to wholesaler performance against specific PM share targets and business objectives. In March 1994, we expanded the program to require that distributors require weekly shipment data by retailer and sku. We now receive weekly cigarette shipments from our wholesalers to over 300,000 retail outlets. *This information gives us competitive advantage over all manufacturers in planning our* **[**100]** *marketing expenditures*. At present, accounts representing 78% of our volume have signed up and accounts representing 71.7% of our volume are submitting data. The database gives us better inventory control and an early warning system for competitive initiatives.

PMAT000026525 (emphasis added). In their response to Defendants' Statement of Material Undisputed Facts, at 23, Plaintiffs interestingly omit the portion of this document highlighted by the court and focus rather on the last sentence only. Seen in context with the entire discussion, however, is at least equally, and most likely more, susceptible to interpretation as a competitive, rather than collusive discussion. It is a significant element of competition to try to prevent your competitors from gaining share inroads into your product sales. [29] Accordingly, the court finds **[*1296]** that the testimony of Plaintiffs' expert is ambiguous as to whether the information sent to MSA/Pittsburgh was used to monitor the conspiracy. As the court described above, because Dr. Fisher's testimony does not make it more likely that Defendants had an agreement to fix prices, it is of no relevance. *See* Fed. R. Evid. 401. As Plaintiffs' contentions **[**101]** about Defendants' monitoring of the conspiracy do not tend to exclude the possibility of competitive conduct, the sending of information to MSA/Pittsburgh cannot be a "plus factor."

5. Actions Contrary To Economic Interests

Plaintiffs contend that on numerous occasions, Defendants took the following actions against their economic **[**102]** interests: (1) non-initiating Defendants always followed price increases; (2) after Marlboro Friday, B&W and RJR turned away from discount cigarettes; (3) RJR led, and Philip Morris followed, a price increase despite planning documents which reflected they would not take increases; (4) each Defendant exchanged information through MSA/Pittsburgh; (5) each Defendant had permanent allocation programs; (6) Philip Morris based settlement payments on market capitalization and not market share; and (7) Defendants agreed to pay "excessive" settlement price increases. [30]

HN37[] It is clearly established that actions taken against economic interest may be a "plus factor." *See* Harcros, 158 F.3d at 572. However, as described above, in analyzing such allegations, the court must be mindful not to engage in second-guessing of companies' business decisions. *See* Todorov, 921 F.2d at 1456-57; **[**103]** In re Citric Acid, 191 F.3d at 1101; Reserve Supply, 971 F.2d at 49-53; Areeda, P 1415d, at 90-91. Similarly, the court in *In re Baby Food* cautioned that "actions against economic interest" was an "ambiguous" term that simply could be interpreted as a restatement of the definition of "interdependence." *See* 166 F.3d at 122 (stating, for example, that "refusing to raise or lower prices unless rivals do the same could be against a firm's self-interest but nevertheless could spring from independent behavior"). In the Eleventh Circuit, to show that an act is against "economic self-interest" the "plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action." Harcros, 158 F.3d at 570 n.33 (quoting Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 826-27 (11th Cir. 1990)).

a. Little Analysis of Whether to Follow Price Increases

Plaintiffs contend that either Philip Morris or RJR initiated every price increase from **[**104]** November 1993 through February 2000. It is contended the price increases could have an effect on a follower's financial situation and place in the market, and yet Defendants followed price increases with little or no analysis. It is true that while little appears to have been done to evaluate alternatives, Plaintiffs point to no evidence to support the contention that following the price increase was against Defendants' economic interests. *See* Pls.' Resp., at 59-60. It is important to note that Plaintiffs do not argue that the quick decisions support the notion that **[*1297]** there was an agreement to do so. Further, such an argument would not be helpful. *See* Blomkest, 203 F.3d at 1032-33 (***HN38***[] fact that "price changes by one producer were quickly met by others . . . establishes only that the producers consciously paralleled each other's prices"). This court finds that no inference here may be drawn from the speed with which competitors followed price increases. Conscious parallelism is not unlawful, and, as said, there is no evidence that the followers had more favorable alternatives.

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[29] The court also notes that Plaintiffs offer no support for their contention that each modification to the service provided by MSA/Pittsburgh was made with the "joint agreement of all Defendants." Pls.' Resp., at 54. Rather, the documents cited by Plaintiffs show that MSA/Pittsburgh discussed various proposals with each company individually and made modifications to their services based on their, MSA/Pittsburgh's, views about what would be the most acceptable to their customers. There is no evidence in the documents cited by Plaintiffs that any of the Defendants negotiated together or reached any agreement together about what services they would request from MSA/Pittsburgh.

[30] The court has addressed above Plaintiffs' arguments concerning the permanent allocation program and the sending of data to MSA/Pittsburgh.

Testimony and contemporaneous documents show that RJR, B&W, and Lorillard found their options **[**105]** extremely limited after Philip Morris' Marlboro Friday announcement. Under those circumstances, Defendants contend, it did not take much analysis to decide whether to follow the price increases of RJR and Philip Morris. As Plaintiffs' expert testified, Marlboro Friday "made it clear to the other companies that Philip Morris was prepared to take quite drastic action to get what it wanted in the way of pricing." Fisher Depo., at 32-33. RJR also recognized that with Marlboro Friday, Philip Morris was announcing that it would maintain Marlboro's market share growth at the "expense of profits." *See* Perspective on Marlboro Friday, dated April 26, 1994, 51696 9589. *See also* Keith Depo., at 87 (testifying that trying to gain a "competitive advantage via pricing actions" would not be successful against Philip Morris because RJR is not "as strong a financial company"); Beasley Depo., at 131 ("They [Philip Morris] have a lot more money than we do, and they're not going to let us take share from them because we're at a lower price. It's just not going to happen over a sustained period of time."); Johnston Aff., P 13 (the drop in earnings experienced by RJR after Marlboro Friday was serious **[**106]** problem for the company because RJR/Nabisco, RJR's parent company, carried a great deal of debt following a leveraged buy-out by Kohlberg Kravis Roberts in 1988). In considering its responses to Marlboro Friday, RJR rejected maintaining higher prices. *See* RJRT Update, April 28, 1993, at 51649 0214 ("Past lessons learned in Savings show that if we don't respond, we are badly and quickly hurt . . . RJRT share would decline substantially."). RJR could not afford to lower its prices further than Philip Morris did. *See* Responding to PM's Share Initiative, April 7, 1993, at 51643 6584 ("An across-the-board price war would be worse than the scenarios outlined."). Thus, RJR decided to match Philip Morris' price reductions. [31]

RJR then undertook a series of "war games" to determine its **[**107]** strategy in response to Marlboro Friday. RJR reviewed the results of the "war games" and determined that "pricing is too easily matched, and therefore an ineffective way for gaining advantage." Strategies, 51602 8811. *See also* RJR 1994-1998 Strategic Plan, June 1993, at 51953 4165 ("our objectives address how to compete in an evolving price war environment, while reducing its erosion of margins and earnings . . . price is not a competitive advantage -- escalating discounts does not pay"); Memo of James Schroer, Vice President of Sales & Marketing, November 4, 1993, at 51961 6249 ("I learned in 1993 that Nuclear War over market share between RJR and PM is a disaster we cannot afford, and we are all better off engaging in a 'Cold War.'"). Considering all of this information, RJR developed a "defensive price strategy." *See* 1994-1998 Strategic Plan, June 1993, at 51953 4166 ("Avoid escalating the price **[*1298]** war: match competitive discounting, but do *not* use price to grow share.") (emphasis in original). Once RJR determined what its strategic response would be to Marlboro Friday, there was no need to re-complete that evaluation each time RJR needed to decide whether to respond to **[**108]** a price increase. Plaintiffs presented no evidence to challenge RJR's conclusion that it was in its economic interest to follow price increases.

Furthermore, these and other contemporaneous documents reflect RJR's uncertainty about what trends would occur in pricing -- an uncertainty that belies Plaintiffs' allegations of conspiracy. *See* Agenda 1995 Outlook, dated September 12, 1994, 51961 1618-1626, at 1620 (predicting, incorrectly, that Philip Morris would lower premium prices in November 1994); Price Rollback Contingency Plan, dated September 16, 1994, 51694 6787-6822, at 6788-89 (assuming Philip Morris would lower prices by $ 1.50 /carton, but recommending that RJR only drop $ 1.25/carton); Intercompany Memorandum, May 25, 1995, 51393 1583 (noting possibility of another Philip Morris rollback); 1996-1998 Strategic Assessment, dated June 1995, 51952 6068-6085, at 6077 ("market disruption due to pricing actions remains huge concern") at 6080 ("'Price Wars' continue to be a looming threat as players guard and/or develop market positions").

Similarly, B&W contends that as a small player in the cigarette industry, it really had no choice but to follow the price leadership of Philip **[**109]** Morris and RJR, who made up nearly 75% of the cigarette industry. Facts, PP 58-59. Mr. Carpenter, brand manager for B&W's GPC brand, testified that it did not take much analysis for B&W to follow RJR's November 1993 price increase.

> There is such a thing within the company as institutional knowledge. I mean, we have had price increases over the years, so it is not like each individual price increase requires a huge amount of analysis to determine whether it is a good thing or not. In the case of the Reynolds price increase in November, as I recall it, given

[31] Dr. Fisher did not disagree with this strategic decision. *See* Fisher Depo., at 68 (testifying that he thought there were "legitimate business reasons" for matching price decreases immediately following Marlboro Friday).

> the financial pain that we had suffered as a result of Marlboro's actions, it probably took us less than a second to make that decision that of course we wanted more money, and more profitability, so that analysis would have been quite simple.

Carpenter Depo., at 69. *See also* Brookes Depo., at 102-03 (B&W followed RJR's price increase in May 1995 because there had not been a price increase for some time and volumes were declining, so a price increase gave an opportunity to reverse profits that had been "flat to declining"). Lorillard had similar concerns. Because of its market size, Lorillard viewed itself as **[**110]** a "price taker" rather than a "price leader." *See* Spell Depo., at 43 (Lorillard could not lead price increase because volume and share would suffer). *See* *id. at 44-45* (Lorillard could not lead price decrease because they could not get separate price points from various points in the distribution chain). Again, Plaintiffs offered no evidence to challenge the economic decisions of B&W and Lorillard.

Plaintiffs contend in this connection that there was little analysis of whether to follow price increases because Defendants had advance notice of competitors' price announcements, *see* Pls.' Resp., at 24-25, and they paint these as evidence of an agreement. Plaintiffs argue that this "advance notice" was given through Gary Black's reports in 1995 through 1997. As the court has explained above, however, Mr. Black received his information from "the trade," most often wholesalers, and not from the cigarette manufacturers. Thus, his reports provided nothing more than his own personal analysis of publicly available information. Moreover, as Defendants **[*1299]** have demonstrated, Mr. Black was far more often inaccurate in his pricing predictions, than accurate. No reasonable inference could **[**111]** be drawn, therefore, that his reports constituted some kind of "advance announcement" of a pricing decision.

Plaintiffs also assert that RJR and B&W had Philip Morris' Labor Day 1997 price increase announcement before Philip Morris released it to the trade and that Lorillard had advance notice of price increases on November 23, 1998; August 24, 1999; and a federal government price increase announcement of August 12, 1998. Philip Morris announced on August 29, 1997, that it would increase its prices effective September 2, 1997. *See* RJR 58003 9738. The documents cited by Plaintiffs give no indication that RJR had prior knowledge of that announcement. In fact, they indicate the precise opposite. RJR distributed through its organizations copies of competitors' price increase announcements *after* they had been made. *See* RJR 58003 9743 (announcement of August 30, 1997 B&W price increase faxed on September 2, 4997); RJR 58002 9472-73 (copy of August 29 memo distributed through RJR attaching August 29 price increase announcement by Philip Morris); RJR 53002 7868-69 (copy of September 2 memo distributed through RJR attaching August 30 price increase announcement by B&W); WU001273-75 (August **[**112]** 29 instructions from RJR to Western Union for price increase announcement). *See also* Supplemental Affidavit of Clay Lentz, PP 3-6.

Plaintiffs contend that B&W had advance notice of the Labor Day 1997 price increase and the January 23, 1998 increase. Again, Plaintiffs' citations to the record fail to support this contention. Plaintiffs cite a document entitled "Market Information TMB Report, August 1997." Although Plaintiffs give no indication who produced this report, it is clear from the document itself that it contains only public speculation about price announcements. *See* 462116427 ("Effective October 1st, cigarette prices in the U.S. will increase $ 3.50 per thousand, or $ .70 per carton. *Press reports suggest* this increase will be put into place to cover settlement costs resulting from the Mississippi and Florida class action lawsuits.") (emphasis added). The other document cited by Plaintiffs, "Industry Assumptions," is clearly a document speculating on the effects of the costs of settlement of suits in the tobacco industry. *See* 544109245-46 ("Our *assumption* is that [settlement costs and elasticity] will force Philip Morris to redeploy funds into discounting **[**113]** . . . . It is *assumed* that other major trademarks, Camel, Newport, Basic and Doral, maintain their current relative pricing strategies . . . . The industry will take a price increase of $ 2.50/M in 1/1/98.") (emphasis added). The "Industry Assumptions" document reflects a competitive environment where each company tried to plan its responses to guessed plans of fellow competitors rather than a cartel. In fact, both of the predictions made in these documents did not prove out.

Although Plaintiffs contend that "Lorillard had advance notice of imminent price increase announcements taken on November 23, 1998, and August 24, 1999," Pls.' Resp., at 25, Plaintiffs' citations again fail to support this allegation. Plaintiffs cite two "Contact Report" records kept by the company hired by Lorillard to send out price announcements. One report stated: "Sam [Zolot, Lorillard, General Manager of Sales Planning and Operations] called to give heads up that a price increase might be going out within the next two weeks." The other noted: "Called Kathy [Sparrow, Lorillard Vice President of Sales] to see if she was going to send out price increase tonight. She was in a meeting and will call back." **[**114]** *See* Lorillard Reply Brief, Ex. **[*1300]** 2. Neither of these statements reflects the import ascribed to them by Plaintiffs that Lorillard had advance notice of price increases.

Plaintiffs contend that Lorillard received a Philip Morris Federal Government price change announcement on July 25, 1998, before its issue date of August 12, 1998. Lorillard demonstrated conclusively that it did not receive the announcement on July 25, 1998, but rather received it on *August* 25, 1998. *See* Lorillard Reply Brief, Ex. 1 (comparing Lorillard 90260724 with Lorillard 05005150, and August 25, 1998, time stamp); Oral Argument, at 31-32. Thus, the evidence pointed to by Plaintiffs would require a jury to engage in speculation and conjecture to such a degree as to render its finding a "guess or mere possibility" that Defendants received advance price announcements from competitors. [32]

[115] b. B&W/RJR Going Away from Discount Cigarettes**

Plaintiffs argue that it was against the economic self-interest of B&W and RJR to turn away from the discount cigarette market. Plaintiffs note that in 1992 and 1993, RJR and B&W were "making significant inroads" into Philip Morris' market share by emphasizing non-premium categories. Plaintiffs further state that "analysts expected" that B&W and RJR would continue to pursue the discount market even after Philip Morris' Marlboro Friday announcement. Finally, Plaintiffs contend that it "was well recognized that it was not in either B&W's or RJR's economic interest to cease the discounting and promotions that had garnered them increased profits and market share at PM's expense." Pls.' Resp., at 60-61.

Significantly, the court notes that the *only* support Plaintiffs offer for their contention that "analysts expected" and it was "well recognized" that RJR and B&W should continue to pursue the discount market is the testimony of Gary Black. Plaintiffs point to the "estimation" of Mr. Black that had RJR "continued its market share drive in the discount segment, it could have been the new overall market leader by 1997." Pls.' Resp., **[**116]** at 36. Plaintiffs' gloss on Mr. Black's statement is misleading in several ways. Mr. Black's statement is taken from a document entitled "Cigarette Price Wars: Philip Morris' Strategy and Likely Outcomes," dated May 10, 1993. In that document, Mr. Black reviews the "origins" of the "price wars" and presumably, Marlboro Friday. He states as one of the origins that "RJR Was Winning Too Much Share: New Market Leader by 1997?" LOR05013199-217, at 200. Thus, Mr. Black's statement was not a prediction of what he would have expected RJR to accomplish *after* Marlboro Friday, but rather was an explanation for why Philip Morris felt it needed to take action in the form of the Marlboro Friday **[*1301]** pricing changes. Furthermore, Mr. Black's statement is far from definitive; he himself uses a "question mark" when considering whether RJR would have been the new market leader by 1997. In fact, Mr. Black himself indicated in October 1993 that he expected the cigarette manufacturers to focus on profits rather than market share. *See* RJR Reply Brief, Ex. 35, October 29, 1993 Analyst Report, at 10 ("Our view is that Philip Morris' competitors will realize that the optimal solution is to focus on profits **[**117]** -- even though on its own, a market share strategy seems to make more sense if Philip Morris continues to do so."); Black Depo., at 163 ("It could have [been the 'perfect opportunity' for B&W to expand market share by discounting], except that Brown & Williamson was hurt by the price war as well. Their profits had gotten pummeled, their stock price was down sharply, and our thought was why would you want your stock price to remain low as an investor."). Thus, Mr. Black's testimony does not show that "analysts expected" RJR and B&W to continue discount marketing after Marlboro Friday.

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[32] The parties also dispute the manner in which wholesalers price cigarettes. Defendants contend that wholesalers raise prices on all manufacturers' brands as soon as one manufacturer raises its prices. As such, Defendants argue, they must follow price increases because to do otherwise would "leave money on the table" for wholesalers. Plaintiffs contend that wholesalers are able to price separately all brands of cigarettes, so Defendants would be able to distinguish their prices from competitors.

The court need not decide this issue because Plaintiffs have presented no evidence from which a jury could reasonably infer that "follow the leader" pricing was against the economic interest of Defendants or reflective of an agreement to fix prices. The court notes, however, that while there is some limited evidence to the contrary, it appears the vast majority of wholesalers act as Defendants contend. *See, e.g.,* Supplement No. 4 to Plaintiffs' Response and Objections to Defendants' Interrogatories; Gutlove Depo., at 224-25; Nelson Depo., at 79-80; and Wertheim Depo., at 93, 152.

Similarly, Plaintiffs offer no support for their contention that after Marlboro Friday it was "directly contrary to the self-interests of B&W and RJR" to raise the prices of discounted cigarettes. *See* Pls.' Resp., at 61. The document cited by Plaintiffs is an analysis of competitors conducted by Philip Morris in November 1993. It does not indicate at all that it was contrary to the interests of B&W or RJR to raise the price of discounted cigarettes. *See* PMAT000216641-653. In fact, the document reports that RJR's price increase was met with great favor by investors and stock analysts. *See id.* **[**118]** *at 646.*

Plaintiffs also contend that it was against the economic self-interest of RJR and B&W to "maintain a price gap" between premium and discount brands because those two companies were more heavily invested in discount brands. See Pls.' Resp., at 61-62. RJR, however, contends that it was in its economic self-interest to protect its premium brands, Camel and Winston, because those brands generated higher margins than its discount brands. RJR, then, also wanted to maintain an "appropriate gap" between the two tiers so that sales of its premium brands would not decline too much. *See* RJR Reply, at 15. RJR has proffered contemporaneous documents that support its strategic decisions to maintain a price gap. *See* RJR Confidential 1996 Pricing Strategy Overall Guidelines, 51693 6267 ("The importance of managing the price relationship (gap) between RJR Full Price Non Menthol (Camel, Winston, Vantage) and competitive brands at retail cannot be underestimated. These relationships are based on sophisticated statistical models, and when executed properly, have proven to hold our business."); Strategies, 51602 8811 ("profitability in Full-Price is still several times that of Savings"). **[**119]** RJR also responds that it could not have continued to pursue the same discount strategy that it used prior to Marlboro Friday because of the significance of Marlboro Friday. RJR learned that if it continued to pursue discount prices downward, Philip Morris could respond in the same manner it did on Marlboro Friday. [33] B&W apparently reached the same conclusion. *See* BAT000001172 (Marlboro Friday "forced all companies in the industry to reevaluate their brands since they can no longer **[*1302]** count on increase volumes in the VFM sector").

B&W contends that it did not move away from the discount market, but that it moved its spending to the retail level where the company believed its spending would be more effective. *See* Schoenbachler Aff., **[**120]** P 26 ("We believed that we could use the increased revenue from higher list prices strategically to discount GPC's retail prices . . . and thereby increase the retail price gap where we could gain the greatest advantage."). Documents cited by Plaintiffs also confirm this strategy. *See* BAT0000011168 (B&W has been "implementing sales incentive programs that further emphasize a partnering between B&W and retailers and wholesalers"); BAT0000011649 ("PM has already demonstrated its willingness to invest in achieving a FR/VFM price differential that is beneficial to its portfolio mix. . . . Their strategy is detrimental to B&W, as our portfolio mix is 60% VFM products. *B&W's philosophy is to provide competitive discounting support which ensures that the consumer experiences, at retail, at least the current price advantage in VFM products from FR*.") (emphasis added).

Defendants offered additional contemporaneous documents reflecting the same. *See* B&W Analysis of Industry Pricing Dynamics and Recommended Strategies, Oct. 29, 1992, 690802309-331, at 316 ("To execute its pricing strategy, B&W recommends that the company generally follow the industry's pricing actions given the **[**121]** difficulty of operating outside established industry boundaries. . . . Some portion of the [list] price increases will be discounted back to consumers to maintain the targeted [retail price] spreads."); B&W 1993-1997 Corporate Plan, Jan. 1993, 526030282-392, at 303 ("GPC has proven that an aggressively-supported program, with promotion spend directed at the consumer, remains the most effective and efficient method of competing."); B&W 1994-1998 Five Year Plan, Dec. 1993, 526300784-864, at 802 ("Given GPC's objective of growing share, volume and brand contribution throughout the Plan period, the key brand strategy is to maintain the brand's price competitiveness by providing sufficient discounting support to compete at/near the market bottom."). Thus, B&W chose to battle not on the wholesale list prices, but rather on providing discounting at retail. Plaintiffs have proffered no evidence that this strategic decision was against the economic interests of B&W. [34]

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[33] Plaintiffs have provided no expert testimony, for example, showing that increased discount sales would have offset the lower profit margins, to support their contention that RJR would have been economically better off after Marlboro Friday by pursuing the discount market.

[34] The court understands that where price fixing is alleged, an injury to competition is presumed. It would seem, however, that the presumption is somewhat suspect in this case. The demand for cigarettes is fairly inelastic. Further, there is sufficient

[122]** Plaintiffs offer nothing more than the musings of Mr. Black to support their contention that RJR and B&W "should have" maintained emphasis on the discount market. Plaintiffs have not disputed the contemporaneous documentation provided by Defendants to support their strategic decisions. Further, there is no evidence that B&W de-emphasized discount brands. As such, Plaintiffs have presented no evidence from which an inference could be drawn that RJR's and B&W's actions were against their economic self-interest.

[*1303] c. The May 1995 Price Increase

Plaintiffs contend that it was against the economic interest of RJR and Philip Morris to increase prices by $ 1.50 per pack in May 1995 because the companies had previously stated they would not take a price increase in 1995. Plaintiffs cite a January 18, 1995 speech made by Philip Morris' CEO to the Board of Directors which indicated that Philip Morris planned no price increase in 1995. *See* PMAT100009165. Plaintiffs also point to an internal RJR recommendation against raising prices in 1995. [35]

[123]** RJR responds that while it is true that internal RJR staff recommended against raising prices, that recommendation was made because it was "doubtful" whether the other companies would follow RJR's price increase, a concern that belies Plaintiffs' allegation of price fixing. Nonetheless, RJR's CEO Jim Johnston decided in the spring of 1995 to increase prices in order to determine whether its competitors would do the same. *See* 51694 6707 ("Push price until see a problem created, then bring price back down."). Mr. Johnston testified that RJR "continued to face earnings pressure and to look for ways to improve its performance." Johnston Aff., P 17. Thus, RJR decided to take the risk of increasing prices. Plaintiffs' expert also agreed that "RJR was under considerable pressure in 1995 to improve its profits." Fisher Depo., at 122. Furthermore, Plaintiffs' expert testified that it would not have been "irrational" for Mr. Johnston to decide the risks mentioned in the recommendation were worth taking. *Id. at 482*.

Philip Morris followed RJR's price increase. While it is true that Philip Morris' CEO told the Board of Directors in January 1995 that the company planned no price increases **[**124]** in 1995, Plaintiffs, again, did not cite fully the CEO's comments.

> We also plan NO PRICE INCREASE in 1995. The benefit of this strategy will be higher Premium volume and a strong competitive advantage. PM USA has not raised prices since November 1993, and we firmly believe that we can significantly increase our IFO without resorting to either a price hike or a decrease in marketing/sales impact. *If the competitive environment changes significantly, however, we will respond immediately and appropriately*.

PMAT100009165 (italic emphasis added). Thus, Philip Morris did not say under any circumstances would it not raise prices in 1995; it left open the need to respond to competitors' actions.

Plaintiffs contend that Philip Morris had some remorse about its decision to follow RJR's price increase. *See* Pls.' Resp., at 63 (Philip Morris "subsequently conceded this was not in its self-interest"). The document cited for this proposition, however, provides no such support. *See* PMAT000003105-115, at 106, September 25, 1995 Memo from Jim Morgan to Geoff Bible ("However, our year was not without challenges and one major setback -- the

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product differentiation so that wholesalers do not have an opportunity to substitute Winstons for Marlboro if Winstons are cheaper than Marlboro, so it is difficult to see what the injury to competition is at the wholesale level. There is cross-elasticity of demand between brands at the retail level. As such, B&W's decision to discount its VFM brands at the retail level is pro-competitive and it evidences an intent to maintain its commitment to discount brands. It is by no means an "unreasonable" business decision, and it is inconsistent with an agreement to fix prices to please Philip Morris.

[35] Plaintiffs' expert contends that the "pricing event is difficult to understand outside the context of explicit coordination through direct communications between companies." Fisher Report, at P 78. *See also id., at P 82* ("it is difficult to understand R. J. Reynolds' decision to lead a price increase unless some explicit communication took place, giving R. J. Reynolds the assurance that Philip Morris would follow its price increase."). As demonstrated below, a full reading of the contemporaneous documents shows that, indeed, RJR was concerned about whether other companies would follow its increase, thus, contradicting Dr. Fisher's theory. These statements, furthermore, offer no support for a contention that the May 1995 price increases were against the economic self-interest of Philip Morris or RJR.

product recall which slowed our **[**125]** momentum and gave our competitors an opportunity **[*1304]** to attack our premium brand strength. Their increased spending behind premium brands, fueled by the May price increase, has expanded the premium segment and lowered our share of this category."). This statement does not indicate that Philip Morris believed following RJR's May 1995 price increase was against the company's economic interest. Accordingly, Plaintiffs have proffered no evidence from which a reasonable inference could be drawn that the May 1995 price increase was against the economic self-interest of RJR or Philip Morris.

d. PM's Market Capitalization Agreement

Major tort cases against Defendants were settled in 1997. The shares of the initial payment (equal to about 1% of the total settlement) were computed on the companies' share of total market capitalization. Subsequent annual payments were allocated based on market share. Plaintiffs argue that it was against the economic self-interest of Philip Morris to agree that the up-front payments be based on market capitalization rather than market share. *See* Pls.' Resp., at 64.

Michael Syzmanczyk, CEO of Philip Morris, however, testified that Philip Morris' "up-front" **[**126]** payment under the market capitalization agreement was more than it would have been under a market share agreement, but that the company wanted to get the agreement made and negotiated the best terms it believed it could get. *See* Syzmanczyk Depo., at 196-97. There is no evidence that Philip Morris could have settled on a more favorable basis at that time, and Plaintiffs have proffered no evidence to dispute Mr. Syzmancyzk's testimony. Further, there is no evidence that the relatively small premium paid by Philip Morris in the initial installment was an unreasonable price for litigation peace. Plaintiffs' theory seems to be that Philip Morris was rewarding its co-conspirators for their participation. Plaintiffs, however, fail to note that B&W paid nearly 18% of the initial payment although its market share was only about 13%. As their thesis does not take into account all the known facts, it fails to create an inference of any sort.

e. "Excessive" Price Increases After Settlement Agreement

Plaintiffs allege that after state settlements, Defendants raised prices identically which benefitted the other Defendants more than Philip Morris. Defendants contend that Philip Morris **[**127]** should have used its stronger cash position to keep prices low and increase market share. Plaintiffs, however, provide no evidence for this position other than their own speculation. *See* Pls.' Resp., at 65 ("at the time of the Master Settlement Agreement, industry analysts questioned whether PM would immediately raise prices to pay for the settlement, or take advantage of its superior cash flow position to gain market share.").

Plaintiffs have offered no testimony, expert or otherwise, that Philip Morris would have been in a better economic position had it strived for market share. The undocumented speculation of industry analysts is insufficient to show that Philip Morris acted against its own economic self-interest in raising prices after the settlement agreement. [36] Strangely, Plaintiffs cite an internal review by B&W for the proposition that a price war breaking out after the Master Settlement Agreement was the "most rational and economically sound scenario." *See* Pls.' Resp., at 66. In fact, the document states the complete **[*1305]** opposite. *See* BW461105009-10 (noting that after the Master Settlement Agreement, industry pricing had two different options: "One view is that **[**128]** the higher base price level mandated by the settlement or [Federal Excise Tax] will provide an umbrella for higher manufacturer's price increases. The other is that lower industry volume, excess capacity, and the intensely competitive nature of the manufacturers will result in a 'price war' that will last until fewer companies are left standing than exist today. The latter view has the benefit of representing a more classical economics viewpoint *but appears irrational*. The former view, on the other hand, appears a bit starry-eyed.") (emphasis added). Accordingly, Plaintiffs presented no evidence from which an inference could be drawn that price increases after the settlement agreements were against the economic interest of Philip Morris.

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[36] The internal review conducted by Philip Morris, and cited by Plaintiffs, is not to the contrary. In that report, Philip Morris speculates that RJR might benefit more from the settlement agreements in 1997, but that Philip Morris would have the advantage over its competitors in 1998. *See* PMAT000211925.

[129] 6. Nature of Market**

Plaintiffs argue that the "economics of the marketplace" is a plus factor because the "cigarette industry's structure is particularly conducive to cartel activity." Pls.' Reps., at 29. Plaintiffs point to the following aspects of the cigarette industry to support their claim: (1) highly concentrated market, (2) fungibility of cigarettes, (3) high barriers to entry, (4) absence of close substitutes, (5) industry's history of collusion, and (6) conspiratorial meetings in other markets.

Plaintiffs' first four factors, however, are simply statements of the characteristics of an oligopolistic market and, thus, are not plus factors that tend to exclude the likelihood that Defendants were engaged in competitive conduct. Plaintiffs next argue that the court should consider the tobacco industry's history of collusion. *See id.* at 31. In support of this contention, Plaintiffs cite *United States v. The American Tobacco Co., 221 U.S. 106, 55 L. Ed. 663, 31 S. Ct. 632 (1911)*, and *American Tobacco Company v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*. ***HN39***[] The law generally disfavors use of such "historical" evidence. **[**130]** *See* Areeda, P 1421a, at 125 ("Illegal behavior elsewhere in time or place does not generally allow the inference of an immediate conspiracy."); *see also* *Fed. R. Evid. 404(b)*. Furthermore, Plaintiffs are not alleging that the prior conspiracy in the 1940s is continuing today. *See* Second Amended Complaint, PP 38-46 (where Plaintiffs describe competition in the industry from 1980-1993 and allege that the early 1990s were marked by competitive activity due to the introduction of discount cigarettes). Plaintiffs have cited no case law, and the court has found none, where "history of collusion" is used as a plus factor courts consider in cases alleging illegal collusion in an oligopolistic market. The court finds that the "history of collusion" in the industry does not tend to exclude the possibility that Defendants were engaged in lawful conduct during 1993 through 2000. Thus, the "nature of the market" is not a "plus factor."

Finally, Plaintiffs appear to allege that the multinational nature of Defendants' businesses should be a "plus factor." Plaintiffs first cite to Dr. Fisher's expert report noting that "it is a well known proposition in economics that multi-market conduct **[**131]** can improve firms' abilities to sustain agreements and coordinate by raising the cost of cheating." Pls.' Resp., at 32 (quoting Fisher Report, P 116). The court finds this statement irrelevant for the proof of a likely conspiracy during the time period in question. Taken to its logical conclusion, Plaintiffs appear to ask the court to find the existence of multinational corporations to be a "plus factor." Given the global nature of the economy, such a finding would substantially alter the legal landscape of antitrust analysis in an oligopolistic market. Plaintiffs then seem to **[*1306]** narrow the focus of their argument and contend that "all Defendants other than Lorillard held meetings and had other contacts in various locations through the world, at which they agreed to fix prices, allocate territories and/or fix terms and conditions of sale." *Id.* (citing evidence collected at Appendix B). The court will address below the lack of evidentiary and legal support for Plaintiffs' allegations regarding Defendants' conspiratorial meetings in other markets. *See infra.*

7. Strong Motivation

Plaintiffs argue that Defendants had a motive to conspire because of (1) declining demand and **[**132]** excess production capacity, (2) increased litigation and regulatory pressure, and (3) the destabilization of the market by introduction of discount cigarettes, so-called "commoditization." Specifically, Plaintiffs contend that Philip Morris believed that discount cigarettes would destroy its Marlboro brand and cause Philip Morris to lose its industry leadership position. Lorillard, though smaller, was in a similar market position because its premium cigarette, Newport, was its only significant brand.

As an initial matter, the courts notes that the characterization of motive as a "plus factor" is questionable. Professor Areeda noted that ***HN40***[] "conspiratorial motivation in the sense of a reasonable prospect of increasing profits through collective action is a logical corollary of interdependence. . . . Motivation is thus synonymous with interdependence and therefore adds nothing to it." *Id.*, P 1434cl, at 215; *see also* *In re Baby Food, 166 F.3d at 122* (noting that the concept of "conspiratorial motivation" is ambiguous because it merely restates the interdependence that characterizes an oligopolistic market). [37]

[133]** Moreover, there are numerous logical inconsistencies with Plaintiffs' position. Plaintiffs contend that Philip Morris and Lorillard, on the one hand, and RJR and B&W, on the other, had differing reasons for being "desperate" in the early 1990s. The fact that these companies had different market position and motivations undercuts Plaintiffs' theory that there was a common industry-wide motive to form a conspiracy. Furthermore, Plaintiffs' allegation that due to discount cigarettes, Philip Morris "desperately needed to take action to protect its leadership of the cigarette industry," Pls.' Resp., at 34-35, explains *Philip Morris*' motivation for Marlboro Friday, an act Plaintiffs agree was pro-competitive, but certainly does not give an industry-wide motivation. Thus, the "commoditization" Plaintiffs allege was not an external force that befell the cigarette industry; rather it was RJR and B&W that began to stake out space in the discount market. To these companies, the "commoditization" of the cigarette industry was not indicative of "desperate times," but rather was a purposeful market strategy. [38] It makes no sense, therefore, that the "solution" to such a "problem" would be **[**134]** an industry-wide conspiracy. [39]

Furthermore, Plaintiffs themselves contend that both declining demand, excess **[*1307]** capacity, and destabilization by discount cigarettes had been features of the cigarette industry since 1980. *See* 1994 Annual Meeting Q & A Book, PMAT300006144 ("The industry has been declining since 1981. We estimate the industry will continue declining at an annual rate between 2% and 2.5%."); Elzinga Depo., at 104 (testifying that since 1980 cigarette industry had excess capacity). Plaintiffs offer no explanation as to why the situation in 1993 had changed so dramatically as to require conspiratorial action that was not deemed necessary in the "competitive" years of 1980-1993. *See* Second Amended Complaint, **[**135]** PP 38-46. Accordingly, the court finds that Plaintiffs have not presented evidence from which a reasonable inference could be drawn that Defendants' "strong motivation" proves the existence of an express agreement to fix prices, nor does it tend to exclude the possibility of Competitive conduct. Plaintiffs' argument essentially contends that a murder may be assumed from the fact that a destitute heir would benefit from the death of a relative. The reasoning, of course, is fallacious and results from assuming talismanic significance of anything that may ever have been referred to as a "plus factor." The court understands that "plus factors" may but do not always create reasonable inferences.

8. Reduction in Price Tiers

Plaintiffs argue that Defendants reduced the number of price tiers for cigarettes to facilitate coordination of the price-fixing conspiracy. Specifically, Plaintiffs note that prior to Marlboro Friday, there were "at least 10 different price points within three or four tiers for cigarettes at the wholesale level." Pls.' Resp., at 47. By August 1993, Plaintiffs contend, there were only two main price tiers at wholesale, and nonpremium categories were consolidated **[**136]** into one price point. *Id.*

Plaintiffs provide no support for their contention that a consolidation of price tiers under the circumstances presented here constitutes a "plus factor." Although Dr. Fisher opined that reduction in the number of price tiers makes coordination of price increases easier, *see* Fisher Rebuttal, P 64, he also testified that Philip Morris' purpose in its Marlboro Friday strategy was "to reduce the price gap between premiums and discount cigarettes to avoid an erosion of share as people switched from premiums to discounts because of price." Fisher Depo., at 31. Dr. Fisher agreed that Philip Morris had "legitimate business justifications for its Marlboro Friday announcement." *Id. at 39*; at 46 (Philip Morris had legitimate business reason for narrowing the price gap to benefit its premium brands).

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[37] *In re Medical X-Ray Film, 946 F. Supp. 209*, cited by Plaintiffs, is not to the contrary. There, the court found ***HN41***[] that "the presence or absence of a strong motive to enter into the alleged conspiracy" could be a "plus factor" under the circumstances. *Id. at 218*.

[38] As discussed, Marlboro Friday forced these companies to reexamine the wisdom of that strategy.

[39] The court addressed above Plaintiffs' allegation that if RJR had continued to push for a market share in the discount segment, it could have been the overall new market leader by 1997.

Plaintiffs have not presented evidence from which a reasonable inference could be drawn that Defendants reduced the number of price tiers to facilitate their conspiracy, particularly in light of Dr. Fisher's ambiguous testimony on this issue. The fact that the reduction of price tiers *could* facilitate a conspiracy does not tend to exclude the possibility **[**137]** that Defendants were engaged in competitive conduct and the court finds it is not a "plus factor." [40]

[138] [*1308] 9. Opportunities to Conspire**

Plaintiffs argue Defendants had numerous opportunities to conspire through the Tobacco Institute, which hosted regular meetings of the top leadership of tobacco companies, and the Institute's Committee of Counsel, consisting of the General Counsels of all of the major cigarette companies. Plaintiffs also contend that Defendants had opportunities to conspire during the attempted settlement negotiations of the state healthcare lawsuits. Finally, Plaintiffs assert that there were social contacts between the tobacco company executives such as golf, dinner, lunches, trade association conferences, and teleconferences.

Plaintiffs cite *In re Medical X-Ray Film, 946 F. Supp. at 218*, for the proposition that "opportunities to conspire" is a plus factor. In *In re Medical X-Ray Film*, however, the court was faced with numerous meetings during which the plaintiffs could demonstrate that pricing information was exchanged. As such, *In re Medical X-Ray* is distinguishable. [41] Furthermore, the Eleventh Circuit has held ***HN42***[] that "the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy. **[**139]** " *Todorov, 921 F.2d at 1456*; *see also* *Blomkest, 203 F.3d at 1036* (opportunity to conspire "not necessarily probative evidence of price-fixing conspiracy"); *In re Citric Acid, 191 F.3d at 1103* (opportunities to conspire are insufficient to support an inference of conspiracy because they "do not tend to exclude the possibility of legitimate activity"); *In re Baby Food, 166 F.3d at 126* (finding that "communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise'"); Areeda, P 1417b, at 97 (***HN43***[] when considering opportunities to conspire "it remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative that no conspiracy occurred.").

[140]** Here, Plaintiffs have proffered no evidence that pricing discussions took place at any of the meetings of the Tobacco Institute or its Committee of Counsel. In fact, Mr. Meyer testified specifically they did not. *See* Meyer Depo., at 68-70. Nor have Plaintiffs shown that Defendants discussed pricing during the meetings to settle the state healthcare lawsuits. [42] Finally, **[*1309]** Plaintiffs have not demonstrated that at any pricing issues were discussed

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[40] As they do on numerous occasions, Plaintiffs attempt to divide the competitive act of Marlboro Friday from its logical consequences. Plaintiffs argue that "part of PM's strategy *after* Marlboro Friday was to reduce the number of price points and to reduce the price gap." Pls.' Resp., at 47 (emphasis added). The reduction of price points and the price gap was not a policy that arose independently *after* Marlboro Friday; it was one of the goals of Marlboro Friday. *See* Fisher Depo., at 31. Plaintiffs again contend that "after Marlboro Friday, PM was intent on destroying the deep discount segment, to the detriment of its competitors and consumers generally." Pls.' Resp., at 47. This contention, however, does not support Plaintiffs' theory of a conspiracy. If the destruction of the deep discount segment was harmful to Philip Morris' competitors, it could hardly be one of the practices which facilitated the operation of the alleged cartel.

[41] For the same reasons, the court finds inapposite *In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. Unit A 1981)*. There, the plaintiffs offered evidence of a series of meetings between plywood producers that the producers themselves described as "an opportunity to secure specific competitive information." *Id. at 633*. Specific pricing information was exchanged. *Id. at 633-43*. The court held that the parallel pricing conduct plus "the numerous items of direct evidence of communication between high-level personnel *on pricing policy* adequately supported the jury's verdict." *Id. at 634* (emphasis added). Here, Plaintiffs have not shown that pricing policies were the subjects of any of the meetings among Defendants.

[42] Although Plaintiffs contend that statements of Mr. Geoffrey Bible, CEO of Philip Morris, illustrate the companies' desire to "pass through" settlements costs in the form of pricing, the specific comments Plaintiffs point to were made during failed settlement negotiations in 1997 which anticipated government involvement and an antitrust immunity provision for Defendants. Furthermore, as the court described above, Mr. Bible's comments were not related to price, but were made in the context of discussing the costs of the settlement agreement allocated based on market share, not pricing.

at the social engagements among the tobacco company executives. The sum total of Plaintiffs' contentions about whether these meetings involved discussions of pricing is the following:

> The Committee of Counsel met frequently, as did the numerous other committees that were part of the Tobacco Institute. It was through these committees that the most sensitive topics -- legal, health-related, etc. -- were discussed within the industry. It is not unreasonable *to assume* that the future price of cigarettes was among the topics discussed during some of these meetings.

Pls.' Resp., at 55-56 (emphasis added). [43] **[**142]** The court, however, cannot credit assumptions. [44] Accordingly, the court finds that Plaintiffs have not presented **[**141]** evidence from which a reasonable inference could be drawn that "opportunities to conspire" tend to exclude the possibility that Defendants were acting lawfully. As such, "opportunities to conspire" is not a "plus factor" under the circumstances presented here.

10. Pricing Decisions at High Levels

Plaintiffs argue that restricting pricing decisions to high level officials only is a "key requirement in any agreement to restrain trade," Pls.' Resp., at 57, and thus argue that the "restriction of decisions on pricing levels and timing is a further factor supporting an inference of conspiracy." *Id.* Specifically, Plaintiffs contend that at Philip Morris only the CEO had authority to authorize and determine the timing of price increases. Similarly, at B&W, only the CEO, marketing director, and CFO would discuss potential price increases.

Plaintiffs, however, provide no authority for their contention that limiting pricing decisions to high levels is a "plus factor," let alone whether it facilitates a conspiracy. In fact, in *Harcros*, the Eleventh Circuit deemed such evidence to be equivocal and, therefore, **[**143]** not a "plus factor" in a conspiracy analysis. There, the plaintiffs proffered a memo which showed that Joe Ragusa, a regional vice president for one of the defendants, "exercised strict control over chlorine pricing." *158 F.3d at 569*. The court found that such a memo could support an inference that Ragusa could not get his subordinates to follow instructions as easily as it could show that pricing was centralized with Ragusa in order to conceal a conspiracy. As such, the court found this evidence in "equipoise" and not sufficient to withstand defendants' motion for summary judgment. *Id.* Furthermore, Plaintiffs provide no evidence that the pricing at either RJR or Lorillard was similarly limited to high level employees. Plaintiffs' argument that to "effectuate such a conspiracy, pricing authority must be limited to a few select, high-ranking officials in *each* conspiring company," *see* **[*1310]** Pls.' Resp., at 57 (emphasis added), loses force when Plaintiffs do not demonstrate that the policy was limited in this manner in each company. Thus, the court finds here that Plaintiffs have not presented evidence from which a reasonable inference could be drawn to show that the restriction **[**144]** of pricing discussion to high level employees is a "plus factor."

11. Smoking and Health Conspiracy

Plaintiffs contend that Defendants have engaged in a "smoking and health conspiracy" whereby Defendants have agreed to limit health-based marketing of cigarettes. Plaintiffs assert that the smoking and health conspiracy is a "plus factor" because Defendants are able to facilitate coordination in their price-fixing conspiracy by suppressing product differentiation. *See* Pls.' Resp., at 58-59.

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[43] The slim reed upon which Plaintiffs base this assumption is the deposition testimony of William Campbell, former President and CEO of Philip Morris, whom Plaintiffs quote as saying the Tobacco Institute "needed to increase even more the continuing cooperation by the members." Campbell Depo., at 287-88. As Defendants demonstrate, however, a full reading of Mr. Campbell's testimony indicates he was not referring to cooperation on issues of price. Rather Mr. Campbell testified that "most of these discussions were the type that, you know, how the organization could be strengthened in its industry efforts against things like the Federal Excise Tax and indoor air and so on." *Id. at 288*. In fact, Mr. Campbell testified that prices were never discussed at Tobacco Institute meetings. *Id. at 296-97*.

[44] As described above, although Plaintiffs claim they "were never given complete access to Committee of Counsel records to determine the existence of additional direct evidence of collusion," Pls.' Resp., at 56 n.30, the court finds otherwise.

Specifically, Plaintiffs allege that in the 1950s the cigarette companies decided to deal cooperatively with the "health crisis," the decline in cigarette consumption purportedly related to the first medical studies linking smoking with disease. *See* Pls.' Resp., at App. C. Plaintiffs contend that the CEOs of American Tobacco, RJR, Philip Morris, Benson & Hedges, and B&W met in New York to discuss the problem. They received advice from a public relations firm that the companies should reach an understanding that no one would seek a competitive advantage on the basis of health issues. Plaintiffs further note that in 1957 when US Tobacco advertised its "King Sano" brand as being "low-tar, **[**145]** " the Chairman of Philip Morris said that such advertising was not consistent with what the industry had been doing. *Id.*

Plaintiffs also cite a 1983 cigarette advertisement run by RJR and Philip Morris in the Netherlands which raised doubts about the tar and nicotine levels represented by B&W for its "Barclay" brand of cigarettes. B&W informed its companies that this was the first time another company had attempted to use health to gain a competitive advantage. Plaintiffs assert that B&W's parent company, the British American Tobacco Company, eventually reached an agreement with Philip Morris not to undertake this kind of advertising in the future. Plaintiffs further contend that the cigarette companies agreed to share the results of biological research and not independently attempt to produce a "safer" cigarette.

These allegations, however, all occur outside the time frame of the conspiracy alleged by Plaintiffs and thus are not probative as to the claims made in Plaintiffs' complaint. To bolster their claims, though, Plaintiffs' expert contends that even if these alleged non-price agreements were no longer in place during the time period relevant in the instant lawsuit, the **[**146]** historic "smoking and health" agreements facilitated price coordination in the relevant period. *See* Fisher Report, PP 130-33. A review of the evidence examined by Dr. Fisher, however, shows that Dr. Fisher either assumed the current existence of such a conspiracy or merely speculated as to the current effects of a past conspiracy. Dr. Fisher first opines that "actions taken to reduce the real or perceived health-based differences between products are important for facilitating coordination on price." *Id., P 133*. But in rendering this opinion, Dr. Fisher assumes such a conspiracy exists and does not relate his opinions to any evidence of a current "smoking and health conspiracy." Furthermore, as the court described above, it is not clear that the possibility that an activity that "facilitates coordination" is sufficient to constitute a "plus factor." Production of evidence to show that something could happen creates no inference that it did happen.

Dr. Fisher then reviews historic allegations of the cigarette industry limiting **[*1311]** health-based marketing, *see id., PP 134-35*, and draws the following conclusions:

> It is entirely ***possible*** that firms' decisions **[**147]** to limit health-based marketing in the past continued to be felt between 1993 and 2000. Such decisions ***may*** have checked companies' incentives to vigorously pursue health-related research. To the extent that health-related innovations were retarded as a result, cigarettes ***would have*** exhibited a higher degree of homogeneity between 1993 and 2000 than they would have otherwise. Similarly, firms limited their health-based advertising in the early to mid 1990s, which ***may have*** served to maintain perceived homogeneity. As explained above, greater homogeneity facilitates coordination on price. Thus ***to the extent*** that firms' decisions resulted in greater homogeneity between 1993 and 2000, it ***would have*** facilitated coordination on price in those years.

Id., P 136 (footnotes omitted and emphasis added). This paragraph addresses only possibilities and certainly does not tend to exclude the possibility that Defendants were engaged in lawful conduct. In order to draw an inference of conspiracy in this testimony, a jury would have to engage in such speculation that its finding would be a "guess or mere possibility." Accordingly, the court **[**148]** finds that Plaintiffs' allegations of a smoking and health conspiracy are insufficient to constitute a "plus factor."

At the conclusion of their smoking and health conspiracy discussion, Plaintiffs remark that they "have had no discovery of Defendants' activities between 1983 and the present, and no discovery of any information relating to 'smoking and health.'" App. C, at 7. The court, however, did permit Plaintiffs to seek discovery on these matters in the relevant time frame. After a hearing, the court addressed the dispute between the parties regarding "non-price" discovery and ordered that Plaintiffs could take discovery on:

> alleged anticompetitive agreements among Defendants during the time period of May 1, 1992 through February 8, 2000 to (1) refrain from competing with regard to the health and safety aspects of their products, (2) refrain from advertising on the basis of health and safety, or (3) restrict research and development activities that might lead to the production of a safer cigarette.

Order, August 22, 2001, at 2. The court also permitted Plaintiffs to serve requests for production and interrogatories and to take nine depositions on "non-price" issues. **[**149]** *Id.* at 2-3. Additionally, the court extended the existing discovery deadlines by sixty (60) days to accommodate Plaintiffs' "non-price" discovery. *Id.* at 3-4. [45]

12. Foreign Conspiracies

Plaintiffs contend that they have "discovered extensive evidence of anticompetitive activity in countries outside the United States, including explicit price-fixing agreements in many countries involving British American Tobacco Co., an affiliate of B&W, and Philip Morris International, an affiliate of Philip Morris U.S.A." Pls.' Resp., at 58. Plaintiffs then allege that "some examples of anticompetitive agreements are identified in Appendix B." *Id.* At Appendix B, Plaintiffs list **[**150]** documents relating to the following countries: (1) Argentina, (2) Canada, (3) Costa Rica, (4) El Salvador, (5) France, (6) Guatemala, (7) Saudi Arabia, Gulf States; (8) Hungary, (9) Panama, and (10) Venezuela. Finally, Plaintiffs avow that the "listing is not intended to be exhaustive, **[*1312]** either in terms of countries involved or of evidence available. Rather, it is intended to demonstrate a pervasive pattern of anticompetitive behavior engaged in by the Defendants or their affiliated companies." App. B., at 1.

Earlier in this litigation, Plaintiffs sought leave from the court to conduct discovery about Defendants' activities in foreign markets. After several hearings, the court instructed that

> Plaintiffs shall be permitted to serve new discovery requests relating to price-fixing episodes in foreign countries, provided that plaintiffs first make the following showing to the Court with respect to each country: (1) plaintiffs must show that under clearly-established statutes of the foreign jurisdiction, or, if the country is a common law jurisdiction, under the common law of the jurisdiction, an agreement between or among competitors to fix prices violated the law of the country **[**151]** where the agreement was made at the time of the alleged unlawful activity in that country; and (2) plaintiffs must identify by direct evidence one or more price fixing episodes in that country during the operative discovery period (May 1992 - January 2000) or that continued into the operative discovery period.

Order, Feb. 13, 2001, at 5-6. Subsequently, Plaintiffs filed a motion seeking discovery of Defendants' activities in Hungary, France, Argentina, Venezuela, and Panama. After full briefing on Plaintiffs' motion seeking discovery and a lengthy analysis of materials, the court concluded that

> price-fixing agreements were not at all times unlawful under the laws of the countries referenced by Plaintiffs. In fact, as the relevant laws are understood by this court, the jurisdictions in question generally analyzed price-fixing agreements under a "rule of reason" approach that considered various factors in determining whether such agreements were illegal. For the finder of fact to draw the inferences permissible under *Rule 404(b)* with regard to these jurisdictions, the court would need to conduct mini-trials on Defendants' conduct in each of the countries at issue. Such **[**152]** a course of action would violate Rule 403 by causing unfair prejudice to Defendants, confusing the issues, and resulting in undue delay of this litigation.

Order, June 15, 2001, at 8. Accordingly, the court denied Plaintiffs' motion to conduct foreign discovery.

Now, at the summary judgment stage, Plaintiffs reassert that they have "extensive evidence of anticompetitive activity" by Defendants in Hungary, France, Argentina, Venezuela, and Panama. *See also* Plaintiffs' Post-Hearing Submission in Opposition to Defendants' Motions for Summary Judgment, at 12 n.22. Plaintiffs fail, however, to address the court's previous ruling that "price-fixing agreements were not at all times unlawful under the laws" of these countries. Furthermore, Plaintiffs baldly contend that Defendants, or their affiliates, undertook anticompetitive

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[45] In fact, Defendants did respond to discovery requests made by Plaintiffs on the smoking and health issues. Plaintiffs deposed two witnesses from RJR. Although the depositions of witnesses from Philip Morris and B&W were noticed by Plaintiffs, Plaintiffs cancelled those depositions. *See* Philip Morris Reply Brief, at 26 n.25.

price fixing agreements in Canada, Costa Rica, El Salvador, Guatemala, and Saudi Arabia (Gulf States). Nowhere do Plaintiffs describe the legal landscape in these countries that would make any such activities unlawful, nor do Plaintiffs do any more than cite to documents in describing the nature of these alleged anticompetitive activities. This is simply **[**153]** too thin a reed upon which to allege that Defendants' "foreign conspiracies" are a "plus factor" in the instant litigation. [46]

[154]** Perhaps recognizing the court's previous holding that Plaintiffs had **[*1313]** not presented evidence sufficient to warrant further discovery, Plaintiffs also assert that this evidence is probative of motive, opportunity, or intent under *Federal Rule of Evidence 404(b)*. However, as the court previously explained in its order on Plaintiffs' motion for leave to conduct foreign discovery, ***HN45***[] *Rule 404(b)* allows jury inferences only where the compared conduct is closely analogous to the conduct at issue in the instant suit. *See, e.g., United States v. Crockett, 514 F.2d 64, 72 (5th Cir. 1975)* ("important consideration" in balancing probative value of extrinsic evidence against prejudicial effects is "whether the other acts are closely connected in time and nature to the offense charged"). Here, Plaintiffs' very brief comments on the alleged anticompetitive acts in foreign markets fall far short of such a showing. Accordingly, the court finds that Plaintiffs have presented no admissible evidence from which a jury could infer that Defendants operated unlawful conspiracies in foreign markets. Thus, Plaintiffs cannot show that "conspiracies in foreign markets" is a "plus factor."

[**155] C. Summary of Plaintiffs' Evidence

1. Nature of Agreement

Plaintiffs have proffered little on their theory of the nature of Defendants' agreement in violation of *Section 1* of the Sherman Act. Plaintiffs allege a rather complex conspiracy, contending that Defendants agreed on "(1) reduction of price tiers to only two: premium and discount; (2) maintenance of the 'price gap' at an absolute constant, which would result in a diminishing percentage gap between premium and discount as prices were raised; (3) limitation of discounting and promotions on non-premium cigarettes; (4) moderate increases of all prices; (5) recognition of PM's price leadership; (6) participation in programs to share and monitor volume, price, and discount information; (7) output restrictions; and (8) ceding some market share to PM." Pls.' Resp., at 13. [47] **[**156]** Yet, Plaintiffs offer little as to their thoughts of how the conspiracy operated. [48]

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[46] Plaintiffs also contend that Dr. Fisher addresses the significance of these activities in his reports, finding that "multi-market contact facilitates a conspiracy in the United States because it decreases the likelihood that competitors will, for example, violate the agreement in the United States for fear of endangering anticompetitive agreements in other countries." Pls.' Resp., at 58. The court, however, has determined that Plaintiffs' allegations of foreign market conspiracies are not probative of collusion as a matter of law. The testimony of Plaintiffs' expert does not alter that conclusion. *See Blomkest, 203 F.3d at 1038* (finding expert's opinion was "not probative of collusion" and holding that ***HN44***[] under *Federal Rule of Evidence 703*, there must be "sufficient facts already in evidence or disclosed by the witness as a result of his or her investigation to take such expert testimony out of the realm of guesswork and speculation").

[47] Plaintiffs cite two B&W documents to support their description of an eight-part conspiracy. Neither document describes any such agreement. *See* B&W462219869-999 (B&W Five Year Plan 1992-1997); B&W970394991-4996 (unidentified handwritten notes).

[48] For the first time, in their Post-Hearing Submission in Opposition to Defendants' Motions for Summary Judgment, Plaintiffs give the court some indication of their speculation as to how such an agreement might have operated. Plaintiffs assert "although presumably there was no agreement at the outset that specific companies (like B&W) would reduce their shares of the market in specific amounts, the necessary consequence of the agreement was that some would lose and others would gain share." *Id.* at 10. "B&W did not necessarily agree in advance to the reduction [in market share] it experienced; however when faced with its pre-conspiracy losses, it acquiesced to a loss (one that would not be inconsistent with its prior loss trend) in exchange for larger per-pack profits resulting from the conspiracy." *Id.* at 10 n.20. This new theory, however, is clearly inconsistent with Plaintiffs' speculation at oral argument where they alleged that B&W agreed to the conspiracy so that it would not be driven out of the

[157] [*1314]** Dr. Fisher offers no theories as to the manner in which this particular alleged agreement could have been implemented over the course of seven years but rather focuses on the "plus factors." The gravamen of Dr. Fisher's opinion relates to how certain practices in the cigarette industry would have facilitated an agreement. Dr. Fisher's opinion does not tend to exclude the possibility that Defendants were engaged in lawful competitive conduct.

Plaintiffs' overarching theory that Philip Morris designed and encouraged the conspiracy cannot stand up to scrutiny. Plaintiffs contend "Marlboro Friday raised the threat of a potentially ruinous price war that could have driven *some* defendants from the market. PM extended an alternative: cooperate through a new joint pricing regime in order to collectively recover from the desperate situation created through a decade of price competition." Post-Hearing Submission in Opposition to Defendants' Motions for Summary Judgment, at 10-11 (emphasis added). After Marlboro Friday, however, there was no incentive for Philip Morris to organize a cartel. Philip Morris achieved what it wanted in Marlboro Friday -- reducing the price gap between premium **[**158]** and discount cigarettes and protecting the Marlboro brand. *See* Corporate Affairs Speech by Larry Wexler, PMAT000066439-63 (discussing that the primary lesson of Marlboro Friday was managing the price gap). Philip Morris was not one of the defendants who could be driven from the marketplace by a "potentially ruinous price war." Philip Morris reacted to the allegedly "desperate" situation of price competition with its Marlboro Friday strategy. There was no reason for it to "extend an alternative" to the other companies after Marlboro Friday, particularly if, as Plaintiffs allege, B&W and RJR were facing elimination from the cigarette industry.

Plaintiffs repeatedly contend that Philip Morris described the industry as being in a "cycle of despair." Pls.' Resp., at 9; Oral Argument, at 64-65, citing PMAT000066439-63, at 444-46, Corporate Affairs Speech given by Larry Wexler, November 7, 1995. A review of this document, however, clearly shows that this "cycle of despair" was Philip Morris' opinion of the growth of the discounting segment. Philip Morris believed that discounting was not economically viable because it was paid for by increasing costs of premium cigarettes. B&W and RJR, **[**159]** who had been gaining share through discount cigarettes, did not share Philip Morris' opinion on these matters. As such, there was no industry-wide "cycle of despair" behind which Philip Morris could "rally the troops" to form a cartel. Philip Morris unilaterally dealt with this "cycle of despair" through its actions on Marlboro Friday. *See* PMAT000066444 ("We concluded that Philip Morris U.S.A. had to act decisively in response to the Discount challenge and break the 'Cycle of Despair.'"). Philip Morris' actions on Marlboro Friday, as Plaintiffs concede, were entirely procompetitive. Plaintiffs' repeated citation to a "cycle of despair" does not change that undisputed fact.

What Plaintiffs fail to recognize, again, is that Marlboro Friday changed what could be "expected" in the cigarette industry. Philip Morris showed that it was willing to sustain substantial losses in order **[*1315]** to protect its premium brand, Marlboro, and stem the flow of market share to the generic brands. It was Philip Morris' act which brought the market back into the "stability" Plaintiffs allege was a result of collusion. This act, however, as Plaintiffs admit, was highly competitive. Thus, it is difficult to **[**160]** fashion an explanation for how a competitive act shows evidence of a conspiracy.

The utter lack of any evidence, circumstantial or otherwise, that Lorillard joined in the alleged conspiracy also casts doubt upon Plaintiffs' theory. In fact, Plaintiffs' expert recognized that not enough attention had been paid to Lorillard:

> Q: Since Lorillard made no public announcements that you are aware of, was engaged in no actual collusive discussions of which you are aware, had legitimate reasons for gathering the monitoring information that it did, was not engaged in the foreign markets, and had initiated its own permanent allocation program during a period of more intense price competition in March 1990, what evidence, sir, do you have that Lorillard engaged in conduct that had the effect of suppressing prices at wholesale from 1993 to 2000?
> MR. REINHARDT: Objection as to form.
> A: It's a fair question, and I certainly perceive that I haven't concentrated sufficiently on Lorillard.

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marketplace by Philip Morris' actions on Marlboro Friday. *See* Oral Argument, at 88. Moreover, this argument is inconsistent with the facts. B&W's market share was not trending down in the years leading up to the conspiracy and thus B&W had no "pre-conspiracy losses" to contend with or give it reason to join a conspiracy. *See* Annual Shares of U.S. Tobacco Shipments by Manufacturer, 1980-2000, Plaintiffs' Exhibits Presented at Oral Argument, at 15.

> It went along with price increases, but I understand the proposition that says that that may be just oligopolistic rationality, even if the others, by the way, even if the others have fixed it to make that **[**161]** coordination more easy. I am going to have to think about that.

Fisher Depo., at 471-72.

At oral argument, Plaintiffs contended that Lorillard's participation in the monitoring programs of MSA/Pittsburgh is sufficient to connect it with the alleged conspiracy. *See* Oral Argument, at 96-97. The parties dispute the level of evidence necessary to connect Lorillard with the conspiracy with Plaintiffs contending that they need only "slight evidence." *See* Pls.' Resp., at 76-77 n.36 (citing *United States v. Wilkinson, 754 F.2d 1427, 1436 (2d Cir. 1974)*. [49] Regardless of the specific amount of evidence Plaintiffs would need to adduce to sufficiently connect Lorillard, individually, to the conspiracy, the fact that Plaintiffs contend the four Defendants gathered together to form an agreement to fix prices and yet have proffered relatively no evidence about Lorillard's participation in the conspiracy diminishes the force of Plaintiffs' argument with respect to all four Defendants.

[162]** At oral argument, Plaintiffs put a new spin on their theories, using the Supreme Court's opinion in *Brooke Group* to assert what they contend is how the cigarette industry "should have" looked from 1993 to 2000, if it were competitive. A complete reading of Plaintiffs' argument, however, essentially boils down to an assertion that there must have been collusion in the cigarette industry because the price war that existed in the early 1990s ended sometime in 1994. *See* Oral Argument, at 59-69. In fact, Plaintiffs' counsel argued **[*1316]** that their basis for collusion was that after Marlboro Friday, the cigarette industry returned from a "competitive industry" to "a market that behaved like a traditional normal oligopoly." *See* *id. at 69*. Plaintiffs' counsel also argued:

> What we have here is a change in a course of dealing over a decade where you went from a market which was characterized by relative price competition and a widening gap between premium brands and discount brands to a period marked again in the words of their expert by the dropping of a sledgehammer, which produced stability in prices and price coordination.

Id. at 59. *See also* *id. at 73-74* ("It's **[**163]** that course of conduct and dealing where we change a nonparallel pricing oligopoly into a parallel pricing oligopoly . . . ."). There is, however, nothing illegal about a "traditional normal oligopoly."

All of the acts of which Plaintiffs complain can be equally explained by Philip Morris exercising its market power as by a collusive agreement among Defendants. The fact that Philip Morris exercised its market power by using its nearly 50% share of the market is not enough to infer that Philip Morris and the remaining Defendants entered into an agreement to fix prices. Moreover, the nature of an oligopoly teaches that when there is a strong market leader, that leader will be the price leader and other market players will often raise prices along with the market leader in order to increase their profit. *See supra*. Again, this is simply an economic description of the interdependent activities in an oligopolistic market and not illustrative of an agreement among competitors. Furthermore, a desire to end a price war is not evidence of collusion. *See* *In re Citric Acid, 191 F.3d at 1101* (accepting as explanation for defendant's decision not to expand capacity that "it **[**164]** was concerned that an excessively rapid expansion in citric acid supply would undermine prices and wanted to avoid precipitating a costly price war as it had done when it first entered the citric acid market (incurring substantial losses as a result)"). Defendants knew the cost of the price war that culminated in Marlboro Friday. No agreement was necessary for all firms to understand that the losses incurred in a price war were not a desirable result for any of the companies.

Plaintiffs then seem to contend that the raising of prices itself is indicative of collusion. *See* Oral Argument, at 67-68 ("And the question then becomes at the level of Marlboro Friday where all of the companies were at that time, were they able to increase prices in parallel fashion over that period of time?"). Plaintiffs contend that in a period of

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[49] ***HN46***[] The "slight evidence" rule, however, is not favored in the Eleventh Circuit. *See* *United States v. Toler, 144 F.3d 1423, 1427 (11th Cir. 1998)* (explaining that "slight evidence" rule was "banished" from circuit jurisprudence). Furthermore, it is not clear that the "slight evidence" rule would apply in a civil conspiracy case on summary judgment. *See* *In re Citric Acid, 996 F. Supp. 951, 955 (N.D. Cal. 1998)* (holding "slight evidence" rule may apply in criminal matters but cannot in civil cases because its standard would conflict with standard for summary judgment), *aff'd,* *In re Citric Acid, 191 F.3d 1090 (9th Cir. 1999)*.

excess capacity and declining demand, Defendants should not have been able to raise prices. As noted in *Brooke Group*, however, prices rose during the competitive period of 1980 through 1993 which was also a period marked by excess capacity and declining demand. *See* Brooke Group, 509 U.S. at 213-15, 238. Furthermore, as discussed below, the **[**165]** evidence shows that from 1993 to 2000 Defendants raised prices at a lower rate of increase than from 1980 to 1993. *See also* id. at 237 ***HN47***[] ("rising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing."); Harcros, 158 F.3d at 572-73 ("Oligopolists behaving in a legal, consciously parallel fashion could achieve high and rising prices, even as costs remained stable, by engaging in price leadership.") (citing Areeda, P 1429, at 176).

Finally, Plaintiffs also attempt to show that the cigarette industry between 1993 **[*1317]** and 2000 was the "anti-*Brooke Group*" and therefore must have been the result of collusion. In *Brooke Group*, Liggett alleged that B&W provided volume rebates to wholesalers that amounted to price discrimination as part of a predatory pricing scheme. In the course of its analysis, the Court considered whether pricing increases took place in light of declining demand and excess capacity, the level of retail competition and the number of price tiers in the **[**166]** market, as well as whether "signaling" was used. The Court held that no reasonable jury could conclude that violations had occurred. Plaintiffs contend that because the factors that the court did *not* find in *Brooke Group* were present in the industry from 1993 to 2000, there must have been a conspiracy.

Contrary to Plaintiffs' assertions, the *Brooke Group* world does not look so different from the 1993 to 2000 cigarette market. There was "lockstep" increase in pricing in the "competitive" *Brooke Group* market. *See* Brooke Group, 509 U.S. at 218 ("after Liggett's June 1985 increase, list prices on generics did not change again until the summer of 1986, when a pattern of twice yearly increases in tandem with the full-priced branded cigarettes was established."); at 235 ("list prices on both generic and branded cigarettes increased twice a year by similar amounts"). The cigarette market during both periods faced declining demand and excess capacity. *See* id., at 238. Similarly, in describing the number of tiers in the cigarette market, the Court discussed the difficulty of coordination of a conspiracy where the "net price in the market was **[**167]** determined not only by list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers." Id. at 239. This intense retail competition exists in the cigarette market today, just as it did in *Brooke Group*. The *Brooke Group* Court also rejected the plaintiffs' allegations of signaling. *See* id., at 240-41.

2. Plus Factors and Facilitating Practices

HN48[] All plus factors" are not created equal. A "plus factor" must "tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism." Harcros, 158 F.3d at 572. As the court demonstrated above, the "plus factors" asserted by Plaintiffs do not meet this test. Only four of the "plus factors" proffered by Plaintiffs warranted any particular analysis by the court. Even after such analysis, the court remains unconvinced that Plaintiffs have proffered admissible evidence or evidence from which a jury could make a reasonable inference that tends to exclude the possibility that Defendants were engaged in lawful conscious parallelism. Plaintiffs' bold assertions were often unsupported in the record or belied **[**168]** by their own cited evidence. Defendants proffered much contemporaneous documentation to support their contention that strategic decisions were taken for independent reasons.

The court, of course, is mindful that it cannot view each of Plaintiffs' proffered "plus factors" in isolation, but rather must view the evidence in its entirety. Even applying that standard, however, the court remains unconvinced that Plaintiffs have offered "plus factors" sufficient to exclude the possibility that Defendants were engaged in lawful conscious parallelism. In *Todorov*, the Eleventh Circuit determined that ***HN49***[] even if a plaintiff could demonstrate a "plus factor," that only creates a rebuttable presumption of a conspiracy that a defendant could defeat with his own evidence. 921 F.2d at 1456 n.30. *See also* In re Baby Food, 166 F.3d at 122. Assuming, then, that Plaintiffs could establish at least one "plus factor," the court turns to Defendants' **[*1318]** evidence to consider whether a presumption of conspiracy could be rebutted.

IV. REBUTTAL

A. Uncertainty in the Market

Rather than supporting an inference of conspiracy, documents cited by both Plaintiffs and **[**169]** Defendants demonstrate that each of the Defendants was uncertain as to what would happen in the cigarette industry during the time of the alleged conspiracy. In an October 1993 memo from Geoffrey Bible to William Campbell, Mr. Bible discusses different marketing strategies for Philip Morris' brands. After reviewing the possibilities, Mr. Bible notes that "these are simply guesses, but I'm using them as a starting point." PMAT000144683. "My guess is that the industry is already running below our expectations and that a price increase plus excise tax will accelerate that decline. Can we handle a sales force of the size we have today, can we fund three plants, ought we move more production offshore where we already have fixed investments and overhead would not increase so much?" *Id.* "Normally, I would think Marlboro would recover 6 to 12 months after the excise tax increase as it has elsewhere in the world. But, I fear that smokers here have become accustomed to cheaper brands (a 40% segment) . . . ." *Id.* These are not the statements of corporate executives engaged in a price-fixing scheme.

Similarly, a November 3, 1993 pricing recommendation memo prepared for William Campbell **[**170]** reflects substantial uncertainty in the market. *See* 2045121128-29. In recommending a price increase, the memo analyzed the risks of a price increase. *See id.* (noting possibility that a competitor could exceed Philip Morris' price increase; could announce a price increase in advance of Philip Morris'; could fail to raise prices at the low end of the market; or could initiate a mid-year price increase).

Philip Morris' Five Year plan (1996-2000) also focused on market instability. In describing the "assumptions" upon which the plan was designed, the company notes that "two risks to the Plan are excise tax increases and general market unpredictability -- primarily due to the competitive positions of B&W and RJR, and their role within their respective corporations." PMAT500103293. "With regard to unpredictability, a number of situations could cause the marketplace to become more challenging. Competitors could react to share losses with large Discount initiatives, or manufacturers could raise prices beyond the pace at which consumers have the willingness to pay." *Id.*

RJR's 1994-1998 Strategic Plan reflects similar anxiety. *See* 51953 4163 ("Given the high degree of pricing **[**171]** uncertainty due to the potential impact of PM's initiatives on manufacturers' net prices . . ."). The document also noted a "high degree of price, volume and mix uncertainty." *Id.* at 4164. This uncertainty remained through the time of the alleged conspiracy. *See* 1996-1998 Strategic Assessment, dated June 1995, 51952 6068-6085, at 6077 ("market disruption due to pricing actions remains huge concern"); at 6080 ("'Price Wars' continue to be looming threat as players guard and/or develop market positions").

Negotiations leading to the Master Settlement Agreement injected even more uncertainty into the market. B&W noted that it could not determine whether industry volume would decline slowly or drop sharply. *See* Plan Discussion Points, BW461105009. The company also stated:

> Whatever our view of industry and B&W volume, our profit outlook will be determined largely by industry pricing. **[*1319]** This can manifest itself in two ways, and both are important. The first is the level of manufacturer's list price increases we obtain. As you might expect, there are (at least) two different views on this issue and most people subscribe strongly to both of them, depending upon the day or **[**172]** hour. One view is that the higher base price level mandated by the settlement or [Federal Excise Tax] will provide an umbrella for higher manufacturer's price increases. The other is that lower industry volume, excess capacity, and the intensely competitive nature of the manufacturers will result in a "price war" that will last until fewer companies are left standing than exist today. The latter view has the benefit of representing a more classical economics viewpoint but appears irrational. The former view, on the other hand, appears a bit starry-eyed. Along with industry volume, it is this issue on which the future rests.

Id. at 5009-5010 (noting also "the interesting possibility of big VFM brands that one day in the future will stop growing due to their inability to attract price switchers as there will be relatively few consumers who find the level of savings to be meaningful. While there is some intuitive appeal to this viewpoint, no one can predict where or when such a turning point may occur"). If B&W were a party to a price-fixing scheme, there would be no need to speculate about various theories in the nature of future pricing in the industry. Thus, viewing the **[**173]** totality of evidence before the court, these documents are inconsistent with even the existence of a tacit agreement among Defendants.

B. Conscious Parallelism v. Cartel Behavior

Significantly, in their presentation of evidence, Plaintiffs have not distinguished conscious parallelism from cartel behavior. Their most significant allegation is of parallel pricing, a factor that alone is insufficient to raise an inference of conspiracy. Plaintiffs argue that "the importance of the pricing itself cannot be overstated" because "Defendants took *identical* price increases at *all price levels* within days or hours." Pls.' Resp., at 76 (emphasis in original). Plaintiffs contend that the "similarity and timing of the price increases themselves" allow Plaintiffs to raise a legitimate inference that there was an agreement among Defendants. *Id.* The law is clear, however, that ***HN50***[] parallel pricing is not sufficient to establish a price-fixing scheme in an oligopoly. [50]

[174]** This requirement is based on economic truths. "Competing firms may be able to achieve cartel-like results for themselves merely by observing each other's behavior in the market place." Areeda, P 1410b, at 65. In an oligopoly, each "firm's pricing decision is *interdependent* with that of its rivals: each knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of his initial choice." *Id.* (emphasis in original); *see also id.*, P 1429a, at 175. "Interdependent decision-making can produce the same unhappy results as a cartel." *Id.*, P 1429b, at 175. "Oligopolists seem readier to 'compete' in sales promotion or product variation than in price." *Id.*, P 1429c, at 177.

"Oligopolists have no choice but to set a price somehow, and it is hard to see how they can be mandated to ignore their rivals' **[*1320]** prices." *Id.*, P 1420, at 123. "Those buying and selling in a concentrated market are forced by circumstance to observe the pricing practices of their competitors. Each wishes to maximize its profits and does so by anticipating the reactions of competitors to its own decisions. The courts cannot create and administer **[**175]** relief that compels the defendants to ignore the actual and prospective market behavior of their rivals." *Id.*, P 1426d, at 280 (Supp. 2001). ***HN51***[] "An oligopolist raising his price with knowledge that he will have to retract it if significant rivals do not follow is, in a sense, inviting his rivals to follow. Following the leader is a conscious acceptance of that 'invitation' to the end that market prices will be higher than before. . . . Nevertheless, tacit price coordination through recognized interdependence was not deemed to be an agreement under *§ 1*." *Id.*, P 1436, at 241.

The case law similarly recognizes that "conscious parallelism" alone cannot support an inference of agreement. Conscious parallelism is

> the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm's market share, but that simple price leadership in such a market can readily increase all competitors' revenues.

Harcros, 158 F.3d at 570. The court further noted that "consciously parallel behavior by oligopolists does not in itself support an inference of agreement, **[**176]** of 'a meeting of the minds,' any more strongly than it supports an inference of legal price maintenance or leadership." *Id. at 571*. *See also* *Brooke Group, 509 U.S. at 227* (conscious parallelism is "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared

[50] Plaintiffs cite *American Tobacco Co. v. United States, 147 F.2d 93, 114 (6th Cir. 1944)*, for this proposition, but the procedural posture of that case was reviewing the guilty verdict rendered by the jury, and thus, the court viewed all possible inferences in favor of the jury's verdict. *Id. at 101*.

economic interests and their interdependence with respect to price and output decisions."); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988)* ("A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-then-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry."). Furthermore, when one firm is substantially larger than the others in an oligopoly, its pricing policies will have more influence on the market. **[**177]** *See* *In re Baby Food, 166 F.3d at 128* ("Because Gerber controlled 70% of the market in baby foods and was the acknowledged leader in this industry, Gerber's pricing understandably may have had an influence on its competitors' pricing."). Therefore, it is particularly important to distinguish between parallel pricing and collusive activity in the cigarette industry because there is one firm that carries nearly 50% of the market. *See* Facts, PP 58-59 (Philip Morris' market share between 42.2% and 49.6% during period of alleged conspiracy).

Plaintiffs' expert does not defer to the legal distinction between conscious parallelism and cartel behavior. Dr. Fisher testified that "facilitating practices" could refer to something that different companies "explicitly agreed to do" or "it can also refer to things that firms agree to do without reaching an explicit agreement." Fisher Depo., at 265. He further testified that certain practices could be facilitating, but would be acts the firm would take regardless because they were in the economic self-interest of the firm. *Id. at 271*. Thus, Dr. Fisher cannot state **[*1321]** that what he labels a "facilitating practice" would distinguish **[**178]** between conscious parallelism and cartel behavior.

Dr. Fisher's testimony illustrates the breadth of his terminology and the fact he recognizes that what he labels "facilitating practices" might not be unlawful conduct:

> Q: . . .
> I understand that you have expressed the opinion that there are certain practices you call facilitating practices here, correct?
> A: Yes.
> Q: And within your definition of anticompetitive acts, you believe that these practices are anticompetitive acts, correct?
> A: Yes.
> Q: Based on your understanding of the law, that doesn't make them illegal necessarily, correct?
> A: Yes.
> MR. REINHARDT: I object as calling for a legal conclusion.
> Q: But as you define anticompetitive practices which includes anything that can only be explained by a desire to obtain supercompetitive profits, these are anticompetitive acts, correct?
> A: Yes.
> Q: And you concede that your definition of anticompetitive acts includes what you term as purely conscious parallelism?
> A: Yes.
>
> Q: So that your definition of anticompetitive act does not distinguish for us those actions that are purely conscious parallelism from those that are beyond purely conscious parallelism, correct? **[**179]**
> A: That's true.

Id. at 305-06. Dr. Fisher then expresses his opinion that "there are real problems with rules against conscious parallelism. They are unintended consequences and you can't prevent it, but that doesn't mean there are unintended consequences and you can't prevent facilitating -- certain kinds of facilitating actions designed to protect conscious parallelism." *Id. at 307*. The failure of Plaintiffs' expert to distinguish conscious parallelism from cartel behavior makes his subsequent opinion inadmissible as he finds inferences of collusion where the law finds none. Dr. Fisher is positing a new theory where certain aspects of conscious parallelism should be found to be anticompetitive. This is not the state of the law. This meshing of two terms is particularly troubling when the hallmark of a "plus factor" under the law is that it tends to exclude the possibility that the defendant was engaged in mere conscious parallelism.

Defendants also point out that the findings of Plaintiffs' expert at one point was inconclusive on the specific issue of whether Defendants engaged in collusive behavior. [51] Dr. Fisher stated: "The actions of the leading cigarette firms **[**180]** have gone beyond the bounds of simple conscious parallelism or independent economic self-interest. The industry's actions exhibit, at the very least, practices that facilitate tacit price coordination and may even embrace explicit price coordination." Fisher Report, P 145; *see also* Fisher Rebuttal Report, P 5 ("I assert that defendants engaged in a pattern of conduct that is, in most instances, consistent with loose, imperfect **[*1322]** coordination."). At oral argument, Plaintiffs' counsel asserted that Dr. Fisher was a bit more decisive in his "addendum" affidavit. There, Dr. Fisher stated:

> I characterize the behavior that I have observed in the cigarette industry during the relevant period as a "collusive oligopoly" or a "loose cartel." I believe that the cigarette companies have engaged in activities beyond mere conscious parallelism, and indeed have participated in various facilitating practices that are anticompetitive in purpose and effect.

Fisher Addendum, P 5. Because of his flawed view of the law, this testimony is inadmissible. As the court has discussed above, "facilitating practices" may not rise to the level of what the law requires in "plus factors" -- actions **[**181]** that tend to exclude the possibility of lawful action. Dr. Fisher's testimony does not explain how these "facilitating practices" exclude the possibility of lawful action. Moreover, as the court previously explained, Dr. Fisher's allegations of "anticompetitive" conduct are broad and could be read to include lawful activity. [52]

[182]** Defendants correctly note that Dr. Fisher's "addendum" was filed out of time. Dr. Fisher's "addendum" is dated February 7, 2002, and there is no certificate of service in the record to clarify when the document was served on Defendants. In an order dated September 5, 2001, based on the parties' agreement and proposed consent order, the court ordered that Plaintiffs' reply expert reports are due on January 28, 2002, and all expert discovery is to close on that date. *See* September 5, 2001, Order, at 2. For this reason, too, Dr. Fisher's addendum is rejected.

C. Practical Economic Sense of Alleged Conspiracy

Defendants contend that Plaintiffs' theory does not make practical sense, *see* *Matsushita, 475 U.S. at 597*, because during the alleged conspiracy Defendants "(1) took price increases at a slower pace and in smaller amounts than before the conspiracy, (2) spent billions of dollars competing with each other on price and other dimensions at retail; and (3) . . . experienced substantial market share shifts, with some defendants gaining at the expense of the other alleged conspirators." PM, Opening Brief, at 25.

1. Prices After Marlboro Friday

Defendants **[**183]** contend that allegations of a conspiracy from 1993 to 2000 do not make economic sense because prices rose less rapidly after Marlboro Friday than before. For the two years preceding Marlboro Friday, Defendants' wholesale list prices for premium cigarettes increased on average $ 7.80 per thousand per year. Fisher Report, Ex. 3, at 1; Facts, P 27. For the four years following Marlboro Friday, Defendants' wholesale list prices for premium cigarettes increased on average $ 2.00 per thousand per year. Fisher Report, Ex. 3, at 1-4; Facts, P 28. The wholesale list prices of premium brands did not exceed pre-Marlboro Friday levels until the price increases of

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[51] When asked at his deposition whether he could "identify any prior price fixing case in which [he has] not given a definitive opinion one way or another as to the presence of actual collusion or an explicit agreement," Dr. Fisher could only name one other case. Fisher Depo., at 410-11.

[52] The assertions of Dr. Fisher's opinion alone are not sufficient to withstand a motion for summary judgment. *See* *In re Citric Acid, 191 F.3d at 1105 n.9* (rejecting plaintiff's claim that the reports of its expert economist "mandate the denial of [defendant's] summary judgment motion" and finding that the court considered the evidence discussed by the expert and determined that "no piece of evidence tends to exclude the possibility that [defendant] acted independently and is not affected by the conclusory statements in the expert report to the contrary") (citing *Brooke Group, 509 U.S. at 242*).

August 3, 1998, nearly five years after the alleged conspiracy began. Elzinga Report, Ex. 7; Facts, P 29. When adjusted for inflation, settlement **[*1323]** costs, and federal excise taxes, the wholesale list price for premium brands did not exceed the pre-Marlboro Friday levels until August 1999. Facts, P 34. *See also* Fisher Depo., at 96-115 (testifying there were more price increases before Marlboro Friday than after; pre-Marlboro Friday price increases were larger than the price increases from 1993 to 1998). Defendants assert that "if one **[**184]** simply projected manufacturer list prices from the pre-cartel period forward, making appropriate adjustment for MSA costs, the projected list prices would be *higher* than the list prices for Marlboro actually were during the alleged cartel period." Elzinga Report, at 38, Exhs. 7 and 8 (emphasis in original).

Plaintiffs respond that this is a "strawman" argument because prices were drastically reduced on Marlboro Friday. During the conspiracy, Plaintiffs contend, prices rose monotonically through February 2000. Plaintiffs, however, offer no econometric testimony specifically as to what prices should have been without a conspiracy. Thus, Defendants have proffered unrefuted expert testimony that projecting from the pre-cartel prices forward, one would have expected prices to be higher than they were during the alleged cartel period.

During oral arguments on the parties' motions for summary judgment, Plaintiffs also argued that Defendants' comparisons are inappropriate because the prices of cigarettes prior to Marlboro Friday were "supracompetitive," that is, they were higher than the market would continue to support, and thus, it is no surprise that prices had to drop. *See* Oral **[**185]** Argument, at 65. Defendants respond that the Supreme Court has rejected this argument in two forms. First, Defendants argue that Plaintiffs' assertion is akin to an argument that Defendants agreed to lower prices on Marlboro Friday so that they could raise them again during the conspiracy to recoup income lost as a result of the drastic price-cutting on Marlboro Friday. In *Matsushita*, Defendants aver, the Court declined to infer existence of an alleged predatory price conspiracy that would depend on the defendants' ability to recoup 15 years of artificially-depressed prices. *See* 475 U.S. at 595-97. Second, Defendants argue in *Brooke Group*, the Supreme Court specifically held that ***HN52***[] ***antitrust law*** should not "punish" competitive acts of reducing prices:

> Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce **[**186]** or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

See 509 U.S. at 223-24. This analysis is significant in its similarity to what Philip Morris achieved unilaterally with Marlboro Friday.

Even accepting Plaintiffs' argument that Marlboro Friday is an improper comparison point, Defendants have demonstrated that prices rose at a lesser rate during the alleged conspiracy period than during the period from 1988 to 1993, which Plaintiffs contend is a period of competitive pricing in the cigarette industry. *See* DeMario Ex. C1. Developing a trend line from the reduced Marlboro Friday prices from November 1993 through February 2000, one would expect a Marlboro list price of **[*1324]** $ 53.26 per thousand, which exceeds the $ 49.56 actual price. *See* Marlboro List Prices Adjusted for Federal Excise Taxes, Inflation and Ongoing Resolution Costs -- Linear Pricing Trends, Philip Morris Argument Binder Oral Argument on Motions for Summary Judgment, Tab 42. If the prices after Marlboro Friday **[**187]** had been increased at the same percentage rate during the alleged conspiracy as before the alleged conspiracy, the Marlboro list price would have been $ 64.35 per thousand. *See id.*, Tab 43.

Dr. Fisher also testified that he would have expected prices to rise after Marlboro Friday.

> A: After '93, there were various events affecting the cigarette industry. There were changes in taxes and there were settlement costs from the various health cases. Each of those -- as I recall, every one of those, but at least the ones I remember, had the property that they raised the marginal cost of cigarette, of the cigarette business.
>
> As a general rule, one would expect that when that happened, it would be in the individual self-interest of each company to raise its price. Whether it was in their individual self-interest to raise their price to the extent they

> did and to follow exactly other people's price, that is a different question. But the prices would go up, that is a natural outcome of what was going on. That's the first part of it.
>
> Q: Are you saying that you are sure prices would have gone up, but you are not sure they would have gone up or should have gone up as much as they did? **[**188]** Is that what you are saying?
> A: By the amount they did in the exact timing they did or for the same extent for everybody.
> Q: Have you attempted to estimate how much you think prices would have gone up in an industry with a structure of the cigarette industry without price coordination?
> . . .
> A: . . . The answer to that is partly yes and partly no. . . . The answer to that is mostly no in the sense that I have not made an econometric study or empirical investigation of how much. On the other hand, I have given some thought to what are the factors that one would have to know about.

Fisher Depo., at 52-54; at 109 (testifying only that prices for premium cigarettes "probably" would have increased less after Marlboro Friday in absence of price coordination). Neither Dr. Fisher, nor any other expert, however, made findings as to what they thought cigarette prices "should have" been absent a conspiracy. *See also* Reserve Supply, 971 F.2d at 52 (rejecting plaintiff's claim that defendants gained supracompetitive profits where plaintiff offered "no evidence, such as studies on the comparative costs of production or on market conditions, to indicate that these profits **[**189]** were above those available in a competitive market"). In sum, Defendants argue that if there had been a conspiracy, prices should have risen at a faster rate than during a competitive period. Defendants have demonstrated that they rose at a slower rate which contradicts a theory of conspiracy.

2. Wholesale v. Retail Prices

Defendants next contend that a theory of conspiracy is illogical because Defendants engaged in substantial competition at the retail level. Dr. Elzinga opines that "cartels are economically plausible only to the extent they influence the prices manufacturers actually 'take home.'" Elzinga **[*1325]** Report, at 21. Dr. Elzinga asserts that the substantial amount of competition at the retail level makes Plaintiffs' cartel theory implausible because (1) it would be "irrational" for the companies to spend this much money on retail competition if prices were fixed, and (2) the value of the cartel would be doubtful when companies like Philip Morris, for example, are permitted "to engage in such extensive price competition designed to draw smokers to the Marlboro brand and away from" the brands of the other companies. *Id.* at 25. There is also legal support for this analysis. **[**190]** In discussing the cigarette industry, the Supreme Court noted there is

> undisputed evidence that . . . list prices were not the actual prices paid by consumers. . . . Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regular means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflects only list prices.

Brooke Group, 509 U.S. at 235-36; *see also* Reserve Supply, 971 F.2d at 53-54 (a system of fixed list prices "would be, to put it mildly, an awkward facilitator of price collusion because the industry practice of providing discounts to individual customers ensured that list price did not reflect the actual transaction price"); In re Baby Food, 166 F.3d at 128 ("In an industry with hundreds of products and a pervasive policy of allowing discounts and promotional allowances to purchasers, allowances that varied even to the same customer if it conducted business in different geographical areas, charts and reports focusing on *list prices* rather than **[**191]** *transactional prices* have little value.") (emphasis in original).

It has been likewise established here that through promotional expenditures, retail transactional prices varied for cigarettes even among brands identically priced at wholesale list. Facts, P 73. From 1993 to 2000, Defendants used promotions that directly reduced the prices paid by consumers at retail. Id., P 62. Retail discounts in the cigarette industry include (1) buydowns, direct reimbursements to retailers for reducing price on promoted brands, [53] (2) "buysomes" where a manufacturer offers a buy-some-get-some-free promotion, or (3) coupons, effectuating price reductions. *Id.*; Elzinga Report, at 21. According to the Federal Trade Commission, the cigarette manufacturers spent the following amounts on promotional allowances, coupons, and retail value added:

Year	**Cigarette Promotional Expenditures**
1994	$ 2.928 billion
1995	$ 3.214 billion
1996	$ 3.460 billion
1997	$ 3.961 billion
1998	$ 5.059 billion
1999	$ 6.634 billion

Facts, P 65. Philip Morris' expenditures on retail promotions, couponing, and its retailer incentive program increased from $ 1.268 billion in 1994 to **[**192]** $ 2.919 billion in 1999. *Id., P 66*. Philip Morris alone spent $ 13.8 billion on retail promotion during the time of the alleged conspiracy from 1994 to 2000. *See* Elzinga Report, at 49. Similarly, RJR's increased from $ 1.24 billion in 1993 to $ 1.81 billion in 1999. Facts, P 68. RJR's retail promotional spending in 1999 was 141.96 % of its operating income. *Id., P 69*. Lorillard's promotional spending increased from approximately $ 205 million in **[*1326]** 1993 to approximately $ 456 million in 1999. *Id., P 71*. In 1993, B&W spent $ 606 million on retail price discounting and promotional spending. By 1998, B&W spent more than $ 1 billion in these areas, almost one-quarter of the company's revenue for that year. *Id., P 70*.

Plaintiffs devote substantial argument to asserting **[**193]** that competition at retail does not mean that Defendants are not fixing prices at wholesale. *See* Pls.' Resp., at 80-85. For example, Plaintiffs argue that Defendants ignore the *per se* rule and cannot contend they should not be liable for the conspiracy because of their retail competition. This misses the mark. Defendants do not assert they should not be held liable because of retail competition, but rather argue that the high level of competition at retail shows that it would not make economic sense for Defendants to fix prices at wholesale while maintaining vigorous competition at retail. [54]

[194]** Plaintiffs contend that (1) because Defendants' profits increased during the conspiracy, it is irrelevant that they were spending money on promotional activities, (2) Defendants' spending at retail was not for competitive purposes, (3) retail price promotions are inferior to wholesale list price changes, and (4) Defendants' assertion that retail promotions are the only way to pass through pricing to consumers is unsupported. [55]

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[53] A "buydown" is a "discount in the form of an allowance offered to a retailer. The allowance is conditioned on the retailer dropping the non-promoted price of cigarettes by at least the amount of the buydown." Elzinga Report, at 6.

[54] Plaintiffs offer no support for their assertion that "the issue of whether the existence and level of retail competition impacts the determination of liability for price-fixing at the wholesale level is one for the finder of fact." Pls.' Resp., at 84. Rather, Defendants are permitted to rebut Plaintiffs' contentions with evidence of their own. *See* *Todorov, 921 F.2d at 1456 n.30*.

Nor does the court find relevant Plaintiffs' citation to a document purporting to discuss strategy between Philip Morris International and BAT in Chile. As the court described above, Plaintiffs have not established the necessary predicate for the court to consider this document, even under *Rule 404(b)*.

[55] The court has addressed above the issue of whether wholesalers will tend to increase the price of all manufacturers' brands when one announces a price increase.

Dr. Fisher testified that in the three years after the start of the conspiracy, industry revenue increased more than $ 1.38 billion while promotional expenses increased only $ 532 million. *See* Fisher Rebuttal, PP 17-18. Dr. Fisher, however, does not agree that profitability is the proper measurement of the plausibility of a conspiracy. In his deposition, Dr. Fisher testified that

> I am the author of some articles **[**195]** on . . . the question of whether you can use profits to infer very much. . . . And what those article say -- and I remain, if I may say so, both committed to this, and rather forcefully committed to this. What the articles say is that you cannot use accounting profits to infer economic profits, and you certainly can't use them to infer that there are monopoly profits, and that attempts to do this are going to almost always end in failure.

Fisher Depo., at 509-10.

Furthermore, from 1996 to 1999, RJR spent $ 5.6 billion on promotional programs. *See* Blynn Aff., P 3. This exceeds the $ 3.2 billion Plaintiffs' damages expert claims that RJR overcharged during the conspiracy period. Similarly, during the time of the alleged conspiracy, Defendants spent a combined $ 25.256 billion on promotional allowances, coupons, and retail value added. Facts, P 65. This exceeds $ 13 to $ 15 billion, the total amount Plaintiffs allege Defendants overcharged during the alleged conspiracy period. Thus, Plaintiffs' claim that Defendants recouped through the conspiracy any losses on increased **[*1327]** promotional spending at retail is without force.

The fact that, as Plaintiffs allege, retail price promotions **[**196]** are not as "efficient" as wholesale list price changes, is irrelevant to whether it would make sense for Defendants to compete at the retail level and agree to fix prices at the wholesale level. Even Plaintiffs' own expert seems to take issue with that position.

> Q: . . . I am facing ways of deploying money to move share, and do you have a view as to the relative efficiency of various ways of deploying that money to move share?
>
> A: If I were to answer that question literally, the answer would be no . . . . I don't mean to suggest that retail promotions are a useless way to do this, nor on the other hand do I believe that resisting following at wholesale is a useless way of doing this either.
>
> Q: But in terms of the relative efficiency of one versus the other, you are not prepared to judge that as you sit here today, correct?
>
> A: Correct.

Fisher Depo., at 501. Furthermore, Defendants never claim that competing at retail is "economically superior to list price competition." Pls.' Resp., at 91. Defendants simply assert that it is illogical to argue that Defendants have fixed prices when their spending on promotional expenses exceeds that which Plaintiffs claim has been **[**197]** overcharged. Accordingly, the court finds persuasive Defendants' argument that Plaintiffs' theory of conspiracy does not make economic sense in light of the high level of spending on competition at the retail level.

3. Changing Market Shares

Defendants argue that the shifts in market shares that occurred among the companies are inconsistent with cartel activity. The following market share changes occurred between 1993 and 2000 in the cigarette industry:

Company	1993	1999	2000
Philip Morris	42.2 %	49.6 %	50.5 %
RJR	30.6 %	23.0 %	23.0 %
B&W	16.6 % [56]	13.4 %	11.7 %
Lorillard	7.1 %	10.4 %	9.6 %
Liggett	2.4 %	1.3 %	1.5 %

[56] The market share figures include those for most of the brands of the American Tobacco Co. acquired by B&W in 1994.

Company	1993	1999	2000
All Others	-	2.3 %	3.7 %

Facts, PP 58-60. Philip Morris' market share increased 17.5%, Lorillard's increased 46.5%, RJR's decreased 24.8%, and B&W's decreased 19.3%.

Defendants contend that it does not make **[**198]** sense that RJR and B&W would agree to and continue in a conspiracy where they continued to lose significant market share. *See* Elzinga Report, at 42 ("the stability of the conspiracy generally requires that cartelists' market shares remain stable"). Dr. Elzinga recognizes that a cartel might shift market shares in order to prevent detection or to appease a disgruntled cartel member, but there would have to be some way to control the redistribution under those circumstances. *See id.* Dr. Elzinga opines, however, that in the cigarette industry, market shares have changed too much for either of these scenarios to be present. *Id.* Philip Morris and Lorillard have gained market share, while B&W and RJR have lost share. The share of "other manufacturers," new entrants to the market, has also grown since 1996.

Plaintiffs recognize that Philip Morris and Lorillard gained market share during the alleged conspiracy while RJR and B&W **[*1328]** lost share. In response to this, however, Plaintiffs' expert testifies that "near constancy of shares is not likely to characterize collusive arrangements in the context of changing market conditions." Fisher Rebuttal, PP 22-23. To show that market shares **[**199]** stabilized after Marlboro Friday, Dr. Fisher relies on data reflecting monthly shipments to wholesalers. *See* Fisher Rebuttal, Exs. 1 & 5. But monthly shipments to wholesalers does not reflect what share of the market each Defendant had because it does not consider the percentage of sales each Defendant made to consumers, but rather what shipments were made to wholesalers. Defendants contend that it is inappropriate to consider market share changes on a monthly, as opposed to annual, basis because monthly basis shifts are affected by whether customers are "loading up" on a particular brand of cigarette. *See* Oral Argument, at 17; Defendants' Joint Post-Argument Reply Memorandum in Support of Their Motions for Summary Judgment, at 7.

Exhibit 13 to Dr. Elzinga's Report shows the year-by-year market share changes in the industry from 1986 to 2000. Over this time, Philip Morris' market share increased 17.5%, Lorillard's increased 46.5%, while RJR's decreased 24.8% and B&W's decreased 19.3%. *See* Fisher Depo., at 172-73 (testifying that a one percent shift in market share would have a "substantial impact on the revenue" of companies). This exhibit clearly shows that there were **[**200]** dramatic "winners and losers" during the alleged conspiracy period, a fact that is inconsistent with cartel behavior. *See also* *In re Baby Food, 166 F.3d at 137* ("It is inconceivable that with losses running at least 10% for every case sold, Nestle would have remained a party to a conspiracy to fix prices, preserve Gerber's market share year after year, and run up its own losses."); *Citric Acid, 191 F.3d at 1102-03*.

Even if the court were to consider the monthly shipping data, Dr. Fisher's exhibits demonstrate only that Defendants' permanent allocation programs were achieving their desired goal of stabilizing inventory shifts month-by-month by preventing "trade loading." As Defendants argue, each company's monthly shipment patterns became more regular as each implemented an allocation program. *See* Defendants' Joint Post-Argument Reply Memorandum, at 7 (citing Fisher Rebuttal Ex. 5 and noting that "RJR's shipment patterns smoothed" after they eliminated trade loading in 1989, Lorillard's in 1990, and Philip Morris' and B&W's in 1993).

Plaintiffs contend that the market share shifts would have been much more dramatic without the collusive agreement **[**201]** among Defendants. *See* Fisher Rebuttal, Ex. 1; Oral Argument, at 88, 91, 93-94 (commenting on RJR's declining market share and stating, "I suggest to the court that if this industry hadn't gotten some price -- back in place that would have continued and RJR and I suspect Brown & Williamson might likely be completely off the chart, they would have just disappeared, become part of Liggett or something"). But Plaintiffs offer no evidence, other than Plaintiffs' counsel's rumination, for their contention that B&W and RJR agreed to the conspiracy in order to slow their rates of decline and allow them to "hang on" a few more years in the industry.

V. CONCLUSION

The court finds that the evidence adduced by Plaintiffs does not singularly or in combination exclude the possibility that Defendants acted independently, as required by *Matsushita*. Even under the more standard summary judgment analysis, the inferences urged in support of Plaintiffs' theory of conspiracy require either that the jury merely guess between **[*1329]** lawful and unlawful activity or are the product of flawed logic. Finally, when the court looks at the case as a whole, the contemporaneous documents show Defendants **[**202]** operated under substantial uncertainty about each other's future pricing actions and are, thus, wholly inconsistent with a settled agreement to fix prices. At the same time, the amount of competition at the retail level forced Defendants to spend more in pro-competitive acts at retail than Plaintiffs contend Defendants gained at wholesale. Under these circumstances, the court finds that no reasonable jury could conclude that the activities in the cigarette industry during the relevant time frame reflect a conspiracy to fix prices.

Accordingly, the court GRANTS Defendant R.J. Reynolds' motion for summary judgment [170-1]; GRANTS Defendant Brown & Williamson's motion for summary judgment [171-1]; GRANTS Defendant Lorillard Tobacco Company's motion for summary judgment [173-1]; and GRANTS Defendant Philip Morris' motion for summary judgment [174-1].

In preparing this order, it came to the court's attention that Plaintiffs' Response to Defendants' Motions for Summary Judgment [180-1] was filed under seal. That document is ordered unsealed instanter. The court is of the opinion that anything submitted to the court and which the court relied on in ruling on the motions for summary **[**203]** judgment ought to be unsealed. The Clerk of the Court is DIRECTED in twenty days from the date of this order to UNSEAL all depositions and documents filed in support or opposition to Defendants' motions for summary judgment unless a party files a motion to keep some particular document or deposition sealed for a competitive or other unique circumstance. Open courts of record are grounded in the democratic process. This is a case of some importance and the public ought to know what information was before the court as the court made its decision.

During the last months of this case, Plaintiffs' counsel became engaged in a heated dispute which primarily centered around administrative issues of fee and expense allocations, but also contained suggestions that some members of the Plaintiffs' Management Committee were inattentive or ill-prepared. The court submitted the issues to a Special Master who determined that while the conduct was not professional, the class was vigorously represented during the conduct of the litigation.

SO ORDERED this 11th day of July 2002.

J. OWEN FORRESTER

UNITED STATES DISTRICT JUDGE

G-I Holdings v. Baron & Budd

United States District Court for the Southern District of New York

July 17, 2002, Decided ; July 18, 2002, Filed

01 Civ. 0216 (RWS)

Reporter

238 F. Supp. 2d 521 *; 2002 U.S. Dist. LEXIS 13009 **

G-I HOLDINGS, INC., Plaintiff, - against - BARON & BUDD; FREDERICK BARON; RUSSELL BUDD; NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE; RONALD MOTLEY; JOSEPH RICE; WEITZ & LUXENBERG; PERRY WEITZ and ROBERT GORDON, Defendants.

Disposition: [1]** Defendants' motion to dismiss granted in part and denied in part, and counts VII, XI and XIII dismissed. Defendant Ness Motley's motion to strike granted.

Core Terms

Holdings, allegations, cases, paralegals, asbestos, amended complaint, predicate act, tortious interference, fraudulent, enterprise, settlement, motion to dismiss, continuity, Counts, Defendants', mail, backdated, identification, wire fraud, Stamp, law firm, documents, Producer, ongoing, falsified, misrepresentation, Memorandum, falsification, depositions, pleadings

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In reviewing a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, courts must accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader. Review must be limited to the complaint and documents attached or incorporated by reference thereto. In this context, a complaint is deemed to include documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit. However, legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. A complaint may only be dismissed when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Complaints, Requirements for Complaint**

See *Fed. R. Civ. P. 8(e)(2)*.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN3 [] **Intentional Interference, Elements**

An essential element of a claim for tortious interference of contract is the existence of an enforceable contract.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4 [] **Pleadings, Rule Application & Interpretation**

A plaintiff need not use particular words to plead in the alternative as long as it can be reasonably inferred that this is what the plaintiff was doing.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5 [] **Private Actions, Racketeer Influenced & Corrupt Organizations**

At a minimum, a plaintiff attempting to state a cognizable claim under *18 U.S.C.S. § 1962(c)* must plead the following elements: (1) that the defendants (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate commerce.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN6 [] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In order to maintain a Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, claim, a plaintiff must allege that each defendant engaged in two or more predicate acts.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN7 [] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that in all allegations of fraud, the circumstances constituting fraud must be stated with particularity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, context, *Fed. R. Civ. P. 9(b)* calls for the complaint to specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN9[] **Tolling of Statute of Limitations, Fraud**

The standard tolling exceptions apply to civil Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, actions. Under the doctrine of wrongful concealment, the statute of limitations will be tolled if the plaintiff proves three elements: (1) wrongful concealment by the defendant, (2) which prevented the plaintiff's discovery of the nature of the claim within the limitations period, and (3) due diligence in pursuing discovery of the claim.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN10[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

With respect to the wrongful concealment element under the tolling doctrine of wrongful concealment, there are two general varieties: the defendant may have taken affirmative steps to prevent the discovery of the plaintiff's injury, or the nature of the wrong itself may have been self-concealing.

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

Governments > Legislation > Statute of Limitations > General Overview

HN11[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss on the basis on a plaintiff's failure to engage in due diligence cannot be granted unless the "undisputed facts" show a lack of reasonable diligence.

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

HN12[] **Motions to Dismiss, Failure to State Claim**

In the absence of some "red flag," such as an introductory letter to that effect or the fact that the affiant is a known "scoundrel," whether a party may reasonably rely on sworn affidavits presents a factual issue that cannot be determined on a motion to dismiss.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN13[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A plaintiff must allege a pattern of racketeering activity consisting of at least two acts of racketeering activity undertaken within 10 years of each other. *18 U.S.C.S. § 1961(5)*. The pattern element of a Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, claim requires a showing of "continuity" plus "relationship."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN14[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept. A party alleging a Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before the continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN15[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, in order to measure whether closed-ended continuity exists, several factors may be considered, including, inter alia: the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes. The length of time over which predicate acts occurred is an important factor and appears to be dispositive if the period of time is not sufficiently long. The Second Circuit has thus far only found closed-ended continuity where the conduct lasted for two years or more.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN16[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The duration of a pattern of racketeering activity is measured by the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, predicate acts the defendants commit.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN17[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, unlike closed-ended continuity, open-ended continuity does not require a substantial temporal showing. Rather, it requires a plaintiff to show a threat of on-going criminal activity beyond the period in which the predicate acts were committed. In the Second Circuit, cases assessing whether a threat of continuity exists look first to the nature of the predicate acts alleged or to the nature of the enterprise at whose behest the predicate acts were performed. Where the alleged enterprise primarily conducts a legitimate business, there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN18[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In order to satisfy *18 U.S.C.S. § 1962(c)*'s requirement, a plaintiff must plead each defendant's participation in the "operation or management" of an "enterprise" as those terms are defined for the purposes of the statute. An enterprise within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, requires an "association in fact" between or among individuals and entities. *18 U.S.C.S. § 1961(4)*. Because *§ 1962(c)* speaks separately of a RICO "person" acting on or conducting the affairs of the "enterprise," which clearly envisions two entities, a plaintiff must also comply with the rule that the RICO person and enterprise referred to must be distinct.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN19[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its legal status. Nothing in the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, requires more "separateness" than that.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN20[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

As part of a fraud-based Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, complaint, the plaintiff must plead detrimental and justifiable reliance on the defendant's misrepresentations.

Civil Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > Standing

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN21[] **Justiciability, Standing**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, grants standing to sue to any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962*. *18 U.S.C.S. § 1964(c)*. This language limits standing to plaintiffs whose injuries were both factually and proximately caused by the alleged RICO violation. While the term "proximate cause" is utilized, liability under statutes such as RICO does not depend on whether there is proximate causation as that term is used at common law. Instead, the question is whether the plaintiff was in the category the statute meant to protect, and whether the harm that occurred was the "mischief" the statute sought to avoid. Thus, to have standing, plaintiffs must show that they were the intended targets of the RICO violations and that any alleged RICO injury must have been the "preconceived purpose" of the RICO activities.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN22[] **Affirmative Defenses, Fraud & Misrepresentation**

To sustain a claim for fraudulent inducement alongside a claim for breach of contract under New York law, one must plead any one of the following: (i) a legal duty separate from the duty to perform under the contract; (ii) a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) special damages that are caused by the misrepresentation and unrecoverable as contract damages.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN23[] **Business Torts, Fraud & Misrepresentation**

To plead a claim of fraud under New York law, plaintiffs must allege five elements: (1) misrepresentation of a material fact; (2) the falsity of that representation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN24[] **Pleadings, Heightened Pleading Requirements**

Fraud pleadings generally cannot be based on information and belief. However, fraud allegations may be so pleaded as to facts peculiarly within the opposing party's knowledge. Even then, the allegations must be accompanied by a statement of facts upon which the belief is founded, and this rule must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN25[] **Pleadings, Service of Process**

Pursuant to *N.Y. C.P.L.R. 306-b*, a complaint must be served within 120 days of its filing.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN26[] **Pleadings, Service of Process**

See *N.Y. C.P.L.R. 306-b*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN27[] **Defenses, Demurrers & Objections, Motions to Strike**

See *Fed. R. Civ. P. 12(f)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN28[] **Defenses, Demurrers & Objections, Motions to Strike**

Although *Fed. R. Civ. P. 12(f)* allows motions to strike only up to the time a party responds to a pleading, it also permits a court to strike such material on its own initiative at any time. *Fed. R. Civ. P. 12(f)*. This provision allows courts to grant meritorious motions to strike even when they are untimely.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN29[] **Defenses, Demurrers & Objections, Motions to Strike**

District courts are cautioned to approach motions to strike with caution: It is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible. Thus the courts should not tamper with the pleadings unless there is a strong reason for doing so. In spite of this reluctance, allegations may be stricken if they have no real bearing on the case, will likely prejudice the movant, or where they have criminal overtones.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN30[] **Intentional Interference, Elements**

Under New York law, the elements of tortious interference with a business relationship are: (1) interference by the defendants with an existing contract or business relationship; (2) the interference was accomplished by dishonest, unfair, or improper means or was done intentionally; and (3) damages therefrom.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN31[] **Intentional Interference, Elements**

The elements of tortious interference with a contract are: (1) the existence of a valid contract between plaintiffs and a third party; (2) that the defendants had knowledge of it; (3) the defendants intentionally procured a breach by the third party; and (4) damages therefrom.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN32[] **Breach of Contract Actions, Elements of Contract Claims**

Under New York law, the elements of breach of contract are: (1) a valid contract; (2) plaintiff's due performance; (3) breach by defendants; and (4) damages from breach.

Counsel: For Plaintiff: PETER N. WANG, ESQ., Of Counsel, FRIEDMAN, WANG & BLEIBERG, THOMAS J. KAVALER, ESQ., Of Counsel, CAHILL GORDON & REINDEL, New York, NY.

Amicus Curiae: DANIEL J. POPEO, ESQ., RICHARD A. SAMP, ESQ., Of Counsel, WASHINGTON LEGAL FOUNDATION, Washington, DC.

Amicus Curiae: ROBERT J. RANDELL, ESQ., New York, NY.

For Baron & Budd, Frederick Baron and Russell Budd, Defendants: MARK C. ZAUDERER, ESQ., JONATHAN D. LUPKIN, ESQ., Of Counsel, SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP, New York, NY.

For Baron & Budd, Frederick Baron and Russell Budd, Defendants: ABBE DAVID LOWELL, ESQ., PAMELA J. MARPLE, ESQ., Of Counsel, MANATT, PHELPS & PHILLIPS, Washington, DC.

For Ness, Motley, Loadholt, Richardson & Poole, Ronald Motley and Joseph Rice: STORCH AMINI & MUNVES, New York, NY.

For Weitz & Luxenberg, Perry Weitz & Robert Gordon: ELKAN ABRAMOWITZ, ESQ., LAWRENCE S. BADER, ESQ., ROBERT M. RADICK, ESQ., Of Counsel, MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, New York, NY.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

[2] [*527] Sweet, D.J.,**

Defendant law firms Baron & Budd, Ness Motley, Loadholt, Richardson & Poole ("Ness Motley"), and Weitz & Luxenberg, and individual defendants Russell Budd ("Budd"), Frederick Baron ("Baron"), Ronald Motley ("Motley"), Joseph Rice ("Rice"), Perry Weitz ("Weitz") and Robert Gordon ("Gordon") (collectively, the "Defendants") have moved pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for an order dismissing portions of the Third Amended Complaint of G-1 Holdings ("Holdings"). In addition, the Ness Motley defendants (the law firm and individual defendants Ness and Motley) have moved to strike certain allegations in the complaint.

For the following reasons, the Defendants' motion is granted in part and denied in part, and Ness Motley's motion is granted.

Parties

Holdings is a New Jersey corporation and is a holding company that includes certain former asbestos manufacturers and is the successor by merger to GAF Corporation ("GAF"). Plaintiffs have initiated many thousands of tort actions against GAF Corporation and Holdings arising out of the manufacture of a product known as Calsilite, an insulation product containing asbestos.

[3]** The Defendants are law firms and their principals. They have represented many of the plaintiffs in the asbestos litigation against Holdings.

Prior Proceedings

This action was initiated by the filing of an action by Holdings against the Defendants on January 10, 2001, alleging violations of the federal Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1961 et seq.* ("RICO"). The First Amended Complaint (the "FAC") was filed on April 30, 2001 and alleged *inter alia* that the Defendants engaged in a scheme to inundate the judicial system, and Holdings, with hundreds of thousands of asbestos cases without regard to their merit, and in various illegal acts in connection with such litigation including suborning false testimony. The FAC contained ten counts and alleged that Defendants (1) maliciously interfered with GAF's right to **[*528]** petition Congress (prima facie tort) (Claim I); (2) tortiously interfered with GAF's contracts and economic advantage (Claim II); (3) violated federal ***antitrust law*** (Claim III); (4) violated the RICO statute (Claims IV-VII); (5) breached contracts with GAF (Counts VIII, IX); and (6) fraudulently induced **[**4]** GAF to enter into contracts they never intended to honor (Count X). That complaint was dismissed in part on December 11, 2001, but leave was granted to replead.

In a Second Amended Complaint, filed on January 25, 2002, Holdings repled certain of its state law claims, asserted a cause of action against Baron & Budd for common law fraud, and amended the allegations with regard to its witness tampering theory. Defendants moved to dismiss the Second Amended Complaint and Weitz & Luxenberg moved to strike certain allegations in the complaint.

On March 18, 2002, however, Holdings filed a Third Amended Complaint (the "TAC" or the "Complaint") in which it added a common law fraud claim against Weitz & Luxenberg and amended two paragraphs of its mail and wire fraud allegations against the Baron & Budd defendants to identify five cases and asserted on information and belief that "the Baron & Budd Memorandum was used to create false product identification and testimony in the deposition of each of the plaintiffs who were deposed in these actions." Holdings also sought the Court's permission to file the Third Amended Complaint after it had already filed it.

At a hearing on April 17, 2002, leave **[**5]** to file the Third Amended Complaint was granted, and the Defendants' motions to dismiss the Second Amended Complaint and strike certain allegations were denied inasmuch as they no longer targeted the current complaint. The Defendants were then given leave to renew their motions with regard to the TAC.

On April 26, 2002, the Defendants moved to dismiss certain of the counts, and Weitz & Luxenberg moved to strike certain allegations in the Complaint.

The Complaint consists of thirteen counts. However, not all the Counts are at issue, as demonstrated below:

. ***Count I*** (prima facie tort against all Defendants): not in contention; Holdings included it for the purposes of appeal.

. ***Count II*** (tortious interference with economic advantage against all Defendants): in contention.

. ***Count III*** (tortious interference with contract against all Defendants): not in contention; the Defendants did not move against it. [1]

. ***Count IV*** (antitrust violations against all Defendants): not in contention; Holdings included it for the purposes of appeal.

. ***Count V*** (RICO mail and wire fraud against Baron & Budd): in contention.

. **[**6]** ***Count VI*** (RICO mail and wire fraud against individual defendants Baron and Budd): in contention.

. ***Count VII*** (RICO substantive violation of witness tampering against all Defendants): not in contention except as to the grounds for dismissal.

. ***Count VIII*** (RICO conspiracy against all Defendants): not in contention; Holdings included it for the purposes of appeal.

. ***Count IX*** (breach of contract against Weitz & Luxenberg): not in contention; **[*529]** defendants did not move against it.

. ***Count X*** (breach of contract against Ness Motley): not in contention; defendants did not move against it.

. ***Count XI*** (fraudulent inducement against Weitz & Luxenberg and Ness Motley): in contention.

. ***Count XII*** (common law fraud against Baron & Budd): in contention.

. ***Count XIII*** (common law fraud against Weitz & Luxenberg): in contention.

[7]** In sum, of the thirteen Counts, only Counts II, V, VI, XI, XII, and XIII are in contention. In addition, Holdings seeks clarification for the grounds for dismissal of Count VII.

The motions were considered fully submitted on May 15, 2002, at which time oral argument was heard.

The Factual Allegations of the Complaint

The Complaint adopts in great measure the factual allegations of the First Amended Complaint. These facts were described in greater detail in *G-I Holdings v. Baron & Budd, 179 F. Supp. 2d 233 (S.D.N.Y. 2001)*, familiarity with which is presumed. Therefore, this section will only detail the additions or alterations from the First Amended Complaint.

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[1] Defendants reserved the right to raise the issue of whether they induced a breach for the sole purpose of harming plaintiff, but do not argue it here.

None of the facts set forth below represent findings by the Court. As befits a motion to dismiss under Rule 12(b)(6), the facts are assumed to be as alleged in the complaint for purposes of the instant motion.

Specific Instances of Falsifications of Affidavits

Holdings alleges that Baron & Budd filed false affidavits in connection with asbestos litigation. In December 1995, paralegals at Baron & Budd working under the supervision of Melanie Oliver, a Baron & Budd supervisor ("Oliver"), **[**8]** were instructed to gather hundreds of affidavits from Baron & Budd clients for use against GAF and other asbestos defendants for trial and/or settlement purposes. Such affidavits were critical to establish liability against a particular defendant whether they were to be used for trial or settlement purposes.

Under Oliver's supervision, the paralegals gathered the affidavits and began to compile the results in a conference room at Baron & Budd. With their deadline looming, the paralegals realized that approximately 200 of the affidavits were missing necessary information, including: (1) the asbestos product to which the affiant had been exposed; (2) the work site(s) at which the affiant had been exposed/employed; and/or (3) the client's signature.

The paralegals reported these omissions to Oliver, who instructed that the affidavits be "fixed." None of the affidavits was returned to the affiant for completion, correction, review or signature. Instead, at Oliver's direction, the paralegals "filled in" the missing information themselves.

Missing product identification was added without reference to or knowledge of whether the client could truthfully testify that he had been exposed **[**9]** to a particular asbestos product. For example, where a client had failed to identify a particular asbestos product to which he had been exposed, the paralegals would attempt to research which of the manufacturer's products "might" have been used at the identified work site and then simply add that product to the affidavit. Where a client had failed to identify a work site, the paralegals would create that information using the client's social security printout (to identify employment history) and then would deduce an appropriate work site that would match the particular product **[*530]** and the particular asbestos manufacturer.

The paralegals also signed clients' names on the unsigned affidavits.

In each case, after a deficient affidavit was "fixed" by Baron & Budd's paralegals, it was filed with the court in which the case was pending or was submitted to the defendants to support a settlement. Holdings claims the affidavits were false and fraudulent and were known by Baron & Budd to be so when they were filed or submitted.

Following their falsification by Baron & Budd, all or substantially all of the affidavits included identification of Ruberoid (plaintiff's predecessor by merger) as a **[**10]** manufacturer of asbestos products to which the affiant was exposed. Holdings claims these identifications were false and fraudulent.

GAF, through its agent, the Center for Claims Resolution ("CCR"), relied upon these false and fraudulent identifications in settling the cases and in allocating portions of the settlement to GAF.

Based on settlement date, trial location, and other salient characteristics, Holdings claims on information and belief that the universe of settlements in which these 200 or so false and fraudulent affidavits were submitted is contained within the list of 190 cases listed in an exhibit to the Complaint. The amount that GAF was defrauded into paying in these cases is a substantial portion of the $ 891,663 it paid to settle these cases.

Until January 16, 2002, Holdings claims that plaintiff was not, and in the exercise of reasonable diligence could not have been, aware of the specific instances alleged above because (1) the nature of the fraud was self-concealing; (2) the volume of litigation by Defendants made individualized investigation into the merits of each case an impossibility; and (3) Baron & Budd took active steps to hinder GAF's investigation into **[**11]** Baron & Budd's ongoing fraud by, *inter alia,* interfering with GAF's ability to locate and interview former Baron & Budd employees. GAF has spent millions of dollars since the revelation of the Baron & Budd memorandum investigating Baron & Budd's misdeeds and seeking to identify the pattern of fraud and specific instances thereof.

The Effects of the Routine Falsification of Product Identification Evidence

The falsification of product identification was not limited to the events of December 1995 described above. Claim forms filed by the Baron & Budd bankruptcy department also included false product identifications provided by a Baron & Budd employee. A paralegal working under the supervision of Baron & Budd bankruptcy department manager Tiffany Tuggle ("Tuggle") routinely listed products on claim forms for clients that had never been identified by the client or were wholly inconsistent with the information that had been provided by the client. Baron & Budd was made aware of this practice and did nothing to stop it. In fact, the paralegal was promoted.

Backdating Claims and Falsifying Court Records

Subsequent to the filing of the Second Amended Complaint, **[**12]** Holdings claims to have uncovered additional evidence of wrongdoing by defendant Weitz & Luxenberg. The following eleven paragraphs are alleged on information and belief based on the investigation of private investigators working for Holdings.

In order to pursue claims against asbestos defendants that would otherwise be time-barred, Weitz & Luxenberg has backdated documents filed in asbestos personal injury cases and tampered with and falsified records of the Supreme Court of the State of New York.

[*531] In the spring of 2000, Weitz & Luxenberg maintained an office at 120 Wall Street in Manhattan that oversaw the prosecution of asbestos personal injury cases on behalf of clients who had died. In May 2000, Weitz & Luxenberg attorneys recognized that they had failed to amend in a timely fashion a complaint filed in New York County, the effect of which was to bar claims against one or more named or unnamed defendants under applicable statutes of limitations. Weitz & Luxenberg remedied the problem by backdating the amended pleading, falsifying the filing stamp and altering the books and records of the New York County Supreme Court to reflect the fact that the amendment had been filed long **[**13]** before it actually was filed.

Pleadings filed in the New York County Supreme Court all bear an official court stamp, affixed by court employees, reflecting the date upon which the pleading was filed in the County Clerk's office (the "Filed Stamp"). The filing date, reflected in the Filed Stamp, is relied upon by both the Court and by litigants (including GAF) in calculating the timeliness of the filing. In the spring of 2000, GAF was a named defendant in all, or substantially all, of the asbestos liability actions brought in New York County by Weitz & Luxenberg on behalf of its clients.

Sometime after Weitz & Luxenberg attorneys discovered the error, Weitz & Luxenberg personnel, acting under the direction of Weitz & Luxenberg attorney Marie Ochigrassi ("Ochigrassi"), undertook to ensure that the amended complaint would be filed with a false backdated Filed Stamp and that the court's records would be falsely altered to reflect that the pleading had been filed before it actually was filed. Ochigrassi was the head of a department comprised of two other attorneys and paralegals. The two supervising paralegals in the department were Alicia Ostracher and Vanessa Ostracher, both of whom **[**14]** are daughters of Elba Aguilar ("Aguilar").

Aguilar is and was at that time a court employee at the New York County Supreme Court building at 60 Centre Street in Manhattan. Aguilar's duties at the courthouse are such that she has and at all relevant times had access to the New York County Clerk's Filed Stamp and New York County Supreme Court case records.

Aguilar is the mother of three present or former Weitz & Luxenberg paralegals: the Ostrachers and Mary Jo Sci. In addition, Weitz & Luxenberg is representing Aguilar's former husband (with whom she is now reconciled) in litigation with Nassau County in which Aguilar's interests appear to be aligned with his. Weitz & Luxenberg is handling the litigation at no charge.

Under the direction of Ochigrassi, Weitz & Luxenberg personnel first prepared a back-dated amended complaint. When the new papers were ready, Ochigrassi summoned a paralegal to her office where paralegal Alicia Ostracher was also waiting. Ochigrassi instructed the paralegal that he was "to take something down to Alicia's mother" and "to follow Alicia's instructions." Ostracher handed the paralegal an envelope containing the amended complaint and indicated that she had **[**15]** called her mother who would be waiting to meet him at 60 Centre Street.

Ostracher instructed the paralegal to meet her mother inside the entrance to the courthouse at 60 Centre Street. When the paralegal arrived, Aguilar told him to go downstairs to the records department of the courthouse ahead of her, to make a copy of the document he had brought with him and to fill out a request form for the case file. He did so. As he was being handed the case file, Aguilar appeared by **[*532]** his side and showed the filing clerk her badge so that the file could be removed from the clerk's view. Aguilar also requested a document log book for a certain time period, which the clerk gave her.

Aguilar and the paralegal took the file, the logbook, and the documents to a space near the copy machine. Aguilar stamped the amended complaint with the court's Filed Stamp to reflect falsely that it had been filed at an earlier date, before the statute of limitations ran on the newly added claims. Aguilar then added a false entry to the court's log book. The entry Aguilar placed in the log book falsely indicated that the amended complaint had been filed on the false filing date. At Aguilar's instruction, the paralegal **[**16]** then took the case file to the copy machine, copied a document in it (so as to suggest that was the reason he had requested it) and then placed the falsely stamped pleading in the case file. The log book and case file were then returned to the filing clerk.

This was not an isolated incident. On several other occasions, the paralegal was instructed by Weitz & Luxenberg attorney Ochigrassi or Weitz & Luxenberg paralegal Ostracher to take blue-backed documents to Aguilar so that false Filed Stamps could be affixed on them. Once Aguilar took the paralegal upstairs at the courthouse at 60 Centre Street and made him wait on a bench. She then took the documents into another room and brought them back, all with back-dated Filed Stamps newly affixed. On another occasion, they met at the court's rotunda on the first floor. At that time, Aguilar simply ducked behind a column and quickly stamped the documents with the earlier, but false, filing dates. On yet another occasion, Aguilar met the paralegal outside the side entrance to 60 Centre Street to effectuate the falsification of filing stamps on case documents generated by Weitz & Luxenberg. On every occasion, Aguilar took steps to ensure that **[**17]** her conduct was not being observed by others.

Under Rule 3025 of New York's Civil Practice Law & Rules, amended complaints must be served on each party to the action, including each named defendant, and each named defendant must serve and file a response thereto. Weitz & Luxenberg's filing of fraudulently time-barred claims increased the litigation costs for all defendants in those cases.

The Producer Agreement

Prior to December 17, 1999, GAF had a valid, written contract with CCR known as the Producer Agreement Concerning Center for Claims Resolution (the "Producer Agreement"). The express purpose of the Producer Agreement was to "provide for the administration, defense, payment, and disposition of asbestos-related claims" for the benefit of its participating members. Under the terms of the Producer Agreement, CCR could only terminate its contract with GAF under certain conditions and subject to certain restrictions enumerated therein.

Pursuant to the terms of the Producer Agreement, GAF designated CCR as its sole agent to administer and arrange on its behalf for the evaluation, settlement, payment or defense of all asbestos-related claims against it. In this capacity, **[**18]** CCR investigated claims, tried cases, and negotiated settlements on behalf of all of its members, thereby substantially reducing GAF's transaction costs in the asbestos claim resolution process.

As lawyers who routinely negotiated such settlements with CCR on behalf of their asbestos liability clients, Defendants were aware of GAF's contract with CCR and the benefits GAF derived from the contract. As alleged in the FAC, Defendants intentionally caused CCR to expel **[*533]** GAF in breach of the Producer Agreement, thereby deliberately and wrongfully interfering with GAF's ongoing economic and contractual relationship with CCR.

By causing CCR to expel GAF, Defendants maliciously and without justification carried out the extortionate threats made in Defendants' campaign to coerce GAF to cease its efforts to lobby Congress for passage of the Fairness in Asbestos Claims Act, depriving GAF of the ongoing benefits of CCR membership and causing GAF special damages and other injury.

From January 17, 2000 to January 5, 2001, GAF was forced to establish and fund a free-standing network of defense counsel and to litigate asbestos bodily injury cases on its own. These expenses exceed the sum of $ 20 **[**19]** million.

Counts V and VI

These counts allege mail and wire fraud in association with a number of claimants. In the first complaint, Holdings had not identified the cases in which the claimants were plaintiffs. The Complaint now asserts that the claimants were plaintiffs in five cases: *Beverly Jean Brown v. Keene Corp.,* No. 93-10952 (98th Judicial District Court of Travis Co., TX); *Jimmy Leon Smathers v. Owens-Corning Fiberglas Corp.,* No. 95-06329 (126th Judicial District Court of Travis Co., TX); *Kenneth Shirley v. Owens-Corning Fiberglas Corp.,* No. 95-10495 (250th Judicial District Court of Travis Co, TX); *C.J. English v. Owens-Corning Fiberglas Corp.,* No. 96-06308 (134th Judicial District Court of Dallas Co., TX); *Edwin Ray McCray v. Owens-Corning Fiberglas Corp.,* No. 95-3109 (28th Judicial District Court of Neuces Co., TX). Further, Holdings alleges that Baron & Budd submitted false and fraudulent affidavits, and that GAF justifiably and reasonably relied upon these false and fraudulent affidavits to its detriment in the amount of several hundred thousand dollars.

Count VII

Holdings has amended its pleading to allege specifically **[**20]** that Defendants intended to prevent GAF; Samuel J. Heyman, the former chairman and chief executive officer of GAF ("Heyman"); and other members of the Coalition for Asbestos Resolution from testifying before Congress in support of FACA, or to cause their testimony to be less favorable to Defendants.

Holdings has included specific examples of attempts by Defendants to intimidate, threaten, or corruptly persuade former asbestos producers with the intent of preventing their testimony before Congress and causing them to withhold their testimony from Congress. With respect to GAF and Heyman, Holdings now alleges that Defendants had actual knowledge that Heyman was expected to be a witness in Congressional hearings on FACA. The conduct alleged above was undertaken with the specific intent of causing Heyman not to appear or, if he did appear, to moderate his testimony to be less unfavorable to the Defendants. Further, with respect to the other former asbestos producers, Defendants actually and correctly believed that some of their number would be called (or would voluntarily appear) as witnesses in those hearings. The conduct alleged above was undertaken with the specific intent of causing **[**21]** these individuals not to appear or, if they did appear, to moderate their testimony to be less unfavorable to the Defendants.

The Futures Agreement

Holdings now alleges that Ness Motley, Weitz & Luxenberg and the Affiliated Law Firms used the Futures Agreements and their explicit and implicit (but false and fraudulent) promises to perform thereunder to induce CCR's agreement to settle **[*534]** some 50,000 pending asbestos cases for approximately $ 750 million.

Discussion

I. *Motion To Dismiss*

A. *Standard for a Motion to Dismiss*

HN1[] In reviewing a motion to dismiss under *Rule 12(b)(6)*, courts must "accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader." *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)* (*citing IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1052 (2d Cir. 1993))*. Review must be limited to the complaint and documents attached or incorporated by reference thereto. *Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991)*. In this context, the Second Circuit has held that a complaint is deemed to "include . . . documents that **[**22]** the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)*. However, "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *L'Eureopeenne de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 122 (S.D.N.Y. 1988)*. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995)* (*quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90,* 94 S. Ct. 1683 (1974)). A complaint may only be dismissed when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). *See also* Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996).

B. *Count II: Tortious Interference* [23] *with Economic Advantage May Be Pleaded in the Alternative***

In Count II of its First Amended Complaint, Holdings pled claims for both tortious interference with contract and tortious interference with prospective economic advantage, based on the existence of an alleged contractual relationship between GAF and the CCR. It was held that Holdings had adequately pleaded a claim for tortious interference with prospective contractual relations. G-I Holdings, 179 F. Supp. 2d at 253-54. However, the claim for tortious interference with contract was dismissed as Holdings failed to satisfy the requirement that it plead the existence of a "valid, existing contract" between itself and the CCR. Id. at 252-53.

In the Complaint, Holdings has restated its claim for tortious interference with prospective economic advantage without change (Count II) and repleaded its previously dismissed claim for tortious interference with contract (Count III). With respect to the latter claim, Holdings no longer relies on the ill-defined "contractual relationship" referred to in its prior pleading, but identifies the specific contract with which the Defendants purportedly interfered, **[**24]** the Producer Agreement, by which GAF designated CCR to act as its agent in the "evaluation, settlement, payment or defense of all asbestos-related claims." Compl. P 188. Defendants do not contest that this allegation cures the defect identified in the earlier opinion.

However, the Defendants argue that by sufficiently pleading Count III, Holdings has undermined its claim for interference with prospective economic advantage. To Defendants' argument that Count II is **[*535]** duplicative of Count III, [2] Holdings states that Count II is merely a claim pleaded in the alternative as permitted under the Federal Rules.

[25]**

Rule 8 of the Federal Rules of Civil Procedure states, in pertinent part, that:

> ***HN2***[] A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Fed. R. Civ. P. 8(e)(2); *see also* Aiena v. Olsen, 69 F. Supp. 2d 521, 531 (S.D.N.Y. 1999) (permitting alternative pleading for ERISA claim made in the alternative to state law claims because plaintiff not bound by alternative allegations at motion to dismiss stage). New York law is also in accord. CPLR § 3014; *see also* Raglan Realty Corp. v. Tudor Hotel Corp., 149 A.D.2d 373, 374, 540 N.Y.S.2d 240, 241 (1st Dep't 1989) (reversing dismissal in action

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[2] Holdings alleges it was owed the same rights pursuant to the contractual relationship and to the Producer Agreement. *Compare* Compl. P 181 (pursuant to contractual relationship, "CCR investigated claims, tried cases, and negotiated settlements on a bulk basis on behalf of all of its members") with Compl. P 188 (pursuant to Producer Agreement, "CCR investigated claims, tried cases, and negotiated settlements on a bulk basis on behalf of all of its members"). In addition, the allegedly interfering behavior is the same. *Compare* Compl. P 182 ("defendants caused CCR to expel GAF") with Compl. P 190 ("defendants intentionally caused CCR to expel GAF in breach of the Producer Agreement"). Finally, the damages are also the same. *Compare* Compl. PP 183-85 (damages include denial of CCR benefits, inability to settle cases and special damages of more than $ 20 million as the result of "establishing and funding a free-standing network of defense counsel and litigating asbestos bodily injury cases on its own") with Compl. PP 191-93 (same).

for specific performance and fraud because plaintiff was allowed to **[**26]** plead alternative theories) (*citing* Mitchell v. New York Hosp., 61 N.Y.2d 208, 218, 473 N.Y.S.2d 148, 461 N.E.2d 285 (1984)).

In *Aiena,* for instance, the court permitted the plaintiffs to plead an ERISA claim in the alternative to their state law claims because "given the uncertainties concerning (a) whether the J&H arrangements were an ERISA plan and (b) the scope of ERISA preemption, it would be foolish to put all of one's eggs in either the ERISA or the state law basket." *Aiena, 69 F. Supp. 2d at 531*. If plaintiffs rested solely on the ERISA plan, it could turn out that the plan was not, in fact an ERISA plan. *Id.* Similarly, if they relied only on the state law claims, it could be determined that the plan was an ERISA claim and therefore the state law claims were preempted. *Id.*

The instant claims present an analogous situation. Should the Defendants demonstrate that Holdings' contract with CCR was not fully enforceable or, assuming the validity of the contract, that there was no breach, the claim for tortious interference might fail. *Catskill Dev. L.L.C. v. Park Place Entertainment Corp., 144 F. Supp. 2d 215, 232* (S. **[**27]** D.N.Y.) ("The New York Court of Appeals has made clear that ***HN3***[] an essential element of a claim for tortious interference of contract is the existence of an enforceable contract . . . .") (*citing* NBT Bancorp Inc. v. Fleet/Norstar Fin. Group Inc., 87 N.Y.2d 614, 641 N.Y.S.2d 581, 585, 664 N.E.2d 492 (N.Y. 1996)), *vacated in part on other grounds,* 154 F. Supp. 2d 696 (S.D.N.Y. 2001); **[*536]** *see also* Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp., 50 N.Y.2d 183, 184, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980) (finding no liability under claim for tortious interference to "one whose actions have induced nonperformance of a contract deemed to be voidable and thus unenforceable"). In those circumstances, however, the alternative claim for tortious interference with economic advantage would be viable. *Catskill Dev., 144 F. Supp. 2d at 232* (plaintiff did not state claim for tortious interference with contract because contracts relied upon were unenforceable yet plaintiff nonetheless stated claim for tortious interference with prospective business relations).

The Defendants have presented three cases that hold that tortious interference **[**28]** with contract and tortious interference with prospective economic advantage cannot be pled in the alternative. *See* D'Andrea v. Ralfa-Demetrious, 3 F. Supp. 2d 239 (E.D.N.Y. 1996) (dismissing on summary judgment claim for tortious interference with prospective economic advantage as redundant of claim for tortious interference with contract because of existence of contract); Stomper v. Chicago Transit Auth., 1997 U.S. Dist. LEXIS 4416, 1997 WL 177844, at *4 (N.D. Ill. April 4, 1997) (dismissing claim for tortious interference with business relations under Illinois law because the existence of an employment contract rendered the claim "completely redundant" with one for tortious interference with contract); Egrets Pointe Townhouses Property Owners Ass'n Inc. v. Fairfield Communities, Inc., 870 F. Supp. 110, 116 (D.S.C. 1994) (under South Carolina law, existence of valid contract "precludes any recovery on a claim for interference with prospective contractual relations").

These cases are not controlling, however, and to follow their holdings would unfairly require Holdings to choose, at an early stage in the proceedings, which cause of action to base its claim. [3] **[**29]**

The Defendants also urge that Counts II and III cannot be "in the alternative" as they are not expressly labeled as such in the Complaint. However, ***HN4***[] Holdings "need not use particular words to plead in the alternative" as long as "it can be reasonably inferred that this is what [it was] doing." *Holman v. Indiana, 211 F.3d 399, 407* (7th Cir.), *cert. denied,* **[**30]** *531 U.S. 880, 148 L. Ed. 2d 132, 121 S. Ct. 191 (2000)*; *see also* Pair-A-Dice Acquisition Partners, Inc. v. Board of Trustees of the Galveston Wharves, 185 F. Supp. 2d 703, 708 n.6 (S.D. Tex. 2002) ("Although [plaintiff] fails to use the term 'promissory estoppel' to describe its theory of recovery . . . the Court assumes that [plaintiff intended to plead promissory estoppel as an alternative theory of recovery and will consider the merit of such argument."); Steel Warehouse of Wisconsin Inc. v. Caterpillar Inc., 1990 U.S. Dist. LEXIS 19153, 1990 WL 304266, at *3 (N.D. Ill. Nov. 13, 1990) (allowing leave to amend complaint to clarify alternative pleading

[3] It is true that in *D'Andrea,* the court recognized that there was a material issue of fact as to the validity of the employment contract. However, it did not take its recognition of that fact into consideration when determining whether the tortious interference with prospective economic advantage claim should withstand summary judgment. Presumably, if it had done so, the result might have been different. In addition, *D'Andrea* involved a motion for summary judgment, and the narrowing down of claims in that manner is more appropriate at the summary judgment stage, after parties have had the opportunity for necessary discovery.

because *Rule 8(a)* "does not state that a party must explicitly identify alternative pleadings, and the court will not dismiss plaintiff's complaint on that basis"). Holdings did not explicitly state **[*537]** that it was alleging Counts II and III in the alternative, but it may be reasonably inferred that it intended to do so. [4]

[31]**

Defendants' motion to dismiss Count II is denied. [5]

C. *Counts V and VI - Holdings Sufficiently Alleges RICO Mail and Wire Fraud Claims*

Counts V and VI state RICO mail and wire fraud claims against the law firm Baron & Budd (Count V) and the individual defendants Baron and Budd (Count VI).

HN5[] At a minimum, a plaintiff attempting to state a cognizable claim under *section 1962(c)* must plead the following elements: (1) that the defendants (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate commerce. *Citadel Mgmt., Inc. v. Telesis Trust Inc., 123 F. Supp. 2d 133, 154 (S.D.N.Y. 2000)* **[**32]** (*citing* *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983))*.

The Defendants [6] argue that Holdings has failed to allege adequately the existence of predicate acts, a pattern, an enterprise, and that it has standing.

1. *Predicate Acts*

HN6[] In order to maintain a RICO claim, a plaintiff must allege that each defendant engaged in two or more predicate acts. *Citadel Mgmt., 123 F. Supp. 2d at 155* (*citing* *Lakonia Mgmt., Ltd. v. Meriwether, 106 F. Supp. 2d 540, 550 (S.D.N.Y. 2000)*; *Moeller v. Zaccaria, 831 F. Supp. 1046, 1056 (S.D.N.Y. 1993))*.

The RICO counts in the First Amended Complaint were dismissed for failure to plead a predicate act with requisite specificity. Holdings alleged in its FAC that the Baron & Budd defendants falsified documents, **[**33]** affidavits, and depositions and then submitted them in a "substantial portion" of 900 Ohio cases identified in an exhibit to the complaint as well as in 31 cases named in the text of the FAC. It was found that the First Amended Complaint failed to allege adequately specific instances of fraudulent conduct to satisfy the Federal Rules with respect to the specific dates, times and contents of the fraudulent statements constituting mail and wire fraud:

> Because Holdings has not alleged which of the over 900 cases specifically referenced **[*538]** in the Complaint (in which the Baron & Budd memorandum was used) included fraudulent product identifications and/or other false testimony, this claim must be dismissed… . Holdings has not pointed to a specific deposition, product identification, or affidavit from those cases that support its claims. Moreover, Holdings has held the

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[4] The Defendants did not cite any authority to suggest the contrary. Several cases have found, however, that a reasonable inference may not be drawn in certain circumstances not applicable here. For instance, in *Samuels v. Old Kent Bank, 1997 U.S. Dist. LEXIS 11485, 1997 WL 458434*, at *14-*15 (N.D. Ill., Aug. 1, 1997), the court applied *Holman* and determined that a reasonable inference could not be drawn that the plaintiff had pleaded breach of contract and unjust enrichment in the alternative. Unjust enrichment may only be pleaded under the applicable state law, Illinois, in the absence of a valid contract. *Id.* The Complaint no where stated that the contract might not be valid, and the unjust enrichment count explicitly incorporated paragraphs alleging the existence of a valid contract. *Id.* Holdings' complaint does not face the same internal inconsistencies as it alleges that there was a contractual relationship in addition to the existence of a valid contract.

[5] The Defendants maintain their challenge to both Counts II and III on the basis that their supposed interference was not intended solely to harm GAF. Defendants do not reargue this point here, however, as they already did so unsuccessfully in their first motion to dismiss.

[6] Because the claim is only advanced against the Baron & Budd defendants (the law firm and the individuals), all references to "Defendants" in this section are to the Baron & Budd defendants only.

> Memorandum in its possession for over three years. A failure to specify any individual false statements and the dates and times they were transmitted is fatal to Holdings' claims.

G-I Holdings, 179 F. Supp. 2d at 262.

Holdings has made two pertinent amendments since the dismissal. It has added **[**34]** (1) the names of cases that it claims on information and belief were affected by the "Baron & Budd Memorandum" and (2) allegations regarding the "fixing" of affidavits by paralegals. The Defendants state the changes still leave the Complaint impermissibly unspecific and, even if the amendments do satisfy Rule 9(b), the new allegations are time-barred and equitable tolling is not applicable.

a. *Allegations Concerning the "Baron & Budd Memorandum" Continue To Lack Specificity*

HN7[] Fed. R. Civ. P. 9(b) requires that in all allegations of fraud, the circumstances constituting fraud must be stated with particularity. Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127 (2d Cir. 1994). The rule is designed to further three goals: (1) providing defendants with fair notice of the claims against them; (2) protecting defendants from harm to their reputations or good will by unfounded allegations of fraud; and (3) reducing the number of strike suits. DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987).

The Second Circuit has made clear that **HN8**[] "in the RICO context, Rule 9(b) calls for the complaint to 'specify the statements **[**35]** it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.'" *E.g.,* Moore v. Paine Webber, Inc., 189 F.3d 165, 173 (2d Cir. 1999) (citations omitted); *see also* Official Publications, Inc. v. Kable News Co., 692 F. Supp. 239, 245 (S.D.N.Y. 1988) (complaint alleging mail and wire fraud must "set forth the contents of the items mailed and specify how each of these items was false and misleading" and "must specify who made the allegedly fraudulent statements and the time and place such statements were made"), *rev'd on other grounds,* 884 F.2d 664 (2d Cir. 1989); Spoto v. Herkimer Co. Trust, 2000 U.S. Dist. LEXIS 6057, 2000 WL 533293, at *6 (N.D.N.Y. April 27, 2000) (dismissing RICO mail fraud claim because plaintiff failed to delineate "the who, what, why, where, and when" of the alleged misrepresentation).

Holdings realleges that the Defendants used the "Baron & Budd Memorandum," entitled "Preparing Your Deposition," to manufacture evidence and coach answers from clients. This claim **[**36]** was dismissed from the FAC for lack of specificity. 179 F. Supp. 2d at 262.

In the FAC, Holdings listed 30 claimants who were "involved" with these allegations. The Complaint now states that the 30 claimants were plaintiffs in five cases and alleges that "on information and belief, the Baron & Budd Memorandum was used to create false product identification testimony in the depositions of each of the plaintiffs who were deposed in these actions." Compl. P 234.

Holdings' addition of new cases, without addressing the specific information **[*539]** deemed necessary in the earlier opinion, is without effect. Holdings fails to allege which claimants were in which case, which claimants were actually deposed, and whether depositions were taken in the cases. In addition, Holdings still does not provide the date of a single deposition, the participating individuals, or the false identification made during the deposition. Importantly, it does not state that the deponents even viewed the Baron & Budd Memorandum.

GAF was involved as a party in those cases and depositions that it refers to in the amended allegations. 179 F. Supp. 2d at 262. In addition, Holdings has had possession **[**37]** of the Memorandum for a number of years. As a result, Holdings must state this claim with much greater specificity than in the Complaint.

The additional allegations do not overcome the shortcomings outlined in the Opinion, and therefore Holdings' RICO mail and wire fraud claims based on the Baron & Budd Memorandum are dismissed.

b. *The "Fixed" Affidavits Constitute Predicate Acts*

Holdings alleges that in December 1995, unnamed paralegals at Baron & Budd noticed that approximately 200 affidavits filed in unnamed asbestos cases against plaintiff and other asbestos defendants were missing necessary information. TAC PP 82, 90. Holdings alleges that Melanie Oliver, a Baron & Budd supervisor, instructed the paralegals to "fix" the affidavits. Holdings further claims that the paralegals added the product identification information to and signed the affidavits without consulting the affiants. These allegations were not included in the First Amended Complaint and therefore have not been previously discussed.

i. *The Allegations Are Sufficiently Specific*

As discussed above, two rationales underlying *Rule 9(b)* are that pleadings should be sufficiently specific as to provide **[**38]** defendants with fair notice of the claims against them and protect them from harm to reputation or good will by unfounded allegations of fraud. Bearing these principles in mind, Holdings has cleared this hurdle -- albeit just barely -- with these particular allegations. The Defendants have notice of when the behavior is alleged to have taken place: in or around December 1995. The allegations are further specified by pointing to the particular supervisor under whose aegis the fraud is alleged to have taken place. Finally, Holdings has narrowed down a sea of potential cases to a smaller group of 200 cases, in which, as they note, it is highly probable that the alleged fraud was involved.

It is true, as Defendants point out, that Holdings does not refer to any specific affidavit or the specific information that was added to the affidavit. No specific product or work histories are mentioned, except that all or substantially all of them included identification of Ruberoid (Holdings' predecessor by merger) as a manufacturer of asbestos products to which the affiant was exposed.

In a typical case, it is true, such details would be mandatory. In the very fact-specific case before the court, **[**39]** it seems, such details are next to impossible to achieve at this stage of pleading. One of the very allegations underlying this Complaint is that the Defendants undertook to bury GAF and other asbestos producers with litigation so that they were unable to scrutinize each and every affidavit of each and every plaintiff in each and every complaint because it was financially ruinous to do so. Holdings is now attempting to do what it did not do before, a task requiring **[*540]** as much effort -- and with as little appeal -- as cleansing the Augean stables.

Holdings has provided sufficient notice so that the Defendants may defend themselves. Further, the allegations are specific enough so that they are not mere shots in the dark in an attempt to hit a broad target. [7] Whether these allegations are borne out in the end, however, is another matter -- but one for another day.

[40] ii. *The Allegations Are Not Time-Barred***

Because the "fixing" of the affidavits took place more than four years ago, Defendants assert that the allegations are barred by the four-year statute of limitations applicable to civil RICO actions. *In re Merrill Lynch Ltd. Partnership Litig., 7 F. Supp. 2d 256, 262 (S.D.N.Y. 1997)*.

Holdings does not contest that the alleged injury was suffered more than four years ago, but argues that the statute of limitations should be tolled either by equitable estoppel or by fraudulent concealment. Holdings asserts that it could not have learned of the falsification of affidavits until January 2002 [8] because (1) the nature of the fraud was self-concealing; (2) the volume of litigation fomented by Defendants made individualized investigation into the merits of each case an impossibility; and (3) Baron & Budd took active, aggressive, and effective steps to hinder

[7] The "fixing" allegations are distinguishable from the Baron & Budd Memorandum cases because of the time in which Holdings has had the requisite information. Holdings has known for years about the Baron & Budd memorandum, yet continues to plead unspecific allegations against Baron & Budd. By contrast, Holdings has only recently obtained the information regarding the alleged "fixing" and already has provided a more specific set of charges.

[8] Holdings learned of the specific instances of falsification on January 16, 2002, when a witness being interviewed under the auspices of Special Master Fitzpatrick provided the information. Nine days later, Holdings employed those allegations in its Second Amended Complaint.

GAF's investigation into Baron & Budd's ongoing fraud by, *inter alia,* seeking to interfere with GAF's ability to locate and interview former Baron & Budd employees.

[41]** The Second Circuit has held that ***HN9***[] the "standard tolling exceptions" apply to civil RICO actions. *Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1105 (2d Cir. 1988)*. "Under the doctrine of wrongful concealment, the statute of limitations will be tolled if the plaintiff proves three elements: (1) wrongful concealment by the defendant, (2) which prevented the plaintiff's discovery of the nature of the claim within the limitations period, and (3) due diligence in pursuing discovery of the claim." *Butala v. Agashiwala, 916 F. Supp. 314, 319 (S.D.N.Y. 1996)*; *see also* *State of New York v. Hendrickson Bros. Inc., 840 F.2d 1065, 1083 (2d Cir. 1988)*.

The Defendants first argue that Holdings' tolling claim fails as it lacks the specificity required by *Rule 9(b)*. *916 F. Supp. at 319-20*; *Glick v. Berk & Michaels, P.C., 1991 U.S. Dist. LEXIS 10347, 1991 WL 152614*, at *9-*10 (S.D.N.Y. July 26, 1991) (granting motion to dismiss for failure to allege equitable tolling on *Rule 9(b)* grounds). The third allegation, that the Defendants have somehow interfered with Holdings' ability to contact and interview employees was not pled with sufficient specificity. Holdings failed **[**42]** to allege what steps the Defendants took, when they took these steps, and which employees were the subject of these efforts. Without more information, the Defendants could not prepare a defense against that charge. In addition, the allegation that **[*541]** the nature of the fraud was self-concealing is insufficient by itself without more detail. However, the second reason is sufficiently specific: the deluge of litigation made it impossible to verify the merits of each and every case.

The Defendants also contend that Holdings has failed to allege the three elements of fraudulent concealment. They argue first that the first element of concealment [9] was lacking because the affidavits allegedly containing the misrepresentations were disclosed in connection with pending civil actions, and that "they were transmitted directly to GAF's agent." *G-I Holdings, 179 F. Supp. 2d at 261*. While this argument on the surface has appeal, it ignores the recurring theme of this case. The affidavits were transmitted directly to GAF's agent amidst a host of other, similar affidavits. The act of providing the allegedly falsified affidavits in such a manner constitutes "concealment" -- according **[**43]** to Holdings, the Defendants knew that it would be unlikely, and perhaps financially disastrous, for GAF or its agent to sift through all of the affidavits to determine their veracity.

The Defendants also challenge Holdings' showing of due diligence. ***HN11***[] A motion to dismiss on the basis on a plaintiff's failure to engage in due diligence cannot be granted unless the "undisputed facts" show a lack of reasonable diligence. *E.g., Nelson v. Stahl, 173 F. Supp. 2d 153, 166 (S.D.N.Y. 2001)* (rejecting defendants' argument that plaintiffs' claim was barred by statute of limitations because plaintiffs were on inquiry notice of the fraud "because the question of whether plaintiffs should have discovered fraud earlier than they did, and **[**44]** thus whether the action is timely, is a question for the trier of fact"); *Dietrich v. Bauer, 76 F. Supp. 2d 312, 346 (S.D.N.Y. 1999)* (whether plaintiff engaged in due diligence in pursuing claims could not be answered on motion to dismiss because pleading did not establish "undisputed facts" to show inquiry notice and a lack of reasonable diligence on plaintiff's part in discovering the fraud).

Defendants present two related arguments as to why the undisputed facts fall in their favor.

First, they argue that because GAF's agent, CCR, was actively involved in litigation in which the alleged fraudulent statements were made, Holdings could have pursued depositions, written interrogatories, and other similar tactics to ensure that the affidavits were correct. Holdings itself admits this fact. Compl. P 188 (pursuant to the Producer Agreement, CCR "investigated claims, tried cases, and negotiated settlements" on behalf of its members); Opp. Mot. to Dismiss at 34 ("Any individualized claim could perhaps be defended."). While this may be the case, the Defendants are not persuasive in arguing that the decision by CCR not to investigate each claim and try each case was a business **[**45]** decision that prevents any reasonable reliance as a matter of law on sworn affidavits filed "as a prerequisite to implementation of certain mass settlements." Compl. P 76. After making the decision to settle,

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[9] ***HN10***[] With respect to this element, "there are two general varieties": the "defendant may have taken affirmative steps to prevent the discovery of the plaintiff's injury, or the nature of the wrong itself may have been self-concealing." *Butala, 916 F. Supp. at 319*.

there was no perceived need to determine the verity of each and every affidavit. In fact, to do so would obviate the rationale behind the mass settlements. Thus, the mere fact that GAF, through its agent, *could* have investigated each and every claim does not in the situation presented here mean that it was unreasonable **[*542]** in relying on the affidavits at issue.

The Defendants' final argument with regard to Holdings' due diligence is somewhat more persuasive. They argue, in essence, that a party to litigation can never reasonably rely on its adversaries' statements -- even if those statements are presented in sworn affidavits. Defendants, however, fail to cite any authority that holds that a party to litigation may not as a matter of law reasonably rely on deliberate untruths in a sworn affidavit.

The closest case cited by Defendants is *DeLorean v. Cork Gully, 118 B.R. 932, 943 (E.D. Mich. 1990)*, in which the court stated that a party could not justifiably rely **[**46]** on a proposed affidavit, provided by the defendants with an introductory cover letter that clearly put the party on notice that facts in the affidavit needed to be confirmed as true. There was no such introductory cover letter here that would have put GAF on notice, and the affidavits were signed, rather than merely proposed. The other cases cited do not involve sworn affidavits, but rather (1) the advice of adversaries, *id.; Kregos v. Associated Press, 3 F.3d 656, 665 (2d Cir. 1993)* (stating it was "unreasonable for one to rely on the advice of an adversary's counsel . . . when both parties are aware that adverse interests are being pursued"); (2) omissions of fact, *Phoenix Canada Oil Co. v. Texaco Inc., 749 F. Supp. 525, 530 (S.D.N.Y. 1990)* (stating that a party's neglect to inform its adversary "of a fact which may or may not have been useful . . . in fashioning a response to [a] . . . defense" cannot be the basis of a party's reasonable reliance claims); and (3) non-egregious adversarial conduct, *Lazich v. Vittoria & Parker, 189 A.D.2d 753, 754, 592 N.Y.S.2d 418, 419* (2d Dep't 1993) (finding, in divorce case, that "all the statements **[**47]** and actions complained of were undertaken in the course of adversarial proceedings and were fully controverted").

In the absence of authority to the contrary, to hold that a party cannot as a matter of law rely on a sworn affidavit goes too far.

In certain fact-specific circumstances, of course, even sworn affidavits may not as a matter of law be reasonably relied upon. *DeLorean* presents one such exception. Another was presented in *Shaw Steel Inc. v. Morris, 240 B.R. 553, 555 (Bankr. N.D. Ill. 1999)*, where the court was faced with the question of whether a creditor's reliance on the misrepresentations of a debtor (a self-proclaimed "liar," "scoundrel," and "fraudster") regarding his financial condition was justifiable. Shaw Steel argued that it relied on the defendant's misrepresentations because they were in affidavits submitted under oath as part of the resolution of disputed litigation. *Id. at 558*. The court rejected this claim: "Shaw Steel does not cite to any case law standing for the proposition that a party may reasonably rely upon the affidavit of a known liar and cheat which, on its own admission, it distrusted, did not know to be true, **[**48]** and would not accept ("Not on your life.") without further investigation." *Id.; see also Friedgood v. Axelrod, 593 F. Supp. 395*, (S.D.N.Y. 1984) (despite numerous inconsistencies in client's affidavit, attorney could reasonably rely on affidavit when it was supported by other sworn statements).

The exceptions here prove the rule. ***HN12***[] In the absence of some "red flag," such as an introductory letter to that effect or the fact that the affiant is a known "scoundrel," whether a party may reasonably rely on sworn affidavits presents a factual issue that cannot be determined at this stage of the proceedings.

The undisputed facts here do not present such an exception to the rule. The affidavits were not proffered during the **[*543]** give-and-take of ongoing litigation, but in connection with settlement, as conditions precedent to the obligation of CCR (as GAF's agent) to fund the settlement. As discussed above, any attempt to conduct inquiries into the affidavits would defeat the purpose of settling, which was to staunch the ongoing defense expenditures. Furthermore, there is no evidence that GAF believed at the time CCR received the affidavits that the Defendants were liars and/or **[**49]** scoundrels.

For these reasons, it is inappropriate to dismiss the mail and wire fraud claim on the basis of whether Holdings acted reasonably in not verifying the accuracy of the affidavits prior to settling the cases. Therefore, Holdings has alleged predicate acts, and the claims will not be dismissed on this ground.

2. *Pattern of Racketeering Activity*

HN13[] Holdings must allege a "pattern of racketeering activity" consisting of "at least two acts of racketeering activity" undertaken within ten years of each other. *18 U.S.C. § 1961(5)*. The pattern element of a RICO claim requires a showing of "continuity" plus "relationship." *Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n. 14, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)* (quoting S.Rep. No. 91-617, p. 158 (1969)). The Defendants do not challenge the "relationship" aspect on this motion.

In *H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)*, the Supreme Court defined the "continuity" element as follows:

> ***HN14***[] Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or **[**50]** to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept… . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before the continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

Id. at 241-42. Later cases have further developed the concepts of closed- and open-ended continuity.

a. *Closed-Ended Continuity*

HN15[] In order to measure whether closed-ended continuity exists, the Second Circuit has stated that several factors may be considered, including, *inter alia:* "the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes. **[**51]** " *GICC Capital Corp. v. Technology Fin. Group, Inc., 67 F.3d 463, 467 (2d Cir. 1995)* (citations omitted).

The length of time over which predicate acts occurred is an important factor and appears to be dispositive if the period of time is not sufficiently long. The Second Circuit has thus far only found closed-ended continuity where the conduct lasted for two years or more. *De Falco v. Bernas, 244 F.3d 286, 321 (2d Cir. 2001)*; *see also* *GICC, 67 F.3d at 467* (*citing* *Jacobson v. Cooper, 882 F.2d 717 (2d Cir. 1989)* (predicate acts occurred over "a matter of years" from 1980 to 1988); *Metromedia v. Fugazy, 983 F.2d 350 (2d Cir. 1992)* (upholding RICO verdict, despite erroneous jury instruction that "a few weeks or months" might constitute a substantial period **[*544]** of time, because predicate acts occurred over two years); *Procter & Gamble Co. v. Big Apple Indus. Bldgs. Inc., 879 F.2d 10, 18 (2d Cir. 1989)* (concluding, prior to *H.J.,* that allegations of predicate acts occurring over "period of nearly two years" as part of five-part fraudulent scheme were sufficient to plead pattern of racketeering **[**52]** activity)). [10]

HN16[] The duration of a pattern of racketeering activity is measured by the RICO predicate acts the defendants commit. *De Falco, 244 F.3d at 321*. The only predicate acts at issue here are the alleged falsification of affidavits in December 1995. The last of the 190 cases alleged to be involved in this scheme was settled in June 1996. As a result, the period of time over which the predicate acts took place is at most seven months. Closed-ended continuity cannot exist over such an abbreviated period of time. Therefore, Holdings must establish open-ended continuity.

b. *Open-Ended Continuity*

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[10] Holdings suggests that the Second Circuit found closed-ended continuity based on a pattern of predicate acts occurring over a period of one year in *Azrielli v. Cohen Law Offices, 21 F.3d 512, 520-21 (2d Cir. 1994)*. However, the Second Circuit in *GICC* cited *Azirelli* as a case in which open-ended continuity had been found. *67 F.3d at 466*.

HN17[] Unlike closed-ended **[**53]** continuity, open-ended continuity "does not require a substantial temporal showing." *Jordan (Bermuda) Inv. Co. v. Hunter Green Inv. Ltd., 154 F. Supp. 2d 682, 694 (S.D.N.Y. 2001)* (*citing Cofacredit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 242 (2d Cir. 1999)*). Rather, it "requires a plaintiff to show a threat of on-going criminal activity beyond the period in which the predicate acts were committed." *Id.*

"In this Circuit, 'cases assessing whether a threat of continuity exists have looked first to the nature of the predicate acts alleged or to the nature of the enterprise at whose behest the predicate acts were performed.'" *DeFalco, 244 F.3d at 323* (*citing GICC, 67 F.3d at 466* (collecting cases)). Where, as here, the alleged enterprise "primarily conducts a legitimate business, there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity." *Cofacredit, 187 F.3d at 243*; *see also H.J., 492 U.S. at 242-43* (finding **[**54]** threat where it can be demonstrated that predicate acts are "a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'").

The nature of the predicate acts at issue imply a threat of on-going criminal activity. According to Holdings, unnamed paralegals were told to "fix" affidavits by a supervisor in order to meet a looming deadline, and they "fixed" them without the assistance or permission of the affiants. First, the alleged "fixing" involved 200 affidavits, rather than merely one or two or even a handful of affidavits. The sheer scope of the predicate acts ratchets up the seriousness and suggests a future threat. Second, a supervisor gave the instruction to "fix" the affidavits, suggesting that it was not merely the independent actions of paralegals who, in the future, may be advised to act differently. Instead, the management was involved. Finally, although perhaps the situation of finding 200 incomplete affidavits on the eve of their due date was quite extreme, the legal profession is in general inundated with deadlines. Further, the sort of asbestos litigation performed by Baron **[**55]** & **[*545]** Budd involves, conservatively, hundreds of clients and thousands of documents. Another group of paralegals almost inevitably has been and will be faced with a similar situation, even if not of the same magnitude. Given the factors discussed above, there is a threat that the affidavits again will be "fixed."

In addition, Holdings alleges that these predicate acts were performed as part of Baron & Budd's regular course of business. The Baron & Budd Defendants' regular course of business is the practice of law, and, in particular, the representation of individuals who claim to have been harmed by toxic substances, including asbestos. *See* *www.baronandbudd.com/About* (last visited June 26, 2002). As discussed above, mass tort litigation spawns numerous documents and requires that they be filed by certain deadlines. Certainly, Baron & Budd must very often take and file the affidavits of its clients as part of the regular course of business. Holdings also alleges that the falsification of the affidavits were part of a larger scheme that was part of Baron & Budd's regular course of business. Holdings alleges that the Baron & Budd defendants falsified claims forms filed by the Baron & **[**56]** Budd bankruptcy department, implemented and used firm policies to encourage false testimony, and intentionally gathered false testimony to support personal injury claims against former asbestos manufacturers. Taking these allegations as a whole, Holdings has sufficiently alleged for the purposes of this motion that there was open-ended continuity as the predicate acts were part of Baron & Budd's regular course of business.

The Defendants argue, however, the scheme is "inherently terminable" and thus cannot constitute open-ended continuity. *GICC, 67 F.3d at 466*; *see also First Capital Asset Mgmt., Inc. v. Brickelbush, 150 F. Supp. 2d 624, 634 (S.D.N.Y. 2001)* ("The scheme here is 'inherently terminable' in that it necessarily ended with the bankruptcy to which it was related."). The Defendants point to the bankruptcy of asbestos manufacturers, including GAF, as the inevitable terminus of the scheme. Compl. P 3 ("This avalanche of asbestos lawsuits . . . has driven more than two dozen once prosperous companies into bankruptcy including, just since the beginning of 2000, such major companies as Owens Corning, The Babcock & Wilcox Company, Armstrong World **[**57]** Industries, Pittsburgh Corning Corporation, and W.R. Grace & Co.").

The scheme is not inherently terminable, however, as asbestos litigation continues to this day. *E.g., In re Asbestos Litigation, 2002 R.I. Super. LEXIS 89, 2002 WL 1378959* (R.I. Super. Jun 20, 2002); *see also* N.Y.L.J., Verdicts and Settlements (July 1, 2002) (reporting on jury verdicts in asbestos-injury case in New York Supreme Court on May 31, 2002); Patti Bond, Asbestos Verdict vs. G-P Upheld, Atlanta J. & Atlanta Const. at D.1, 2002 WL 3725935 (June 12, 2002) (noting that a Maryland appeals court had upheld $ 9 million verdict against Georgia-Pacific and that company stated that the award "will not affect its ability to defend the other cases); Nat'l L.J., $ 5.6 Million in Punitives Was Awarded to Smoker, at B2 col. 1 (June 10, 2002) (reporting on jury verdict in asbestos-related case). In addition, the past behavior of plaintiffs' attorneys in asbestos cases is instructive. After the first major bankruptcy of a asbestos manufacturer in 1981, "plaintiffs' attorneys began looking for anyone else who was culpable." Next Wave of Asbestos Filings Will Stretch on as Companies Buckle Under Weight, 39 No. 15 Bankr. Ct. Dec. (LRP) 1 **[**58]** (June 18, 2002). There is good reason to assume that the more recent filings similarly will not deter the effort to prosecute asbestos claims. *Id.* In **[*546]** any case, to suggest that the scheme is "inherently terminable" because at some point in the future the Defendants will no longer be able to descry potential asbestos-injury defendants because they will have financially ruined all their other prospects is too tenuous -- and fantastical -- an argument to succeed at this stage.

Holdings therefore has pled open-ended continuity.

3. *Existence of a RICO Enterprise*

HN18[] In order to satisfy *section 1962(c)*'s requirement, a plaintiff must plead each defendant's participation in the "operation or management" of an "enterprise" as those terms are defined for the purposes of the statute. *Dietrich v. Bauer, 76 F. Supp. 2d 312, 347 (S.D.N.Y. 1999)* (*citing* *Reves v. Ernst & Young, 507 U.S. 170, 183, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993))*. An enterprise within the meaning of RICO requires an "association in fact" between or among individuals and entities. *18 U.S.C. § 1961(4)*; *see also* *Kashelkar v. Rubin & Rothman, 97 F. Supp. 2d 383, 391* **[**59]** (S.D.N.Y.) ("To plead an enterprise, plaintiff must allege facts showing a group of persons associated together for a common purpose, which is proved by evidence of an ongoing organization . . . and by evidence that the various associates function as a continuing unit." (internal quotation marks omitted), *aff'd 242 F.3d 365 (2d Cir. 2001)*.

Because *§ 1962(c)* speaks separately of a RICO "person" acting on or conducting the affairs of the "enterprise," which clearly envisions two entities, *Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. 1985)*, a plaintiff must also comply with the rule that the RICO "person and enterprise referred to must be distinct." *Riverwoods Chappaqua Corp. v. Shapiro, 30 F.3d 339, 344 (2d Cir. 1994)*.

a. *Count V*

The sole defendant in Count V is the law firm Baron & Budd. It is charged with conducting the "Baron & Budd Association-in-Fact Enterprise" (the "B&B Enterprise") through a pattern of racketeering activity consisting of acts of mail and wire fraud related to the falsification of evidence in asbestos cases and the carrying out of the extortionate threats during 1999 and 2000 **[**60]** through the filing and instigation of fraudulent asbestos actions against Holdings.

The B&B Enterprise is defined as an "association in fact of Baron & Budd, its various local counsel, various doctors and/or various unions." TAC P 203. Holdings has alleged that the law firm Baron & Budd is part of, but smaller than, an ongoing existing enterprise that includes other law firms, trade unions, and doctors. Further, it alleges that each of the participants in that enterprise has a specific role: the trade unions locate plaintiffs; Baron & Budd and the doctors manufacture evidence; and local counsel process cases through courts around the country. Holdings further alleges that this collection operates under the overall direction of Baron & Budd.

The Defendants suggest that the local counsel, unions and doctors are merely agents of the Defendants and thus fail the distinctiveness requirement.

Under Second Circuit case law prior to *Cedric Kushner Promotions Ltd. v. King, 533 U.S. 158, 150 L. Ed. 2d 198, 121 S. Ct. 2087 (2001)*, it is clear that if the additional entities are merely agents acting within the scope of their employment, there cannot be an enterprise. **[**61]** *E.g.* *Riverwoods, 30 F.3d at 344-45*. Holdings suggests that

[*547] *Cedric Kushner* has stretched this rule. [11] There is no need to determine this unsettled issue because, taking the facts in the light most helpful to Holdings, the Complaint fits under the *Riverwoods* rubric. Even if the local counsel, unions and doctors are Baron & Budd's agents -- which Holdings contests -- they were not acting within the scope of the agency. Viewing Holdings' complaint under the applicable standard, the allegations of Holdings' RICO claim can fairly be read to allege that Baron & Budd and its agents went beyond conducting the normal affairs of Baron & Budd, and were acting on behalf of the enterprise with the goal of encouraging large settlements from GAF and others for their own benefit through the device of the enterprise.

[62] b. *Count VI***

Count VI alleges the same wrongdoing against individual defendants Baron and Budd. Messrs. Baron and Budd are the "persons." Holdings alleges two enterprises: the B&B Enterprise, discussed above, and the law firm itself.

This situation falls squarely under the rule of *Cedric Kushner.* In *Cedric Kushner,* the Supreme Court upheld a RICO claim against fight promoter Don King, who as the "person" was alleged to have conducted an "enterprise" consisting of a corporation in which he was the sole shareholder. *533 U.S. at 166*. The Court held that ***HN19***[] "the corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its legal status. And we can find nothing in the statute that requires more 'separateness' than that." *Id. at 163*.

Similarly, Fred Baron and Russell Budd, as named partners and members of the law firm of Baron & Budd, are separate and distinct legal entities from the law firm they control, and which in turn purportedly controls the B&B Enterprise.

Defendants also argue that Holdings has failed to allege how Messrs. Baron **[**63]** and Budd participated in or oversaw the underlying actions which constitute the mail and wire fraud claims. The complaint, however, does allege that the individual defendants were responsible for implementing and maintaining the policies at Baron & Budd and for supervising the law firm's attorneys and personnel. Compl. PP 230, 232. Further, the Complaint states that Messrs. Baron and Budd caused the employees of the law firm and the members of the B&B Enterprise to target GAF, decline to settle cases with GAF, and focus the on-going subornation of perjury through bogus identifications of Calsilite. At the very least, the last allegation regarding bogus identifications of Calsilite covers the specific predicate acts alleged and permits the claim to survive this motion to dismiss on this ground.

4. *Holdings Has Standing*

Defendants challenge Holdings' standing, alleging that it has not alleged reasonable reliance and proximate cause.

[*548] a. *Reasonable Reliance*

HN20[] As part of a fraud-based RICO complaint, plaintiff must plead detrimental and justifiable reliance on defendant's misrepresentations. *Metromedia, 983 F.2d at 368* ("In the context of an alleged **[**64]** RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on." (*citing* *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990))*.

[11] *E.g.* *Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887*, at *23 (S.D.N.Y. Feb. 28, 2002) ("Although some authority weighs against recognizing an 'enterprise' that is comprised of a corporation and its agents or subsidiaries, recent Supreme Court case law suggests that the 'distinctiveness' requirement imposed by *Section 1962(c)* is not as rigid as prior circuit precedent suggests."); *see also* *Chen v. Mayflower Transit, Inc., 159 F. Supp. 2d 1112, 1114-15 (N.D.Ill. 2001)* (*citing Cedric Kushner* for the proposition that the formal legal distinction created by incorporation is sufficient for the RICO statute and holding plaintiff pleaded RICO enterprise comprising common carrier corporation and its local agents).

Defendants allege that Holdings has failed to allege reasonable reliance on the allegedly false affidavits because (1) GAF could not reasonably rely on the sworn affidavits, and (2) Holdings fails to allege a number of specific things about the affidavits it purportedly received from Baron & Budd.

The former argument has been rejected above. Further, Defendants fail to present case law that supports the latter point, which appears to rehash their *Rule 9(b)* arguments. [12] For the reasons discussed in greater length in Part I.C., Holdings has satisfied *Rule 9(b)* for the purposes of a motion to dismiss and, in the absence of any case law requiring a separate showing of specificity for the purposes of demonstrating standing, the motion to dismiss on this ground is denied.

[65] b. *Proximate Cause***

Defendants also allege that Holdings has failed to allege proximate cause. [13]

HN21[] RICO grants standing to sue to "any person injured in his business or property by reason of a violation of *section 1962* of this chapter." *18 U.S.C. § 1964(c)*. This language limits standing to plaintiffs whose injuries were both factually and proximately caused by the alleged RICO violation. *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 234 (2d Cir. 1999)* (*citing Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992))*. While the term "proximate cause" is utilized, the Second Circuit **[**66]** has made clear that liability under statutes such as RICO does not "depend on whether there is proximate causation as that term is used at common law." *Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237 (2d Cir. 1996)*. Instead, the question is whether the plaintiff was "in the category the statute meant to protect," and whether "the harm that occurred [was] the 'mischief' the statute sought to avoid." *Id.; see also BCCI Holdings (Luxembourg), Societe Anonyme v. Pharaon,* ***[*549]*** *43 F. Supp. 2d 359, 365 (S.D.N.Y. 1999)*. Thus, to have standing, plaintiffs must show that they were "the intended targets of the RICO violations" and that any alleged RICO injury must have been the "preconceived purpose" of the RICO activities. *In re American Express Co. Shareholder Litig., 39 F.3d 395, 400 (2d Cir. 1994)* (*citing Sperber v. Boesky, 849 F.2d 60, 64-65 (2d Cir. 1988))*.

Holdings has alleged that GAF was an intended target of the RICO violations. Further, it has alleged that the injury it purportedly suffered -- the payment of higher settlements (and the Defendants' concomitant receipt of more generous legal fees) -- was the preconceived **[**67]** purpose of the violations. This is sufficient to allege standing.

The Defendants' motion to dismiss Counts V and VI is denied.

D. *Count VII: RICO Witness Tampering Claim Is Dismissed*

Holdings has reasserted its former Count VI concerning witness tampering allegations as Count VII for the sole purpose of clarifying the reason for dismissal. In the First Amended Complaint, Holdings alleged that all the Defendants violated the witness tampering statute, *18 U.S.C. § 1512*, in that they attempted to and did use intimidation to corruptly persuade former asbestos producers not to testify before Congress regarding the Fairness

[12] Defendants first cite to *G-I Holdings, 179 F. Supp. 2d at 262*, which did not even discuss the specific allegations of "fixed" affidavits as those allegations were not part of the FAC. Further, the cited section addresses the requirements of *Rule 9(b)*. Defendants cite only one other case for this proposition in their Reply Memorandum, but the portion cited similarly involves a discussion of *Rule 9(b)*. *Associated Wrecking, Inc. v. Local 95 Pension Fund,* 1994 U.S. Dist. LEXIS 3952, 1994 WL 118987, at *5 (S.D.N.Y. March 31, 1994) (dismissing RICO mail and wire fraud claims for, *inter alia,* failure to allege specific times and places that documents were sent). In their Memorandum, Defendants also quoted *Grumman Allied Indus. v. Rohr Indus., 748 F.2d 729, 737-38 (2d Cir. 1984)*, which deals generally with reliance and not with the fact specific situation here. *Id.* ("Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance."

[13] The Defendants appear to concede this argument in their reply memorandum and focus instead on the reliance argument. Defs.' Reply Mem. at 25 ("Proximate Cause Cannot Substitute for the Reliance Requirements"). Because they did not expressly do so, it nevertheless will be discussed.

in Asbestos Compensation Act ("FACA"). That count was dismissed as to the Georgia Pacific allegations on several bases. *179 F. Supp. 2d at 265-67*.

Count VII of the Third Amended Complaint now asserts witness tampering predicate acts other than those related to Georgia Pacific. Holdings acknowledges that it cannot distinguish the facts alleged as to the non-Georgia Pacific witnesses from those alleged and dismissed as to Georgia Pacific. However, it claims to have addressed and satisfied one of the shortcomings found above, **[**68]** that Holdings had not sufficiently alleged that the witnesses were in fact expected to testify before Congress. 179 F. Supp. 2d at 265.

It was earlier held that "at a minimum, Holdings would need to allege an intent to induce someone not to testify or to testify falsely at an actual official proceeding." *Id. at 265*. Holdings has amended its pleading to allege specifically that Defendants intended to prevent GAF, Heyman, and other members of the Coalition for Asbestos Resolution from testifying before Congress in support of FACA, or to cause their testimony to be less favorable to Defendants. The Complaint alleges:

> "265. As described above, upon information and belief, defendants attempted to and did use intimidation, threatened, and corruptly persuaded former asbestos producers with the intent to prevent their testimony before Congress and to cause them to withhold their testimony from Congress, in violation of *18 U.S.C. § 1512(b)*.
>
> > (a) With respect to GAF and Mr. Heyman, defendants had actual knowledge that Mr. Heyman was expected to be a witness in Congressional hearings on FACA, as indeed he was. The conduct alleged **[**69]** above was undertaken with the specific intent of causing Mr. Heyman not to appear or, if he did appear, to moderate his testimony to be less unfavorable to defendants.
> >
> > (b) With respect to the other former asbestos manufacturers, defendants actually and correctly believed that some of their number would be called (or would voluntarily appear) as witnesses in those hearings. The conduct alleged above was undertaken with the specific intent of causing **[*550]** these individuals not to appear or, if they did appear, to moderate their testimony to be less favorable to defendants.

Complaint, P 265.

These allegations are sufficient to allege an intent to induce someone not to testify or to testify falsely at an actual official proceeding. However, as Holdings acknowledges, Count VII is dismissed for the other reasons identified in the earlier opinion. The Defendants' motion to dismiss Count VII is granted.

E. *Count XI: Holdings Again Has Failed to Distinguish Its Fraudulent Inducement and Breach of Contract Claims*

For its breach of contract claim, Holdings alleges that defendants Weitz & Luxenberg and Ness Motley each breached the Futures Agreement by "failing to recommend **[**70]** to its non-sick clients that they defer filing asbestos claims until they met the medical criteria set forth" in those Futures Agreements. Compl. P 289, 299. For its fraudulent inducement claim, Holdings alleges that it was fraudulently induced to make a $ 200 million payment in a transaction that was separate and apart from the parties' obligations under the Futures Agreements. *Id. at PP 306-09*.

As noted in the earlier opinion, ***HN22***[] to sustain a claim for fraudulent inducement alongside a claim for breach of contract under New York law, one must plead any one of the following: (i) a legal duty separate from the duty to perform under the contract; (ii) a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) special damages that are caused by the misrepresentation and unrecoverable as contract damages. *G-I Holdings, 179 F. Supp. 2d at 269* (*citing* *Blank v. Baronowski, 959 F. Supp. 172, 180 (S.D.N.Y. 1997)* (*citing* *Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc., 98 F.3d 13, 20 (2d Cir. 1996))*).

As a result, Holding's fraudulent inducement claim was dismissed previously as indistinguishable **[**71]** from its breach of contract claims:

> Holdings contends the fraudulent inducement claim is based on a $ 200 million payment plaintiff made toward a $ 750 million settlement of certain asbestos claims in reliance on the Defendants' representations that they would perform under the Futures Agreement. The Futures Agreement itself is alleged to consist of CCR agreeing to toll the statute of limitations on numerous asbestos claims in exchange for a promise that, subject to the exercise of their professional judgment, Defendants Weitz & Luxenberg and Ness Motley would recommend to their non-sick clients that they seriously consider deferral of their claims. However, P 138 of the Complaint states that "the consideration for the Futures Agreements included CCR's agreement to settle some 50,000 pending asbestos cases for approximately $ 750 million." This allegation belies Holdings' contention that the settlement was an independent agreement and represents damages not recoverable in contract.
>
> The claim apparently is that the partial settlement payment was made in reliance on the representation that the Futures Agreements would be complied with. Though Holdings contends this agreement is **[**72]** extraneous to the contract, and that damages arising therefrom could not be recovered in contract, the claim is not sufficiently distinguishable from the underlying contract claim. A viable fraudulent misrepresentation claim requires that the misrepresentation pertain to facts that are "collateral or extraneous" to the contract, … not **[*551]** that the plaintiff participated in a separate "event" based on statements contained in the contract, as plaintiff currently asserts.

Id.

In response to the opinion, Holdings has altered former Paragraph 138 [14] to state:

> Ness Motley, Weitz & Luxenberg and the Affiliated Law Firms used the Futures Agreements and their explicit and implicit (but false and fraudulent) promises to perform thereunder to induce CCR's agreement to settle some 50,000 pending asbestos cases for approximately $ 750 million [of which GAF contributed approximately $ 200 million].

Compl. P 162.

[73]** Holdings has failed to cure the defect identified in the earlier holding. It still does not allege that an independent agreement existed. By its statement that Defendants somehow "used" the Futures Agreements and the promises to perform them to "induce" the settlement, Holdings alleges again that the Futures Agreements promises were the very inducement that led to the settlement. This raises the same problem found in the First Amended Complaint: "the claim apparently is that the partial settlement payment was made in reliance on the representation that the Futures Agreements would be complied with." *179 F. Supp. 2d at 269*.

Because Holdings has not altered the failing identified in the earlier opinion, the Defendants' motion to dismiss Count XI is granted.

F. *Count XII States a Common Law Fraud Claim Against Baron & Budd*

Count XII is premised on the same allegations that form the basis of the existing RICO mail and wire fraud count and is alleged only against defendant law firm Baron & Budd. Holdings essentially alleges that Baron & Budd paralegals, at the behest of a supervisor, "fixed" approximately 200 affidavits by filling in missing information without seeking client approval **[**74]** or assistance. GAF then relied on these falsified affidavits in settling the cases.

HN23[] To plead a claim of fraud under New York law, plaintiffs must allege five elements: (1) misrepresentation of a material fact; (2) the falsity of that representation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance. *May Dep't Stores v. Int'l Leasing Corp., 1 F.3d 138, 141 (2d Cir. 1993)*.

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[14] Former Paragraph 138 stated in pertinent part: "The consideration for the Futures Agreements included CCR's agreement to settle some 50,000 pending asbestos cases for approximately $ 750 million."

Baron & Budd argues that Count XII should be dismissed because it fails to meet specificity requirements, does not allege justifiable reliance, and is improperly based on information and belief. The first two allegations have already been discussed and rejected, *supra.*

As for the third, **HN24**[] fraud pleadings generally cannot be based on information and belief. *Stern v. Leucadia Nat'l Corp., 844 F.2d 997, 1003 (2d Cir. 1988)*. However, fraud allegations may be so pleaded as to facts peculiarly within the opposing party's knowledge. *Id.* (citations omitted). Even then, the allegations must be accompanied by a statement of facts upon which the belief is founded, *id.,* and this rule "must not be mistaken for **[**75]** license to base claims of fraud on speculation and conclusory allegations." *Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990)* ("Where pleading is permitted on information and belief, a complaint must adduce **[*552]** specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.").

Baron & Budd challenges the sufficiency of Holdings' claim that "on information and belief," the "200 or so" false affidavits resulting from the paralegals' "fixing" "is contained within the set of 190 cases listed in Exhibit D." Compl. P 90.

Which of the 190 cases -- if any -- contain the allegedly falsified information is, at this moment, peculiarly within the opposing party's knowledge. Holdings' discovery of the falsifications is relatively recent, and it has been unable to engage in the sort of discovery that would make this allegation more clear. Moreover, Holdings has provided a statement of facts elucidating how it came to the conclusion that at least some of these 190 cases contained falsified affidavits. Therefore, at this stage of the pleading, pleading this aspect of the claim on information and belief is sufficient.

Therefore, **[**76]** Baron & Budd's motion to dismiss Count XII is denied.

G. *Count XIII: Claim of Common Law Fraud Against Weitz & Luxenberg Fails to State a Claim with Specificity*

In Count XIII, Holdings asserts that Weitz & Luxenberg "backdated documents filed in asbestos personal injury cases and . . . tampered with and falsified records of the Supreme Court of the State of New York." Compl. P 97. Specifically, Holdings contends that in approximately May 2000, in an unidentified case that was then pending in Supreme Court, New York County, Weitz & Luxenberg realized that it had failed to amend a complaint in a timely fashion, and thus drafted a backdated complaint. *Id. PP 98, 101*. Then, Weitz & Luxenberg enlisted the aid of a court employee related to Weitz & Luxenberg paralegals who stamped the amended complaint with an earlier date and placed a false entry into the court's log book so that it appeared as if the complaint had been filed prior to the expiration of the limitations period. *Id. PP 101-02, 104-05*. Holdings also alleges that this backdating was not an "isolated incident" and that it occurred in other unnamed cases. *Id. P 106*.

Holdings has failed to satisfy *Rule **[**77]** 9(b)*'s requirements with these allegations. Holdings alleges a particular incident of backdating in May 2000 and generally alleges "other occasions" in which the same occurred. Holdings does not appear to challenge that the allegations regarding "other occasions" lack sufficient specificity, [15] but does argue that it has met the requirements of *Rule 9(b)* with regard to the May 2000 incident in that it has alleged (1) the statements that were fraudulent (the false filing date); (2) identified the speaker (Weitz & Luxenberg); (3) where and when the statement was made (at the New York Supreme Court, 60 Centre Street, New York, New York in mid-May 2000); and (4) why the statement was fraudulent (the "filed" stamp did not reflect the true date on which it was filed with the court). *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993)*.

[78]** Yet the Complaint fails to identify, *inter alia:* (1) any of the cases (or even group of cases) in which Weitz & Luxenberg purportedly backdated the amended complaints; (2) the claimant in the case; (3) the asbestos manufacturers in the case; **[*553]** and (4) when the statute of limitations began to run or expired.

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[15] Such defense would be fruitless. Holdings fails to allege even a time frame for these "other occasions" much less the other more specific information that Holdings also fails to allege with regard to the alleged May incident.

Holdings acknowledges that the identity of the specific case in which this backdating occurred is missing, but states that the information is "particularly within the defendants' control and awaits discovery to obtain the necessary physical evidence." Pl.'s Mem. at 56. This information is not particularly within Weitz & Luxenberg's control, as Holdings was able to obtain at least partial information from an interview with an unnamed source. In any case, Holdings should be able to identify at least a group of cases [16] -- if not the actual case itself -- based on New York Civil Practice Law and Rules.

[79]** ***HN25***[] Pursuant to *C.P.L.R. Section 306-b*, a complaint must be served within 120 days of its filing. [17] **[**80]** Therefore, the "backdated" amended complaint could not have been backdated to a date more than 120 days prior to mid-May (because it then would not have been timely served) [18] and yet must have been served after mid-May (when the backdating allegedly occurred). As a result, Holdings has several distinguishing characteristics: the document is an amended complaint where Weitz & Luxenberg served as plaintiffs' counsel, and it should have been served on GAF less than 120 days after mid-May 2000, with a filed date of less than 120 days prior to mid-May 2000. Given these characteristics, Holdings should have delimited the universe of cases to ones meeting these criteria.

The identity of the backdated complaint involved is important because Holdings must do more than conclusorily allege that GAF was a defendant in that complaint [19] and so "incurred expenses in defending" it. Compl. P 316.

The allegations further do not satisfy two of the concerns behind *Rule 9(b)*: (1) to provide defendants with fair notice of the claims against them so that they may prepare a defense; and (2) to protect defendants from harm to their reputations **[**81]** and good will by unfounded allegations of fraud. *DiVittorio, 822 F.2d at 1247*. Holdings finally suggests that its allegations satisfy the first concern, relying on statements from a Weitz & Luxenberg spokesman in response to these allegations. Mark Hamblett, Weitz & Luxenberg Responds to Charges It Falsified Documents, N.Y.L.J., April 12, 2002, at 1; Mark Hamblett, Weitz & Luxenberg Accused of Falsifying Documents, N.Y.L.J., March 20, 2002, at 1. However, this argument is disingenuous as Weitz & Luxenberg's general denials in the legal press cited above are not the type of defense contemplated by *Rule 9(b)*.

[*554] Weitz & Luxenberg's motion to dismiss Count XIII is therefore granted, but leave to replead is permitted for this claim alone. As discussed below, Holdings at oral argument stated that it did not seek leave to replead its complaint after this iteration. Nonetheless, this is the first time Holdings has pressed this claim. Further, if Holdings can identify the amended complaint that was backdated -- or at least a group of potential cases -- and can otherwise add greater specificity to the allegations, then Holdings may have a viable claim and should have the opportunity **[**82]** to replead it.

H. *Leave to Replead Is Denied Except as to Count XIII*

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[16] For instance, it was sufficient at this stage of the proceedings for Holdings in Count XII to identify a group of cases that likely contained the falsified affidavits.

[17] *Section 306-b* provides:

> ***HN26***[] Service of the summons and complaint ... shall be made within one hundred twenty days after their filing ... . If the service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

[18] If the purportedly backdated amended complaint was not served within 120 days of the purported stamp, Holdings could not reasonably have relied on it as such complaint would be subject to summary dismissal pursuant to *§ 306-b*.

[19] Holdings does not directly state that it was a named defendant; rather it states that "the named defendants" relied on the false date, Compl. P 315, and that Holdings "incurred expenses in defending" the complaint. *Id. at P 316*.

Holdings has had four chances over the course of more than fifteen months to prepare its complaint, and has received a lengthy opinion that has addressed the elements and pleading requirements for most of the claims asserted here. In addition, counsel for Holdings stated at oral argument on May 15, 2002, that Holdings did not seek leave to replead. [20] For these reasons, leave to replead is denied on all of the claims except for Count XIII.

II. *Motion To Strike*

The Ness Motley Defendants have moved to strike the following "scandalous" allegations **[**83]** from the Third Amended Complaint pursuant to *Fed. R. Civ. Proc. 12(f)*:

> Upon information and belief, defendant Ness Motley provided … inducement to medical experts to obtain their favorable testimony. Upon information and belief, certain of Ness Motley's female secretaries and paralegals were expected to, and did, "entertain" expert witnesses who would visit the firm in connection with pending asbestos litigation. Upon information and belief, at least one partner of the firm indicated to his secretary that she should have sex with a particular expert witness, and defendant Motley supplied several female employees with cash and encouraged them to "be nice to" certain of the firm's expert and out-of-state counsel.

Compl. P 109. Ness Motley contends that the above allegations are immaterial and prejudicial.

Fed. R. Civ. Proc. 12(f) provides:

> ***HN27***[] Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient **[**84]** defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed. R. Civ. Proc. 12(f).

As an initial matter, Holdings challenges the timeliness of Ness Motley's motion.

HN28[] Although *Rule 12(f)* allows motions to strike only up to the time a party responds to a pleading, it also permits a court to strike such material on its own initiative at any time. *Fed. R. Civ. P. 12(f)*. As the very case cited by Holdings makes clear, "this provision has been interpreted to allow courts to grant meritorious motions to strike even when they are untimely." *Phillips v. Dalton, 1997 U.S. Dist. LEXIS 419, 1997 WL 24846*, at *3 n.8 (E.D. Pa. Jan. 22, 1997) (denying motion because material was not sufficiently **[*555]** prejudicial, rather than due to untimely filing); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380, at 652-54 (2d ed. 1990); *Wine Markets Int'l Inc. v. Bass, 177 F.R.D. 128, 133 (E.D.N.Y. 1998)* ("In effect, the Court's discretion renders the [rule requiring a motion to strike prior to response to a pleading] 'essentially unimportant.'") (citation omitted). *But see* *Eaton V. American Media Operations, Inc., 1997 U.S. Dist. LEXIS 46, 1997 WL 7670* at *5 (Jan. 9, 1997), **[**85]** (dismissing motion to strike as untimely because not filed prior to filing responsive pleading). Therefore, it is necessary to determine whether Ness Motley's motion is meritorious.

The Court of Appeals has ***HN29***[] cautioned district courts to approach such motions with caution: "It is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible . . . . Thus the courts should not tamper with the pleadings unless there is a strong reason for doing so." *Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976)*. In spite of this reluctance, allegations may be stricken if they have no real bearing on the case, will likely prejudice the movant, or where they have criminal overtones. *Toto v. McMahan, Brafman, Morgan & Co., 1995 U.S. Dist. LEXIS 1399, 1995 WL 46691*, at *16 (S.D.N.Y. Feb. 7, 1995) (citation omitted); *see also* Wright, Miller & Marcus, *Fed. Prac. & Proc.: Civil 2d* § 1382, at 714 (West 1994 & Supp. 2001) ("Scandalous allegations . . . will often be stricken from the pleadings in order to purge the court's files and protect the subject of the allegations.")

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[20] Counsel stated that Holdings may wish to amend the complaint if the Special Master's investigation yields more information. If particularly specific facts leading to meritorious claims are uncovered, Holdings may *move* to replead. Holdings may not replead as of right except as to Count XIII, and any such pleadings without seeking leave of court will be summarily dismissed.

As a result **[**86]** of Part I of this opinion, only three claims remain against Ness Motley: (1) tortious interference with business relations [21] (Count II); (2) tortious interference with contract [22] (Count III); and (3) breach of contract [23] (Count X).

[87]** Counts II and III allege that all the defendants, including Ness Motley, "caused CCR to expel GAF," carrying out their "extortionate threats . . . to coerce GAF to cease its efforts to lobby Congress for passage of the [FACA] . . . ." Compl. PP 182-83. The only possible materiality of the allegations are to provide background regarding the strength of the "improper" means, the purported "extortionate threats." This background has "no real bearing on the case."

Count X alleges a breach of the Futures Agreement by Ness Motley's "failing to recommend to its non-sick clients that they defer filing asbestos claims until they met the medical criteria set forth" in the Agreement. Compl. P 209. The allegations have no bearing on whether Ness Motley breached the Futures Agreement.

In addition to the lack of relevance of the allegations, they are also prejudicial. **[*556]** They are amorphous, unspecific and cannot be defended against. Further, the allegations, which have been publicized, harm Ness Motley in the public eye and could influence prospective jury members.

Holdings cites the myriad media reports concerning these allegations to suggest that any prejudice has already occurred and that **[**88]** striking the allegations will not cause the legal community, the public or a jury to ignore the proverbial white elephant standing in the corner of the room. If a party has suffered prejudice as a result of scandalous allegations -- as is likely here -- the solution under *Rule 12(f)* is not thereafter to ignore the party's plight. The portion is therefore stricken.

Conclusion

For the foregoing reasons, the Defendants' motion to dismiss is granted in part and denied in part. Counts VII, XI and XIII are dismissed, but leave is granted to replead Count XIII. Further, Counts I, IV, and VIII were previously dismissed, and Holdings did not replead them. As a result, the following claims remain: (1) Count II (tortious interference with economic advantage against all defendants); (2) Count III (tortious interference with contract against all defendants); (3) Count V (RICO mail and wire fraud against Baron & Budd); (4) Count VI (RICO mail and wire fraud against the individual defendants Baron and Budd); (5) Count IX (breach of contract against Weitz & Luxenberg); (6) Count X (breach of contract against Ness Motley); and (7) Count XII (common law fraud against Baron & Budd).

[89]** In addition, Ness Motley's motion to strike is granted.

It is so ordered.

New York, NY

July 17, 2002

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[21] ***HN30***[] Under New York law, the elements of tortious interference with a business relationship are: (1) interference by the defendants with an existing contract or business relationship; (2) the interference was accomplished by dishonest, unfair, or improper means or was done intentionally; and (3) damages therefrom. *Martin Ice Cream Co. v. Chipwich Inc., 554 F. Supp. 933, 945 (S.D.N.Y. 1983)* (citation omitted).

[22] ***HN31***[] The elements of tortious interference with a contract are: (1) the existence of a valid contract between plaintiffs and a third party; (2) that the defendants had knowledge of it; (3) the defendants intentionally procured a breach by the third party; and (4) damages therefrom. *Id.*

[23] ***HN32***[] Under New York law, the elements of breach of contract are: (1) a valid contract; (2) plaintiff's due performance; (3) breach by defendants; and (4) damages from breach. *E.g., R.H. Damon & Co. v. Softkey Software Prods. Inc., 811 F. Supp. 986, 991 (S.D.N.Y. 1993)*.

ROBERT W. SWEET

U.S.D.J.

Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft

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

July 24, 2002, Decided

Civil Action No. 01-1689-A

Reporter

213 F. Supp. 2d 612 *; 2002 U.S. Dist. LEXIS 13615 **

EUROTECH, INC., et al., Plaintiffs, v. COSMOS EUROPEAN TRAVELS AKTIENGESELLSCHAFT, Defendant.

Disposition: [1]** Plaintiffs' request for declaratory relief denied and complaint dismissed with prejudice.

Core Terms

domain name, registration, plaintiffs', travel, website, marks, bad faith, registered, incontestability, cosmotravels, trademark, unfair competition, trademark infringement, consumers, disputed, infringer's, likelihood of confusion, factors, summary judgment, Lanham Act, advertising, confusingly, undisputed, licensing, abandoned, commerce, vacation, tours, registered trademark, no evidence

LexisNexis® Headnotes

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

Trademark Law > ... > Infringement Actions > Standards of Review > General Overview

Trademark Law > Foreign & International Protection > International Treaties

HN1[] **Standards of Review, De Novo Review**

The result reached in a World Intellectual Property Organization (WIPO) proceeding is neither admissible, nor entitled to any deference, with respect to the merits issues presented in a lawsuit. Review must be de novo and independent of any WIPO panel conclusion.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Trademark Law > ... > Infringement Actions > Summary Judgment > General Overview

HN2[] **Summary Judgment, Opposing Materials**

Summary judgment is appropriately granted where the movant shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. To survive a motion for summary judgment, the nonmoving party must come forward with evidence sufficient to establish the existence of every element essential to its case on which it bears the burden of proof at trial, even if the moving party presents no evidence. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. A mere scintilla of evidence is not enough to defeat summary judgment.

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

Computer & Internet Law > ... > Trademark Protection > Civil Infringement Actions > Jurisdiction

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Trademark Law > ... > Particular Subject Matter > Names > Internet Domain Names

HN3[] **Infringement Actions, Burdens of Proof**

See *15 U.S.C.S. §§ 1114*, *1125(a)*.

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN4[] **Federal Unfair Competition Law, Lanham Act**

A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Incontestability > Affidavit Requirement

Trademark Law > Trademark Cancellation & Establishment > Incontestability > Effects

Trademark Law > Trademark Cancellation & Establishment > General Overview

Trademark Law > ... > Registration Procedures > Federal Registration > Federal Registration as Evidence

Trademark Law > Trademark Cancellation & Establishment > Incontestability > General Overview

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Incontestability > Continuing Use Requirement

HN5[] **Incontestability, Affidavit Requirement**

Incontestability is conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce. *15 U.S.C.S. § 1115(b)*. A registrant's right to use a mark may become incontestable after five years of continuous and unchallenged use, if such use has been averred to in an affidavit filed with the Patent and Trademark Office within one year after the five-year period. *15 U.S.C.S. § 1065*.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > Trademark Cancellation & Establishment > Incontestability > General Overview

Trademark Law > Subject Matter of Trademarks > Terms With Inherent Distinctiveness

HN6[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

Merely establishing a mark's incontestability does not, alone, mean that the mark is protectible. Incontestability, however, forecloses challenges that the mark is not inherently distinctive or that it lacks secondary meaning. It also precludes a claim that the mark is not owned by the registrant because it is inferior in priority to plaintiffs' previously used mark.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > Subject Matter of Trademarks > Terms With Inherent Distinctiveness > Suggestive Terms

HN7[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

Both arbitrary and suggestive marks are deemed distinctive and are afforded the highest protections under the Lanham Act.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Trademark Law > ... > Registration Procedures > Federal Registration > Federal Registration as Evidence

Antitrust & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Trademark Law > ... > Infringement Actions > Defenses > General Overview

HN8[] **Robinson-Patman Act, Defenses**

Putative infringers may challenge incontestability by bearing the burden of showing one or more of the following nine statutory exceptions to incontestability: (1) fraud in obtaining the registration or the status of incontestability, (2) abandonment, (3) use of the mark to misrepresent its source, (4) "fair use" of the mark, (5) limited territory defense of an intermediate junior user, (6) prior registration of plaintiffs, (7) use of the mark to violate federal ***antitrust law***, (8) that the mark is functional, and (9) equitable defenses such as laches, estoppel, and acquiescence. *15 U.S.C.S. § 1115(b)*.

Trademark Law > ... > Registration Procedures > Federal Registration > Federal Registration as Evidence

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > ... > Names > Generic Names > General Overview

HN9[] **Federal Registration, Federal Registration as Evidence**

While the generic nature of a term is not on the *15 U.S.C.S. § 1115(b)* list, the Lanham Act also requires that no incontestable right shall be acquired in a generic name.

Evidence > Burdens of Proof > Clear & Convincing Proof

Trademark Law > Abandonment > General Overview

HN10[] **Burdens of Proof, Clear & Convincing Proof**

Plaintiffs are required to prove abandonment by clear and convincing evidence.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > Trademark Cancellation & Establishment > Incontestability > General Overview

HN11[] Federal Unfair Competition Law, Trade Dress Protection

Even if a mark somehow loses its incontestable status, it may still be found to be protectible if the remaining requirements of *15 U.S.C.S. § 1125(a)* are met. A mark holder's separate federal rights in unregistered marks under *§ 1125(a)* continue unabated even if a registration is disregarded or cancelled.

Business & Corporate Compliance > ... > Abandonment > Unintentional Abandonment > Loss of Significance

Trademark Law > Abandonment > General Overview

Trademark Law > Abandonment > Unintentional Abandonment > General Overview

Business & Corporate Compliance > ... > Abandonment > Unintentional Abandonment > Uncontrolled Licensing

HN12[] Unintentional Abandonment, Loss of Significance

The Lanham Act provides that a mark is deemed abandoned when any course of conduct of the registrant, including acts of omission as well as commission, causes the mark to lose its significance as an indication of origin. *15 U.S.C.S. § 1127(b)*. While it is true that so-called "naked" or uncontrolled licensing can result in abandonment, under the Lanham Act, naked (or uncontrolled) licensing of a mark occurs when a licensor allows a licensee to use the mark on any quality or type of good or service the licensee chooses.

Computer & Internet Law > ... > Trademark Protection > Civil Infringement Actions > Determinations

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > Trademark Infringement

Computer & Internet Law > Internet Business > Online Advertising > General Overview

Computer & Internet Law > ... > Trademark Protection > Civil Infringement Actions > General Overview

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > Internet Domain Names

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > Likelihood of Confusion > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Trademark Law > Trademark Cancellation & Establishment > Incontestability > General Overview

HN13[] **Civil Infringement Actions, Determinations**

The final element of a claim of unfair competition and trademark infringement under the Lanham Act, *15 U.S.C.S. § 1114* and *1125(a)*, is whether the record shows that unauthorized use of terms creates a likelihood of confusion for an ordinary consumer as to the source or sponsorship of the services. Although a showing of incontestability affects the validity of a trademark, it does not establish the likelihood of confusion necessary to warrant protection from infringement. Rather, likelihood of consumer confusion remains an independent requirement for trademark infringement. And, determining whether a putative infringer's actions create a likelihood of confusion requires consideration of the following factors: (1) the strength of the mark, (2) the similarity between the alleged infringer's domain name and/or use and the mark, (3) the similarity between defendant's services and the services provided at the domain name, (4) the similarity between the facilities defendant uses in its business and the facilities used in connection with the provision of services under the disputed domain names, (5) the similarity between defendant's advertising and advertising used to promote services offered by plaintiffs, (6) plaintiffs' intent underlying use of the mark, and (7) the existence of any actual confusion. These factors are neither exhaustive nor exclusive.

Trademark Law > ... > Infringement Actions > Summary Judgment > General Overview

HN14[] **Infringement Actions, Summary Judgment**

Although the likelihood of confusion is factual issue dependent on the circumstances of each case, summary judgment is appropriate when the material, undisputed facts disclose a likelihood of confusion, a determination that courts make.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Trademark Law > Likelihood of Confusion > General Overview

HN15[] **Likelihood of Confusion, Consumer Confusion**

The burden falls upon the putative senior trademark holder to establish likelihood of confusion. For the burden to shift to plaintiffs, copying must be shown to be intentional.

Computer & Internet Law > ... > Trademark Protection > Civil Infringement Actions > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Computer & Internet Law > Intellectual Property Protection > Trademark Protection > Antidilution

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > General Overview

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > Internet Domain Names

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Remedies

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Damages > Types of Damages > Profits

Trademark Law > ... > Infringement Actions > Summary Judgment > General Overview

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > ... > Particular Subject Matter > Names > Internet Domain Names

HN16[] **Trademark Protection, Civil Infringement Actions**

The Anticybersquatting Consumer Protection Act, *15 U.S.C.S. § 1125(d)*, (ACPA) imposes liability in a civil action on a person by the owner of a mark if, without regard to the goods or services of the parties, that person (1) has a bad faith intent to profit from that mark and (2) registers, traffics in, or uses a domain name that (a) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark, or (b) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark. *15 U.S.C.S. § 1125(d)(1)(A)*. Thus, to succeed in an in personam ACPA claim, a party must prove the following two elements: (i) that the other party's use of domain names constitutes either trademark infringement or trademark dilution and (ii) that party has or had a bad faith intent to profit from use of the marks.

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > Internet Domain Names

HN17[] **Protection of Rights, Internet Domain Names**

The Anticybersquatting Consumer Protection Act, *15 U.S.C.S. § 1125(d)*, lists nine nonexclusive factors for courts to consider in determining whether a domain name has been registered or used in bad faith. Although courts are not obliged to consider every factor and may also consider factors not listed in *15 U.S.C.S. § 1125(d)(1)(B)(i)*, the statutory factors are typically what courts use to determine bad faith. Each factor addresses whether there is some legitimate reason for the registrant or user of a domain name to possess or make use of the disputed domain name.

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > Internet Domain Names

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

HN18[] **Protection of Rights, Internet Domain Names**

The purpose of *15 U.S.C.S. § 1125(d)(1)(B)(i)(IV)*, bona fide noncommercial or fair use, is to protect domain name registrants and users engaged in protected activities, such as political criticism.

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > General Overview

HN19[] **Factors for Determining Confusion, Intent of Defendant to Confuse**

As intent is rarely discernible directly, it must typically be inferred from pertinent facts and circumstances.

Computer & Internet Law > ... > Trademark Protection > Civil Infringement Actions > General Overview

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > General Overview

HN20[] **Trademark Protection, Civil Infringement Actions**

A trademark's distinctive nature is sufficient to satisfy *15 U.S.C.S. § 1125(d)(1)(B)(i)(IX)*.

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > Internet Domain Names

Trademark Law > ... > Infringement Actions > Standards of Review > General Overview

HN21[] **Protection of Rights, Internet Domain Names**

It is important to pursue the analysis of the issue of bad faith factor-by-factor, and it is significant that when this is done and on balance points persuasively to a finding of bad faith, it is equally important to step back and examine the larger picture to determine whether it is consistent with a finding of bad faith.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

Computer & Internet Law > ... > Civil Infringement Actions > Remedies > Injunctions

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Computer & Internet Law > ... > Civil Infringement Actions > Remedies > General Overview

Computer & Internet Law > ... > Civil Infringement Actions > Remedies > Damages

Computer & Internet Law > ... > Trademark Protection > Protection of Rights > Internet Domain Names

Copyright Law > ... > Damages > Types of Damages > Statutory Damages

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Remedies

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > ... > Particular Subject Matter > Names > Internet Domain Names

HN22[] In Rem Actions, True In Rem Actions

The Lanham Act, 15 U.S.C.S. § 1114, 1125(a), standing alone without the Anticybersquatting Consumer Protection Act, 15 U.S.C.S. § 1125(d), is sufficient to order the transfer of domain names and the issuance of an injunction.

Counsel: FOR PLAINTIFF(S): Steven B. Ramsdell, Tyler Bartl Burke & Gorman P.L.C., Alexandria, VA.

FOR DEFENDANT(S): John Francis Cahill, Carter Ledyard & Milburn, Washington, DC.

FOR DEFENDANT(S): Rose Auslander, Carter Ledyard & Milburn, New York, NY.

Judges: Honorable T. S. Ellis, III, United States District Judge.

Opinion by: T. S. Ellis, III

Opinion

[*614] MEMORANDUM OPINION

This is a dispute over the ownership of the domain name "cosmos.com." Plaintiffs, one of which is the current owner of the disputed domain name, seek a declaration confirming the propriety of their use and ownership of the domain name. Defendant, the owner of a registered trademark for the term "Cosmos," counterclaims against plaintiffs for trademark infringement and unfair competition in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), cybersquatting in violation of the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), and common law unfair competition.

The parties, having filed and fully briefed cross-motions for summary judgment, agree that the matter **[**2]** is now ripe for resolution on the current record and that a trial is unnecessary.

I.

Plaintiffs Eurotech, Inc. ("Eurotech") and Eurotech Data Systems Hellas, Ltd. ("Hellas") [1] are two related entities that provide consumer and business exchange information and technology services via the Internet to various businesses. Hellas, a Greek corporation with its principal place of business in Athens, Greece is a subsidiary of Eurotech, an Illinois corporation with its principal place of business in Illinois. Eurotech's founder and owner is Dino Matingas, who is also the sole owner of Hellas.

Eurotech purchased the domain name, cosmos.com, in May 1998 from an individual unaffiliated with any of the parties in this dispute. [2] The record reveals that, in **[*615]** the course of making this purchase, Eurotech did not conduct a trademark search to determine whether the mark "Cosmos" was already registered or in use as a trademark or trade name. Eurotech **[**3]** claims that since acquiring the cosmos.com domain name in 1998, it has operated under the Cosmos.com name. Then, in March 2002, Eurotech changed its business name to CosmoTravels.com, Inc. Undisputed record evidence reveals that plaintiffs were not actively in business prior to purchasing the cosmos.com domain name and posting travel-related information at that Internet address.

[1] Eurotech and Hellas are referred to collectively as "plaintiffs."

[2] The domain name, cosmos.com, was registered with Network Solutions, Inc. (NSI) on September 21, 1994. NSI has since been acquired by Verisign Global Registry Services. Verisign, located in Herndon, Virginia, continues to operate as one of a number of domain name registrars and the sole registry for all ".com" domain names.

Defendant Cosmos European Travels Aktiengesellschaft is a privately-held Liechtenstein company that is part of a privately-held family of companies under common ownership. It appears from the record that defendant's role in this family of companies is, in part, to serve as a holding company to administer trademark **[**4]** applications and registrations for the "Cosmos" mark. In this role, defendant filed applications in the United States Patent and Trademark Office (PTO) to register the marks "Cosmos" and "Cosmos Tourama" for "conducting travel tours" in the United States Patent and Trademark Office (PTO) on March 18, 1987. Registrations on these applications issued on November 10, 1987 under registration numbers 1,464,902 and 1,464,901, respectively. [3] These registrations became incontestable pursuant to *15 U.S.C. § 1065* on July 28, 1993, when the PTO accepted and acknowledged the appropriate affidavits. [4] As early as 1995, defendant licensed the "Cosmos" mark to another member of defendant's family of companies, Tourama, Ltd., a Bahamian company. Tourama, in turn, also as early as 1995, sublicensed the mark to yet another member of this business family, Group Voyagers, Inc. (GVI), a subsidiary of defendant, [5] for use in the United States in connection with the business of selling or conducting travel tours. Uncontroverted evidence shows that GVI's use of the "Cosmos" mark is pursuant to the conditions contained in the license and under the supervision and control of the **[**5]** majority owners of defendant's group of companies.

It is further undisputed that defendant's efforts to promote the "Cosmos" mark, chiefly through its affiliate, GVI, have been both **[**6]** substantial and substantially successful. Specifically, these efforts are as follows:

> . In the past four years, GVI has spent over $ 32 million on marketing and promotion involving the "Cosmos" mark. These marketing and promotional activities have included magazine advertising, co-operative advertising, attendance at trade shows, and distributing brochures. **[*616]** GVI has also used the "Cosmos" mark on a variety of items, such as brochures, stationery letterhead, envelopes, post cards, luggage tags, and travel portfolios.
> . GVI also uses the "Cosmos" mark on the Internet, where it and its affiliated entities use websites at the domain names cosmosvacations.com and globusandcosmos.com for the purpose of promoting its services by providing travel information for travel arrangements of clients and potential clients. These websites provide United States residents with information on booking travel and vacation reservations.
> . GVI has enjoyed significant successes in marketing and providing travel and vacation tours under the "Cosmos" mark. In the past five years alone, sales in the United States of "Cosmos" brand tours have exceeded $ 400 million.
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> . There has been substantial unsolicited **[**7]** media coverage of the Cosmos companies and "Cosmos" brand services in publications, such as *Forbes.*

In 2001, Matingas, plaintiffs' owner, approached GVI, proposing that plaintiffs, using the cosmos.com domain name, could serve as vendors or distributors for defendant, and asked that GVI pay Eurotech $ 250,000 up front, and $ 100,000 quarterly, for five years. Matingas's rationale for this proposal was that plaintiffs had received Internet inquiries at their cosmos.com site from consumers mistakenly seeking defendant's travel tour services and thus GVI should be willing to pay plaintiffs to reap the benefits of this consumer interest. After some negotiation, GVI's director of marketing rejected the proposal. Matingas responded with a second offer, pursuant to which GVI, as vendor, would pay Eurotech, as distributor, a $ 20,000 "one-time fee" and a $ 10,000 monthly charge in return for

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[3] Defendant has also registered these marks in the United Kingdom, Canada, and Australia for use in connection with its business of selling and conducting travel tours.

[4] *Section 1065(4)* provides that

> the incontestable right with reference to a mark registered under this chapter shall apply to a mark registered under the Act of March 3, 1881, or the Act of February 20, 1905, upon the filing of the required affidavit with the Director within one year after the expiration of any period of five consecutive years after the date of publication of a mark

15 U.S.C. § 1065(4). *See also infra* notes 14-15 and accompanying text.

[5] Defendant, Tourama, and GVI all are under the controlling ownership of trusts controlled by three individuals: Sergio Mantegazza, Mario Albek, and Geo Mantegazza.

which plaintiffs would release the most appropriate email messages it received from customers mistakenly seeking to contact defendant via the cosmos.com website. This discussion, too, eventually ended with no deal being struck between GVI and plaintiffs.

A review of the cosmos.com website and **[**8]** websites to which it is linked, including cosmotravels.com, reveals prominent use of the terms "Cosmos.com" and "Cosmotravels" in connection with the travel information services posted on those sites. [6] More specifically, plaintiffs' various websites exhibit the following features:

. all pages currently appearing on the cosmos.com or cosmotravels.com website contain some material that is related to travel or tourism;

. below the text "cosmotravels.com front page" on the cosmos.com or cosmotravels.com website is the text "travel reservations," "vacations," "cruises," and "destination guides;"

. below the text "cosmotravels.com front page" on the cosmos.com or cosmotravels.com website is a banner with the text "Vacations," "Cruises," "Hotels," and "Airlines."

. if the cursor is placed on the text "Vacations," "Cruises," "Hotels," or "Airlines" on the cosmos.com or cosmotravels.com website, the names of different vacation, cruise, hotel, or airline packages scroll across the screen.

Although plaintiffs do not offer travel tours through their websites, the undisputed record reflects that these websites provide travel information and, according to the website itself, **[**9]** serve as an "On-line **[*617]** Market Place for the Travel Industry by Third Party Sellers of Goods and or Services," which permits third-party businesses to offer their products and services. The record also reflects that Eurotech owns twenty-five domain names that are similar to the "Cosmos" mark. [7]

On July 20, 2001, defendant filed a complaint with the World Intellectual Property **[**10]** Organization (WIPO) in accordance with the Uniform Domain Name Dispute Resolution Policy (UDRP). [8] In its WIPO complaint against Hellas, defendant asserted a claim for trademark infringement based on allegations (i) that defendant had consistently used its registered trademarks "Cosmos" and "Cosmos Tourama;" (ii) that the cosmos.com domain name was identical to its "Cosmos" trademark, and confusingly similar to defendant's "Cosmos Tourama" trademark; and (iii) that Hellas used the cosmos.com domain name as an integral part of a travel business that competes directly with defendant's business. Defendant further claimed that Hellas had no rights or legitimate interest in the cosmos.com domain name and that the domain name was registered and used in bad faith. The relief defendant sought was an order transferring ownership to defendant of the registrar certificate for cosmos.com.

[11]** In the WIPO proceeding, defendant also alleged that Hellas offered to sell the cosmos.com domain name to defendant, an allegation Hellas disputed. After Hellas filed its response denying that an offer of sale had been made, defendant was allowed to amend its complaint to withdraw this allegation. Although the WIPO arbitrator [9] **[**12]** allowed defendant to amend the complaint, he declined to give Hellas the opportunity to respond to the

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[6] Record evidence reveals that all plaintiffs' travel-related information has been directly available at cosmos.com, but that within the past two months, plaintiffs moved that content from cosmos.com to cosmotravels.com and cosmotravels.com/index1.html, two websites that are linked to cosmos.com.

[7] These domain names include cosmos.com, cosmosnews, cosmobusiness, cosmofinance, cosmoscitech, cosmosports, cosmoshow, cosmokids, cosmoreligion, cosmohealth, cosmohome, cosmostyle, cosmoarts, cosmotravels, cosmogovern, cosmostransport, cosmoedu, cosmoradio, cosmoweather, cosmotvc, cosmovvtel, cosmocommerce, cosmopolis, cosmonetshow, and mycosmos.

[8] On October 24, 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) adopted the Uniform Domain Name Dispute Resolution Policy, which effectively altered all contracts between domain name registrars and their customers, mandating the use of WIPO arbitration to resolve domain name disputes before resorting to litigation in United States courts. Plaintiffs do not dispute this, nor do they dispute that the agreement with Verisign for the cosmos.com domain name now mandates a WIPO arbitration proceeding.

[9] The complaint was assigned to a sole arbitrator, an attorney from the United Kingdom, the location of defendant's principal place of business.

amended complaint. On the basis of the arbitration record, the arbitrator ruled that the domain name cosmos.com should be transferred to defendant (i) because the domain name cosmos.com was identical or confusingly similar to defendant's registered trademarks "Cosmos" and "Cosmos Tourama;" (ii) because there was evidence that Hellas was commonly known by the name "Cosmos.com;" and (iii) because Hellas's use of the cosmos.com domain name was not legitimate or fair. *See* WIPO Case No. D2001-0941. [10] Thus, on October 22, 2001, Hellas was notified by Verisign that unless it commenced a lawsuit by 5 p.m., November 5, 2001, the domain name cosmos.com **[*618]** would be transferred to defendant.

To avoid the transfer, plaintiffs filed this complaint against defendant, asserting the following claims:

(i) declaratory relief with respect to the domain name cosmos.com;
(ii) unlawful conversion;
(iii) tortious interference with prospective economic advantage; and
(iv) abuse of process.

Defendant responded with a motion seeking threshold dismissal of counts (iii) and (iv), which motion was granted. *See* *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft, 189 F. Supp. 2d 385, 390-94 (E.D. Va. 2002)*. [11] Defendant also filed a counterclaim, alleging **[**13]** that plaintiffs

(i) engaged in trademark infringement and unfair competition under the Lanham Act, *15 U.S.C. §§ 1114*, *1125(a)*;
(ii) engaged in common law unfair competition; and

(iii) violated the Anticybersquatting Consumer Protection Act (ACPA), *15 U.S.C. § 1125(d)*.

Plaintiffs filed a motion to dismiss defendant's counterclaim and a motion to strike defendant's affirmative defenses, both of which were denied. *See* *Eurotech, 189 F. Supp. 2d at 389*. The parties thereafter completed discovery and then filed various miscellaneous motions as well as cross-motions for summary judgment. The miscellaneous motions were resolved [12] **[**15]** and the cross motions for summary judgment are now ripe for resolution as the parties have fully briefed the issues and waived oral argument. *See Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft,* Civil Action No. 01-1689-A (E.D. Va. July 2, 2002) (order). [13] At issue on summary judgment are the following claims:

(i) plaintiffs' claim for declaratory relief with respect to the domain name cosmos.com;

(ii) defendant's claim of trademark infringement and unfair **[**14]** competition in violation of the Lanham Act, *15 U.S.C. §§ 1114*, *1125(a)*;

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[10] ***HN1***[] Worth noting here is that the result reached in the WIPO proceeding is neither admissible, nor entitled to any deference, with respect to the merits issues presented in this suit. Review here must be *de novo* and independent of any WIPO panel conclusion. *See International Bancorp v. Societe des Bains de Mer et du* *Cercle des Etrangers a Monaco, 192 F. Supp. 2d 467, 475 n.16 (E.D. Va. 2002)* (citing *Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 752 (E.D. Va. 2001))*.

[11] The tortious interference and abuse of process claims were dismissed because (i) plaintiffs were unable to establish the necessary elements of their claims; (ii) the *Noerr-Pennington* doctrine confers immunity to defendant's seeking WIPO redress to protect its mark; and (iii) plaintiffs' prior agreement to submit to a WIPO proceeding precluded their claims. *See* *Eurotech, 189 F. Supp. 2d at 390-94*.

[12] The motions were resolved as follows (i) plaintiffs' motion to strike expert report and bar expert testimony of defendant's expert, Michael Rappeport, was denied; (ii) plaintiffs' motion to strike defendant's reply brief in support of defendant's motion for summary judgment was denied; (iii) defendant's motion to withdraw its claims for a monetary award was granted; (iv) plaintiffs' claim for unlawful conversion was dismissed; and (v) defendant's motion to strike jury demand was granted. *See Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft,* Civil Action No. 01-1689-A (E.D. Va. July 12, 2002) (order).

[13] The parties reiterated during oral argument on July 12, 2002 that the case should be adjudicated on the existing summary judgment record.

(iii) defendant's claim of common law unfair competition; and

(iv) defendant's claim of cybersquatting in violation of the ACPA, 15 U.S.C. § 1125(d).

II.

HN2[] Summary judgment is appropriately granted where the movant shows "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322, **[*619]** 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). To survive a motion for summary judgment, the nonmoving party must come forward with evidence sufficient to establish the existence of every element essential to its case on which it bears the burden of proof at trial, even if the moving party presents no evidence. *See* id. at 321-24. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). A "mere scintilla" of evidence is not enough to defeat summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). **[**16]**

III.

Defendant first claims that plaintiffs' use in American commerce of the term "Cosmos" in the cosmos.com domain name and on websites constitutes infringement of defendant's "Cosmos" and "Cosmos Tourama" marks in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). HN3[] To prevail on this trademark infringement and unfair competition cause of action, defendant must prove the following elements:

(i) that defendant possesses a protectible mark;
(ii) that plaintiffs used the mark;
(iii) that plaintiffs' use of the mark occurred "in commerce;"
(iv) that plaintiffs used the mark "in connection with the sale, offering for sale, distribution, or advertising" of goods or services; and

(v) that plaintiffs used the mark in a manner likely to confuse consumers.

People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 364 (4th Cir. 2001); *see also* 15 U.S.C. §§ 1114, 1125(a). [14]

[17]** Elements two through four are plainly met here. Thus, there is no dispute that plaintiffs used the "Cosmos" mark both as a domain name and on websites. [15] Furthermore, there can be no dispute that plaintiffs' use of the mark occurred in American commerce. Indeed, maintaining a website that provides commercial information originally supplied by third-party companies clearly satisfies the "use in commerce" requirement. *See Cable News Network L.P., L.L.L.P. v. cnnews.com,* 177 F. Supp. 2d 506, 516-18 (E.D. Va. 2001). And further, it is also clear that plaintiffs use the "Cosmos" mark in connection with the distribution of travel and tourism information services. Only

[14] These five criteria establish a claim by a registered mark holder for trademark infringement and unfair competition pursuant to Sections 1114 and 1125(a). *See* Doughney, 263 F.3d at 364.

[15] Although plaintiffs no longer provide travel information at the website found at the cosmos.com domain name, *see supra* note 6, such a move does not absolve plaintiffs from any liability they may have incurred. To begin with, cosmos.com still provides travel related information in the form of the prominent link to cosmotravels.com, which along with related websites, contains travel information. Further, it is well-established that HN4[] "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 71 L. Ed. 2d 152, 102 S. Ct. 1070 (1982); *see also American Legion Post 7 of* Durham, N.C. v. City of Durham, 239 F.3d 601, 605 (4th Cir. 2001) (same). Thus, plaintiffs have not shielded themselves from liability by moving the direct travel-related links from cosmos.com to cosmotravels.com.

elements (i) and (v) are seriously contested here and thus defendant's trademark infringement claim depends on whether the undisputed record establishes as a matter of law that defendant possesses a protectible mark and whether plaintiffs' domain name cosmos.com is likely to cause confusion among consumers.

[18]** **[*620]** As an initial matter, the record evidence reflects that defendant's registered marks, "Cosmos" and "Cosmos Tourama" are incontestable. ***HN5***[] Incontestability is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." *15 U.S.C. § 1115(b)*; *see also* *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 930 (4th Cir. 1995)*. A registrant's right to use a mark may become incontestable after five years of continuous and unchallenged use, if such use has been averred to in an affidavit filed with the PTO within one year after the five-year period. *See* *15 U.S.C. § 1065*, *Lone Star, 43 F.3d at 930*. Here, it is undisputed that defendant did precisely this for the marks "Cosmos" and "Cosmos Tourama."

HN6[] Merely establishing a mark's incontestability does not, alone, mean that the mark is protectible. *See* *Lone Star, 43 F.3d at 930*; 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:147 (4th **[**19]** ed. 1998) (hereinafter "McCarthy"). Incontestability, however, forecloses challenges that the mark is not inherently distinctive or that it lacks secondary meaning. [16] It also precludes a claim that the mark is not owned by the registrant because it is inferior in priority to plaintiffs' previously used mark. *See* McCarthy § 32:148.

[20]** Although defendant has met the requirements for incontestability for the marks "Cosmos" and "Cosmos Tourama," plaintiffs, as ***HN8***[] putative infringers, may challenge incontestability by bearing the burden of showing one or more of the following nine statutory exceptions to incontestability:

(i) fraud in obtaining the registration or the status of incontestability;
(ii) abandonment;
(iii) use of the mark to misrepresent its source;
(iv) "fair use" of the mark;
(v) limited territory defense of an intermediate junior user;
(vi) prior registration of plaintiffs;

(vii) use of the mark to violate federal ***antitrust law***;
(viii) that the mark is functional; and
(ix) equitable defenses such as laches, estoppel, and acquiescence.

See *15 U.S.C. § 1115(b)*; *Lone Star, 43 F.3d at 930*. [17] Here, plaintiffs assert only exceptions (i) and (ii). Thus, plaintiffs argue (i) that defendant engaged in fraud to obtain both the registrations and the **[*621]** marks' incontestable status and (ii) that defendant abandoned its rights in the "Cosmos" and "Cosmos Tourama" marks. Neither argument has merit. First, plaintiffs have adduced no evidence that defendant's **[**21]** registration and the

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[16] Notwithstanding the issue of incontestability, it is quite apparent that the marks "Cosmos" and "Cosmos Tourama" are distinctive, not generic, and therefore protectible under the Lanham Act. Indeed, because it is clear that these marks are either arbitrary or suggestive, they are deemed distinctive without requiring a showing of secondary meaning. *See* *Washington Speakers Bureau, Inc. v. Leading Authorities, Inc., 33 F. Supp. 2d 488, 494 (E.D. Va. 1999)* ***HN7***[] (holding that both arbitrary and suggestive marks are deemed distinctive and are afforded the highest protections under the Lanham Act).

Plaintiffs argue that because the term "Cosmos" is, ostensibly, a commonly-used term, the mark "Cosmos" is generic. This is not so; simply because a word is commonly-used does not render it generic. Rather, many commonly-used terms receive Lanham Act protection within a particular industry: "Delta" faucets, "Polo" clothing, and "Apple" computers.

[17] A distinguished commentator has also noted that ***HN9***[] while the generic nature of a term is not on the *Section 1115(b)* list, the Lanham Act also requires that no incontestable right shall be acquired in a generic name. *See* McCarthy § 32:149. *Cf.* *Lone Star, 43 F.3d at 930* (not recognizing this additional exception). In any event, the terms "Cosmos" and "Cosmos Tourama" are not generic. *See infra* note 16.

status of incontestability were the product of fraud on the PTO. They also have not met their burden of showing by clear and convincing evidence [18] defendant's abandonment of the marks. [19]

[22]** ***HN12***[] The Lanham Act provides that a mark is deemed abandoned "when any course of conduct of the registrant, including acts of omission as well as commission, causes the mark to lose its significance as an indication of origin." *15 U.S.C. § 1127(b)*. Here, plaintiffs claim defendant abandoned its rights in the "Cosmos" and "Cosmos Tourama" marks by its uncontrolled or "naked" licensing of the marks to defendant's family of companies. While it is true that so-called "naked" or uncontrolled licencing can result in abandonment, nothing of the sort has been shown here. Under the Lanham Act, "naked (or uncontrolled) licensing of a mark occurs when a licensor allows a licensee to use the mark on any quality or type of good [or service] the licensee chooses." *Stanfield v. Osborne Industries. Inc., 52 F.3d 867, 871 (10th Cir.)*, *cert. denied, 516 U.S. 920, 133 L. Ed. 2d 217, 116 S. Ct. 314 (1995)*. Here, the undisputed record shows that far from "naked" licensing, all use of defendant's mark by Tourama or GVI occurred pursuant to licenses that closely regulated such use and under the control and supervision of the majority owners of defendant's group of companies. [20] For **[**23]** instance, defendant's licensing agreements prohibit use of the "Cosmos" mark in connection with businesses unrelated to travel. In sum, defendant has clearly established the incontestability of "Cosmos" and "Cosmos Tourama" and plaintiffs have not met their burden of establishing the contrary.

HN13[] The final element of a claim of unfair competition and trademark infringement under *Sections 1114* and *1125(a)* is whether the record shows that plaintiffs' unauthorized use of the terms "Cosmos" or "Cosmos Tourama" creates a likelihood of confusion for an "ordinary consumer as to the source or sponsorship of the [services]," in this case travel tour services. *See* *Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 318 (4th Cir. 1992)* (internal quotation marks omitted). Although **[**24]** a showing of "incontestability affects the validity of [defendant's] trademark, [it] does not establish the likelihood of confusion necessary to warrant protection from infringement." *Lone Star, 43 F.3d at 935*. Rather, "likelihood of consumer **[*622]** confusion remains an independent requirement for trademark infringement." *Id.* And, determining whether a putative infringer's actions create a likelihood of confusion requires consideration of the following factors:

(i) the strength of the mark;
(ii) the similarity between the alleged infringer's domain name and/or use and the mark;
(iii) the similarity between defendant's services and the services provided at the domain name;
(iv) the similarity between the facilities defendant uses in its business and the facilities used in connection with the provision of services under the disputed domain names;
(v) the similarity between defendant's advertising and advertising used to promote services offered by plaintiffs;

(vi) plaintiffs' intent underlying use of the mark; and

(vii) the existence of any actual confusion.

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[18] ***HN10***[] Plaintiffs are required to prove abandonment by "clear and convincing evidence." McCarthy § 17:12.

[19] ***HN11***[] Even if a mark somehow loses its incontestable status, it may still be found to be protectible if the remaining requirements of *Section 1125(a)* are met. *See* McCarthy § 31:60 (noting that a mark holder's "separate federal rights in unregistered marks under *[Section 1125(a)*] continue unabated even if a registration is disregarded or cancelled"); *see also* *Orient Express Trading Co. v. Federated Dep't Stores, Inc., 842 F.2d 650 (2d Cir. 1988)* (holding that fraud in the registration process leading to cancellation of registrations does not bar possible relief based upon a *[Section 1125(a)*] claim for infringement of unregistered rights). Thus, even if defendant's "Cosmos" mark were unregistered, the mark would still be protectible because it is "arbitrary" or "suggestive." Such marks are categorically deemed distinctive and therefore entitled to the highest level of protection. *See supra* note 16.

[20] This lack of "naked" licensing distinguishes the case at bar from *CNA Financial Corp v. Brown, 922 F. Supp. 567, 574 (M.D. Fla. 1996)*, the case plaintiffs cite in support of their claim of abandonment.

See Petro Stopping Centers, L.P. v. James River Petroleum, Inc., 130 F.3d 88, 91 (4th Cir. 1997) **[**25]** (citing Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984)). These factors are neither exhaustive nor exclusive. *See* Pizzeria Uno, 747 F.2d at 1527. [21]

[26]** Because six of the seven *Petro Stopping* factors weigh in defendant's favor, a likelihood of confusion is convincingly established. [22] As an initial matter, there can be no doubt that the first factor points toward a likelihood of confusion: the terms "Cosmos" and "Cosmos Tourama" are strong because their registrations are incontestable and the marks themselves, which are arbitrary or suggestive, are distinctive. The second factor--that of similarity between the alleged infringer's domain name or use of the mark and the mark itself--also weights heavily, if not conclusively, in favor of a likelihood of confusion. Indeed, plaintiffs' domain names, such as "cosmos.com" and "cosmotravels.com" are virtually identical to defendant's "Cosmos" mark. It also appears that defendant's services are essentially similar to those services provided at the cosmos.com domain name or at related sites to which cosmos.com provides a link. Indeed, defendant conducts travel tours and plaintiffs' websites provide travel information. The fourth factor--similarity of facilities--also weighs in favor of a finding of likelihood of confusion: plaintiffs use the Internet, specifically the cosmos.com domain **[**27]** name and related websites, to offer their travel-related services. Similarly, uncontradicted record evidence shows that **[*623]** defendant uses the Internet to offer travel-related services. And, although there is no evidence that plaintiffs engaged in advertising, this lack of advertising suggests that plaintiffs sought to obtain a free ride off the goodwill of defendant's registered trademarks. The final factor, existence of actual confusion, also points convincingly toward a likelihood of confusion. Indeed, Matingas attempted to entice GVI to enter into an agreement with plaintiffs with the promise of forwarding scores of email messages or web hits from confused consumers who mistakenly thought they were communicating with defendant.

[28]** In sum, defendant has established a strong likelihood of confusion and, therefore, has proven all the necessary elements of unfair competition and trademark infringement pursuant to 15 U.S.C. §§ 1114, 1125(a). [23]

IV.

Next, defendant alleges that plaintiffs' use of the "Cosmos" and "Cosmos Tourama" marks violates the *in personam* provisions of the ACPA, 15 U.S.C. § 1125(d)(1). ***HN16***[] The ACPA imposes liability in a civil action on a person by the owner of a mark if, without regard to the goods or services of the parties, that person

(i) has a bad faith intent to profit from that mark and

(ii) registers, traffics in, or uses a domain name that-

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; [or]

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[21] It is also well-established that ***HN14***[] although "the likelihood of confusion is factual issue dependent on the circumstances of each case…, summary judgment is appropriate when the material, undisputed facts disclose a likelihood of confusion," a determination that courts make in light of the seven factors. Resorts of Pinehurst, Inc. v. Pinehurst Nat. Corp., 148 F.3d 417, 422 (4th Cir. 1998). Thus, although likelihood of confusion is a factual issue, "weighing the seven factors that determine likelihood of confusion is a judicial function." International Bancorp, 192 F. Supp. 2d at 483 (citing Pinehurst, 148 F.3d at 422). Furthermore, in determining whether a likelihood of confusion exists, courts should consider the specific facts and circumstances of each case. *See* Anheuser Busch, 962 F.2d at 318.

[22] ***HN15***[] The burden falls upon defendant, the putative senior mark holder, to establish likelihood of confusion. Defendant argues that this burden ought to fall upon plaintiffs because they have engaged in copying defendant's mark. For the burden to shift to plaintiffs, however, such copying must be shown to be intentional. *See* Larsen v. Terk Technologies Corp., 151 F.3d 140, 149 (4th Cir. 1998); International Bancorp, 192 F. Supp. 2d at 483. Because the evidence of intentional copying is not compelling, the analysis here proceeds with defendant as the party bearing the burden of proving likelihood of confusion.

[23] The same proof establishes trademark infringement and unfair competition under Sections 1114 and 1125(a).

(II) in the case of a famous mark that is famous **[**29]** at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark....

15 U.S.C. § 1125(d)(1)(A). Thus, for defendant to succeed in this *in personam* ACPA claim, it must prove the following two elements: (i) that plaintiffs' use of cosmos.com and other related domain names constitutes either trademark infringement or trademark dilution and (ii) that plaintiffs have or had a bad faith intent to profit from use of the "Cosmos" or "Cosmos Tourama" marks. *See* *Doughney, 263 F.3d at 366-68*. As reflected in Part III, *supra,* defendant has established the first element; plaintiffs' use of cosmos.com infringes defendant's registered marks pursuant to *15 U.S.C. §§ 1114(a)*, *1125*. It remains, therefore, to determine whether this summary judgment record establishes that plaintiffs acted in bad faith by registering the cosmos.com domain name.

HN17[] The ACPA lists nine nonexclusive factors for courts to consider in determining whether a domain name has been registered or used in bad faith. [24] Although **[*624]** courts are not obliged to consider every factor and may also consider factors **[**30]** not listed in *Section 1125(d)(1)(B)(i)*, the statutory factors are typically what courts use to determine bad faith. *See International Bancorp v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco, 192 F. Supp. 2d 467, 485 (E.D. Va. 2002)*; *Cnnews.com, 177 F. Supp. 2d at 522*. Each factor addresses whether there is some legitimate reason for the registrant or user of a domain name to possess or make use of the disputed domain name. *See id.*

[31]** The first factor is whether plaintiffs have any legitimate rights in the "Cosmos" and "Cosmos Tourama" marks. *See 15 U.S.C. § 1125(d)(1)(B)(i)(I)*. On this issue the undisputed record reflects the following: (i) defendant registered and obtained an incontestable trademark for "Cosmos" and "Cosmos Tourama" in 1993, long before plaintiffs purchased the domain name cosmos.com in 1998; and (ii) plaintiffs did not conduct a trademark search before purchasing the disputed domain name. Had plaintiffs done so, they would have discovered defendant's registration of the marks. It follows that plaintiffs have no rights in these marks. This factor, therefore, weighs in favor of a finding of bad faith.

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[24] The ACPA bad faith factors are:

(1) the trademark or other intellectual property rights of the registrant, if any, in the domain name;

(2) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(3) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(4) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(5) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark;

(6) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having intent to use, the domain name in the bona fide offering of any goods or services or the person's prior conduct indicating a pattern of such conduct;

(7) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(8) the person's registration or acquisition of multiple domain names that the person knows are identical or confusingly similar to the distinctive marks of others or are dilutive of the famous marks of others; and

(9) the extent to which the mark incorporated in the domain name is distinctive and famous within the meaning of the Federal Trademark Dilution Act.

See 15 U.S.C. § 1125(d)(1)(B)(i).

The second factor is whether the terms "Cosmos" or "Cosmos Tourama" constitute a legal name or commonly-used name of plaintiffs. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(II). They do not; neither term consisted of the legal or commonly-used name of plaintiffs prior to the acquisition of the cosmos.com domain name. Although Eurotech has now evidently changed its name to CosmoTravels.com, Inc., this name change does not allow plaintiffs to escape liability. **[**32]** [25] If such a name change could preclude a finding of bad faith, an entity could escape the effect of the ACPA simply by registering an infringing domain name and then changing its business name to match the infringing domain name. Thus, the second factor also supports a finding of bad faith.

The third factor is whether plaintiffs engaged in prior, bona fide use of the "Cosmos" and "Cosmos Tourama" marks. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(III). They did not; there is no evidence in this record that plaintiffs used these marks in connection with providing travel-related services at any time prior to defendant's registration and use of its marks for this purpose. Accordingly, the third factor also weighs in favor of a finding of bad faith.

The fourth factor--whether plaintiffs engaged in any bona fide noncommercial or "fair use" of the marks at issue--does not operate in plaintiffs' favor here. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(IV). **[**33]** It is established that ***HN18***[] "the purpose of this factor is to protect domain name registrants and users engaged in protected activities, such **[*625]** as political criticism." International Bancorp, 192 F. Supp. 2d 467, 486; *see also* Cnnews.com, 177 F. Supp. 2d at 525. It is abundantly clear that plaintiffs' websites do not reflect any such protected conduct and, therefore, this factor does not help plaintiffs avoid a finding of bad faith.

The fifth factor is whether plaintiffs intended to divert consumers from defendant's online location to a website accessible at one of the disputed domain names that could harm the goodwill of defendant's mark, either for commercial gain or with the intent to tarnish or disparage the mark by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the website. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(V). In this regard, it is important to note that, ***HN19***[] "as intent is rarely discernible directly, it must typically be inferred from pertinent facts and circumstances." International Bancorp, 192 F. Supp. 2d 467, 486. On this point, defendant notes that plaintiffs received **[**34]** a significant number of Internet inquiries from defendant's potential consumers. While this is evidence of actual confusion, there is no convincing evidence that plaintiffs intended to divert such consumers. Thus, this factor does not point to a finding of bad faith.

The sixth factor--whether plaintiffs offered to transfer or sell a disputed domain name for financial gain without having an intent to use it in the bona fide offering of any goods or services--is a close question. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(VI). While it may appear that plaintiffs are offering legitimate, travel-related services on their website (even if those services do infringe defendant's marks), it also appears that plaintiffs tried to sell GVI access to the cosmos.com website for a substantial fee, which suggests that this offer to sell to defendant may have been plaintiffs' real or principal reason for acquiring the domain name. Indeed, that plaintiffs failed to conduct a trademark search prior to buying the disputed domain name and then received communications at cosmos.com seeking defendant's services all weigh in favor of a finding of bad faith. In sum, whether this factor **[**35]** supports a finding of bad faith is a close question.

The seventh factor is whether plaintiffs provided material and misleading false contact information when applying for the registration of the disputed domain name. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(VII). Because there is no evidence of plaintiffs' supplying any misleading information, this factor does not support a finding of bad faith.

The eighth factor is whether plaintiffs registered or acquired multiple domain names that they knew were identical or confusingly similar to the distinctive marks of others. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(VIII). Defendant contends that plaintiffs' registration of twenty-five domain names that contain the term "Cosmos" is sufficient to satisfy this factor. Yet, of all the additional registered domain names, only two use the term "cosmos" together with a word connoting or describing travel. Furthermore, there is no record evidence of plaintiffs' registering domain names containing trademarks other than "Cosmos." Thus, this factor does not militate strongly in favor of bad faith, but does not negate bad faith either. *Cf.* International Bancorp, 192 F. Supp. 2d 467, 487 **[**36]** (holding that the

[25] *See supra* note 15.

eighth bad faith factor was satisfied by the plaintiffs' registration of forty-three domain names employing both the disputed mark, "Monte Carlo," *and* referencing the industry in which the defendant used the mark, *i.e.,* gambling services).

The ninth factor--the extent to which the mark incorporated in the registrant's domain name is or is not distinctive and famous--supports a conclusion of bad faith. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(IX). **[*626]** Defendant's "Cosmos" mark clearly satisfies this factor as it is registered, incontestable, and distinctive. *See* International Bancorp, 192 F. Supp. 2d 467, 487 **HN20**[] (holding that a mark's distinctive nature is sufficient to satisfy this factor). Thus, defendant has clearly satisfied five of the nine ACPA factors and two others are close decisions. [26]

[37]** **HN21**[] It is important to pursue the analysis of the issue of bad faith factor-by-factor, and it is significant that when this is done here, the factors on balance point persuasively to a finding of bad faith. It is equally important, however, to step back and examine the larger picture to determine whether it is consistent with a finding of bad faith. [27] It is. The larger picture does not reveal an ongoing business entity that, prior to purchasing a domain name, made a reasonable investigation to ensure that the name was non-infringing and then purchased a relatively obscure domain name. To the contrary, the big picture here reflects that plaintiffs did not engage in any business until they purchased the disputed domain name and when they did so, they made no effort to ascertain whether the "Cosmos" name was a registered trademark, as it then had been for eleven years. Nor did plaintiffs make any reasonable investigation to determine whether the name was used in the travel industry. Had plaintiffs conducted the proper investigation, they not only would have easily discovered that defendant had registered the "Cosmos" and "Cosmos Tourama" marks, but they also likely would have seen evidence **[**38]** of the fact that defendant had spent millions of dollars promoting the "Cosmos" mark and had succeeded in generating a large amount of revenue in the travel business ($ 400 million over five years). In the larger picture, these facts loom large, and it is hard to see how they could have been missed by plaintiffs. Furthermore, within three years of purchasing the cosmos.com domain name, plaintiffs, armed with the certain knowledge that many consumers thought the cosmos.com website belonged to defendant, sought to sell defendant space and access to the site for a substantial sum of money. This is closely akin to purchasing a domain name with an intent to exploit it by selling it to the registered owner of the trademark incorporated in the domain name. In sum, the big picture is fully consistent with a finding of bad faith.

[39]** Yet, even were there no ACPA violation, defendant's proof of unfair competition and trademark infringement under the Lanham Act is sufficient to provide defendant the relief it seeks, namely transfer of the cosmos.com domain name and an injunction against the use of "cosmos.com," "cosmotravels," "cosmotravels.com," or any other term confusingly similar thereto. [28] **[*627]** Put differently, even if plaintiffs' conduct does not run afoul the ACPA, defendant would still be entitled to the relief it seeks.

[40] V.**

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[26] It is also apparent that plaintiffs fall outside the ACPA's "safe harbor," which provides that "bad faith intent… shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful." 15 U.S.C. § 1125(d)(1)(B)(ii). Nothing in the record reflects that plaintiffs meet this standard.

[27] *See* International Bancorp, 192 F. Supp. 2d 467, 485 (noting that it is permissible to look beyond the nine ACPA factors to determine whether a putative infringer acted with the requisite bad faith); Cnnews.com, 177 F. Supp. 2d at 522 (same).

[28] **HN22**[] The Lanham Act, standing alone without the ACPA, is sufficient to order the transfer of domain names and the issuance of an injunction. *See* Washington Speakers, 33 F. Supp. 2d at 488; McCarthy § 25:71.

Such a result does not render the ACPA meaningless, for it, *inter alia,* (i) reinforces the concept established in cases such as *Washington Speakers* that courts may transfer ownership of infringing domain names, (ii) provides an *in rem* cause of action, and (iii) provides a statutory damages remedy, pursuant to 15 U.S.C. § 1117(d), relief not sought by defendant here.

Defendant also asserts a state common law trademark infringement claim against plaintiffs, but neither party addresses which jurisdiction's substantive law applies or the appropriate elements. [29] **[**41]** For this reason, because the unfair competition laws of many states are similar to those of the Lanham Act, [30] and because federal law adequately provides the relief defendant seeks, it is unnecessary to address defendant's claim of common law unfair competition.

VI.

Thus, plaintiffs engaged in unfair competition and trademark infringement, in violation of *15 U.S.C. §§ 1114*, *1125(a)*, and cybersquatting, in violation of *15 U.S.C. § 1125(d)*. These statutory violations demonstrate that judgment on the counterclaims for defendant and against plaintiffs is appropriate with respect to the domain name cosmos.com and the following remedies should issue:

(i) transfer of the cosmos.com domain name to defendant and

(ii) issuance of an injunction against the use by plaintiffs and plaintiffs' successors in interest of "cosmos.com," "cosmotravels," "cosmotravels.com," or any other term confusingly similar thereto in United States commerce.

Accordingly, plaintiffs' request for declaratory relief must be **[**42]** denied and their complaint dismissed with prejudice.

An appropriate Order has issued.

July 24, 2002

Alexandria, Virginia

T.S. Ellis III

United States District Judge

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[29] Of course, Virginia choice of law rules apply here. *See* *ITCO Corp. v. Michelin Tire Corp., Commercial Div., 722 F.2d 42, 49 n.11 (4th Cir. 1983)* (holding that in federal question cases, a district court entertaining pendent state claims should follow the choice of law rules of the forum state) (citing *Klaxon Co v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941))*; *Jones v. R.S. Jones and Assoc., Inc., 246 Va. 3, 431 S.E.2d 33, 34 (Va. 1993)* (holding that Virginia applies the *lex loci delicti,* the law of the place of the wrong); *Diaz Vicente v. Obenauer, 736 F. Supp. 679, 690 (E.D. Va. 1990)* ("The rule of *lex loci delicti* is well-settled in Virginia; the place of the injury supplies the government law in tort actions.").

[30] *See, e.g.,* *Rubbermaid Commercial Products, Inc. v. Contico Intern., Inc., 836 F. Supp. 1247, 1262 (W.D. Va. 1993)* (holding that "the requirements for success on the merits of [a Virginia trademark] claim are substantially similar to those for the federal Lanham Act claim").

Ohio Bell Tel. Co. v. CoreComm Newco, Inc.

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

July 25, 2002, Decided ; July 25, 2002, Filed

CASE NO. 1:01 CV 2057

Reporter

214 F. Supp. 2d 810 *; 2002 U.S. Dist. LEXIS 14222 **; 2002-2 Trade Cas. (CCH) P73,837

THE OHIO BELL TELEPHONE CO., Plaintiff, v. CORECOMM NEWCO, INC., Defendant, Counterclaimant, and Third-Party Plaintiff v. AMERITECH CORP., et al., Third-Party Defendant

Disposition: [1]** Plaintiff and Third-Party Defendants' Motion to Dismiss Counts Two and Three of Defendant's First Amended Counterclaim denied.

Core Terms

Telecommunications, facilities, customers, competitors, anti trust law, Counterclaim, alleges, motion to dismiss, Sherman Act, antitrust, contractual, monopolist, terms, Interconnection, conversion, misrepresentation, fraudulent, telephone, convert, infrastructure, intentionally, incumbents, provisions, violations, monopoly, compete

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion brought under *Fed. R. Civ. P. 12(b)(6)*, the court's inquiry is limited to the content of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

In evaluating a motion for dismissal under *Fed. R. Civ. P. 12(b)(6)*, the district court must consider the pleadings and affidavits in a light most favorable to the non-moving party. However, though construing the complaint in favor of the non-moving party, a trial court will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] Motions to Dismiss, Failure to State Claim

The court will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In deciding a *Fed. R. Civ. P. 12(b)(6)* motion, the court must determine not whether the complaining party will prevail in the matter but whether it is entitled to offer evidence to support the claims made in its complaint.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] Motions to Dismiss, Failure to State Claim

If materials outside the pleadings have been attached to a motion to dismiss brought pursuant to *Fed. R. Civ. P. 12(b)(6)* the court has two options. First, the court may exclude the additional material and decide the matter based upon the complaint alone. Second, the court can treat the motion as one for summary judgment and dispose of it as provided in *Fed. R. Civ. P. 56*; *Fed. R. Civ. P. 12(b)(6)*.

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

Energy & Utilities Law > Administrative Proceedings > Alternative Dispute Resolution

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Jurisdiction

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

HN5[] Introducing Competition, Interconnection Agreements

Title *47 U.S.C.S. §§ 251* and *252* of the Telecommunications Act impose cooperative duties which are incorporated into a interconnection agreement between the incumbent local exchange carriers and their new competitors. The Telecommunications Act requires incumbents to provide services for resale with reasonable pricing and without unreasonable limitations. *47 U.S.C.S. § 251 (b)*. The Telecommunications Act also requires incumbents to negotiate in good faith with new competitors to establish terms under which the competitors will be allowed to access the incumbents services and facilities. Negotiated terms must be submitted to the state public utilities commission for review and approval. *47 U.S.C.S. § 252 (a)*, *(e)*. The commission will also mediate disputes arising in the negotiations, and arbitrate any impasses. *§ 252(a)(2)*, *(b)(1)*. Any disputes not resolved through arbitration may be reviewed in a federal district court. *§ 252(e)(6)*.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > Federal Acts > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN6[] **Communications, Sherman Act**

Only if *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*, somehow incorporates the more particularized statutory duties the 1996 Act has imposed on incumbent local exchange carriers (ILECs) would the ILECs' alleged failure to comply with the Telecommunications Act of 1996 be, in itself, also an antitrust violation. So far as it goes, this is a correct statement, however, it does not follow that no Telecommunications Act violations can constitute antitrust violations.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Overview & Legal Concepts > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN7[] **Communications, Telecommunications Act**

While not every violation of the Telecommunications Act and resulting interconnection agreements can be the basis for an antitrust claim, it is possible, that some actions, such as a failure to provide access to essential facilities on reasonable and non-discriminatory terms, could violate both the Telecommunications Act (through violations of an interconnection agreement) and the Federal Antitrust laws. Although the duties imposed on incumbent providers by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices, neither are those duties mutually exclusive.

Governments > Legislation > Interpretation

HN8[] Legislation, Interpretation

The principle that more specific legislation should take precedence over the general laws, where the two are covering precisely the same field does not apply if the legislature intended the general act to retain independent force.

Antitrust & Trade Law > Regulated Industries > Communications > State Regulation

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > Modification & Termination

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

HN9[] Communications, State Regulation

See *47 U.S.C.S. § 152*.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN10[] Federal Acts, Telecommunications Act

See *47 U.S.C.S. § 601(c)(1)*.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > General Overview

HN11[] Regulated Industries, Communications

Congress has clearly expressed its intention that the Telecommunications Act was not to interfere in any way with the application of the antitrust laws. Therefore, if an act or failure to act constituted an antitrust violation prior to the enactment of the Telecommunications Act, it should still constitute a violation of the antitrust laws following the enactment. If an act or failure to act did not constitute a violation of the antitrust laws prior to the enactment of the Telecommunications Act, it still does not constitute a violation of the antitrust laws, though it may form the basis for a claim under the Act itself.

Governments > Legislation > Interpretation

HN12[] Legislation, Interpretation

When there are two legislative acts addressing the same subject, and Congress does not provide a clear and manifest intent to repeal one of them, the rule is to give effect to both if possible.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN13[] **Communications, Sherman Act**

The United States Supreme Court has also long noted that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Sherman Act, Claims**

Generally a plaintiff can establish a violation of *Section 2* of the Sherman Act, codified at *15 U.S.C.S. § 5*, by proving two elements (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN15[] **Monopolies & Monopolization, Actual Monopolization**

A monopolist generally has no duty to cooperate with its competitors, however, a monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market. The United States Supreme Court has explained that the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN16[] Regulated Industries, Communications

A monopolist has a duty to provide competitors with reasonable access to "essential facilities" which are facilities that are essential to effective competition and are under the control of the monopolist. Under the antitrust laws, those in possession of essential facilities must allow them to be shared on fair terms, unless such sharing would be impractical or would inhibit their ability to serve their customers adequately.

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN17[] Regulated Industries, Communications

The elements necessary to establish an essentials facility claim are: (1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitors; and (4) the feasibility of providing the facility. Access to essential facilities must be provided upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every competitor upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Contracts Law > Breach > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Contracts Law > Breach > Breach of Contract Actions > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Remedies

HN18[] Contracts Law, Breach

The economic loss doctrine prevents a party from suing in tort when the only duty breached is a contractual duty and the only damages claimed are direct or indirect economic losses due to the breach. The doctrine applies only if the claimant does not allege a separate and unique duty not created by contract which would exist even in the absence of a contract.

Counsel: For Ohio Bell Telephone Company, Plaintiff: James F. Lang, Mark I. Wallach, Calfee, Halter & Griswold LLP, Michael T. Mulcahy, Calfee, Halter & Griswold, Cleveland, OH.

For CoreComm Newco, Inc., Defendant: Eric J. Branfman, Swidler Berlin Shereff Friedman, Washington, DC.

For CoreComm Newco, Inc., Defendant: Randolph C Wiseman, Bricker & Eckler, Columbus, OH.

For CoreComm Newco, Inc., Counter-Claimant: Eric J. Branfman, Swidler Berlin Shereff Friedman, Washington, DC.

For Ohio Bell Telephone Company, Counter-Defendant: James F. Lang, Calfee, Halter & Griswold LLP, Cleveland, OH.

For CoreComm Newco, Inc., 3rd Party Plaintiff: Eric J. Branfman, Swidler Berlin Shereff Friedman, Washington, DC.

For SBC Services, Inc., SBC Operations, Inc., SBC Communications, Inc., Ameritech Services, Inc., Ameritech Corporation, 3rd Party Defendants: James F. Lang, Calfee, Halter & Griswold LLP, Cleveland, OH.

Judges: DONALD C. NUGENT, United States District Judge.

Opinion by: DONALD C. NUGENT

Opinion

[*812] MEMORANDUM OPINION

This matter is before the Court on **[**2]** a Motion to Dismiss Counts II and III of Defendant's First Amended Counterclaim, filed on behalf of Plaintiff, The Ohio Bell Telephone Company and Third-Party Defendants, Ameritech Corporation, Ameritech Services, Inc., SBC Communications, Inc., SBC Operations, Inc., and SBC Services, Inc. (collectively "SBC" or "Counterdefendants"). The Counterdefendants have moved for a dismissal of CoreComm Newco, Inc.'s ("CoreComm") claim for maintenance of a monopoly under Section two of the Sherman Act, *15 U.S.C. § 2*, and for fraudulent and negligent misrepresentation. After careful consideration of the pleadings and a review of all relevant statutes and cited authority, the Counterdefendants' Motion to Dismiss is denied.

STANDARD OF REVIEW

HN1[] On a motion brought under *Fed.R.Civ.P. 12(b)(6)*, this Court's inquiry is limited to the content of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. *See* *Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808 (3rd Cir. 1990)*.

HN2[] In evaluating a motion for dismissal under **[**3]** *Rule 12(b)(6)*, the district court must "consider the pleadings and affidavits in a light most favorable to the [non-moving party]." *Jones v. City of Carlisle, Ky., 3 F.3d 945, 947 (6th Cir. 1993)* (quoting *Welsh v. Gibbs, 631 F.2d 436, 439, 19 Ohio Op. 3d 333 (6th Cir. 1980))*. However, though construing the complaint in favor of the non-moving party, a trial court will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *See* *City of Heath, Ohio v. Ashland Oil, Inc., 834 F. Supp. 971, 975 (S.D.Ohio 1993)*.

HN3[] This Court will not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can **[*813]** prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1980)*. In deciding a *Rule 12(b)(6)* motion, this Court must determine not whether the complaining party will prevail in the matter but whether it is entitled to offer evidence to support the claims made in its complaint. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Op. 2d 474 (1974)*.

HN4[] If materials outside **[**4]** the pleadings have been attached to a motion to dismiss brought pursuant to *Fed.R.Civ.P. 12(b)(6)* this court has two options. First, the court may exclude the additional material and decide the matter based upon the complaint alone. Second, the court can treat the motion as one for summary judgment and dispose of it as provided in *FED.R.CIV.P. 56*. *Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54, 55 (N.D.Ohio 1993)*; *FED.R.CIV.P. 12(b)(6)*. In this case, the Court will treat the motion as a true motion to dismiss limited to the allegations and facts set forth in the counterclaim.

FACTUAL AND LEGAL OVERVIEW

[1]

CoreComm competes with SBC to provide local telephone **[**5]** services (including exchange access, Internet access, facsimile transmissions, data transmissions, caller I.D. services, call waiting, call forwarding, voicemail and other services) to residential and business customers in greater Cleveland and greater Columbus. SBC allegedly serves about 95 percent of residential consumers and 90 percent of the business customers in these areas.

SBC controls the "last mile" of telephone infrastructure connecting individual customers to the rest of the telephone network, as well as other forms of infrastructure necessary for the provision of local telephone service in greater Cleveland and greater Columbus. Duplication of this infrastructure is alleged to be prohibitively expensive for companies wishing to break into the local phone service business, though CoreComm does admit that over time SBC competitors could acquire their own facilities and could profitably develop alternatives to significant segments of this local infrastructure. Access to this infrastructure is allegedly essential to any company wishing to compete in the provision of local exchange service and exchange access services.

In November of 1997, SBC Ameritech Ohio ("SBC") [2] and **[**6]** OCOM Corporation ("OCOM") entered into a contract whereby SBC was to provide a variety of services to OCOM. OCOM assigned its interests under the Contract to CoreComm in June of 1998. The contract obligates SBC to (1) provide CoreComm with access to SBC's network elements, including provisioning, pricing, billing, maintenance and performance standards for such access; (2) provide CoreComm with services for resale; (3) provide CoreComm with collocation, including pricing, billing and performance standards for collocation; and (4) provide CoreComm with promotional discounts for certain services. The contract further defines performance measurements and standards and sets time frames within which certain services are to be performed.

[*814] There have been a multitude of disputes relating to the parties' duties and performance under the contract since it was implemented in 1998. The parties have communicated extensively **[**7]** about the disputes and have attended mediation through the Public Utilities Commission of Ohio's ("PUCO") dispute resolution program. In July of 2001, in an attempt to collect monies allegedly owed by CoreComm under the Contract, SBC filed a complaint with the PUCO and shortly thereafter filed a complaint in the Court of Common Pleas in Cuyahoga County, Ohio. CoreComm had the common pleas court complaint removed to this Court, and SBC then amended its Complaint to consolidate the claims it brought in both the Common Pleas case and the PUCO case into a single action.

According to CoreComm's counterclaim, SBC has failed to live up to the terms of the Contract; imposed unreasonable fees for its services; charged for services not properly administered; provided faulty service and support; provided inaccurate billing; overcharged competitors; caused customers to be unnecessarily without service for extended periods of time if they chose to switch from SBC to CoreComm; and erroneously rejected, limited, and delayed service and customer change orders. CoreComm alleges that none of these quality and service issues arise with SBC 's direct customers, but appear only in connection with the **[**8]** wholesale services provided to SBC's competitors and their customers. More than seventeen companies who attempted to compete with SBC have filed for bankruptcy, allegedly as a result of SBC's discriminatory and improper handling of those companies' service and access agreements.

CoreComm further alleges that SBC has denied CoreComm access to its shared transport network preventing it from being able to route inter LATA [3] toll traffic and, therefore, requiring it to toll traffic through third-party interexchange carriers, which is more expensive and limits the scope of CoreComm's local coverage. Despite having agreed to provide such access, SBC has argued that the denial is warranted before the PUCO and before

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[1] The facts as stated in this Memorandum and Order are taken from Defendant's Counterclaim and should not be construed as findings of this Court. In a motion to dismiss, the Court is obligated, for the purposes of that motion, to accept as true the facts set forth by the non-moving party, in this case, the Defendant.

[2] SBC Ameritech Ohio is a trade name under which The Ohio Bell Telephone Company conducts its business.

[3] CoreComm explains that a LATA is a geographic market section that was established when AT&T was broken up. There are six LATA's in Ohio.

the Federal Communications Commission ("FCC"). All of these failures, delays and hurdles are alleged to have intentionally raised CoreComm's and other competitors' costs to a point where they cannot effectively compete, and to have intentionally interfered with CoreComm's customer relations. The Counterclaim also sets forth other allegedly anti-competitive behavior of SBC.

[9]** In addition to its claims of anti-competitive behavior CoreComm claims that SBC made fraudulent or negligent misrepresentations upon which CoreComm relied to its detriment. Primarily these representations centered around SBC's assurances that it could, without disrupting customer service, convert CoreComm customers' service from resale to an arrangement called UNE-P. UNE-P is a form of service that would allow CoreComm to provide service using a combination of elements in SBC's network and without need of its own facilities, but at a lesser cost than pure resale. SBC and CoreComm contracted for a UNE-P service arrangement in 1998. CoreComm first considered converting customers to UNE-P service in 1999 but did not go forward with this plan because it knew it would have to pay a large conversion charge and it "knew that Counterdefendants were not prepared to provide a technically workable UNE-P **[*815]** product." In 2001 SBC informed CoreComm that it was ready to convert to UNE-P, however CoreComm alleges that SBC had never tested the transfer process in Ohio and as a result virtually ever customer who made the conversion lost some or all of its service in the process.

CoreComm alleges that **[**10]** SBC knew or should have known that it was incapable of performing an efficient conversion, and that SBC had the ability to make effective conversions had it wanted to do so. When, despite its apparent inability to perform the service, SBC nonetheless misrepresented to CoreComm that it was ready and able to make the conversions, CoreComm relied on these representations and allowed thousands of customers to convert. CoreComm allegedly suffered loss of clients and goodwill due to the poor implementation of the conversions.

ANALYSIS

I. Count Two: Illegal Monopoly in Violation of *Section 2* of the Sherman Act

SBC contends that this case is a simple contract action and that CoreComm's claim for monopolization should fail because it rests solely on the allegation that SBC did not "more actively help[] CoreComm to compete less expensively and more efficiently than it already does for telecommunications customers in Ohio." According to SBC any affirmative duty to aid competitors in the telecommunications industry stems from either a contractual responsibility or a duty imposed by the Telecommunications Act of 1996, not from any ***antitrust law***.

SBC is correct that many **[**11]** of the complaints set forth in CoreComm's Counterclaims stem from violations of the Interconnection Agreement and are, therefore, subject to the provisions of the The Telecommunications Act of 1996 ("Telecommunications Act"). ***HN5***[] *Sections 251* and *252* of the Telecommunications Act impose cooperative duties which are incorporated into a interconnection agreement between the incumbent local exchange carriers and their new competitors. The Telecommunications Act requires incumbents to provide services for resale with reasonable pricing and without unreasonable limitations. TCA *§ 251 (b)*. The Telecommunications Act also requires incumbents to negotiate in good faith with new competitors to establish terms under which the competitors will be allowed to access the incumbents services and facilities. Negotiated terms must be submitted to the state public utilities commission for review and approval. TCA *§ 252 (a)*, *(e)*. The commission will also mediate disputes arising in the negotiations, and arbitrate any impasses. TCA *§ 252(a)(2)*, *(b)(1)*. Any disputes not resolved through arbitration may be reviewed in a federal district court. TCA *§ 252(e)(6)*.

CoreComm, however, has articulated claims **[**12]** not only for breach of the Interconnection Agreement and violation of the Telecommunications Act, but has further alleged that SBC's actions and failures to act violate Section two of the Sherman Antitrust Act, *15 U.S.C. § 2*. SBC argues that actions which violate the Telecommunications Act, or breach an interconnection agreement cannot be the basis for an antitrust claim under the Sherman Act. Courts across the country appear to be split in their approach to this question.

SBC relies heavily on the *Goldwasser* decision out of the Seventh Circuit. In *Goldwasser v. Ameritech Corporation, 222 F.3d 390 (7th Cir. 2000)*, the Court of Appeals dismissed a consumer claim for a violation of the Sherman Antitrust Act *§ 2*. The *Goldwasser* Court reviewed the history of telecommunications regulation, including the Telecommunications Act, and **[*816]** reviewed the antitrust case law which generally does not impose upon a monopolist any duty to assist or even deal with its competitors. The court held that "***HN6***[] only if *Section 2* [of the Sherman Act] somehow incorporates the more particularized statutory duties the 1996 Act has imposed on ILECs like Ameritech would **[**13]** Ameritech's alleged failure to comply with the 1996 Act be, in itself, also an antitrust violation." So far as it goes, this is a correct statement, however, it does not follow, as the *Goldwasser* decision seems to imply, that no Telecommunications Act violations can constitute antitrust violations.

HN7[] While not every violation of the Telecommunications Act and resulting interconnection agreements can be the basis for an antitrust claim, it is possible, that some actions, such as a failure to provide access to essential facilities on reasonable and non-discriminatory terms, could violate both the Telecommunications Act (through violations of an interconnection agreement) and the Federal Antitrust laws. *See generally, Southern Pacific Communications v. AT & T, 238 U.S. App. D.C. 309, 740 F.2d 980 (D.C. Cir. 1984)*(stating that the antitrust laws prohibit unreasonable and discriminatory restrictions on access to essential facilities) (citations omitted). Although, as the *Goldwasser* court noted, the duties imposed on incumbent providers by the Telecommunications Act are not "coterminous with the duty of a monopolist to refrain from exclusionary practices," neither **[**14]** are those duties mutually exclusive. *Cf. Goldwasser, 222 F.3d at 399*, *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corporation, 305 F.3d 89, 106-107 (2nd Cir. 2002)*.

The *Goldwasser* court based its decision on the maxim that more specific legislation should take precedence over the general laws, where the two are covering precisely the same field. *222 F.3d at 401*. However, as many courts have noted, "***HN8***[] this principle does not apply if the legislature intended the general act to retain independent force." *See, e.g., Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir. 1990)*. ***HN9***[] The Historical and Statutory Notes of the Telecommunications Act explicitly state that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." *47 U.S.C.A. § 152*, Applicability of Consent Decrees and Other Laws (b)(1). ***HN10***[] Similarly, *Section 601(c)(1)* states that "this Act and the amendments made by this Act shall not be construed to modify, impair, or supercede Federal, State, or local law unless expressly so provided **[**15]** in such Act or amendments." *47 U.S.C.A. § 601(c)(1)*. Thus, ***HN11***[] Congress has clearly expressed its intention that the Telecommunications Act was not to interfere in any way with the application of the antitrust laws. Therefore, if an act or failure to act constituted an antitrust violation prior to the enactment of the Telecommunications Act, it should still constitute a violation of the antitrust laws following the enactment. If an act or failure to act did not constitute a violation of the antitrust laws prior to the enactment of the Telecommunications Act, it still does not constitute a violation of the antitrust laws, though it may form the basis for a claim under the Act itself. [4]

[16]** ***HN12***[] When there are two legislative acts addressing the same subject, and Congress does not provide a clear and manifest intent **[*817]** to repeal one of them, "the rule is to give effect to both if possible." *Morton v. Mancari, 417 U.S. 535, 550-551, 41 L. Ed. 2d 290, 94 S. Ct. 2474*. ***HN13***[] The Supreme Court has also long noted that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*(quoting *United States v. Philadelphia National Bank, 374 U.S. 321, 350-351, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. [5] Here, both the

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[4] The parties also included a clause in their Interconnection Agreement in which they agreed that "no remedy under this Agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter existing under applicable law or otherwise." Interconnection Agreement § 26.6.

[5] Prior to the 1996 Telecommunications Act, it was well settled that there was no repugnancy between the antitrust laws and the regulatory scheme that was then applicable to the telecommunications industry. *See Southern Pac. Communications Co. v. AT&T, 238 U.S. App. D.C. 309, 740 F.2d 980, 999-1000(D.C. Cir. 1984)*(citations omitted). While the 1996 Telecommunications

Telecommunications Act and the Sherman Act set forth responsibilities for monopolists.. The two acts have different scope, different remedies, and different procedural requirements, yet they are complimentary in purpose. These acts are clearly not repugnant, and it is possible to give effect to both. Thus, in order to determine whether the Plaintiff's motion to dismiss Count Two of the Amended Counterclaim should be granted, this Court should **[**17]** evaluate the Counterclaim to see if it would state a claim for a violation of Section two of the Sherman Act if the Interconnection Agreement and the Telecommunications Act did not exist.

HN14[] Generally a plaintiff can establish a violation of *Section 2* of the Sherman Act by proving two elements "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of **[**18]** that power, as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *Volvo N. Am. Corp. v. Men's Inter. Prof'l Tennis Council, 857 F.2d 55, 73 (2d Cir. 1988)*(citations omitted). CoreComm has clearly alleged facts that, taken in the light most favorable to it, would support a claim that SBC has monopoly power in an identified market. Therefore, the only question is whether it has stated a claim that SBC has willfully maintained or attempted to maintain that monopoly power by a means other than its actual superiority in product, service, and business development.

HN15[] A monopolist generally has no duty to cooperate with its competitors, however, "[a] monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market" *United States Football League v. National Football League, 842 F.2d 1335, 1360-61 (2d Cir. 1988)*(citations omitted). The Supreme Court has explained that

> the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a cooperative venture, that **[**19]** decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. . . . The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985).

HN16[] A monopolist has a duty to provide competitors with reasonable access to "essential facilities" which are facilities that are essential to effective competition **[*818]** and are under the control of the monopolist. *See Southern Pac. Communications Co. v. AT&T, 740 F.2d at 1009*. Under the antitrust laws, those in possession of essential facilities "must allow them to be shared on fair terms," *Directory Sales Management Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 612 (6th Cir. 1987)*, unless "such sharing would be impractical or would inhibit [their] ability to serve [their] customers adequately." *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992-993 (D.C. Cir. 1977)*.

HN17[] The elements necessary to establish an essentials facility claim are: (1) **[**20]** control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitors; and (4) the feasibility of providing the facility. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir. 1984)*. Access to essential facilities must be provided 'upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every [competitor] upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *Southern Pac. Communications Co., 740 F.2d at 1009*(quoting *United States v. Terminal R.R. Assoc., 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507*, (1912)).

CoreComm has alleged (1) that SBC is a monopolist, (2) that SBC has control of allegedly "essential facilities;" (3) that SBC has in some cases outright denied CoreComm access to such facilities, and in others cases has denied access under just and reasonable terms; and (4) that it is feasible for SBC to provide just and reasonable access to the facilities in question. Although SBC **[**21]** may eventually be able to show that the facilities in question are not essential, that access was provided under just and reasonable terms, or that it was somehow infeasible to provide such access, these defenses are issues of fact which cannot be decided on a 12(b)(6) motion to dismiss.

Act added additional requirements, both the 1996 Act and the prior regulatory scheme subjected rates or tariffs, and other conditions for interconnections and other access to local distribution facilities to FCC approval. *Id.*

CoreComm argues that its Counterclaim also alleges other anti-competitive activities that could form the basis for a violation of Section two of the Sherman Act including, disruption of CoreComm operations, price-quality squeeze, sham litigation, and a general failure to deal. While these each state a potential means of violating Section two, they are not discreet claims in the Counterclaim. Therefore, having found that a claim has been stated under Section two, the Court need not pass on the validity of each of these individual allegations. Nonetheless, it is doubtful that these alleged activities would support an antitrust claim in the absence of an essential facilities violation in this case. [6] The charges of disruption of CoreComm operations, general refusal to deal, and price-quality squeeze are all premised on the same allegations that support the essential facilities claim. If the facilities **[**22]** at issue are not essential to competition, then SBC has no duty to deal with CoreComm reasonably or unreasonably, or to provide any particular level of quality, service or pricing under the antitrust laws. [7] Any **[*819]** violation of a duty arising solely from the Telecommunications Act or the Interconnection Agreement, does not state a claim under the antitrust laws.

[23]** As neither side has been able to cite to a case in which a charge of "sham litigation" was upheld where the complaining party actually initiated the proceedings complained of, this Court would not find that a the sham litigation charge states a claim for a Sherman Act Section two violation under these circumstances. CoreComm's grievance on this matter is really that SBC violated its contract, causing CoreComm to have to sue, which is a different type of harm than CoreComm would have suffered if SBC, itself, initiated fraudulent proceedings thus using the governmental process as an affirmative anticompetitive weapon. To hold otherwise would be to create a potential cause of action for "sham litigation" against any defendant who intentionally breached a contract or otherwise acted in a manner which allowed them to be sued. As for claims that SBC intentionally and baselessly prolonged litigation, CoreComm, itself, pointed out, there are other remedies, including Rule 11 sanctions, for baseless motions filed by SBC within a procedure initiated by CoreComm.

Although CoreComm has stated a claim for a violation of Section two of the Sherman Act, this does not mean that the claim will be **[**24]** successful. In order to prevail, or indeed to defeat any possible summary judgment motions that may be filed after further factual development, CoreComm will have to produce evidence proving that the facilities it has been denied are indeed essential to competition. Denial of fair access to non-essential facilities, and the provision of inferior quality or service, no matter how unreasonable, would not equal a violation of the antitrust laws under these circumstances.

II. Count Three: Fraudulent or Negligent Misrepresentation

SBC asserts that CoreComm's claim for fraudulent or negligent misrepresentation is in reality a breach of contract claim alleging only economic loss, and that this count is, therefore, barred by the economic loss doctrine. ***HN18***[] The economic loss doctrine prevents a party from suing in tort when the only duty breached is a contractual duty and the only damages claimed are direct or indirect economic losses due to the breach. *See* *Picker Int'l v. Mayo Found., 6 F. Supp. 2d 685, 689 (N.D. Ohio 1998)*. The doctrine applies only if the claimant does not allege a "separate and unique duty not created by contract which would exist even in the **[**25]** absence of a contract." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 115 Ohio App. 3d 137, 150, 684 N.E.2d 1261 (Summit App. 1996)*.

SBC and CoreComm contracted for a UNE-P service arrangement in 1998. CoreComm first considered converting customers to UNE-P service in 1999 but did not go forward with this plan because it knew it would have to pay a

[6] It is possible that although these activities don't state independent antitrust claims in the context of this case, they could be additional evidence of SBC's alleged intent to maintain its monopoly.

[7] An exception to the general rule that competitors, outside of an essential facilities claim, have no duty to assist or even deal with their competitors was established in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. This exception, however, does not apply under the facts set forth in the Counterclaim. In *Aspen,* the competitors had a previous history of voluntary cooperation in a joint marketing venture that had proven profitable for both parties. In this case, there is no history of prior cooperation, and no allegation that SBC's cooperation with CoreComm would be profitable for SBC. The only basis alleged for any agreement or cooperation between SBC and CoreComm has been forced through regulation.

large conversion charge and it "knew that Counterdefendants were not prepared to provide a technically workable UNE-P product." In 2001 SBC informed CoreComm that it was ready to convert to UNE-P, however CoreComm alleges that SBC had never tested the transfer process in Ohio and as a result virtually ever customer who made **[*820]** the conversion lost some or all of its service in the process. CoreComm further alleges that SBC knew or should have known at the time it made this representation that it was false, and that CoreComm would rely on it.

The Court has not been provided with a copy of the provisions of the contract relating to the UNE-P service agreement. It is possible that the claims alleged may be addressed by the contract language, which could then prevent CoreComm from recovering economic damages under a theory of **[**26]** misrepresentation. However, without proof that the issues allegedly misrepresented were part of the contractual terms, CoreComm has stated a claim for negligent or fraudulent misrepresentation. The contractual duties alleged in the Counterclaim apply to CoreComm's claims that UNE-P service was not timely provided and that it was not provided pursuant to the contractual terms. However, CoreComm has stated a separate allegation that, regardless of SBC's contractual promises, CoreComm withheld its requests for transfer to UNE-P service for nearly three years because it knew SBC was not prepared to effectuate those changes. When SBC affirmatively represented (outside of the contractual promises) that it was indeed ready to make the changes, CoreComm relied on that representation, and began requesting UNE-P service changes. The harm CoreComm seeks to recover, according to the Counterclaim, is the harm resulting from making those changes before SBC was prepared to handle them, not the harm from waiting additional years for SBC to become ready. The latter is a contractual claim, the prior is a claim based on a general duty to avoid negligently or intentionally misrepresenting facts upon which **[**27]** another party can be expected to rely.

Thus, though it is possible that the facts will not bear out the claim, or that contractual provisions not yet known to the court actually govern SBC's representations of readiness, at this stage CoreComm has stated a claim for negligent or fraudulent misrepresentation. [8] Counterdefendants' Motion to Dismiss Count Three is, therefore, denied.

CONCLUSION

For the reasons set forth above. Plaintiff and Third-Party Defendants' Motion to Dismiss Counts Two and Three of Defendant's First Amended Counterclaim are hereby DENIED.

IT IS SO ORDERED.

DONALD C. NUGENT

[28]** United States District Judge

DATED: July 25, 2002

ORDER

Plaintiff, The Ohio Bell Telephone Company and Third-Party Defendants, Ameritech Corporation, Ameritech Services, Inc., SBC Communications, Inc., SBC Operations, Inc., and SBC Services, Inc. (collectively "SBC" or "Counterdefendants") have moved for a dismissal of Counts Two and Three of CoreComm Newco, Inc.,'s ("CoreComm")'s Counterclaim and Third Party Complaint. After careful consideration of the pleadings and a review

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[8] None of the cases cited by SBC in support of its motion to dismiss addressed a 12(b)(6) motion to dismiss. Though in the cited cases, the facts did not bear out a distinction between the contract claims at issue and the additional misrepresentation claims, these cases were decided at the summary judgment stage or later after there had been more opportunity for factual development of the claims.

of all relevant law, for the reasons set forth in the accompanying Memorandum Opinion, the Counterdefendants' Motion to Dismiss is DENIED.

IT IS SO ORDERED.

DONALD C. NUGENT

United States District Judge

DATED: July 25, 2002

Dee-K Enters. v. Heveafil Sdn. Bhd.

United States Court of Appeals for the Fourth Circuit

May 7, 2002, Argued ; July 30, 2002, Decided

No. 01-1894

Reporter
299 F.3d 281 *; 2002 U.S. App. LEXIS 15256 **; 2002-2 Trade Cas. (CCH) P73,756

DEE-K ENTERPRISES, INCORPORATED, a corporation of the Commonwealth of Virginia; ASHEBORO ELASTICS CORPORATION, a corporation of the state of North Carolina, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. HEVEAFIL Sdn. Bhd; FILMAX Sdn. Bhd; RUBFIL Sdn. Bhd; FILATI LASTEX Sdn. Bhd, corporations of Malaysia; RUBFIL USA, INCORPORATED, a corporation of the State of North Carolina, Defendants-Appellees, and RUBBERFLEX Sdn. Bhd; FILATI LASTEX ELASTOFIBRE USA, INCORPORATED, a corporation of Rhode Island; FLEXFIL CORPORATION OF RHODE ISLAND, a corporation registered to do business in North Carolina; FLEXFIL CORPORATION, a corporation of the state of North Carolina; Pt BAKRIE RUBBER INDUSTRIES; Pt PERKEBUNAN III, corporations of Indonesia; NATURAL RUBBER THREAD COMPANY, LIMITED; LONGTEX RUBBER INDUSTRIES COMPANY, LIMITED, corporations of Thailand; CONSORTIUM INTERNATIONAL CORPORATION, a corporation of the state of Texas; JPS ELASTOMERICS CORPORATION, a corporation of the state of Delaware, Defendants.

Subsequent History: Later proceeding at *Dee-K Enters. v. Heveafil Sdn. Bhd., 154 L. Ed. 2d 770, 123 S. Ct. 954, 2003 U.S. LEXIS 573 (U.S., 2003)*

US Supreme Court certiorari denied by, Motion granted by *Dee-K Enters. v. Heveafil Sdn. Bhd., 2003 U.S. LEXIS 5188 (U.S., June 27, 2003)*

Prior History: **[**1]** Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Chief District Judge. (CA-98-10-3-MU).

Disposition: Affirmed.

Core Terms

conspiracy, commerce, producers, domestic, rubber, antitrust, thread, effects, import, substantial effect, cases, anti trust law, price-fixing, Sherman Act, meetings, courts, target, district court, price fixing, substantial-effect, affiliations, Carpet, global, fix prices, characterization, transactions, abroad, prices, subsidiaries, conspiratorial

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Exports & Imports > Countervailing Duties > US Department of Commerce

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > ... > Exports & Imports > Antidumping > General Overview

International Trade Law > ... > Trade Agreements Act > Investigations & Proceedings > General Overview

International Trade Law > ... > Antidumping > Trade Agreements Act > Dumping Margin

International Trade Law > ... > Antidumping > Trade Agreements Act > US International Trade Commission

HN1[] **Countervailing Duties, US Department of Commerce**

The United States Department of Commerce may impose tariffs on product dumpers to bring the United States price into line with the price in the producer's home market. *19 U.S.C.S. § 1673*.

International Trade Law > ... > Exports & Imports > Antidumping > General Overview

HN2[] **Exports & Imports, Antidumping**

Although to avoid dumping a company must price goods at or above the price in its own home market, it also may not agree with its competitors to fix prices, restricting the market movement of prices in the United States market.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

International Trade Law > General Overview

HN3[] **Regulated Industries, Transportation**

Under the jurisdictional test used in domestic antitrust cases, a plaintiff need only demonstrate that the defendant's activity is itself in interstate commerce, or that it has an effect on some other appreciable activity demonstrably in interstate commerce.

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

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN4[] **Private Actions, Remedies**

American antitrust laws do not regulate the competitive conditions of other nations' economies.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN5[] Per Se Rule & Rule of Reason, Per Se Violations

In every case involving direct sales to the United States in which its antitrust laws condemn an activity per se, however foreign the conduct, United States courts would have jurisdiction without any showing whatsoever of an effect on United States commerce.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rationale for per se rules in cases addressing domestic conduct seems plainly inapplicable to foreign restraints that pose very little danger to American commerce.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN7[] Regulated Practices, Price Fixing & Restraints of Trade

Courts consistently required a showing of effect on United States commerce even in cases involving price fixing on imports.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Trade Law > General Overview

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

Meetings in the United States to negotiate an agreement to fix prices in an overseas foreign market that had no effect on domestic commerce do not yield antitrust jurisdiction in American courts.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

HN9[] Procedural Matters, Jurisdiction

In determining which jurisdictional antitrust test applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic.

Counsel: ARGUED: Joel Davidow, MILLER & CHEVALIER, CHARTERED, Washington, D.C., for Appellants.

Christopher M. Curran, WHITE & CASE, L.L.P., Washington, D.C., for Appellees.

ON BRIEF: Alan I. Horowitz, Michael T. Brady, MILLER & CHEVALIER, CHARTERED, Washington, D.C.; William T. Rikard, Jr., PARKER, POE, ADAMS & BERNSTEIN, L.L.P., Charlotte, North Carolina; Daniel Small, Mary Strimel, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, D.C., for Appellants.

J. Mark Gidley, Jaime M. Crowe, Eric Grannon, WHITE & CASE, L.L.P., Washington, D.C., for Appellees.

Judges: Before WILKINS and MOTZ, Circuit Judges, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation. Judge Motz wrote the opinion, in which Judge Wilkins and Senior Judge Michael joined.

Opinion by: DIANA GRIBBON MOTZ

Opinion

[*283] DIANA GRIBBON MOTZ, Circuit Judge:

Two United States companies that purchase rubber thread brought this private antitrust action, alleging a price-fixing conspiracy led by Southeast Asian producers **[**2]** of the thread. After an eight-day trial, the jury returned a special verdict, finding that although one or more of the producers engaged in a conspiracy to fix prices that was intended to affect United States commerce, that conspiracy had no "substantial effect" on this country's commerce. The district court then entered judgment on the verdict for the producers. The purchasers appeal, principally contending that the substantial-effect test applies only to "wholly" foreign conduct, and so does not govern this case because the rubber-thread conspiracy resulted in the sale of price-fixed goods directly into the United States. Because the conspiracy involved primarily foreign conduct, we hold that the district court did not abuse its discretion in applying the substantial-effect test. Accordingly, we affirm.

I.

In 1997, Dee-K Enterprises, Incorporated, and Asheboro Elastics Corporation (collectively Dee-K), United States corporations that purchase rubber thread to make elastic fabric, brought this class action, alleging a conspiracy to fix the price of rubber thread in the United States, in violation of the Sherman Act. *See* 15 U.S.C.A. § 1 (West 1997). Rubber **[**3]** thread, also called extruded rubber thread or elastic rubber thread, and sometimes abbreviated as "ERT," is manufactured in Southeast Asia and used to make elastic fabric, bungee cords, toys, and other products.

Dee-K named as defendants nine Southeast Asian producers of rubber thread and some of their subsidiaries and distributors in the United States. Five of the producers are Malaysian companies: Heveafil Sendirian Berhad, Filmax Sendirian Berhad, Rubfil Sendirian Berhad, Rubberflex Sendirian Berhad, and Filati Lastex Sendirian **[*284]** Berhad. (The suffix "Sendirian Berhad," used in Malaysia and abbreviated "Sdn. Bhd.," translates as "private limited company.") Two are Indonesian: PT. Bakrie Rubber Industries and PT. Perkebunan III. Two are Thai: Longtex Rubber Industries Company, Limited, and Natural Rubber Thread Company, Limited. Dee-K also named as defendants the United States subsidiaries of three Malaysian producers (Rubfil USA, Incorporated, Flexfil Corporation of Rhode Island, Flexfil Corporation, and Filati Lastex Elastofibre USA, Incorporated) and two United States independent distributors used by other producers (Consortium International and JPS Elastomerics).

In its complaint, **[**4]** Dee-K alleged that the members of the class it sought to represent, domestic purchasers of rubber thread, paid "artificially high and non-competitive prices" for rubber thread, that they "were deprived of free and open competition in the market" for rubber thread, and that "competition among defendants" in the United States sale of rubber thread "was restrained." As to injury, Dee-K contended that "plaintiffs . . . purchased substantial quantities of extruded rubber thread from defendants."

Dee-K originally filed this action in the Eastern District of Virginia. Following a number of early rulings not relevant to our disposition of this appeal, the district court determined that venue did not lie in Virginia and transferred the case to the Western District of North Carolina. *See* Dee-K Enters. v. Heveafil Sdn. Bhd., 985 F. Supp. 640 (E.D. Va.

1997). Prior to trial, that court denied class certification. After most defendants settled, declined to appear, or were dismissed, the case against the five Malaysian producers and the United States subsidiary of one of them (Rubfil USA), none of whom now contest personal jurisdiction, *see* Dee-K Enters. v. Heveafil Sdn. Bhd., 174 F.R.D. 376 (E.D. Va. 1997), **[**5]** proceeded to trial before a jury.

Dee-K introduced substantial evidence at trial of horizontal price fixing among the producers. This price fixing apparently originated at least in part in reaction to 1991 threats by the United States government to punish Southeast Asian rubber-thread producers for violating antitrust prohibitions against "dumping." "Dumping" occurs when a foreign producer injures a United States producer by selling a product in the United States at less than what would be "fair value" in the foreign producer's home market. *See* 19 U.S.C.A. § 1673 (West 1999) (authorizing an "antidumping duty"). ***HN1***[] The United States Department of Commerce may impose tariffs on dumpers to bring the United States price into line with the price in the producer's home market. *See id.* Thus, if a product sells for $ 1 in the home market, it warrants dumping duties if it sells for less than $ 1 in the United States. Of course, avoidance of dumping penalties in itself does not provide foreign producers with a license to fix prices in violation of United States antitrust laws. ***HN2***[] Although to avoid dumping a company must price goods at or above the price in its own **[**6]** home market, it may not agree with its competitors to fix prices, restricting the market movement of prices in the United States market. *See* Dee-K Enters. v. Heveafil Sdn. Bhd., 982 F. Supp. 1138, 1156 & n.45 (E.D. Va. 1997); *see also* United States v. Nippon Paper Indus., 62 F. Supp. 2d 173, 180 (D. Mass. 1999) (noting that foreign companies threatened with anti-dumping provisions must "walk a fine line").

In December 1991, responding to the dumping accusations, officials of the Malaysian producers representing Heveafil, Rubfil, Rubberflex, and Filati Lastex met with a Malaysian government official and **[*285]** agreed to fix rubber-thread prices throughout the world. Later joined by other rubber-thread producers from Malaysia, Indonesia, and Thailand, they continued to meet for several years, at conventions and in other settings, to discuss and implement these and other efforts to fix prices. They met regularly between 1992 and 1995 -- in Kuala Lumpur, in Columbo, in Bali, and in Penang. They never met in the United States.

Throughout the period during which they met to fix prices, the Malaysian producers sold their rubber thread around the world, distributing **[**7]** it to the United States market in three different ways. Heveafil and Filmax sold to the United States through a division of Heveafil based in the United States. Rubfil, Rubberflex, and Filati Lastex all sold to large United States customers directly and to smaller customers through wholly owned subsidiaries incorporated in the United States, all four of which were named as defendants. *See* Dee-K, 982 F. Supp. at 1142. The record does not disclose the United States share of the global market.

From 1991 to 1996, United States prices for rubber thread (adjusted for inflation using the producer price index) generally rose, with some decreases on various scales. Dee-K attributes these increases to the price-fixing conspiracy. The producers attribute them to an antidumping order entered by the United States Department of Commerce in 1992 that imposed a duty on rubber thread and to increases in the price of raw materials, particularly the price of latex.

At the conclusion of an eight-day trial, the district court submitted a special verdict form to the jury. The verdict form included two questions: (1) Was there "a conspiracy . . . to fix the prices of extruded rubber thread, **[**8]** which was intended to have a substantial effect in the United States"? (2) If so, did "the conspiracy have a substantial effect in the United States"?

The jury answered the first question in the affirmative, finding a conspiracy to fix prices with the intent of affecting the United States. But the jury answered the second question in the negative, finding that the conspiracy did not have a substantial effect in the United States. In accordance with this verdict, the court entered judgment for the producers.

Dee-K moved for a new trial pursuant to Rule 59, arguing that the jury's verdict as to the lack of a substantial effect on United States commerce was contrary to the weight of the evidence. The district court denied the motion and simultaneously denied a late-filed Rule 50 motion for judgment as a matter of law on the substantial-effect question.

Dee-K appeals, contending that the substantial-effect test (at least as stated in the jury instructions and special verdict) does not govern this case. [1]

[9]** II.

In *Hartford Fire Insurance Co. v. California*, the Supreme Court noted that **[*286]** "it is well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *509 U.S. 764, 796, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* (citations omitted).

Dee-K argues that this statement in *Hartford Fire* does not govern the case at hand, primarily because the price-fixing conspiracy it proved does not constitute "foreign conduct." Dee-K contends that instead ***HN3***[] the jurisdictional test used in domestic antitrust cases controls here; in domestic cases a plaintiff need only demonstrate "that the defendant's activity is itself *in* interstate commerce, or . . . that it has an effect on some other appreciable activity demonstrably *in* interstate commerce." *See McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)* (emphasis added and citation omitted). Accordingly, Dee-K asserts that the district court abused its discretion by applying the substantial-effect test from *Hartford Fire*. *See Nelson v. Green Ford, Inc., 788 F.2d 205, 208-09 (4th Cir. 1986)* **[**10]** (noting that we review jury instructions for abuse of discretion); *Tights, Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1060 (4th Cir. 1976)* (noting that we review special verdict interrogatories for abuse of discretion).

The producers respond that *Hartford Fire* is "analytically indistinguishable" from Dee-K's case. Thus, they maintain that the district court correctly applied *Hartford Fire* when it required Dee-K to show a "substantial effect in the United States" before concluding that "the Sherman Act applies" to the "foreign conduct" that Dee-K alleged.

The mixture of foreign and domestic elements in this case makes its analysis challenging; either an entirely foreign or an entirely domestic conspiracy would present a comparatively easy jurisdictional question. If the conspiracy had involved participants with United States affiliations, acting only in the United States, and targeting a United States market, the jurisdiction of United States courts would be clear, without any proof of effect. [2] At the other extreme, if everything about the conspiracy were foreign -- if it were a conspiracy formed in Southeast Asia, by Southeast Asian persons and corporations, **[**11]** intended to affect only Southeast Asian markets, and affecting only those markets -- the Sherman Act would not provide a United States court any jurisdiction to address it. *See Matsushita*

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[1] Dee-K does not appeal the denial of its Rule 50 motion. It does, however, appeal the denial of its motion for a new trial, asserting that the jury's finding of no substantial effect was against the weight of the evidence. In fact, the producers provided the jury with a good deal of evidence supporting the challenged finding, including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases. Given these alternatives, nothing about this case presents the "exceptional circumstances" that might lead us to conclude that the verdict was against the weight of the evidence. *See Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 186 (4th Cir. 1994)* (citation omitted); *see also Poynter v. Ratcliff, 874 F.2d 219, 223 (4th Cir. 1989)*; *see generally* 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2819 (2d ed. 1995 & Supp. 2002).

[2] We recognize that the Ninth Circuit has suggested that the foreign-conduct question affects the substantive analysis of a particular offense under the antitrust laws. *See Metro Indus. v. Sammi Corp., 82 F.3d 839, 844-45 (9th Cir. 1996)*. Although market effect of course has its place in substantive antitrust analysis, we follow the Supreme Court and Congress in treating allegations that an antitrust case involves only foreign conduct as raising a jurisdictional issue. *See 15 U.S.C.A. § 6a (West 1997)* (addressing the presence of certain types of foreign conduct in an antitrust case by providing that the Sherman Act does not apply to such cases at all); *Hartford Fire*, 509 U.S. at 795-96; *see also Restatement (Third) of the Foreign Relations Law of the United States § 415*, reporter's note 3 (1987) ("Accurate analysis distinguishes between the requirement of sufficient effect on commerce of the United States to support application of United States law, and the requirement of sufficient injury or anti-competitive effect to establish liability."); Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.14 at 16 (Supp. 2002) (criticizing the *Metro Industries* court on this point); IA Philip Areeda & Herbert Hovenkamp, ***Antitrust Law*** § 273 (2d ed. 2000) ("We emphasize that 'jurisdictional' and 'substantive' inquiries are not wholly independent.").

Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) ***HN4***[] ("American antitrust laws do not regulate **[*287]** the competitive conditions of other nations' economies.").

[12]** We earn our keep, of course, in the middle ground between such extremes -- in cases such as this. Dee-K alleged (and proved to the jury) a largely foreign conspiracy with some domestic elements, aimed at a global market including, but certainly not limited to, a United States import market. Indeed, the conspiracy mixed foreign and domestic elements in several respects: it included many *participants* with foreign affiliations but a few who also had United States affiliations; *acts* that range from a series of conspiratorial meetings, all held abroad, to routine communications, a few with the United States; and a *target market* embracing dozens of nations including the United States. This sort of mixed fact pattern will probably become increasingly familiar as global economic links and assertions of transnational jurisdiction increase. *See generally* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289, 290-92. But this is one of the few cases to date that involves an import market and presents such a mixed fact pattern, and neither the statutory scheme nor the case law provides clear guidance.

[13]** Although the Supreme Court noted in *Hartford Fire*, 509 U.S. at 796, that the substantial-effect test applies to "foreign conduct," no antitrust statute defines "foreign conduct." Nor does any statute explicitly address any aspect of a case involving the effect of foreign conduct on United States *import* commerce, like that at issue here.

To be sure, Congress legislated in this area relatively recently, establishing a threshold jurisdictional standard for "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign Trade Antitrust Improvements Act (FTAIA) of 1982 § 402, Pub. L. 97-290, 96 Stat. 1246 (codified at *15 U.S.C.A. § 6a*). According to that statutory standard, United States antitrust laws do not apply to such conduct unless it has "a direct, substantial and reasonably foreseeable effect" on United States commerce. *Id.* Because this case involves importation of foreign-made goods, however -- conduct Congress *expressly exempted* from FTAIA coverage as "involving . . . import trade or import commerce . . . with foreign nations," *id.* -- the FTAIA standard obviously does not **[**14]** directly govern this case, even though it may constitute an effort to "clarify the application of United States antitrust laws to foreign conduct" in other circumstances. [3] *See Den Norske Stats Oljeselskap AS v. Heeremac Vof, 241 F.3d 420, 421 (5th Cir. 2001)*; *Hartford Fire*, 509 U.S. at 796 n.23 (refusing to decide whether the FTAIA applies to the conduct alleged, an agreement between foreign and United States participants, formed abroad, to refuse to sell a service to United States consumers); *see also id.* (refusing to decide whether the FTAIA's "direct, substantial, and reasonably foreseeable effect" provision "amends existing law or merely codifies it"); *Kruman v. Christie's Int'l P.L.C., 284 F.3d 384, 399 n.5 (2d Cir. 2002)* (same). Nor do we find any guidance in the FTAIA as to what constitutes "foreign conduct."

We thus must rely **[**15]** on case law, which provides some, albeit limited, assistance. Only a few cases give any hint of how to decide whether conduct is foreign.

[*288] In cases that date from the early twentieth century, silence on this point is hardly surprising, because the Supreme Court then rejected any exercise of jurisdiction based only on acts committed abroad, on the theory that the law of the country where an act occurred should govern it. *See American Banana Co. v. United Fruit Co., 213 U.S. 347, 356, 53 L. Ed. 826, 29 S. Ct. 511 (1909)*; IA Areeda & Hovenkamp § 272b at 350-51 (describing post-*American Banana* Supreme Court cases in which jurisdiction depended on finding "actions within the United States").

In 1945, a leading opinion by Judge Learned Hand, which the Supreme Court later endorsed, displaced this approach based on the location of the conduct, and shifted attention to the location of the conduct's actual or intended effect. *See United States v. Aluminum Co. (Alcoa), 148 F.2d 416 (2d Cir. 1945)*; IA Areeda & Hovenkamp § 272c; I Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.10 at 68-69 (5th ed. 1996). The case, *Alcoa*, thus **[**16]** introduced a predecessor of *Hartford Fire*'s effects test. Although *Alcoa* refocused the jurisdictional analysis on the location of the effects of alleged violations of the antitrust laws, it did not eliminate the

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[3] Not even the producers suggest that we should, by analogy or otherwise, borrow the FTAIA standard in this import case.

location of the conduct from the inquiry entirely, since its test applied only to cases involving foreign conduct. [4] *See, e.g.*, *Kruman, 284 F.3d at 393-94* ("Under [*Alcoa*'s] . . . 'effects test,' *foreign conduct* was actionable under our antitrust laws if it was intended to affect domestic commerce and actually did so." (emphasis added)). Yet *Alcoa* does not discuss how to assess whether conduct is "foreign," rather than domestic and therefore subject to *McLain*'s test.

[17]** In the decades after *Alcoa*, courts and commentators analyzed not how to assess whether conduct is foreign, but how to interpret and apply *Alcoa*'s effects test. They disagreed as to whether antitrust jurisdiction over foreign conduct requires both "an effect" on United States commerce and an "intent to affect United States commerce," or just effect or just intent, and as to the magnitude of any effect. *See, e.g.*, *Matsushita, 475 U.S. at 582 n.6* (characterizing the Sherman Act as "reaching conduct outside our borders, but only when the conduct has *an effect* on American commerce") (emphasis added)); *Restatement (Third) of Foreign Relations Law § 415* (concluding that the Sherman Act applies to a foreign-made agreement with "a principal purpose . . . to interfere with the commerce of the United States" and "some effect on that commerce" and to other foreign-made agreements with a "substantial effect" on United States commerce if "the exercise of jurisdiction is not unreasonable"); Fugate § 2.12 at 82 (proposing "the 'direct and substantial' [effect] test, plus an element of intent" where "U.S. jurisdiction is based upon acts or agreements abroad which **[**18]** are not in the flow of foreign commerce" (emphasis omitted)); *id.* § 2.5 at 56, § 2.8 at 62 (suggesting and citing authority for a requirement of a "substantial effect"); IA Areeda & Hovenkamp § 272a at 350, § 272f at 354 (describing a minimal requirement of "significant effects"); *see also* *Den Norske Stats Oljeselskap, 241 F.3d at 423-24* & n.12 **[*289]** (describing the "general [] disagreement," "assorted tests," and "confusing and unsettled" federal case law governing "the extraterritorial reach of the antitrust laws" before (and after) *Hartford Fire*). In promulgating these variants on the effects test, however, the authorities do not explore how to define "foreign conduct" in deciding whether to apply an effects test at all.

Although *Hartford Fire* itself does not discuss how to define "foreign conduct" either, it gives us some guidance by characterizing certain conduct as foreign. The complaint in *Hartford Fire* alleged multiple, partially overlapping conspiracies among reinsurers and their insurers (that is, insurers of reinsurers, also known as providers of retrocessional insurance) to limit the kinds of policies written for general corporate coverage **[**19]** in the United States market. *See* *509 U.S. at 770-78*. Three counts specifically alleged that companies in London agreed among themselves to refuse to reinsure policies covering the United States market unless the policies contained certain restrictions on liability. Two of these alleged conspiracies involved *only* international participants, *see id. at 776, 778* & n.7, but one involved both international and United States participants. *See id. at 775-77*.

It was in its discussion of these three counts that the *Hartford Fire* Court stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *509 U.S. at 796*. The Court thus plainly characterized the three counts it was then considering (including the count involving conspirators based in the United States) as "foreign conduct," but did not further define the term. The Court did not explain whether or how it had weighed the national affiliation or affiliations of the violators, the location of their acts, the location of the target market, or **[**20]** some combination of these factors in determining that the counts involved "foreign conduct." [5]

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[4] After *Alcoa* as before, a wholly domestic antitrust case does not necessarily require any proof of an effect on commerce. *See, e.g.*, *Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 432-36, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)* (expounding on the rationale for *per se* antitrust rules that create a presumption of effect in many cases); *McLain, 444 U.S. at 242* (explaining that antitrust jurisdictional requirements in a domestic case may be satisfied by a showing that "the defendants' activity" of any magnitude "is itself in interstate commerce").

[5] Nor, as Dee-K notes, did the Court resolve whether the Sherman Act might also apply to foreign conduct (however defined) that meets some lesser standard -- that is, whether intent alone, substantial effect alone, or some "effect" less than "substantial" coupled with intent might suffice. Instead, the Court stated that the Sherman Act *does* apply to foreign conduct when intent and substantial effect exist, without explicitly excluding the possibility of jurisdiction in other circumstances. *509 U.S. at 796*; *see also* IA Areeda & Hovenkamp § 273. (Indeed, the parties presented no jurisdictional issue to the Court in *Hartford Fire*; rather, the

[21]** III.

Dee-K seeks to rely on the *Hartford Fire* Court's silence on these issues to argue that it need not satisfy the substantial-effect test described in *Hartford Fire*. **[*290]** Specifically, Dee-K maintains that, even if the *Hartford Fire* statement does set forth minimal requirements for antitrust jurisdiction over foreign conduct, those requirements govern only antitrust violations involving "wholly" foreign conduct -- and do not govern foreign conspiracies that result in the sale of price-fixed goods directly into United States commerce. Meanwhile, the producers argue that *Hartford Fire* directly controls here, without acknowledging any distinctions between the two cases. They insist that the only relevant consideration in assessing whether conduct is foreign is the location of actual conspiratorial meetings. We ultimately reject both sides' rigid views of *Hartford Fire* and apply a more nuanced analysis.

A.

We begin with Dee-K's contention that the standard set forth in *Hartford Fire* does not govern this case because the conduct at issue here is not foreign enough. Dee-K offers two arguments in support of this contention. Neither is persuasive.

First, Dee-K **[**22]** relies on the fact that two of our sister circuits have characterized *Hartford Fire* as involving "wholly foreign" conduct. *See* *Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 75 (3d Cir. 2000)*; *United States v. Nippon Paper Indus., 109 F.3d 1, 9 (1st Cir. 1997)*. Dee-K maintains, in line with this characterization, that *Hartford Fire* does not govern a conspiracy like that at hand, with some domestic elements, including direct sales into the United States and one or more participants based in the United States (here the United States subsidiaries and distributors of the producers). Dee-K does not specify whether it is the nationality of the participants involved in the alleged antitrust violation, the location of their acts, the nature of their target market, or some combination of these factors that must be foreign to render their conduct "wholly foreign."

The *Carpet Group* and *Nippon Paper* courts did not state or suggest the origin of the phrase "wholly foreign." A possible source for the phrase is the legislative history of the FTAIA, the 1982 statute that required "a direct, substantial and reasonably foreseeable **[**23]** effect" on United States commerce for antitrust jurisdiction over conduct involving non-import foreign commerce. *See* *15 U.S.C.A. § 6a(1)*; H.R. Rep. No. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495. A House Report explained that the FTAIA covers "wholly foreign transactions as well as export transactions" but *not* "import transactions." *Id.* In the FTAIA's legislative history, then, "wholly foreign transactions" appear to be those conducted entirely outside the United States -- transactions that have no point of contact with this country. *See also* *In re Ins. Antitrust Litig., 723 F. Supp. 464, 486 (N.D. Cal. 1989)* (characterizing the FTAIA as applicable to "wholly foreign commerce") (subsequent history, culminating in *Hartford Fire, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891*, omitted). If this legislative history indeed constitutes the source of the phrase "wholly foreign," the history itself makes plain that the phrase does not apply to cases like ours, which involve "import transactions." Dee-K derives little benefit, however, from this possible origin of the phrase, because based on the **[**24]** legislative history, "wholly foreign" cannot be an appropriate characterization of the transactions at issue in *Hartford Fire* itself -- which involved a refusal to sell to United States consumers. Thus, if the FTAIA's legislative history is the source of the term "wholly foreign," a court certainly should not use the term in deciding whether to apply the *Hartford Fire* test.

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defendant reinsurers "conceded" jurisdiction, but contended that "the District Court should have declined to exercise such jurisdiction under the principle of international comity." *509 U.S. at 795-97*.)

However, we need not decide whether the *Hartford Fire* formulation is the *only* test for jurisdiction in antitrust cases involving foreign conduct, because Dee-K has waived this argument by failing to pursue it in the district court. Dee-K now contends that the district court should have applied a test drawn from the *Restatement (Third) of Foreign Relations Law § 415(2)*, permitting a lesser effects test if the intent to affect the United States was a "principal purpose" of the conduct -- but Dee-K never so much as mentioned a "principal purpose" requirement in the district court, nor objected to the jury instructions or special verdict form on this basis. Never having proposed its theory or alternative test to the district court, Dee-K cannot prevail on this argument on appeal.

[*291] *Carpet Group* and *Nippon Paper*'s characterization of *Hartford Fire* as involving "wholly foreign" conduct may, however, simply have been a shorthand description of the case, for in neither *Carpet Group* nor *Nippon Paper* does the holding turn on this characterization or otherwise assist Dee-K. Indeed, the analysis of the Third Circuit in *Carpet Group* is directly contrary to that suggested by Dee-K. The Third Circuit did refuse to apply the *Hartford Fire* test to a conspiracy among United States and foreign entities to protect the role of distributors in the United States market for imported carpets. However, the *Carpet Group* court did not simply point to the existence of *some* domestic contacts and end its analysis, as Dee-K would have us do. Rather, before applying the **[**25]** *McLain* domestic-conduct jurisdictional standard, the *Carpet Group* court determined that the alleged conduct "dealt primarily with conduct in the United States," because of the United States location of most participants, several targets of their pressure, and several of their meetings. *227 F.3d at 64-68, 75*. Thus, looking at participants' affiliations and the locations of both acts and targets, the court focused on whether the conduct at issue was "primarily" domestic or foreign, not whether it was "wholly" domestic or foreign.

Furthermore, and perhaps most importantly, characterization of a prior case by a lower court cannot revise or amend the case's language or facts. Hence, even if *Carpet Group* or *Nippon Paper* had held that *Hartford Fire* controlled only "wholly foreign" conduct, that could not change the language or facts of *Hartford Fire* itself. In *Hartford Fire*, although the district court had used the term "wholly foreign" in a related context, *see In re Ins. Antitrust Litig., 723 F. Supp. at 486*, the Supreme Court *never* described the conduct before it as "wholly" foreign. Moreover, some of the participants in one **[**26]** of the conspiracies alleged in *Hartford Fire* were entities based in the United States, *see509 U.S. at 775, 776, 795*, all of the London-based corporate defendants were "subsidiaries of American corporations," and at least one key meeting attended by London-based defendants occurred in New York City. *See In re Ins. Antitrust Litig., 938 F.2d 919, 922-23, 929 (9th Cir. 1991)*, *rev'd on other grounds sub nom. Hartford Fire, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891*. Thus, *Hartford Fire* itself severely undercuts Dee-K's claim that the substantial-effect test applies only to "wholly" foreign conduct, and Dee-K has shown no other reason to limit *Hartford Fire* to such conduct. *But see* IA Areeda & Hovenkamp § 272e at 354 (hypothesizing that the Sherman Act might reach even conduct with "only remote[] and insignificant[]" effects on the United States and no intent to affect the United States if "American firms participate" or "some planning or other conduct" occurs here).

Dee-K's other foreign-conduct argument, although reiterated several times, fares no better. Dee-K repeatedly contends that whenever conspirators **[**27]** "sell price-fixed goods directly into U.S. commerce," the conspiracy must be regarded as domestic rather than foreign conduct, because these goods by definition are then "in" United States commerce. This single-factor test -- under which even a conspiracy hatched and planned entirely on foreign soil by foreign entities would be domestic if it resulted in direct sales of price-fixed goods into a United States import market -- comes perilously close to clear conflict with *Hartford Fire*. After all, there the Supreme Court characterized as "foreign conduct" a conspiracy to refuse to sell reinsurance policies directly into United States markets. The *Hartford Fire* conspiracy **[*292]** had a direct, anticompetitive impact on a United States import market -- just like the direct anticompetitive impact that Dee-K attributes to the rubber-thread price-fixing conspiracy.

Dee-K apparently hopes to distinguish *Hartford Fire* simply because that case concerned a *refusal* to sell to, rather than a sale to, purchasers in the United States. We acknowledge that in some circumstances this factual distinction may have significance. [6] When we consider actual harm to United States consumers, however, **[**28]** we see no distinction between the impact of refusing to sell and that of fixing the price of imported goods, both of which may seriously and directly harm United States consumers. Both situations involve harmful conduct affecting a transaction in which a United States participant takes place.

[6] The *Hartford Fire* Court specifically declined to decide whether the FTAIA governed a refusal to sell a service into the United States, even though the lower courts had held that the FTAIA did not apply to such conduct. *See In re Ins. Antitrust Litig., 723 F. Supp. at 486*, *aff'd on this ground*, *938 F.2d at 932*, *rev'd on other grounds sub nom. Hartford Fire, 509 U.S. at 796 n.23* (taking no position on the applicability of the FTAIA). Perhaps the Court declined to decide the issue because a refusal to sell a service into the United States does not 'enter' the United States in some sense, as an import does.

In refusal cases, courts have not hesitated to require antitrust **[**29]** plaintiffs to allege and prove a substantial effect on the United States. In addition to the *Hartford Fire* Court itself, the Ninth Circuit required such proof in a case involving allegations that competitors had divided up the right to sell directly to United States consumers, even though market division rings the same alarm bells as price fixing; indeed, both constitute *per se* Sherman Act violations. *See* *Metro Indus., 82 F.3d at 841, 843-44*.

Moreover, given complex global trade patterns of sale, resale, and distribution, Dee-K's formulation would grant United States courts jurisdiction over a great variety of foreign conduct. *Cf.* *Den Norske Stats Oljeselskap, 241 F.3d 420* (rejecting the existence of any form of antitrust jurisdiction over a foreign conspiracy even though it assertedly indirectly raised prices in a United States import market, in part because the plaintiff was not a buyer or seller in that market). For example, ***HN5***[] in every case involving direct sales to the United States in which our antitrust laws condemn an activity *per se*, however foreign the conduct, United States courts would have jurisdiction without any showing whatsoever **[**30]** of an effect on United States commerce. *See, e.g.*, *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 995 (4th Cir. 1990)* (noting that explicit horizontal minimum price fixing is a *per se* violation of the Sherman Act). Yet ***HN6***[] the rationale for *per se* rules in cases addressing domestic conduct seems plainly "inapplicable to foreign restraints that . . . pose very little danger to American commerce." IA Areeda & Hovenkamp § 273 at 370-71 (noting that "price fixing in a foreign country might have some but very little impact on United States commerce," and concluding that "appraising restraints abroad requires an assessment of effects on American foreign commerce").

Perhaps for this reason, ***HN7***[] courts have consistently required a showing of effect on United States commerce even in cases involving price fixing on imports. Before *Hartford Fire*, the Seventh Circuit considered a conspiracy among "twenty domestic and nine foreign corporations. . . to fix the price of uranium in the world market" at meetings in five foreign countries and the United States. *See* *In re Uranium Antitrust Litig., 617 F.2d 1248, 1254 (7th Cir.* ***[*293]*** *1980)*. In that **[**31]** case the Seventh Circuit applied *Alcoa*'s effects test, although the domestic participants greatly outnumbered the foreign participants, a meeting occurred in the United States, and the target market included the United States. *See* *id. at 1253-54*. Similarly, in *Nippon Paper*, on which Dee-K heavily relies, the First Circuit had no trouble treating a criminal conspiracy resulting in price fixing of goods imported into the United States as "foreign conduct" requiring proof of a substantial effect on United States commerce. *Nippon Paper, 109 F.3d at 2*. [7]

[32]** Finally, the Executive Branch has endorsed the view that plaintiffs alleging antitrust violations affecting imports into a United States market must still prove a substantial effect on United States commerce. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.11 (1995), *available at* *http://www.usdoj.gov/atr/public/guidelines/internat.htm* (as of July 2, 2002) (advising that "imports into the United States by definition affect the U.S. domestic market directly" but that they yet must "produce the requisite substantial effects," while commenting that effects are likely to be "clear" in such a case).

For these reasons, we reject Dee-K's contention that *Hartford Fire* never applies when a conspiracy involves price-fixed goods sold directly into United States commerce.

B.

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[7] The *Nippon Paper* court stated that the Sherman Act treated civil and criminal jurisdiction alike and then extended criminal jurisdiction by applying the *Hartford Fire* test from the civil context. *See* *109 F.3d at 4-8*. Dee-K seeks to distinguish *Nippon Paper* on the ground that it involved goods not directly sold into the United States market by the price-fixers themselves. However, Dee-K can point to no authority applying *per se* condemnation to foreign price fixing simply because the price fixing was on directly imported goods. Moreover, nothing in *Nippon Paper* suggests that the corporate layer between the price-fixers and the United States market protected the price-fixers from full domestic treatment, i.e., that the case might have been analyzed as domestic conduct if the price-fixing scheme had not been indirect. Indeed, the commentators see *Nippon Paper* as novel, not because it applied an effects test as a prerequisite for jurisdiction, but because it asserted jurisdiction *at all* in a criminal context. *See* Fugate § 2.14 at 14, 15 (Supp. 2002); IA Areeda & Hovenkamp § 272i at 364-68.

We likewise reject the producers' equally rigid view as to the applicability of *Hartford Fire*. The producers contend that in assessing whether "conduct" is "foreign" (and thus subject to the substantial-effect, rather than the domestic *McLain* test), we should consider only the location of acts that themselves independently violate **[**33]** the Sherman Act. According to the producers, "the *Hartford Fire* test . . . is based solely upon the situs of a conspiratorial agreement." The producers thus turn Dee-K's argument back upon it: even if *Hartford Fire* does apply just to "wholly foreign conduct," the only relevant "conduct" is the conspiratorial meetings themselves. In this case, they argue, we should therefore focus only on the location of the meetings at which the conspirators agreed to fix prices -- and all of those meetings were held outside the United States.

The producers' suggested rule eliminates any examination of the national affiliation of the participants in the conduct, the scope and location of the target market, and the location of all acts other than the actual conspiratorial acts. This rigidity troubles us. A noted commentary has warned against an overly rigid approach in this area of ***antitrust law***: "to say that domestic *per se* rules are not necessarily **[*294]** and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints with significant and obvious effects on United States commerce, and without any plausible **[**34]** purpose other than the suppression of competition with and in the United States." IA Areeda & Hovenkamp § 273 at 371. In short, the flexibility that permits a court not to apply domestic rules to a defendant engaging in foreign conduct should be balanced by a court's ability to allow a plaintiff to pursue foreign conduct that does harm United States interests -- even if the defendants scrupulously entered into their illegal agreements only outside the United States.

The suggestion that we consider only the location of certain acts concerns us particularly given that ever since *Alcoa*, the Supreme Court's jurisdictional analysis has emphasized above all else the effects, i.e., the intended location, actual location, and magnitude of those effects. *See, e.g.*, *Kruman, 284 F.3d at 395*. Quite simply, the Supreme Court has moved away from its earlier doctrine focused solely on the location of acts. We therefore doubt whether a jurisdictional rule focused exclusively on defining and locating a certain limited set of acts could possibly be appropriate.

The potential consequences of the rule that the producers champion only confirm our doubts. If, for example, executives **[**35]** of United States corporations that did business solely in the United States met abroad simply to consummate a price-fixing conspiracy that was carried out entirely within the United States, the producers' proposed rule would *still* require special proof of the conspiracy's effect before a United States court could assert jurisdiction.

We reject this overly narrow view. *McLain* might well apply to such a conspiracy, even though the acts that constituted the illegal agreement took place exclusively abroad. Conversely, as the Second Circuit has noted, ***HN8***[] meetings in the United States to negotiate "an agreement to fix prices in an overseas foreign market that had no effect on domestic commerce" do not yield antitrust jurisdiction in our courts. *See* *Kruman, 284 F.3d at 395*. The universe of factors relevant to our jurisdictional analysis must be greater than the location of the specific conspiratorial acts alone.

C.

Instead of the parties' bright-line rules, we believe a court should properly engage in a more flexible and subtle inquiry. ***HN9***[] In determining which jurisdictional test (*Hartford Fire* or *McLain*) applies, a court should consider whether the participants, **[**36]** acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic.

This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization as "foreign" or "domestic" conduct, which our increasingly global economy will undoubtedly produce. We cannot begin to foresee the scope or complexity of future transactions. To adopt the simplistic rules the parties favor might well yield unintended and unfortunate results.

Moreover, this area of ***antitrust law*** has historically been marked by change, and remains a subject of serious debate. Not only the courts, but also numerous commentators and even representatives of various other countries (as frequent amici), have presented differing views, focusing on various elements of conduct as crucial in addressing whether assertion of jurisdiction is appropriate. Given these concerns, **[*295]** we believe courts should remain able to consider the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction in any given case.

We note that this approach echoes that of the Third Circuit in *Carpet Group* and finds support in several of the treatises. **[**37]** *See* *Carpet Group, 227 F.3d at 75*; Fugate § 2.12 at 80-82 (discussing the location of "acts and agreements," the location of their effects, and the nationality of participants in considering jurisdiction); *Restatement (Third) of Foreign Relations Law § 415(2)* (applying the same proposed jurisdictional test to "any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out *predominantly* outside of the United States" (emphasis added)); *cf.* *Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981)* ("When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, . . . we do not accept jurisdiction.").

In this case, the bulk of the conduct related to the global conspiracy alleged in the complaint and proved at trial occurred abroad. As in *Nippon Paper*, the agreements here were all formed entirely outside the United States -- in several other countries. The target of the conspiracy was a global market, and the participants monitored prices in many markets around **[**38]** the world. Although dozens of people participated in the meetings over the years, Dee-K can only point to two who held office in United States companies, and both of them also had important and in fact primary roles in Southeast Asian companies.

To be sure, the producers sold rubber thread in the United States to United States consumers. In particular, Heveafil sold through a United States division of the parent producer, directing pricing by communications from Southeast Asia, while Rubfil sold through a wholly owned United States subsidiary and co-defendant. In addition, a handful of faxes from the producers describe pricing in the United States. It further appears that a United States distributor was made aware, by a fax sent "FYI," of a group commitment not to hire an executive whom one producer had fired for his opposition to price increases.

But these links to the United States are mere drops in the sea of conduct that occurred in Southeast Asia (and around the world). *See* *In re Uranium Antitrust Litig., 617 F.2d at 1254* (applying *Alcoa*'s effects test in a price-fixing case even though twenty participants were domestic and only nine foreign and the United **[**39]** States was part of the target market). Just as the Third Circuit looked at a mass of conduct and concluded it was "primarily" domestic in *Carpet Group, 227 F.3d at 75*, so examining all of the conduct here, we can only conclude that it is primarily foreign. The handful of contacts with the United States that Dee-K cites cannot change the fact that the rubber-thread conspiracy was formulated and furthered at numerous meetings, all of which took place in Southeast Asia, with attendees, all of whom worked for Southeast Asian firms, and who directed their activity to the global market. Only a few of the participants had any United States affiliation, and each of those also had a primary Southeast Asian affiliation. In addition, although we have explained that we do not find this factor alone dispositive, we consider it significant that not one of the conspirators' many meetings took place in the United States. In light of all of these factors, we conclude that the price-fixing conspiracy Dee-K alleged and proved was **[*296]** primarily "foreign conduct" to which the *Hartford Fire* test properly applied.

In closing, we note that even when a conspiracy constitutes "foreign conduct, **[**40]** " an antitrust plaintiff still has access to the federal courts to challenge it. The district court did not dismiss Dee-K's lawsuit because its claim involved foreign conduct. The court merely required Dee-K to prove that the foreign conduct had a substantial effect on United States commerce in order to recover. Other litigants who claim that foreign conduct, which violates our antitrust laws, has harmed them may also have their day in court, and the federal courts will provide redress for those who can show that the harm of which they complain had a substantial effect on our commerce. For Dee-K, that day in court has come and gone.

IV.

For the reasons given herein, the judgment of the district court is

AFFIRMED.

In re Auto. Refinishing Paint Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

July 31, 2002, Decided ; July 31, 2002, Filed; August 1, 2002, Entered

MDL DOCKET NO. 1426

Reporter

2002 U.S. Dist. LEXIS 15099 *; 2002-2 Trade Cas. (CCH) P73,793

IN RE: AUTOMOTIVE REFINISHING PAINT ANTITRUST LITIGATION

Subsequent History: Settled by, Stay granted by *In re Auto. Refinishing Paint Antitrust Litig., 2003 U.S. Dist. LEXIS 4681 (E.D. Pa., Mar. 17, 2003)*
Affirmed by In re Auto. Refinishing Paint Antitrust Litig., 2004 U.S. App. LEXIS 2432 (3d Cir. Pa., Feb. 13, 2004)

Prior History: *In re Auto. Refinishing Paint Antitrust Litig., 177 F. Supp. 2d 1378, 2001 U.S. Dist. LEXIS 19051 (J.P.M.L., 2001)*

Disposition: **[*1]** Defendants' Motions to Dismiss DENIED without prejudice.

Core Terms

Coatings, contacts, paint, automotive, discovery, refinishing, subsidiary, personal jurisdiction, cases, Alien, venue provision, manufactured, venue, anti trust law, venue statute, Clayton Act, co-conspirators, prices, lack of personal jurisdiction, antitrust, employees, products, patent, marketing, web-site, wherever, courts, domestic corporation, board of directors, service of process

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **In Rem & Personal Jurisdiction, In Personam Actions**

In response to a claim, a party may assert the defense of lack of jurisdiction over the person. *Fed. R. Civ. P. 12(b)(2)*. When the defendant raises such a defense, the burden shifts to the plaintiff to prove, by a preponderance of the evidence, facts sufficient to establish jurisdiction. To satisfy its burden, the plaintiff may not rely on the bare pleadings, but must establish jurisdictional facts through sworn affidavits or other competent evidence. Nevertheless, disputed facts must be construed in favor of the plaintiff.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN2[] Pleadings, Service of Process

Before a court can exercise personal jurisdiction over a defendant, there must be a basis for the defendant's amenability to service of summons. Unless otherwise provided by federal law, federal courts must follow the methods prescribed by the state in which the court is located to determine whether a defendant is amenable to service. *Fed. R. Civ. P. 4(e)*. Thus, a federal district court must look either to a federal statute or to the long-arm statute of the state in which it sits. This rule also applies to service upon corporations. *Fed. R. Civ. P. 4(h)*.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN3[] Jurisdiction, Jurisdictional Sources

Under the *Due Process Clause of the Fifth Amendment*, a federal court may not exercise personal jurisdiction over a foreign defendant unless that defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The analysis will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. In that regard, a court must examine the relationship among the defendant, the forum, and the litigation. A plaintiff may meet this burden by establishing the court's general jurisdiction by virtue of the defendant's continuous and systematic general business contacts with the forum state. Alternatively, a plaintiff may show that the court has specific jurisdiction because the particular cause of action arose from the defendant's forum-related activities. Pennsylvania courts have stated that a cause of action is sufficiently related to a defendant's forum contacts where the acts of the defendant within the forum state represent the factual predicates upon which the cause of action are to be based.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN4[] Jurisdiction, Jurisdictional Sources

In multi-district litigation that is consolidated for pretrial purposes under *28 U.S.C.S. § 1407*, the transferee court can exercise personal jurisdiction to the same extent that the transferor court could. Thus, if the transferor court in an individual case has jurisdiction over a defendant in the transferor court's forum, the transferee court also has jurisdiction in that action regardless of the defendant's contacts with this forum.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5[] **Civil Procedure, Discovery & Disclosure**

Before dismissing a case for lack of personal jurisdiction, courts should generally permit discovery into jurisdictional facts. The general rule in the Third Circuit is that jurisdictional discovery should be allowed unless the plaintiff's claim is clearly frivolous. A court may deny jurisdictional discovery where the plaintiff has failed to meet its burden of making out a threshold prima facie case of personal jurisdiction. The plaintiff has the burden of establishing a threshold prima facie showing of personal jurisdiction. The scope of discovery is within the court's discretion, and allowing such discovery is premised on the assumption that further discovery would be worthwhile.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] **In Rem & Personal Jurisdiction, In Personam Actions**

A federal court's personal jurisdiction may be assessed on the basis of the defendant's national contacts when the plaintiff's claim rests on a federal statute authorizing nationwide service of process or service wherever defendant is doing business or may be found.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN7[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 22*.

Governments > Legislation > Interpretation

HN8[] **Legislation, Interpretation**

The starting point for interpreting a statute is the language of the statute itself.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

HN9[] **Antitrust & Trade Law, Clayton Act**

The word "such" means the aforementioned. Thus, when "such" precedes a noun it is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence. Applying this rule to *section 12* of the Clayton Act, *15 U.S.C.S. § 22*, "in such cases" would refer to any suit, action, or proceeding under the antitrust laws against a corporation, and not to anything else in *section 12*'s first clause.

Governments > Legislation > Interpretation

HN10[] Legislation, Interpretation

The general canon of statutory construction, that referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, i.e., the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence, is merely an aid to interpretation and is not inflexible or uniformly binding. The canons of interpretation are more appropriately applied to divine intent from statutes that are carefully worded and assiduously compiled than from imprecise statutory language.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN11[] Clayton Act, Jurisdiction

Perhaps more than any other law, the antitrust laws are national in scope and impact. In interpreting *section 12* of the Clayton Act, *15 U.S.C.S. § 22*, courts are mindful that antitrust cases, especially those involving aliens, may pose problems for any one district court to obtain jurisdiction over all the defendants, if left to state long arm statutes. If the antitrust laws are to be effective, district courts' jurisdiction must reach the limits of the power of the United States of America. In the case of antitrust laws, it makes no sense to tie a district court's jurisdiction to the state in which it sits; it neither promotes the enforcement of ***antitrust law*** nor the management of litigation.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Special Venue

Antitrust & Trade Law > Clayton Act > General Overview

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

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN12[] Clayton Act, Jurisdiction

Enactment of the venue provision in *section 12* of the Clayton Act, *15 U.S.C.S. § 22*, does not preclude application of the Alien Venue Statute, *28 U.S.C.S. § 1391(d)*. In general, special venue provisions supplement rather than preempt general venue statutes. Indeed, the purpose of enacting the specific venue provisions under the Clayton Act was to enlarge jurisdiction to give an antitrust plaintiff the widest possible selection of forums to promote the plaintiff's role as a private attorney general. Moreover, *§ 1391(d)* was intended to have broad and overriding application to prevent an alien defendant from using narrower venue statutes as a shield against suit.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Evidence > ... > Demonstrative Evidence > Photographs > Visual Formats

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN13[] **Venue, Corporations**

On its face, the Alien Venue Act, *28 U.S.C.S. § 1391(d)*, is not applicable to domestic corporations, which remain covered by the venue provision of *section 12* of the Clayton Act, *15 U.S.C.S. § 22*.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN14[] **Antitrust & Trade Law, Clayton Act**

The holding of Go-Video permits a plaintiff to sue only an alien corporation in any district; nothing in Go-Video permits a domestic corporation to be sued in any district. Rather, a domestic corporation could only be sued, according to *section 12* of the Clayton Act, in the judicial district whereof it is an inhabitant, or in any district wherein it may be found or transacts business. *15 U.S.C.S. § 22*.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN15[] **Venue, Corporations**

Typically, a foreign corporation is not subject to personal jurisdiction merely because of its ownership of the shares of stock of a subsidiary doing business in the state. There are, however, several lines of cases discussing when the contacts of a subsidiary my be imputed to the parent under an alter ego theory when direct contacts between the parent and forum are absent.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN16[] **Venue, Corporations**

To prevail under the alter-ego theory of personal jurisdiction over corporation holding companies, the plaintiff must demonstrate that the degree of control exercised by the parent must be greater than normally associated with common ownership and directorship. Plaintiffs must prove that the parent controls the day-to-day operations of the subsidiary such that the subsidiary can be said to be a mere department of the parent. The court should examine all relevant factors that relate to the intimacy of the relationship between the parent and subsidiary to assess whether the contacts of the subsidiary with the forum should be imputed to the parent. The test perforce incorporates all the factors that have been historically used in determining whether a subsidiary is an alter ego or agent of the parent.

Business & Corporate Law > Agency Relationships > Types > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Trademark Law > Conveyances > General Overview

Business & Corporate Law > Agency Relationships > General Overview

HN17[] **Agency Relationships, Types**

Among the factors courts have considered in determining whether the parent exercises sufficient control over the subsidiary to justify application of the corporate alter-ego jurisdictional theory are (1) ownership of all or most of the stock of the related corporation, (2) common officers and directors, (3) a common marketing image, (4) the common use of a trademark or logo, (5) the common use of employees, (6) an integrated sales system, (7) the interchange of managerial and supervisory personnel, (8) the performance by the related corporation of business functions which the principal corporation would normally conduct through its own agents or departments, (9) the acting of related corporation as marketing arm of the principal corporation, or as an exclusive distributor, and (10) receipt by the officers of the related corporation of instruction from the principal corporation.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN18[] **In Rem & Personal Jurisdiction, Constitutional Limits**

Courts have recognized jurisdiction over non-residents based upon the contacts of the alleged co-conspirators. A court looks not only at the defendant's forum contacts, but at those of the defendant's resident co-conspirators. The court imputes the contacts of the resident co-conspirator over whom it has jurisdiction to the foreign co-conspirator to see if there are sufficient contacts to exercise jurisdiction over the latter. However, merely belonging to a civil conspiracy does not make a member subject to the jurisdiction of every other member's forum. There must also be substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state co-conspirator was or should have been aware.

Judges: R. Barclay Surrick, Judge.

Opinion by: R.Barclay Surrick

Opinion

MEMORANDUM & ORDER

SURRICK, J.

JULY 31, 2002

Plaintiffs filed a Consolidated and Amended Class Action Complaint (the "Amended Complaint") on behalf of all individuals and entities who purchased automotive refinishing paint in the United States directly from Defendants, their predecessors or their controlled subsidiaries from at least as early as January 1, 1993 to at least December 31, 2000 (the "Class Period"). The Amended Complaint alleges that during that period, Defendants conspired to fix, raise, maintain or stabilize prices for automotive refinishing paint sold in the United States, thereby artificially inflating prices for automotive refinishing paint in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. Plaintiffs seek damages and injunctive relief pursuant to *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15*, *26*.

Among the Defendants in this case are Defendant BASF Aktiengesellschaft ("BASF AG") and Defendant BASF Aktiengesellschaft Coatings ("BASF Coatings"). Presently before **[*2]** the Court are Defendant BASF AG's Motion to Dismiss for Lack of Personal Jurisdiction (the "BASF AG Motion," Docket No. 22) and Defendant BASF Coatings AG's Motion to Dismiss for Lack of Personal Jurisdiction (the "BASF Coatings Motion," Docket No. 23) (collectively, the "Motions to Dismiss"). For the following reasons, the Motions will be denied.

I. BACKGROUND

Defendants BASF AG and BASF Coatings are foreign corporations based in Germany. In the Amended Complaint, Plaintiffs allege that BASF AG and BASF Coatings have extensive operations and affiliates in the United States. Cmpl. PP 20-21. Defendants are alleged to have "manufactured, marketed and/or sold automotive refinishing paint in the United States during the Class Period, both directly and through its predecessors, affiliates and/or subsidiaries." Id. Defendants are alleged to have artificially fixed, raised, maintained or stabilized the prices of automotive refinishing paint by engaging in the following anti-competitive activities: a) participating in meetings and conversations to discuss the prices of automotive refinishing paint in the United States and elsewhere, b) agreeing during those meetings to fix, **[*3]** raise, maintain and stabilize the prices at which automotive refinishing paint was sold in the United States and elsewhere, c) agreeing to refrain and in fact refraining from competing among themselves with respect to the sale of automotive refinishing paint and d) selling automotive refinishing paint to customers in the United States at supracompetitive prices. Id. P 52.

In connection with its Motion to Dismiss, BASF AG filed an affidavit to demonstrate its lack of involvement in the paint refinishing business and its lack of contacts with the State of Pennsylvania. See Affidavit of Jorg Buchmuller (the "Buchmuller Affidavit"). According to the Buchmuller Affidavit, BASF AG is a German corporation with its principle offices and manufacturing plant located in Germany. Id. P 2. Contrary to the allegations in the Amended Complaint, BASF AG does not manufacture, market or sell automotive refinishing paint. Id. P 3. BASF AG was not subpoenaed by the Department of Justice in connection with its investigation of the automotive refinishing paint industry. Id. P 4. BASF AG purports to be a chemical company and denies having substantive contact with the State of Pennsylvania. **[*4]** Id. PP 5-13. BASF AG is not authorized or registered to do business in Pennsylvania. Id. P 6. It does not have an office, a manufacturing plant, a bank account, post office box or telephone listing in Pennsylvania. Id. P 7. It has never paid Pennsylvania income tax or franchise fees, and it does not own or lease property in Pennsylvania. Id. PP 9, 10.

Although BASF AG indirectly owns all the shares of BASF Corporation, another defendant in this case that is not contesting jurisdiction, BASF AG specifically avers that it does not dominate or control BASF Corporation. Id. PP 14-25. BASF Corporation produces and sells chemicals, polymers, fibers, coatings, agricultural chemicals, vitamins and other products in the United States. Id. P 15. It maintains its own research and development facilities and holds numerous patents. Id. According to the Buchmuller Affidavit, all of BASF Corporation's officers are employees of BASF Corporation. Id. P 16. BASF Corporation's Chairman and CEO, and the president of its divisions, manage the day-to-day operations of the corporation. Id. BASF Corporations management and business are overseen by its own board of directors, **[*5]** and BASF AG has never participated in the management of BASF Corporation's day-to-day operations and decisions. Id. P 18. Because BASF AG is an indirect owner of all of BASF Corporation's stock, BASF AG is represented on BASF Corporation's board of directors; however, since at least 1986, BASF AG's employees have never comprised a majority of BASF Corporation's board of directors. Id. P 19. [1] Meetings of BASF Corporation's board of directors have always been held at different times and places than those of the BASF AG board. Id. P 20. BASF Corporation maintains its own books and records and files its own United States tax returns. Id. P 24.

[*6] BASF Corporation maintains offices, manufacturing, research, sales and distribution facilities separate from the operations of BASF AG. Id. P 21. Although BASF AG supplies BASF Corporation with certain products, as it does with other companies, BASF Corporation obtains those products through arm-length transactions involving purchase and distribution agreements. Id. P 22. Furthermore, the majority of BASF Corporation's sales are derived from products manufactured by BASF Corporation. Id. BASF Corporation also pays its own expenses and maintains a separate payroll for it employees. Id. P 23. It provides its employees its own benefit plans and its own pension program independent of any support from BASF AG. Id.

Similarly, BASF Coatings filed an affidavit to describe its business and demonstrate its lack of contacts with Pennsylvania. See Affidavit of Jurgen Hinteresch (the "Hinteresch Affidavit"). According to the Hinteresch Affidavit, BASF Coatings does not manufacture, market or sell automotive refinishing paint in Pennsylvania. Id. P 3. BASF Coatings was not subpoenaed by the Department of Justice in connection with its investigation of the automotive **[*7]** refinishing paint industry. Id. P 4. BASF Coatings is not authorized or registered to do business in Pennsylvania. Id. P 6. It does not have an office, a manufacturing plant, a registered agent, a bank account, post office box or telephone listing in Pennsylvania. Id. P 7. It has never paid Pennsylvania income tax or franchise fees. Id. P 9. It does not own or lease property in Pennsylvania. Id. P 10.

Based on public information prepared by Defendants, Plaintiffs submit the following facts to demonstrate BASF AG's and BASF Coatings's contacts with the United States. BASF AG and BASF Coatings are the holders of numerous patents in the United States. In its BASF AG's Form 20F, BASF's 2001 Annual Report and the company's website, BASF AG presents itself as part of a integrated entity, i.e., BASF or the BASF Group, that is comprised of BASF AG and its 153 subsidiaries. BASF AG is, however, the only BASF corporate entity that reports to the SEC. In its 2002 Form 20F, BASF AG refers to itself simply as "BASF" and defines itself as follows:

> BASF is comprised of the parent company, BASF Aktiengesellschaft of Ludwigshafen, Germany, and 153 consolidated subsidiaries. **[*8]** The company has customers in more than 170 countries and operates production sites in 39 countries.

2002 Form 20F, at 84. Shares of BASF AG have traded on the New York Stock Exchange since 2000. BASF AG 2002 Form 20F, at 141.

Despite BASF AG's averment that it "does not, and never has, manufactured, marketed or sold automotive refinishing paint in the United States or in any other country," see BASF AG Mem. in Supp. at 2, the BASF 2001 Annual Report for BASF AG and its many subsidiaries plainly states the following:

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[1] Of BASF Corporation's board, only two of eight directors are employees of BASF AG. Buchmuller Aff. P 19. BASF AG has not had a greater proportion of representation on BASF Corporation's board since 1994. Prior to 1994, BASF Corporation's board varied from 12 to 13 members, but only five members were employees of BASF AG. Id. Presently, there is one employee of BASF Corporation on the eight-person board of executive directors of BASF AG. Id.

> Be honest now: What would even the most beautiful car look like without the appropriate paint finish?
> ***
>
> BASF is now one of the *global* market leaders in high-quality automotive OEM *and refinish* coatings and industrial coatings.
> ***
>
> We develop, produce and market coating systems as well as the associated coating processes.

BASF 2001 Annual Report at 32 (emphasis added).

In addition, BASF AG owns 100% of the shares of BASF Corporation, which is located in Mount Olive, New Jersey. BASF AG 2002 Form 20F, at 79. BASF AG sold approximately $ 1.5 billion in goods to the BASF Corporation. See Affidavit of Jorg Buchmuller **[*9]** P 19, filed in 2000 in Wyman's Auto Body v. BASF AG, Civ. No. CV-01-423 (Sup. Ct. Me. Nov. 20, 2001) (the "Buchmuller Wyman's Auto Affidavit"). Approximately 21% of the domestic BASF Corporation's revenues come exclusively from the distribution and sale of products manufactured by other members of the BASF Group. BASF AG Mem. in Supp. at 11.

According to BASF's web-site, BASF Coatings belongs to the Coatings Division of BASF, which had sales of 2.3 billion Euros in 2001 and which has a "significant market position[] in North America." [2] The Coatings Division operates a facility in Morganton, North Carolina. BASF AG 2002 Form 20F, at 82. According to the Paint & Coatings Industry web-site, BASF Coatings maintains an office in Southfield, Michigan, a Detroit suburb where many other suppliers to the U.S. automotive industry are based. [3]

Defendants also explicitly endorse the **[*10]** "exchange of staff among BASF Group companies" as being "critical" in achieving BASF's worldwide corporate goals. 2001 Annual Report, at 51. For example, according to the BASF web-site, Klaus Peter Lobbe, Chairman and Chief Executive Officer of BASF Corporation and also a member of the Board of Executive Directors of BASF AG, is responsible for BASF's operations in North America and for the company's worldwide coatings business. [4] As of March 1, 2002, Mr. Lobbe assumed responsibility for the newly created Ressort IX, based in Mount Olive, New Jersey. The Coatings Division of BASF, including BASF Coatings, will be a part of Ressort. [5] Dr. Hans U Engel, who is currently the Chief Financial Officer of BASF Corporation and whose previous assignments included a position in the BASF AG General Counsel's office, was most recently Chief Executive Officer of BASF Schwarzheide GmbH, which also is based in Germany. [6] Hans W. Reiners is the Executive Vice President of BASF Corporation and President of the Company's Agricultural Products Division, located in Mount Olive, NJ. Prior to this, Mr. Reiners worked as Director of Business Management, Agricultural Products, for Southern Europe and moved **[*11]** to BASF's Regional headquarters in Barcelona, Spain. He returned to Germany in 1998 to serve as Group Vice President, Global Marketing. [7]

II. NATURE AND STAGE OF PROCEEDING

In their Motions to Dismiss, Defendants BASF AG and BASF Coatings argue that personal jurisdiction cannot be exercised in Pennsylvania. In particular, BASF AG contends that the evidence demonstrates an absence of

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[2] *www.basf.de/en/news/presse/P=Coat503.htm*

[3] *www.pcimag.com/CDA/PC1100/companyprofile/CompnayProfileItem/0,1857,731,00*.

[4] *www.basf.com/static/OpenMarket/Xcelerate/Preview_cid-974236657882_pubid-974129513031_c-Article.html*

[5] *www.basf.com/static/latest_news.html*

[6] *www.basf.com/static/OpenMarket/Xcelerate/Preview_cid-974236657882_pubid-974129513031_c-Article.html*

[7] *www.basf.com/static/OpenMarket/Xcelerate/Preview_cid-974236657882_pubid-974129513031_c-Article.html*

personal jurisdiction, general or specific, because BASF AG has almost no contact with Pennsylvania and Plaintiffs' causes of action do not arise out of BASF AG's contacts with Pennsylvania. BASF AG Mem. in Supp. at 5-6. BASF Coatings makes essentially the same **[*12]** arguments but adds that it "has absolutely no contact with Pennsylvania whatsoever." BASF Coatings Mem. in Supp. at 5-6.

In opposition to the Motions to Dismiss, Plaintiffs argue that personal jurisdiction in this case should be assessed based on BASF AG's and BASF Coatings's contacts with not only Pennsylvania but also with the United States as a whole. Plaintiffs contend they have adduced more than sufficient evidence of BASF AG's and BASF Coatings's contacts with the United States as a whole to justify jurisdictional discovery. Plaintiffs argue that the national contacts of the entire BASF corporate conglomeration, which includes BASF AG and BASF Coatings, and the pervasive contacts of BASF Corporation, BASF's wholly-owned American based subsidiary, are attributable to BASF AG. Plaintiffs also argue that jurisdiction over BASF AG and BASF Coatings may be grounded on the jurisdictional contacts of Defendants' co-conspirators. In addition, Plaintiffs separately argue that sufficient contacts are established by BASF AG's and BASF Coatings's use of the United States patent laws. Finally, Plaintiffs contend that jurisdiction exists pursuant to *Rule 4(k)(2) of the Federal Rules of Civil* **[*13]** *Procedure*, and under the Rules for Multi-District Litigation.

III. STANDARD

HN1[] In response to a claim, a party may assert the defense of lack of jurisdiction over the person. *Fed.R.Civ.P. 12(b)(2)*. When the defendant raises such a defense, the burden shifts to the plaintiff to prove, by a preponderance of the evidence, facts sufficient to establish jurisdiction. *IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254, 257 (3d Cir. 1998)*; *Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 146* (3d Cir.), cert. denied, *506 U.S. 817, 121 L. Ed. 2d 29, 113 S. Ct. 61 (1992)*. To satisfy its burden, the plaintiff may not rely on the bare pleadings, but must establish jurisdictional facts through sworn affidavits or other competent evidence. *Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 n. 7 (3d Cir.1984)*. Nevertheless, disputed facts must be construed in favor of the plaintiff. *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002)* (quoting *Carteret Sav. Bank, 954 F.2d at 142 n.1*).

HN2[] Before a court can exercise personal jurisdiction over a defendant, there must **[*14]** be a basis for the defendant's amenability to service of summons. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987)*. Unless otherwise provided by federal law, federal courts must follow the methods prescribed by the state in which the court is located to determine whether a defendant is amenable to service. *Id. at 105*; *Fed.R.Civ.P. 4(e)*. Thus, a federal district court must look either to a federal statute or to the long-arm statute of the state in which it sits. *Omni Capital, 484 U.S. at 105*. This rule also applies to service upon corporations. See *Fed.R.Civ.P. 4(h)*.

HN3[] Under the *Due Process Clause of the Fifth Amendment*, a federal court may not exercise personal jurisdiction over a foreign defendant unless that defendant has "certain minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*. The analysis "will vary with the quality and nature of the defendant's activity, but **[*15]** it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)*. In that regard, a court must "examine the relationship among the defendant, the forum, and the litigation." *Pinker, 292 F.3d at 368*.

A plaintiff may meet this burden by establishing the court's general jurisdiction by virtue of the defendant's "continuous and systematic general business contacts" with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)*; see also Provident Nat'l Bank, 819 F.2d at 437. Alternatively, a plaintiff may show that the court has specific jurisdiction because the particular cause of action arose from the defendant's forum-related activities. See *Helicopteros, 466 U.S. at 414*; *Wims v. Beach*

Terrace Motor Inn, Inc., 759 F. Supp. 264, 268 (E.D. Pa.1991) (rejecting "but for" causal link between **[*16]** advertisement and injury as too broad, stating "Pennsylvania courts have stated that a cause of action is sufficiently related to a defendant's forum contacts where the acts of the defendant within the forum state represent the factual predicates upon which the cause of action are to be based.").

HN4[] In Multi-District Litigation that is consolidated for pretrial purposes under *28 U.S.C. § 1407*, such as the instant action, the transferee court can exercise personal jurisdiction to the same extent that the transferor court could. *In re Agent Orange Prod. Liability Litigation, 818 F.2d 145, 163 (2d Cir.1987)*; *In re Telectronics Pacing Systems Inc., 953 F. Supp. 909 (S.D. Oh. 1997)*. Thus, if the transferor court in an individual case has jurisdiction over a defendant in the transferor court's forum, the transferee Court also has jurisdiction in that action regardless of the defendant's contacts with this forum.

HN5[] Before dismissing a case for lack of personal jurisdiction, courts should generally permit discovery into jurisdictional facts. *Massachusetts School of Law at Andover, Inc. v. American Bar Assoc., 107 F.3d 1026, 1042 (3d Cir. 1997)* **[*17]** (stating that the general rule in the Third Circuit is that "jurisdictional discovery should be allowed unless the plaintiff's claim is clearly frivolous."); *Renner v. Lanard Toys, Ltd., 33 F.3d 277, 283-84 (3d Cir. 1994)* (permitting jurisdictional discovery and stating that leave to conduct jurisdictional discovery should be freely granted); *Arch v. American Tobacco Co., Inc., 984 F. Supp. 830 (E.D. Pa. 1997)* ("A court may deny jurisdictional discovery where the plaintiff has failed to meet its burden of making out a threshold *prima facie* case of personal jurisdiction."); *Southern Ocean Seafood Co. v. Holt Cargo Systems, Inc., 1997 U.S. Dist. LEXIS 12159*, *Civ. A. No. 96-5217, 1997 WL 539763*, *8 (O'Neill, S.J.) (E.D. Pa. Aug. 11, 1997) (holding that plaintiff has burden of establishing a "threshold *prima facie* showing" of personal jurisdiction, and denying request to conduct jurisdictional discovery where plaintiff failed to contend that any defendant had contacts with the forum). "The scope of discovery is within the court's discretion, and allowing such discovery is premised on the assumption that further discovery would be worthwhile." *Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd., 64 F. Supp. 2d 448, 454 (E.D. Pa. 1999)*. **[*18]**

IV. ANALYSIS

A. *Section 12* of the Clayton Act Require Analysis of Personal Jurisdiction Based on National Contacts.

Plaintiffs first argue that Defendants's Motions to Dismiss must be denied because Defendants fail to consider BASF AG's and BASF Coatings's contacts with the United States as a whole. ***HN6***[] "A federal court's personal jurisdiction may be assessed on the basis of the defendant's national contacts when the plaintiff's claim rests on a federal statute authorizing nationwide service of process" or "service wherever defendant is 'doing business' or 'may be found.'" *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369 (3d Cir. 2002)*. See also *Go-Video, Inc. v. Akai Electric Co., 885 F.2d 1406, 1414-15 (9th Cir. 1989)*.

Plaintiffs contend that the Court must consider BASF AG's and BASF Coatings's national contacts because Plaintiffs advance antitrust claims and the Clayton Act provides for service on a defendant corporation wherever it may be found. *Section 12* of the Clayton Act states as follows:

> ***HN7***[] Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district **[*19]** whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. *Section 12* is comprised of two clauses: the first relating to venue and the second concerning service of process. Relying on the Ninth Circuit's decision in Go-Video, Plaintiffs argue that the second clause operates independently from the venue provision, and that venue in this case may be obtained under the Alien Venue Act, *28 U.S.C. 1391(d)*, which provides that an alien may be sued in any federal district. See *Go-Video, Inc. v. Akai Electric Co., 885 F.2d 1406 (9th Cir. 1989)*. Defendants, on the other hand, rely heavily on the D.C. Circuit's holding in *GTE New Media Servs. Inc. v. BellSouth Corp., 339 U.S. App. D.C. 332, 199 F.3d 1343 (D.C. Cir. 2000)* and argue that *Section 12* must be read as an integrated whole and that the service of process provision is effective only when, pursuant to the first clause of *Section 12*, the action is brought in a district where **[*20]** the defendant resides, is found or transacts business. See *GTE New Media Servs. Inc. v. BellSouth Corp., 339 U.S. App. D.C. 332, 199 F.3d 1343 (D.C. Cir. 2000)*.

To resolve the dispute, we are drawn to the text of the statute and called upon to interpret the meaning of the words "in such cases" found in the second clause, dealing with service of process. If "in such cases" refers only to "any suit, action, or proceeding under the ***antitrust law*** against a corporation," Plaintiffs' argument would be correct, Defendants may be served wherever they may be found, and the Court would therefore assess personal jurisdiction based on Defendants' contacts with the United States as a whole. If, on the other hand, "in such cases" was intended to refer to the entire first clause, Plaintiffs would not be authorized under *Section 12* to serve BASF AG and BASF Coatings wherever they may be found because they have not been sued in the judicial district where they are inhabitants, or in any district where they may be found or transact business. [8]

[*21] Our Court of Appeals has not yet directly addressed this issue. We are, however, persuaded that Plaintiffs' position is correct. First, "it is axiomatic that ***HN8***[] the starting point for interpreting a statute is the language of the statute itself." *Tippins Inc. v. USX Corp., 37 F.3d 87, 92-93 (3d Cir. 1994)* (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980))*. In examining the text of the *Section 12* of the Clayton Act in this fashion, we agree with the analysis of the court in *General Elec. Co. v. Bucyrus-Erie Co., 550 F. Supp. 1037 (S.D.N.Y. 1982)*, a case relied upon by Go-Video:

> ***HN9***[] The word "such" means "the aforementioned," *Webster's Third International Dictionary* (unabr. ed.1963). Thus, when "such" precedes a noun it is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence. Applying this rule to *section 12*, "in such cases" would refer to "any suit, action, or proceeding under the antitrust laws against a corporation," and not **[*22]** to anything else in *section 12*'s first clause.

Bucyrus-Erie, 550 F. Supp. at 1042, n.7 (citing *Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340, n.10 (2d Cir. 1972)*, which construed terms "in such cases" in securities statute, *15 U.S.C. § 78aa*, a statute modeled upon *Section 12*); *In re Magnetic Audiotape Antitrust Litig., 171 F. Supp. 2d 179, 184-85 (S.D.N.Y. 2001)*, rev'd on other grounds by, *Texas International Magnetics, Inc. v. BASF Aktiengesellschaft, 31 Fed. Appx. 738* (2d Cir., Mar. 12, 2002) (holding that, under the circumstances, plaintiffs were entitled to discovery prior to dismissal for lack of personal jurisdiction). [9]

[*23] Moreover, even if we were to assume that the text of *Section 12* is ambiguous, Plaintiff's position is clearly in greater harmony with the purpose of the antitrust laws. ***HN11***[] "Perhaps more than any other law, the antitrust laws are national in scope and impact." *Paper Systems Inc. v. Mitsubishi Corp., 967 F. Supp. 364, 368 (E.D. Wisc.*

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[8] Many of the cases in this consolidated action were transferred to this District pursuant to the MDL Transfer Order. Although a transferee court in an MDL action consolidated for pretrial purposes under *28 U.S.C. § 1407* can exercise personal jurisdiction to the same extent that the transferor court could, *In re Agent Orange, 818 F.2d at 163*; *In re Telectronics Pacing Systems, 953 F. Supp. 909 (S.D. Oh. 1997)*, the parties have not presented evidence or argument regarding BASF AG's or BASF Coatings's contacts with respective jurisdictions of the transferor courts.

[9] Although this interpretation of *Section 12* appears to conflict with ***HN10***[] the general canon of statutory construction that "referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent[,] [i.e.,] the last word, phrase, or *clause* that can be made an antecedent without impairing the meaning of the sentence," see NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.33 (6th ed. 2000), the rule is merely an aid to interpretation and is not inflexible or uniformly binding. Id. See also ***Tippins*, *37 F.3d at 93*** (stating that the canons of interpretation are more appropriately applied to divine intent from statutes that carefully worded and assiduously compiled than from imprecise statutory language); *Shendock v. Director, Office of Workers' Compensation Programs, 893 F.2d 1458, 1464 (3d Cir. 1990)*; *Paper Systems Inc. v. Mitsubishi Corp., 967 F. Supp. 364, 367 (E.D. Wisc. 1997)*.

1997). In interpreting *Section 12* of the Clayton Act, we are mindful that "antitrust cases, especially those involving aliens, may pose problems for any one district court to obtain jurisdiction over all the defendants, if left to state long arm statutes." Id. As stated in Paper Systems:

> If the antitrust laws are to be effective, district courts' jurisdiction must reach the limits of the power of the United States of America. In the case of antitrust laws, it makes no sense to tie a district court's jurisdiction to the state in which it sits; it neither promotes the enforcement of ***antitrust law*** nor the management of litigation.

Id. [10]

[*24] Furthermore, as discussed in Go-Video, nothing in the legislative history of *Section 12* explains how "in such cases" is to be interpreted or suggests that Congress intended service of process under *Section 12* to be contingent upon satisfaction of the statute's venue provision. See *Go-Video, 885 F.2d at 1410*. We find it appropriate, however, that the court in Go-Video was guided by the relationship between general and specific venue statutes. ***HN12***[] Enactment of the venue provision in *Section 12* of the Clayton act does not preclude application of the Alien Venue Statute, *28 U.S.C. § 1391(d)*. In general, special venue provisions supplement rather than preempt general venue statutes. *Go-Video, 885 F.2d at 1409* (citing *Pure Oil v. Suarez, 384 U.S. 202, 16 L. Ed. 2d 474, 86 S. Ct. 1394 (1966))*; *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 257-59 (E.D. Pa. 1968)* Indeed, the purpose of enacting the specific venue provisions under the Clayton Act was to enlarge jurisdiction to give an antitrust plaintiff the widest possible selection of forums to **[*25]** promote the plaintiff's role as a private attorney general. *Go-Video, 885 F.2d at 1410-11* (citing *United States v. Scophony Corp., 333 U.S. 795, 806-07, 92 L. Ed. 1091, 68 S. Ct. 855 (1948))*; *Bucyrus-Erie, 550 F. Supp. at 1040* (quoting Scophony Corp.); *Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, 352 F. Supp. 648, 651 (E.D. Pa. 1972)*; *Albert Levine Assocs. v. Bertoni & Cotti, S.p.A., 314 F. Supp. 169 (S.D.N.Y. 1970)* ("specific venue provisions of the antitrust statutes were intended to facilitate the prosecution of [antitrust violations] and "not to make unavailable the general venue provisions").

Moreover, *section 1391(d)* was intended to have "broad and overriding application" to prevent an alien defendant from using narrower venue statutes as a "shield against suit." *Go-Video, 885 F.2d at 1409-10* (quoting *Brunette Machine Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 714, 32 L. Ed. 2d 428, 92 S. Ct. 1936 (1972))*. In Brunette, the Supreme Court held that a specific venue provision for patent infringement cases under **[*26]** *28 U.S.C. § 1400(b)* did not bar suit where venue had been satisfied under the Alien Venue Act, *28 U.S.C. § 1391(d)*, even though the Court had previously held the same venue statute for patent infringement cases did preclude application of the general corporate venue provision of *28 U.S.C. § 1391(c)*. *Brunette, 406 U.S. at 713-14* (distinguishing *Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 1 L. Ed. 2d 786, 77 S. Ct. 787 (1957)*, and holding that "suits against aliens are wholly outside the operation of all the federal venue laws, general and special.").

In contrast, we are not persuaded by Defendants' arguments, which rely heavily on the D.C. Circuit's holding in GTE. In that case, the court explicitly rejected the holding of Go-Video and, instead, opted to follow the Second Circuit's explanation of *Section 12* in *Goldlawr, Inc. v. Heiman, 288 F.2d 579, 581 (2d Cir. 1961)* (stating, in dicta, that "the extraterritorial service privilege [of *Section 12*] is given only when the other requirements [of the statute] are satisfied"), rev'd on **[*27]** other grounds, *369 U.S. 463, 8 L. Ed. 2d 39, 82 S. Ct. 913 (1962)*. As discussed in Go-Video, Goldlawr was decided prior to the Supreme Court's decision in Brunette, where the Court held that a specific venue statute supplements rather than preempts the Alien Venue Statute. *Go-Video, 885 F.2d at 1411*.

[10] We note that even the D.C. District Court, bound by the Circuit's holding in GTE, has "questioned whether the holding of GTE comports with the goals of the antitrust laws . . . ." *In re Vitamins Antitrust Litig., 94 F. Supp. 2d 26, 27, n.3 (D.D.C. 2000)*. Originally, in that case, the district court upheld the national contacts standard espoused in Go-Video. *In re Vitamin Antitrust Litig., 1999 U.S. Dist. LEXIS 12405, 1999 WL 728100* (D.D.C., July 29, 1999). However, in light of the D.C. Circuit's subsequent holding in GTE, the district court reconsidered its decision and ruled that *Section 12* does not permit a national contacts test in determining the existence of personal jurisdiction. *94 F. Supp. 2d at 27, n.2*. The district court nevertheless expressed its concern with the effect of the GTE holding on the consolidation and management of multidistrict litigation. *Id., at 30* and n.2.

Furthermore, the decision in Goldlawr did not reach the special case of an alien corporation, see Go-Video, 885 F.2d at 1411; Bucyrus-Erie, 550 F. Supp. at 1041-42. That distinction is significant given the Supreme Court's broad application of the Alien Venue Act. See Brunette, 406 U.S. at 713-14. Thus, the Goldlawr court was not squarely presented with the question at issue in the instant action. See In re Magnetic Audiotape, 171 F. Supp. 2d at 184 (stating that "the question presented [in Goldlawr, where defendants argued they had not been served, and plaintiff did not challenge the transferor court's determination that it lacked personal jurisdiction,] appeared to be whether transfer was appropriate while jurisdiction was still lacking, not whether jurisdiction, **[*28]** under Section 12 or any other provision, had been properly found."), rev'd on other grounds.

The GTE court also reasoned that a broad interpretation of Section 12, as adopted in Go-Video, would render Section 12's venue provision wholly redundant. GTE, 199 F.3d at 1351. We disagree. **HN13**[] On its face, the Alien Venue Act is not applicable to domestic corporations, which remain covered by the venue provision of Section 12.

Defendants also cite Management Insights, Inc. v. CIC Enterprises, Inc., 194 F. Supp. 2d 520 (N.D. Tex. 2001) to support their interpretation of Section 12. In that case, the court rejected the holding of Go-Video based on the belief that the Ninth Circuit in Go-Video failed to consider the general venue statute's treatment of corporations under 28 U.S.C. 1391(c). 194 F. Supp. 2d at 531-32. The Management Insights court stated:

> If the defendant is a domestic corporation, the Ninth Circuit's approach, in conjunction with § 1391(c), allows a plaintiff to sue a defendant *in any district,* even if that district has absolutely no relation to the defendant's business or **[*29]** to the incident that prompted the suit. For instance, a Texas plaintiff could hale an Alaskan corporate defendant into its courts even though the defendant has had no dealings at all with the forum state.

Id., at 532 (footnote omitted). This conclusion significantly distorts the holding of Go-Video. The broad grant of venue under the Alien Venue Statute is inapplicable to domestic corporations. **HN14**[] The holding of Go-Video permits a plaintiff to sue only an alien corporation in any district; nothing in Go-Video permits a domestic corporation to be sued in any district. Rather, a domestic corporation could only be sued, according to Section 12, "in the judicial district whereof it is an inhabitant," or "in any district wherein it may be found or transacts business." 15 U.S.C. § 22. [11]

[*30] Accordingly, we reject the reasoning of the GTE and hold that Section 12 authorizes Plaintiffs to serve foreign defendants, BASF AG and BASF Coatings, wherever they may be found. Our determination of jurisdiction over those Defendants will therefore be based on their respective contacts with the United States as a whole, rather than just Pennsylvania or the individual districts from which each individual case was transferred. Go-Video, Inc. v. Akai Electric Co., 885 F.2d 1406 (9th Cir. 1989); In re Magnetic Audiotape Antitrust Litig., 171 F. Supp. 2d 179, 184-85 (S.D.N.Y. 2001), rev'd on other grounds, Texas International Magnetics, Inc. v. BASF Aktiengesellschaft, 31 Fed. Appx. 738 (2d Cir., Mar. 12, 2002); Miller Pipeline Corp. v. British Gas, 901 F. Supp. 1416, 1423 (S.D. Ind. 1995) (exercising personal jurisdiction over a British corporation under the national contacts approach based on the foreign company's license agreements with at least one U.S. company in New Jersey, its status as a U.S. patent holder and a service contract for an oil refinery). [12]

[*31] Here, Plaintiffs have presented evidence that both BASF AG and BASF Coating hold United States patents. In addition, twenty one percent of BASF Corporation's sales in 2000 were based on products purchased from BASF

[11] We have no occasion here to determine whether any of the general venue statutes would, in addition to Section 12, be applicable to domestic corporations sued under the federal antitrust laws.

[12] Having held pursuant to Section 12 of the Clayton Act that Plaintiff may establish personal jurisdiction based on Defendants' national contacts, we will not address Plaintiffs' arguments under Fed. R. Civ. P. 4(k)(2). We note, however, application of Rule 4(k)(2) against BASF AG or BASF Coatings is undermined by several of the allegations and arguments raised by Plaintiffs, including the alleged sales of BASF AG to BASF Corporation and BASF Coatings's operation of offices in the United States. See Pls. Mem. in Opp. at 12, 15.

AG and other BASF affiliates. Buchmuller Aff. P 19. BASF AG sold approximately $ 1.5 billion in goods to the BASF Corporation located in Mount Olive New Jersey. See Buchmuller Wyman's Auto Affidavit P 19. According to BASF's web-site, BASF Coatings belongs to the Coatings Division of BASF, which had sales of 2.3 billion Euros in 2001 and which has a "significant market position[] in North America." The Coatings Division operates a facility in Morganton, North Carolina. BASF AG 2002 Form 20F, at 82. According to the Paint & Coatings Industry web-site, BASF Coatings maintains an office in Southfield, Michigan, a Detroit suburb where many other suppliers to the U.S. automotive industry are based. Plaintiffs' allegations and preliminary evidence thus support the existence of contacts between BASF AG and BASF Coatings and the United States. In our view, Plaintiffs have made a threshold *prima facie* showing of personal jurisdiction over Defendants. The allegations **[*32]** and facts presented warrant further discovery into BASF AG's and BASF Coatings's contacts with the United States. See *Texas International Magnetics v. BASF AG, 31 Fed. Appx. 738, 2002 WL 385569 (2d Cir. 2002)* (reversing dismissal and permitting jurisdictional discovery). Plaintiffs will be permitted to conduct discovery into whether Defendants BASF AG and BASF Coatings had sufficient contacts with the United States so that it can be said fairly that they purposefully availed themselves of the privilege of conducting activities within the United States, thus invoking the benefits and protections of its laws.

B. The Jurisdictional Contacts of BASF Corporation Are Not Attributable to BASF AG or BASF Coatings.

Plaintiffs argue that personal jurisdiction exists over BASF AG because the contacts of its wholly owned American subsidiary, BASF Corporation, are attributable to BASF AG. Defendant responds by drawing the Court's attention to, among other cases, *Arch v. American Tobacco Co., Inc., 984 F. Supp. 830 (E.D. Pa. 1997)* and In re: *Latex Gloves Products Liability Litig., 2001 U.S. Dist. LEXIS 12757*, MDL No. 1148, 2001 WL 964105 **[*33]** (Ludwig, J.) (E.D. Pa. Aug. 22, 2001).

HN15[] Typically, a foreign corporation is not subject to personal jurisdiction "merely because of its ownership of the shares of stock of a subsidiary doing business in the state." *Lucas v. Gulf & Western Indus., Inc., 666 F.2d 800, 805-06 (3d Cir.1981)*; see also *Renner v. Lanard Toys Ltd., 33 F.3d 277, 283-84 (3d Cir.1994)* (emphasizing need to clarify relationship between distributor and foreign corporation). There are, however, several lines of cases discussing when the contacts of a subsidiary my be imputed to the parent under an alter ego theory when direct contacts between the parent and forum are absent. See *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *3-4 (E.D. Pa. Aug. 22, 2001); *Visual Sec. Concepts, Inc. v. KTV, Inc., 102 F. Supp. 2d 601, 605 (E.D. Pa. 2000)*; *Arch v. American Tobacco Co., Inc., 984 F. Supp. 830 (E.D. Pa. 1997)*.

HN16[] To prevail under this theory, the plaintiff must demonstrate that "the degree of control exercised by the parent must be greater than normally associated with common ownership and directorship." *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *3; **[*34]** *Visual Sec. Concepts, 102 F. Supp. 2d at 605*; *Arch, 984 F. Supp. at 837*. "Plaintiffs must prove that the parent controls the day-to-day operations of the subsidiary such that the subsidiary can be said to be a mere department of the parent." *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *3 (quoting *Arch, 984 F. Supp. at 837*, and citing other cases following its holding). The Court "should examine all relevant factors that relate to the intimacy of the relationship between the parent and subsidiary to assess whether the contacts of the subsidiary [with the forum] should be imputed to the parent." *Arch, 984 F. Supp. at 837* (stating that the test "perforce incorporates all the factors that have been historically used in determining whether a subsidiary is an alter ego or agent of the parent"). [13]

HN17[] Among the **[*35]** factors courts in this district have considered in determining whether the parent exercises sufficient control over the subsidiary to justify application of this jurisdictional theory are: 1) ownership of all or most of the stock of the related corporation; 2) common officers and directors; 3) a common marketing image; 4) the common use of a trademark or logo; 5) the common use of employees; 6) an integrated sales system; 7) the interchange of managerial and supervisory personnel; 8) the performance by the related corporation of business

[13] Arch has been followed numerous time in our District. See *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *3 n.10 (citing cases).

functions which the principal corporation would normally conduct through its own agents or departments; 9) the acting of related corporation as marketing arm of the principal corporation, or as an exclusive distributor; and 10) receipt by the officers of the related corporation of instruction from the principal corporation. *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *3-4 (citing *Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414, 421 (E.D. Pa.1979)* (permitting discovery of relationship between affiliate companies in antitrust case for purpose of establishing jurisdiction); *Savin Corp. v. Heritage Copy Prods., Inc., 661 F. Supp. 463, 469 (M.D. Pa.1987))*. **[*36]** See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262, 321 (E.D. Pa. 1975)* (exercising jurisdiction over a Japanese consumer electronics corporation in antitrust cases brought under *Section 12* of the Clayton Act firm based on the forum-related activity of corporation's United States distribution subsidiary) (citing *United States v. Scophony Corp., 333 U.S. 795, 814, 92 L. Ed. 1091, 68 S. Ct. 855 (1948)*.

After a careful examination of the relevant factors and the facts presented by Plaintiffs, we find that Plaintiffs have failed to establish that BASF AG has sufficient control over BASF Corporation to permit the exercise of alter ego jurisdiction. Although Plaintiffs have presented facts to establish some of the factors identified in Latex Gloves, including BASF AG's indirect ownership of all of BASF Corporation's stock and the use of BASF as a common marketing image for BASF AG and its subsidiaries, the primary factor that precludes a finding of alter ego jurisdiction in this case is the lack of representation of BASF AG on BASF Corporation's board of directors. Unlike the circumstances in Latex Gloves, only one of BASF **[*37]** AG's employees is currently a director of BASF Corporation, and at no time since 1986 have BASF AG's employees constituted a majority of BASF Corporation's board. See *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *4 (finding that a "nearly complete congruence" of management and directors of the respective entities showed that the parent could exercise control over its subsidiaries). In our view, that type of control is no more than what is typically associated with majority ownership. *Latex Gloves, 2001 U.S. Dist. LEXIS 12757, 2001 WL 964105*, *3; *Visual Sec. Concepts, 102 F. Supp. 2d at 605*; *Arch, 984 F. Supp. at 837*; *Savin Corp., 661 F. Supp. at 470*. The facts also fail to demonstrate that BASF Corporation performs business functions that BASF AG would normally conduct through its own agents and functions; rather, BASF AG supplies products to BASF Corporation just as BASF AG does for other companies, on an arms length basis. These facts demonstrate that BASF Corporation is not controlled in its day-to-day operations such that it is a mere department of BASF AG.

C. Plaintiffs Have Not Properly Presented a Case for Co-Conspiratorial **[*38]** Jurisdiction.

Plaintiffs further argue, in a footnote, that jurisdiction over BASF AG and BASF Coatings may also be established on the basis of the jurisdictional contacts of the Defendants' co-conspirators. ***HN18***[] Courts have recognized jurisdiction over non-residents based upon the contacts of the alleged co-conspirators. *Massachusetts School of Law at Andover, Inc. v. American Bar Assoc., 846 F. Supp. 374, 379 (E.D. Pa.1994)* ("[A] court looks not only at the defendant's forum contacts, but at those of the defendant's 'resident' co-conspirators. The court imputes the contacts of the 'resident' co-conspirator over whom it has jurisdiction to the 'foreign' co-conspirator to see if there are sufficient contacts to exercise jurisdiction over the latter."), aff'd, *107 F.3d 1026 (3d Cir.1997)*. See also *Santana Products, Inc. v. Bobrick Washroom Equipment, 14 F. Supp. 2d 710, 718 (M.D. Pa. 1998)* (listing cases); but cf. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 261 (E.D. Pa. 1968)* (citing *Bankers Life & Cas. Co. v Holland, 346 U.S. 379, 98 L. Ed. 106, 74 S. Ct. 145 (1953))*. **[*39]**

However, "merely belonging to a civil conspiracy does not make a member subject to the jurisdiction of every other member's forum. . . . There must also be substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state co-conspirator was or should have been aware." *Id. at 379-80*. See also *Santana Products, Inc. v. Bobrick Washroom Equipment, 14 F. Supp. 2d 710 (M.D. Pa. 1998)*; *Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Brecher, 635 F. Supp. 15 (E.D. Pa. 1985)*; In re Arthur Treacher's Franchisee *Litigation, 92 F.R.D. 398 (E.D. Pa. 1981)*.

In furtherance of their conspiracy, Defendants are alleged to have engaged in the following anti-competitive activities: 1) participating in meetings and conversations to discuss the prices of automotive refinishing paint in the United States and elsewhere, and 2) selling automotive refinishing paint to customers in the United States at supracompetitive prices. *Id. P 52*. Plaintiffs have not alleged, however, that meetings, planning sessions, conferences or any other concerted action occurred with the forum. See *Santana Products, 14 F. Supp. 2d at 720*. **[*40]** Having raised this argument in a single footnote, Plaintiffs have failed to identify exactly what acts occurred in the relevant forum. Furthermore, even if we were to assume such acts occurred in the United States, Plaintiffs have neither alleged nor argued that BASF AG or BASF Coatings knew or should have known of their occurrence in the forum. See *Von Pein v. Ciccotelli, 1995 U.S. Dist. LEXIS 2189, 1995 WL 79527*, *2 (E.D. Pa. 1995) (finding lack of personal jurisdiction under conspiracy theory where complaint failed to allege that out-of-state defendants were aware of the alleged co-conspirator's activities within the forum).

Under these circumstances, where Plaintiffs have neither alleged sufficient facts nor presented complete argument on this issue, we will not permit discovery in furtherance of such theory where such discovery would be intertwined with the merits of Plaintiffs substantive conspiracy claims. See *Mass. School, 107 F.3d at 1042*; In re Arthur Treacher's Franchisee *Litigation, 92 F.R.D. 398 (E.D. Pa. 1981)*.

V. CONCLUSION

For these reasons, we will deny Defendants' Motion to Dismiss. An appropriate Order follows.

ORDER

[*41] AND NOW, this 31st day of July, 2002, upon consideration of Defendant BASF AG's Motion to Dismiss for Lack of Personal Jurisdiction (Docket No. 22) and Defendant BASF Coatings AG's Motion to Dismiss for Lack of Personal Jurisdiction (Docket No. 23) and all papers filed in support thereof and in opposition thereto, it is ORDERED that the Motions to Dismiss are **DENIED** without prejudice. Plaintiffs shall conduct jurisdictional discovery with respect to BASF AG and BASF Coatings AG. Jurisdictional discovery shall be completed within sixty (60) days of this Order. Within ten (10) days thereafter, Defendants BASF AG and BASF Coatings AG may file, if necessary, renewed motions to dismiss pursuant to *Rule 12(b)(2)*.

AND IT IS SO ORDERED.

R. Barclay Surrick, Judge

Covad Communs. Co. v. BellSouth Corp.

United States Court of Appeals for the Eleventh Circuit

August 2, 2002, Decided

No. 01-16064

Reporter

299 F.3d 1272 *; 2002 U.S. App. LEXIS 15486 **; 2002-2 U.S. Tax Cas. (CCH) P73,761; 2002-2 Trade Cas. (CCH) P73,761; 15 Fla. L. Weekly Fed. C 868

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company, Plaintiffs-Appellants, versus BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC., Defendants-Appellees.

Subsequent History: **[**1]** Rehearing En Banc Denied December 20, 2002, Reported at: *2002 U.S. App. LEXIS 26429*.

Rehearing, en banc, denied by *Covad Communs. Co. v. BellSouth Corp., 314 F.3d 1282, 2002 U.S. App. LEXIS 26429 (11th Cir. Ga., 2002)*
Vacated by, Remanded by BELLSOUTH CORP., ET AL. v. COVAD COMMUNICATIONS CO., 2004 U.S. LEXIS 670 (U.S., Jan. 20, 2004)

Prior History: Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 00-03414-CV-BBM-1. Judge: Beverly B. Martin.

Disposition: Reversed and remanded.

Core Terms

anti trust law, facilities, competitors, antitrust, Sherman Act, Telecommunications, interconnection, alleges, monopoly, network, anticompetitive, customers, wholesale, Skiing, monopolist, squeeze, argues, consumers, retail, monopoly power, prices, local telephone, monopolization, terms, saving clause, compete, markets, cases, antitrust claim, retail price

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

Because in an appeal of a federal district court's dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)*, the appellate court reviews de novo, the court take the facts as they are alleged in the complaint.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > Federal Acts > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN2[] **Communications, Telecommunications Act**

The Telecommunications Act of 1996 requires, among other things, that incumbent local exchange carriers (ILECs) allow competitors to interconnect with their networks. The centerpieces of the 1996 Telecommunications Act are codified at *47 U.S.C.S. §§ 251* and *252*, which together impose a series of affirmative duties on ILECs, for the benefit of competitive local exchange carriers (CLECs). *Sections 251* and *252* also establish the standards for the arbitration and approval of interconnection agreements between ILECs and CLECs.

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN3[] **Introducing Competition, Duties of Incumbent Carriers & Resellers**

Title *47 U.S.C.S. § 251* imposes various duties on all local exchange carriers (LECs): to permit the resale of their telecommunication services; to provide number portability; to provide dialing parity to other LECs; to afford other LECs access to poles, ducts, conduits, and rights-of-way; and, most significantly here, to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *47 U.S.C.S. § 251(b)*. *Section 251* also imposes additional obligation on ILECs, including the duty to interconnect their networks with that of any requesting telecommunications carriers on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, and to negotiate in good faith the agreements establishing the rates, terms, and conditions of these interconnections. *47 U.S.C.S. § 251(c)(1)* and *(2)*.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN4[] **Alternative Dispute Resolution, Arbitration**

Title *47 U.S.C.S. § 252* provides for the negotiation, arbitration, and approval of interconnection agreements and requires all parties to participate in any arbitration. *47 U.S.C.S. § 252(b)(1)*, *(5)*. All interconnection agreements adopted by negotiation or arbitration must be submitted for approval to the respective state public service commission. *47 U.S.C.S. § 252(e)*.

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

HN5[] **Standards of Review, De Novo Review**

The appellate court reviews a district court's dismissal of a complaint de novo. In particular, whether specific conduct is anti-competitive is a question of law reviewed de novo.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN6[] **Motions to Dismiss, Failure to State Claim**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court must accept the facts pleaded as true and construe them in a light favorable to plaintiffs.

Antitrust & Trade Law > Regulated Industries > Communications

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN7[] **Regulated Industries, Communications**

Fed. R. Civ. P. 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases. In claims under *§§ 1* and *2* of the Sherman Act, codified at *15 U.S.C.S. §§ 1* and *2*, according to the United States Court of Appeals for the Eleventh Circuit, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low. Although authorized by the Federal Rules of Civil Procedure, the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion to dismiss should be granted.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

HN8[] **Communications, Sherman Act**

Regarding the question of whether a litany of facts pleaded in a complaint, if taken as true, state a cause of action for the violation of the Sherman Act, answering this question requires a two-tiered inquiry. First, the court must determine whether the Telecommunications Act of 1996's (1996 Act) regulation of local telecommunications markets precludes application of the Sherman Act, so that a claim based on facts "inextricably linked" to an alleged violation of the 1996 Act can never, as a matter of law, form the basis of an independent Sherman Act claim. If the court concludes that the 1996 Act precludes "inextricably linked" antitrust claims, then the inquiry is at an end. However, if such a claim can stand as an independent Sherman Act claim, then the court must determine whether the allegations in the complaint adequately allege a violation of the Sherman Act.

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN9[] **Regulated Industries, Communications**

As a general principle, a statute does not automatically limit causes of action under another statute, and conduct that is alleged to violate one statute can also violate another, subjecting the perpetrator to liability for the violation of each. Moreover, the same conduct may support various theories of liability and expose the perpetrator to different types of damages. At the same time, Congress can determine the contours and extent of the remedy for specific conduct it determines to be unlawful and accordingly limit the causes of action for such conduct. While such congressional limitations can be established explicitly, courts have also determined that if two statutes are deemed to be plainly repugnant to each other, then Congress has implicitly limited one or the other. However, the court must be mindful that courts should be reluctant to imply a limitation resulting in antitrust immunity. Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > State Regulation

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN10[] **Communications, Sherman Act**

Rather than pre-emptive language, Congress specifically and directly stated that the Sherman Act and the Telecommunications Act were intended to be used in tandem to accomplish the congressional goals served by both acts--namely, the stimulation of competition. Congress explicitly stated--both through a savings clause directed specifically at antitrust enforcement and through an additional general savings clause--that the Telecommunications Act does not supplant or change the antitrust laws.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN11[] **Regulated Industries, Communications**

See 47 U.S.C.S. § 152 note.

Antitrust & Trade Law > Regulated Industries > Communications > State Regulation

Communications Law > Federal Acts > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > Overview & Legal Concepts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

HN12[] **Communications, State Regulation**

In enacting the Telecommunications Act of 1996, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

HN13[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

The United States Court of Appeals for the Eleventh Circuit agree with the United States Court of Appeals for the Second Circuit that the savings clause of the Telecommunications Act of 1996 unambiguously establishes that there is no plain repugnancy between the Telecommunications Act and the antitrust statutes and thus that the Telecommunications Act does not provide an implicit immunity from the antitrust laws.

Governments > Legislation > Interpretation

HN14[] **Legislation, Interpretation**

When the words of a statute are unambiguous, then, the first canon of statutory construction is also the last: judicial inquiry is complete.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Communications Law > Federal Acts > General Overview

HN15[] **Regulated Industries, Communications**

The United States Court of Appeals for the Eleventh Circuit agrees with the United States Court of Appeals for the Second Circuit, which concluded that controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws. The Second Circuit also noted that it is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act. While injunctive relief in such suits may require judicial restraint, awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act, noting that in some instances, it is possible that the antitrust laws will be needed to supplement the regulatory scheme to bring competition to the local phone service markets.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN16[] **Communications, Sherman Act**

Merely pleading violations of the Telecommunications Act of 1996 (1996 Act) alone will not suffice to plead Sherman Act violations. Thus, a claim that a defendant failed to live up to its contractual obligations under an agreement made pursuant to the 1996 Act in and of itself will be insufficient to establish an antitrust violation. However, if a plaintiff also pleads facts that, if true, tend to show an anticompetitive purpose to create or maintain a monopoly, then that plaintiff has pleaded an antitrust violation.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN17[] Sherman Act, Claims

Establishing a § 2 of the Sherman Act, codified at 15 U.S.C.S. § 2, monopolization violation requires proof of two elements: (1) the possession of monopoly power in the relevant market and (2)"the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is defined as the power to control prices or exclude competition. A firm that does not achieve monopoly power may nonetheless violate § 2 through attempted monopolization. Proving attempted monopolization requires a showing of: (1) anticompetitive or exclusionary conduct; (2) with specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. Anticompetitive conduct is the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor. An assessment of intent is critical in determining whether an accused monopolist's actions qualify as anti-competitive conduct. In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] Antitrust & Trade Law, Sherman Act

The antitrust laws in general do not require that firms (including monopolies) affirmatively help their competitors to succeed, there is a narrow exception to this general rule when a monopolist improperly withholds access to an "essential facility" without which a competitor cannot enter or compete in a market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN19[] Monopolies & Monopolization, Actual Monopolization

Although a party may ordinarily choose freely the companies with which it will conduct business, when a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate § 2 of the Sherman Act, 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN20[] Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes

In an antitrust action, a price squeeze is an intentional pattern of pricing wholesale inputs at such a high level that the competitor cannot absorb those costs and still compete profitably in the downstream retail markets.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN21[] Actual Monopolization, Anticompetitive & Predatory Practices

Monopoly leveraging occurs when a firm uses its market power in one market to gain market share in another market other than by competitive means. The use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2* of the Sherman Act, even if there has not been an attempt to monopolize the second market.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Computer & Internet Law > Internet Business > Licensing > Trademark Antitrust Issues

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN22[] Actual Monopolization, Anticompetitive & Predatory Practices

Monopoly leveraging can violate *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*. When a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in and monopolizing another market, the United States Court of Appeals for the Eleventh Circuit does not hesitate to conclude that the Sherman Act prohibits such conduct. The United States Supreme Court has also found that a triable question of fact exists on a *§ 2* claim where a defendant uses its control over one market to gain dominance in another market.

Governments > Courts > Judicial Precedent

HN23[] Courts, Judicial Precedent

The United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all United States Court of Appeals for the Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Pipelines & Transportation > Access

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

HN24[] **Natural Gas Industry, Distribution & Sale**

The withholding of access to an essential facility without which a competitor cannot enter or compete in a market is a violation of the antitrust laws. Under the well-established "essential facilities" doctrine, an inference of anticompetitive intent in violation of *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2* arises upon a showing of four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. By exercising its control over an essential facility (sometimes called a "bottleneck") to withhold access to that facility, a monopolist can exclude competition. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.

Governments > Courts > Authority to Adjudicate

HN25[] **Courts, Authority to Adjudicate**

A federal circuit court is not authorized to abrogate doctrines that have been endorsed and not yet rejected by the United States Supreme Court.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN26[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Section 2 of the Sherman Act, codified at *15 U.S.C.S. § 2* prohibits denial of access to essential facilities on reasonable terms. The "applicable legal standard" is that any company which controls an essential facility or a strategic bottleneck in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them. As the United States Supreme Court explained, a monopolist must provide access to essential facilities upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN27[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Breach of contract and antitrust are not mutually exclusive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN28[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Although a party may ordinarily choose the companies with whom it will conduct business, the existence of a right to refuse to deal with other firms does not mean that the right is unqualified. When a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*. The right to refuse to deal is limited when the company possesses a monopoly because the danger exists that it may use its monopoly position to decrease competition in other markets. As the United States Supreme Court has explained, it is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN29[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A vertically integrated monopolist that refuses to deal with a customer to foreclose competition in a second market may violate *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN30[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Allegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN31[] **Regulated Industries, Communications**

State commissions are not authorized under *47 U.S.C.S. § 252* to interpret interconnection agreements at all.

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

HN32[] **Federal Communications Act, Federal Preemption**

A holding that state tort law claims are preempted by the Telecommunications Act of 1996 is irreconcilable with the Act's express "No Implied Effect" clause, which sets forth Congress' intent not to modify, impair, or supercede federal, state or local laws. *47 U.S.C.S. § 152* note.

Counsel: For Bellsouth Corporation, Appellee: A. Stephens Clay, Kilpatrick & Cody, ATLANTA, GA.

For BellSouth Telecommunications, Appellee: Jeffrey W. Sarles, Mayer, Brown, Rowe & Maw, Chicago, IL. J. Henry Walker, Bellsouth, Atlanta, GA. Michael K. Kellogg, Aaron M. Panner, Mark C. Hansen, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, DC. Ashley B. Watson, Marc William Franklin Galonsky, BellSouth Corporation, Atlanta, GA. James F. Bogan, III, Kilpatrick Stockton, Atlanta, GA. Marc Gary, Atlanta, GA. Stephen Michael Shapiro, Mayer, Brown, Rowe & Maw, Chicago, IL.

Judges: Before BARKETT and MARCUS, Circuit Judges, and HIGHSMITH [*], District Judge.

Opinion by: BARKETT

Opinion

[*1276] BARKETT, Circuit Judge:

Covad Communications Company and Dieca Communications, Inc. (collectively "Covad") [1] appeal the district court's dismissal, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, of their action against BellSouth Corporation and BellSouth Telecommunications Corporation (collectively "BellSouth"). Covad is a seller of high-speed Digital Subscriber Line ("DSL") internet service. BellSouth is a regional telephone service and telecommunications provider, which also sells DSL service. Covad and BellSouth have entered into an "interconnection agreement" to allow Covad to provide DSL service to consumers over BellSouth's existing telephone lines. However, Covad alleges that BellSouth has attempted to stifle competition both by failing to live up to its contractual obligations and through broad exclusionary behavior, including **[**2]** the use of price squeezes, misleading advertising, and the misuse of Covad's confidential customer information. Covad's 24-count complaint asserts that BellSouth's actions violated the Sherman Antitrust Act, the Telecommunications Act of 1996, state anti- monopoly statutes and unfair competition laws, and state law of breach of contract. On appeal, Covad argues that the trial court erred in dismissing Covad's complaint. We agree and REVERSE.

BACKGROUND

BellSouth is the incumbent local exchange carrier ("ILEC") that inherited monopoly control over the local telephone network in a nine-state region after the breakup of AT&T in 1983. Covad, formed in 1996, sells high speed DSL service, a technology that allows consumers and businesses to transmit and receive data over existing copper phone lines. Covad's DSL service competes directly with BellSouth's own DSL and other retail data services, such as dial-up internet access, Internet Services Digital Network ("ISDN") **[**3]** and dedicated line services such as "Frame Relay" and "T-1."

As Covad explains it, [2] to bring its services to consumers in BellSouth's region, Covad must have dependable, timely, and affordable access to the local telephone network controlled by BellSouth. Because of the ubiquitous nature of the local telephone network, the facilities controlled by BellSouth cannot practicably be duplicated. Thus, to operate feasibly, Covad must **[*1277]** be able to "interconnect" its DSL network with BellSouth's local telephone network, which means, at its most basic, that Covad needs to be able to connect its wires to the BellSouth wires that make up the local telephone network.

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[*] Honorable Shelby Highsmith, U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] Dieca is a wholly-owned subsidiary of Covad.

[2] ***HN1***[] Because in this appeal we review *de novo* the district court's grant of a motion to dismiss Covad's complaint, we take the facts as they are alleged in Covad's complaint. *See* *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983)*.

Congress recognized that new companies seeking **[**4]** entry into the market could not compete if they had to duplicate existing telephone networks, and addressed this concern by passing ***HN2***[] the Telecommunications Act of 1996 (the "1996 Act"), which requires, among other things, that ILECs allow competitors to interconnect with their networks. The centerpieces of the 1996 Telecommunications Act are *sections 251* [3] **[**5]** and *252*, [4] codified at *47 U.S.C. §§ 251* and *252*, which together impose a series of affirmative duties on ILECs like BellSouth, for the benefit of competitive local exchange carriers ("CLECs") like Covad. *Sections 251* and *252* also establish the standards for the arbitration and approval of interconnection agreements between ILECs and CLECs.

Pursuant to the 1996 Act, Covad entered into a contract in 1998 with BellSouth (the "Interconnection Agreement") in which BellSouth agreed, among other things: (1) to allow Covad to "collocate" (place Covad's equipment) in BellSouth central offices throughout its region, providing interconnection between the network controlled by BellSouth and Covad's network; (2) to provide interoffice transport facilities (high capacity connections necessary to connect Covad's equipment in various central offices); (3) to provide nondiscriminatory access to operational support systems ("OSS") to allow Covad to place orders for facilities; and (4) to provide loops (the actual copper wires used for DSL **[**6]** transmission).

In this suit, Covad alleges that Bell South aimed to stifle competition and protect and extend its local telephone monopoly, in violation of the Interconnection Agreement and the antitrust laws, by embarking on a series of dilatory, anti-competitive acts designed to prevent or delay Covad's entry into the DSL market, impede its ability to deliver service to consumers, and drive Covad from the marketplace. In particular, Covad alleges that BellSouth regularly misrepresented the availability of space in BellSouth's central offices so as initially to effectively deny collocation altogether. When it did permit collocation, BellSouth allegedly raised Covad's costs unnecessarily and systematically and in bad faith denied and delayed facilities essential to Covad's success, including interoffice transport, OSS, and local loops, resulting in delays and lost customers. Covad also asserts that BellSouth manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) **[*1278]** by engaging in a "price squeeze"--an intentional pattern of pricing wholesale inputs at such a high level that Covad (or indeed BellSouth itself) cannot **[**7]** absorb those costs and still compete profitably in the downstream retail markets. By assigning inordinately high costs to its wholesale offerings, and inordinately low costs to its retail offerings, BellSouth allegedly squeezed out competitors such as Covad, clearing the field for its own retail services.

Furthermore, Covad alleges that BellSouth strategically understaffed its wholesale division, which BellSouth created to serve customer-competitors like Covad. This strategy slowed down order processing and created backlogs that, at times, included over 5,000 Covad orders. By refusing to develop adequate systems for placing wholesale orders, BellSouth thwarted Covad's aggressive first-to-market strategy, caused Covad to lose customers, impeded Covad's ability to deliver high quality service, and protected BellSouth's monopoly.

Finally, Covad alleges that BellSouth acted with clear motive and intent to destroy DSL competition and competitors like Covad. Covad asserts that BellSouth possessed DSL technology, but did not offer it to the public as a means of internet access until forced to do so in competition with Covad; BellSouth preferred to offer more profitable alternatives such **[**8]** as ISDN or T-1 service, at the expense of consumer choice. When Covad threatened to

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[3] ***HN3***[] *Section 251* imposes various duties on all local exchange carriers ("LECs"): to permit the resale of their telecommunication services; to provide number portability; to provide dialing parity to other LECs; to afford other LECs access to poles, ducts, conduits, and rights-of-way; and, most significantly here, to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *47 U.S.C. § 251(b)*. *Section 251* also imposes additional obligation on ILECs, including the duty to interconnect their networks with that of any requesting telecommunications carriers "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," and to negotiate in good faith the agreements establishing the rates, terms, and conditions of these interconnections. *47 U.S.C. § 251(c)(1)* and *(2)*.

[4] ***HN4***[] *Section 252* provides for the negotiation, arbitration, and approval of interconnection agreements and requires all parties to participate in any arbitration. *47 U.S.C. § 252(b)(1)* and *(5)*. All interconnection agreements adopted by negotiation or arbitration must be submitted for approval to the respective state public service commission ("PSC"). *47 U.S.C. § 252(e)*.

compete for internet access customers with DSL, a cheaper and more convenient service, BellSouth itself began an aggressive campaign to offer DSL. BellSouth confirmed its anticompetitive intent, Covad says, by falsely disparaging Covad's services and using confidential Covad information to solicit its customers. Covad states that BellSouth's scheme has had the intended effect of denying Covad access to the local internet access markets, substantially lessening competition and consumer choice in those markets, creating higher prices, and stifling innovation.

These actions, according to Covad, violate the 1996 Act, the Sherman Act, and various state laws. The district court, relying on the Seventh Circuit's opinion in *Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)*, dismissed Covad's Sherman Act claims, holding that allegations that are based on duties established by the 1996 Act cannot form the basis of a violation of the Sherman Act because (1) "'affirmative duties to help one's competitors . . . do not exist under the unadorned antitrust laws,'" D.C. Opinion at 15 n. **[**9]** 8 (quoting *Goldwasser, 222 F.3d at 400*); (2) "the 'elaborate enforcement structure' of the 1996 Act precludes suits under the Sherman Act for ILEC duties because 'antitrust laws would add nothing to the oversight already available under the 1996 law,'" *id.* at 15 (quoting *Goldwasser, 222 F.3d at 400-01*); and (3) even if such allegations could be entirely divorced from the 1996 Act context, such claims nonetheless would not constitute "allegations of a freestanding antitrust claim" because "'the elaborate system of negotiated agreements and enforcement established by the 1996 Act'" should not be "'brushed aside by any unsatisfied party with the simple act of filing an antitrust action.'" *Id.* at 16-17 (quoting *Goldwasser, 222 F.3d at 401*). [5]

[10]** **[*1279]** Turning to Covad's claims under Section 222 of the 1996 Act and for breach of contract, the district court found that, because state commissions have the power not only to approve interconnection agreements "but to later interpret and enforce them as well," "sections 206 and 207 do not grant federal courts jurisdiction . . . when claims directly implicate the regulatory scheme of the 1996 Act," except for the power to review "a determination by a [state commission]." *Id.* at 37-38. Because Covad's claims "relate directly to duties under the 1996 Act or the interconnection agreement, which are to be first reviewed and enforced by the respective [state commissions]," the court dismissed those claims. *Id.* at 38. Finally, the court dismissed Covad's tort claims for interference and unfair competition to the extent they involved any allegation other than "improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, [and] disparaging Covad's products and services." *Id.* at 40. [6] The trial court rejected the bulk of Covad's tort claims because they "are merely a restated breach of contract claim which the court has already dismissed **[**11]** for the reasons noted above." *Id.*

HN5[] We review a district court's dismissal of a complaint *de novo*. In particular, "whether specific conduct is anti-competitive is a question of law reviewed *de novo*." *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996)*. "'[***HN6***[] A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F.2d 948, 953 (11th Cir. 1986)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))*. This Court "must accept the facts pleaded as true and construe them in a light favorable to plaintiffs." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983)*. **[**12]** ***HN7***[] *Rule 12(b)(6)* dismissals are particularly disfavored in fact-intensive antitrust cases. In *Quality Foods*, which involved claims under *sections 1* and *2* of the Sherman Act, this Court stated that "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *711 F.2d at 994*. "Although authorized by the Federal Rules of Civil Procedure, the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion [to dismiss] should be granted." *St. Joseph's Hosp., 795 F.2d at 953* (footnote omitted).

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[5] The district court, however, did not dismiss Covad's antitrust claims in their entirety; it found that allegations that "BellSouth engaged in predatory advertising and promotion" could support an antitrust violation and dismissed these claims only to the extent that they alleged misuse of proprietary information, a subject that is "covered by paragraph 9 of the Interconnection Agreement." D.C. Opinion at 29-31. The court also declined to dismiss Covad's "monopoly leveraging" claim to the extent it was based on conduct "not implicated by the 1996 Act." *Id.* at 33.

[6] The tort claims not dismissed by the district court were subsequently dismissed by stipulation and are not part of this appeal.

DISCUSSION

I. *Sherman Act Claims*

*We turn first to **HN8**[] the question of whether the litany of facts pleaded in Covad's complaint, if taken as true, state a cause of action for the violation of the Sherman Act. Answering this question requires a two-tiered inquiry. First, we must determine whether the 1996 Act's regulation of local telecommunications markets precludes application of the Sherman Act so that a claim based on facts "inextricably linked" to an alleged violation of the 1996 Act can never, as a matter of law, form the basis of an independent **[**13]** Sherman Act claim. If we conclude that the 1996 Act precludes "inextricably linked" antitrust claims, then our inquiry is at an end. However, if such a claim can stand as an independent Sherman Act claim, then we must determine* **[*1280]** *whether the allegations in Covad's complaint adequately allege a violation of the Sherman Act.*

A. Does the 1996 Act Preempt All Sherman Act Claims?

HN9[] *As a general principle, a statute does not automatically limit causes of action under another statute, and conduct that is alleged to violate one statute can also violate another, subjecting the perpetrator to liability for the violation of each. Moreover, the same conduct may support various theories of liability and expose the perpetrator to different types of damages. At the same time, Congress can determine the contours and extent of the remedy for specific conduct it determines to be unlawful and accordingly limit the causes of action for such conduct. While such congressional limitations can be established explicitly, courts have also determined that if two statutes are deemed to be plainly repugnant to each other, then Congress has implicitly limited one or the other. However, we must be mindful that **[**14]** courts should be reluctant to imply a limitation resulting in antitrust immunity. See Cantor v. Detroit Edison Co., 428 U.S. 579, 597, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)* (footnotes omitted).

The initial question before us in this case is whether Congress intended in the 1996 Act to provide immunity from antitrust violation claims for conduct covered in that Act. We begin by examining the plain language of the 1996 Act to determine whether it expresses any intention to preempt Sherman Act antitrust claims for conduct that is inextricably linked to the 1996 Act. Our examination reveals that, ***HN10***[] rather than pre-emptive language, Congress specifically and directly stated that the two Acts were intended to be used in tandem to accomplish the congressional goals served by both acts--namely, the stimulation of competition. [7] Congress explicitly stated--both **[**15]** through a savings clause directed specifically at antitrust enforcement and through an additional general savings clause--that the 1996 Act does not supplant or change the antitrust laws. ***HN11***[] The 1996 Act provides:

> SAVINGS CLAUSE . . . nothing in this Act or the amendments made by this Act shall be construed to modify, impair, *or supersede the applicability of any of the antitrust laws*.
> NO IMPLIED EFFECT . . . This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.

Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), *§ 152* note, 110 Stat. 56, 143 (1996) (emphasis added). Thus, ***HN12***[] in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry.

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[7] The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. 104-458, 1996 WL 46795, at *1 (1996).

[16]** It is clear that plain repugnancy cannot be found between the 1996 Act and the antitrust laws in view of the 1996 Act's express language reserving the applicability of the antitrust laws. An act that expressly **[*1281]** preserves the antitrust laws' applicability and fully subjects anticompetitive activities to them cannot be read to impliedly repeal those laws. ***HN13***[] We agree with the Second Circuit that the "savings clause unambiguously establishes that there is no 'plain repugnancy' between the Telecommunications Act and the antitrust statutes [and thus] that the Telecommunications Act does not provide an 'implicit immunity' from the antitrust laws.'" *Law Offices of Curtis V. Trinko v. Bell Atl. Corp., 294 F.3d 307 (2d Cir. 2002)*. We conclude that the plain statutory language is sufficient to end our inquiry on this matter. *CBS Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001)* ("***HN14***[] When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete.") (brackets in original) (citations omitted).

However, should there be any doubt that the plain language of the savings clause **[**17]** resolves the issue, we find support for our conclusion in the legislative history surrounding the 1996 Act, reflecting that the President, the Congress, the Department of Justice, and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry. For example, the Senate Report analyzing the bill specifically provided: "The provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill." S. Rep. No. 104-23, at 17 (1995) (R2-7-A18). Thus, the savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, S. Rep. No. 104-230, at 201 (1996) ("Conference Report"). Throughout the legislative record, Congress repeatedly emphasized that ILECs like BellSouth remain subject to antitrust enforcement:

> ***Antitrust law*** is synonymous with low prices and consumer protection -- and that is exactly what we need in our telecommunications industry . . . . The bill contains an all-important **[**18]** antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers.

142 Cong. Rec. H1145-06 (daily ed. February 1, 1996) (statement of Rep. Conyers).

> The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector. . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy.

142 Cong. Rec. S687-01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

> I firmly believe that we must rely on the bipartisan principles of ***antitrust law*** in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. **[**19]** Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry.

141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) (statement of Sen. Leahy).

Former President Clinton again emphasized the importance of antitrust enforcement **[*1282]** when he signed the 1996 Act into law:

> The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.

Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), *reprinted in* 1996 U.S.C.C.A.N. 228-1, 228-3. Thus, both the legislative and executive branches recognized that the antitrust laws would coexist alongside the Act.

Finally, in implementing *sections 251* and *252* of the 1996 Act (governing the arbitration for and approval of interconnection agreements between ILECs like BellSouth and CLECs like Covad), the FCC formally acknowledged that its regulations did not provide the "exclusive **[**20]** remedy" for anticompetitive conduct. First Report and

Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *11 F.C.C.R. 15499, P 124* (Aug. 8, 1996) (R2-7-A174). The FCC emphasized that, in addition to judicial review of arbitrations setting the terms of interconnection agreements, "parties have several options for seeking relief if they believe that a carrier has violated the standards under *section 251* or *252*," *id.*, expressly including private antitrust enforcement: "We clarify . . . that nothing in *sections 251* and *252* or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id. at P 129 (R2-7-A175)* (footnote omitted).

Thus, in view of the plain statutory language and the legislative pronouncements of the intended coexistence of the antitrust laws and the 1996 Act, we cannot agree with *Goldwasser* to the extent that it is read to say that a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anti-competitive conduct that happens to be "intertwined" with obligations established by the 1996 Act. [8]

[21]** **[*1283]** At the same time, we agree with *Goldwasser* that ***HN16***[] merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations. Thus, a claim that a defendant failed to live up to its contractual obligations under an agreement made pursuant to the 1996 Act in and of itself will be insufficient to establish an antitrust violation. However, if a plaintiff also pleads facts that, if true, tend to show an anticompetitive purpose to create or maintain a monopoly, then that plaintiff has pleaded an antitrust violation. [9] Because we

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[8] The *Goldwasser* court stated:

> Nevertheless, when one reads the complaint as a whole these allegations appear to be inextricably linked to the claims under the 1996 Act. Even if they were not, such a conclusion would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the *§ 252* agreements. The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

Goldwasser, 222 F.3d at 401.

The district court interpreted this language to mean that a Sherman Act antitrust claim cannot ever be brought if it alleges conduct also covered by the 1996 Act. We disagree that *Goldwasser* stands for such a broad proposition, and note that *Goldwasser* tied its conclusion to the specific allegations of the complaint in that case. We do agree, however, with the Second Circuit in *Trinko*, when it concluded that "***HN15***[] controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws," *Trinko*, ___F.3d at ___ (citing *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973))*. The Second Circuit also noted that "it is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act." *Id*. While acknowledging that injunctive relief in such suits may require judicial restraint, the *Trinko* court stated that "awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act," noting that in some instances, "it is possible that the antitrust laws will be needed to supplement the regulatory scheme" to bring competition to the local phone service markets. *Id*. at ___ (footnote omitted).

[9] In *Goldwasser*, the plaintiff pleaded 20 counts, seventeen of which explicitly cited violations of the 1996 Act. Goldwasser then alleged that "all of these practices . . . violate both *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and the 1996 Act itself." *Goldwasser, 222 F.3d at 395*. None of the charges involved any allegations of anticompetitive intent; rather, the complaint merely asserted that the defendant was a monopolist, and that it had violated the 1996 Act. The Seventh Circuit observed, consistent with what we have said above, that such allegations of mere failure to fulfill obligations under the 1996 Act are insufficient to state a claim under the Sherman Act: "The fundamental fallacy in the plaintiffs' theory is that the duties the 1996 Act imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not." *Id. at 399*. The *Goldwasser* court further observed that there exists no independent duty to help competitors under the antitrust laws. Therefore, "[a] complaint like this one, which takes the form 'X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high' does not state a claim under *Section 2*." *Id. at 400*.

believe that the 1996 Act does not preempt claims under the Sherman Act as a matter of law, we turn to the question of whether Covad has pleaded a valid antitrust claim.

[**22] B. Does Covad's Complaint Sufficiently Allege a Violation of the Sherman Act?

HN17[] Establishing a *Section 2* monopolization violation requires proof of two elements: "(1) the possession of monopoly power in the relevant market and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *accord* *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-83, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. A firm that does not achieve monopoly power may nonetheless violate *Section 2* through "attempted monopolization." Proving attempted monopolization requires a showing of: (1) anticompetitive or exclusionary conduct; (2) with specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *See* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. **[**23]** Anticompetitive conduct is "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*, disapproved of on other grounds by *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. An assessment **[*1284]** of intent is critical in determining whether an accused monopolist's actions qualify as anti-competitive conduct. *334 U.S. 100, 106-07*; *accord* *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)* (stating that "in the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

Covad's Sherman Act claims fall under three different categories of alleged anti-competitive behavior. First, Covad complains that BellSouth denied Covad the use of an "essential facility," namely its network of **[**24]** telephone lines. Although, as Covad recognizes, ***HN18***[] the antitrust laws in general do not require that firms (including monopolies) affirmatively help their competitors to succeed, there is a narrow exception to this general rule when a monopolist improperly withholds access to an "essential facility" without which a competitor cannot enter or compete in a market. *See, e.g.*, *Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla., 880 F.2d 297, 301 (11th Cir. 1989)* (hereinafter, "*Consolidated Gas I*"). [10] Second, Covad complains about BellSouth's "refusal to deal." ***HN19***[] Although a party may ordinarily choose freely the companies with which it will conduct business, when a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate *Section 2*. *See, e.g.*, *Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial, Inc. 919 F.2d 1517, 1522 (11th Cir. 1990)*. Third, Covad alleges that BellSouth illegally manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze." ***HN20***[] A price **[**25]** squeeze is an intentional pattern of pricing wholesale inputs at such a high level that Covad cannot absorb those costs and still compete profitably in the downstream retail markets. *See, e.g.*, *Cities of Anaheim, Riverside, Banning, Colton & Azusa, Cal. v. Fed. Energy Regulatory Comm'n, 941 F.2d 1234, 1238 (D.C. Cir. 1991)*. Covad alleges that by assigning inordinately high costs to its wholesale offerings, and inordinately low costs to its retail offerings, BellSouth squeezes out competitors such as Covad, clearing the field for its own retail services.

It is important to recognize that each of these three theories is related to Covad's allegation that BellSouth engages in what is known as "monopoly leveraging. **[**26]** " ***HN21***[] Monopoly leveraging occurs when a firm uses its market power in one market to gain market share in another market other than by competitive means. *See*

[10] *Consolidated Gas I* was reinstated, *en banc*, by *912 F.2d 1262 (11th Cir. 1990)* ("*Consolidated Gas II*"), which was then vacated and remanded in ***499 U.S. 915 (1991)***, because the parties reached a settlement and the case therefore became moot."

Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998) (citing *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979)* ("The use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2*, even if there has not been an attempt to monopolize the second market.")). For example, in this case, while BellSouth may not at present have a monopoly in the high-speed internet market, it can attempt to leverage its clear monopoly in the telecommunications market by refusing to deal with or provide essential facilities to competitors in the high-speed internet market. **[*1285]** ***HN22***[] We have previously held that monopoly leveraging can violate *Section 2*: "When a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in and monopolizing another market, we have no hesitation to conclude that the Sherman Act prohibits such conduct." *Key Enters. of Del., Inc. v. Venice Hosp., 919 F.2d 1550, 1568 (11th Cir. 1990)*, **[**27]** *vacated as moot by* *9 F.3d 893 (11th Cir. 1993)*. The Supreme Court has also found that a triable question of fact exists on a *Section 2* claim where a defendant used its control over one market to gain dominance in another market. *See* *Eastman Kodak, 504 U.S. at 482-83*; *see also* *Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 431 F.2d 334, 339 (5th Cir. 1970)*. [11] Guided by these basic principles of ***antitrust law***, we consider Covad's three claims sequentially. [12]

[28]** 1. *Essential Facilities*

HN24[] The withholding of access to an essential facility without which a competitor cannot enter or compete in a market is a violation of the antitrust laws. *See* *Consolidated Gas I, 880 F.2d at 301*. Under the well-established "essential facilities" doctrine, an inference of anticompetitive intent in violation of *Section 2* arises upon a showing of four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *See* *MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983)*. By exercising its control over an essential facility (sometimes called a "bottleneck") to withhold access to that facility, a monopolist can exclude competition. For example, in *Consolidated Gas I*, we found that a massive system of natural gas pipes controlled by the defendant was an essential facility. Control over that bottleneck, the gas pipelines, enabled the defendant to exercise its power in the market to exclude competition. **[**29]** *See* *Consolidated Gas I, 880 F.2d at 301*. "Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." *MCI, 708 F.2d at 1132*.

In *MCI, 708 F.2d at 1133*, the Seventh Circuit held that the local telephone network was an essential facility and that AT&T could not deny MCI reasonable access to it. Covad argues that *MCI* is essentially indistinguishable from the present case, and uses it as a template in stating the elements of its essential facilities claim. First, Covad alleges that BellSouth controls an essential facility, indeed, the same essential facility (local telephone exchange) at issue in *MCI*. *See id.* Second, Covad alleges that it would not be economically feasible "to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such an uneconomical duplication." *Id*. Third, **[*1286]** Covad contends that BellSouth denied interconnections to the essential facilities, and fourth, did so even though the interconnections **[**30]** could have been feasibly provided. *See id*. Finally, Covad maintains that BellSouth's conduct was intended to, and did, leverage BellSouth's local exchange monopoly into the local internet access markets to exclude Covad and to create or preserve BellSouth's monopoly power in the local internet access markets. *See id*.

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[11] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (*en banc*), ***HN23***[] the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

[12] We stress here that our inquiry is limited by the standard of review appropriate to BellSouth's *Rule 12(b)(6)* motion. Covad need only have alleged necessary elements of the relevant claims. We are not presented here with deciding, for example, whether telephone lines are in fact essential facilities for providing high-speed internet service, or whether BellSouth in fact had monopolistic intent in performing the alleged anticompetitive conduct. The standard of review at this stage is, of course, different than those at summary judgment or at trial.

BellSouth's response to this claim begins with a critique of the essential facilities doctrine itself, explaining that "essential facilities claims--along with other doctrines that Covad invokes in passing--exist at the fringes of ***antitrust law***." Br. of Appellee at 34 (citing *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir. 1995)* ("The essential-facilities line[] has been criticized as having nothing to do with the purposes of ***antitrust law***."). Whatever the merits of this critique, as the Seventh Circuit observed in *Blue Cross*, "**HN25**[] we are not authorized to abrogate doctrines that have been endorsed and not yet rejected by the Supreme Court." *Blue Cross, 65 F.3d at 1413* (citing *Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986))*.

With **[**31]** regard to the substance of Covad's essential facilities claim, BellSouth responds with three points. First, BellSouth argues that Covad cannot allege the most basic element of an essential facilities claim: the actual denial of access to an essential facility. BellSouth states that Covad conceded that BellSouth has participated in the interconnection and negotiation/arbitration process, and that BellSouth has provided all of the types of facilities that Covad has sought. According to BellSouth, the dispute is thus restricted to the following matters: the specific terms, timing, and implementation of the interconnection agreement; the alleged "delays" in obtaining collocation space and transport; and the "obstacles" in obtaining loops. BellSouth maintains that these complaints are properly characterized as claims regarding the terms or quality of access under the interconnection agreement, and that none of these claims can amount to an antitrust claim.

Second, BellSouth argues that Covad's claim fails because the essential facilities doctrine never applies where a competitor seeks "preferential access" or asks the owner to "abandon its facilities." Br. of Appellee at 39 (citing *MCI, 708 F.2d at 1133*). **[**32]** BellSouth explains that when Covad purchases an unbundled loop, it gains exclusive use of that loop, and that antitrust laws have never required a monopolist to "cease using its own facility so that [a competitor] can begin using it." *Id.* (quoting *City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1366 (9th Cir. 1992))*.

Third, BellSouth argues that Covad is attempting to use ***antitrust law*** not merely to gain access to facilities, but also to force BellSouth to construct new facilities or to alter the nature of its business and become a renter of facilities for competitors to use. BellSouth observes that "no case has suggested that the monopolist must build new capacity to satisfy a would-be sharer." *Id.* at 40 (quoting 3A Areeda & Hovenkamp, ***Antitrust Law*** P 773e, at 214). BellSouth characterizes Covad's claim as an attempt to harness the ***antitrust law*** to force BellSouth to build new facilities, to develop new software, or to modify existing facilities quickly enough to meet Covad's alleged business needs.

For the most part, these are arguments that must be addressed at a later stage of the proceedings, such as summary judgment or trial. We note that with **[**33]** regard to BellSouth's first point, **HN26**[] *Section 2* prohibits denial of access to essential **[*1287]** facilities *on reasonable terms*. *See* *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991)*; *City of Vernon, 955 F.2d at 1367*; *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 545 (4th Cir. 1991)*; *accord* *Del. & Hudson Ry. v. Consol. Rail Corp., 902 F.2d 174, 179-80 (2d Cir. 1990)* ("it is sufficient if the terms of the offer to deal are unreasonable"). The "applicable legal standard" is that "any company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors *on fair and reasonable terms* that do not disadvantage them." *United States v. AT&T, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981)* (emphasis added) (citing *United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*, and *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*, among **[**34]** other cases). As the Supreme Court explained in *Terminal R.R.*, a monopolist must provide access to essential facilities "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." [13] **[**35]** *224 U.S. at 411*. Whether or not Covad can

[13] BellSouth cites to a number of cases denying essential facilities claims, but those cases are distinguishable from the present case. For example, *Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir. 1996)*, affirming summary judgment, involved alleged overcharges under the parties' contract, not denial of access to essential facilities. *Anserphone, Inc. v. Bell Atl.*

ultimately prove a violation, its complaint does allege that Bell South sometimes denied access to its facilities outright and other times denied access on reasonable terms. [14]

As to BellSouth's second argument, we likewise note that the case upon which BellSouth relies, *City of Vernon, 955 F.2d at 1361*, affirmed a summary judgment, not a *Rule 12* dismissal. Moreover, *City of Vernon* sought exclusive use of a relative share of defendants' entire electrical transmission facilities. *See* *id. at 1364* & nn. 3 & 4. As we understand the claim here, Covad seeks temporary use of an element of the ratepayer-funded local telephone network only for so long as Covad has a customer, after which BellSouth **[**36]** regains full use of the facility (which at all times remains its property). That temporary use seems quite similar to the use of a pipeline in *Consolidated Gas I* and is nothing more than *MCI* found proper. *See* *MCI, 708 F.2d at 1132-33*. In any case, these are primarily fact issues that reflect upon the feasibility of the requested relief. It would thus be inappropriate to grant dismissal on this basis. Similarly, whether the relief sought would unreasonably require BellSouth to construct new facilities as opposed to granting nondiscriminatory access to existing ones is primarily a question **[*1288]** of fact inappropriate for disposition on a motion to dismiss.

Without venturing any opinion on the merits of its specific allegations, we conclude that Covad's complaint satisfies the "exceedingly low" threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim, *Quality Foods, 711 F.2d at 995*, namely, that it must adequately allege that as an integrated telecommunications company with monopoly control, BellSouth attempted to leverage its monopoly power in the high-speed internet market by giving itself preferential **[**37]** access to its essential facilities.

2. *Refusal to deal*

Covad also claims anticompetitive conduct based on BellSouth's refusal to deal with a competitor or potential competitor. ***HN28***[] Although a party may ordinarily choose the companies with whom it will conduct business, the existence of a "right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. When a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate *Section 2*. *See* *Mr. Furniture, 919 F.2d at 1522* (citing *National Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc. 747 F.2d 1396, 1402 (11th Cir. 1984)*, and *Otter Tail, 410 U.S. at 377-78*); *accord* *Lorain Journal Co. v. United States, 342 U.S. 143, 154, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*; *Mid-Texas Communications Sys., Inc. v. AT&T Co., 615 F.2d 1372, 1387 (5th Cir. 1980)* (right to refuse to deal is "limited when the company possesses a monopoly **[**38]** because the danger exists that it may use its monopoly position to decrease competition in other markets"). As the Supreme Court has explained, "it is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." *Eastman Kodak, 504 U.S. at 483 n.32*; *accord* *Aspen, 472 U.S. at 600-05* (affirming jury's monopolization finding where monopolist ski resort ended joint marketing program with competitor).

The Seventh Circuit has summarized the Supreme Court's holding in *Aspen* in terms useful to our consideration of the present case:

> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* . . . goes the furthest of any case we know toward imposing (more precisely, allowing a jury to impose) a duty under ***antitrust law*** to help a competitor; and as a recent decision by the Supreme Court it requires our most careful and respectful consideration. The Aspen Skiing

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Corp., 955 F. Supp. 418, 428-29 (W.D. Pa. 1996), found plaintiff's evidence of poor service an insufficient "constructive denial" of access to withstand summary judgment. *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990)* and *Valet Apt. Servs. Inc. v. Atlanta Journal & Constitution, 865 F. Supp. 828, 830-31 (N.D. Ga. 1994)*, involved fact-bound disputes about whether and where to place print advertisements.

[14] BellSouth's argument that the essential facilities claim is really an ordinary breach of contract claim does not support its motion to dismiss. Covad's allegations of anticompetitive conduct can and do "support antitrust liability" at the pleading stage. *Mr. Furniture Warehouse, 919 F.2d at 1522-23* (monopolist's refusal to deal supports *Section 2* claim where it is "designed to have an anticompetitive effect"). ***HN27***[] Breach of contract and antitrust are not mutually exclusive. *See* *City of Vernon, 955 F.2d at 1368*.

> Company owned three of the four mountains that make up the Aspen skiing complex. Aspen Highlands Skiing Corporation owned the fourth. The two companies had offered their **[**39]** customers a joint ticket, usable on all four mountains, and the suit arose because Aspen Skiing Company terminated this cooperative arrangement. The Supreme Court found that for the convenience of customers an owner of a ski mountain in a multi-mountain skiing area normally would want to offer a ski ticket usable on any of the mountains. The joint ticket had originated at a time when there was competition among the different ski mountains at Aspen, and similar tickets were offered at other multi-mountain ski areas. *105 S. Ct. at 2858*. In other words, competition required some cooperation among competitors. *Aspen Highlands* is not a conventional monopoly refusal-to-deal case like *Otter Tail* because Aspen Highlands was never a **[*1289]** customer of Aspen Skiing Company; the skiers are the customers. But it is like the essential-facility cases in that the plaintiff could not compete with the defendant without being able to offer its customers access to the defendant's larger facilities.

Olympia, 797 F.2d at 377.

As we understand it, Covad's refusal-to-deal claim is based on alleged facts that are virtually identical to those supporting its essential **[**40]** facilities claim; that is, Covad simply alleges that BellSouth has refused to deal with Covad with respect to an essential facility, and that this refusal was motivated by monopolistic intent. [15] The claim is thus an amalgam of *Aspen* and *Otter Tail*, in that Covad is a customer of BellSouth that would like to purchase from BellSouth the right to interconnect with BellSouth's essential facility.

[41]** In response, BellSouth argues that *Aspen* is inapposite, because in that case the Court held that the defendant had a duty to continue to deal where *termination* of the relationship would involve a "sacrifice [of] short-run benefits and consumer goodwill" in the interest of excluding a rival and reducing competition. *472 U.S. at 610-11*. BellSouth argues that Covad has never alleged that BellSouth has refused to deal (much less terminated a relationship); rather, BellSouth says, Covad alleged that Covad and BellSouth established a new relationship. We do not find this argument persuasive. In *Aspen*, which involved competitors only (not a competitor-customer relationship), defendant's termination of an existing joint-marketing relationship and accompanying sacrifice of short-term benefits supported the jury's inference of the defendant's anticompetitive intent. *See* *Aspen, 472 U.S. at 610-11*. However, those are not prerequisites for a refusal-to-deal claim, and *Aspen* does not say or suggest that they are. Other cases, such as *Otter Tail*, involve a refusal to deal where there has been no prior arrangement, and ***HN29***[] a vertically integrated monopolist **[**42]** that refuses to deal with a customer to foreclose competition in a second market may violate *Section 2*. *See* *Olympia, 797 F.2d at 376-77*. In other words, in *Aspen*, the fact that the defendant had terminated a long-standing and mutually economically beneficial agreement was significant only because it supported the jury's conclusion that the defendant's refusal to deal had been motivated by monopolistic intent rather than legitimate business purpose.

We note that in *Stein v. Pac. Bell Tel. Co., 173 F. Supp. 2d 975, 983 (N.D. Cal. 2001)*, the district court held that plaintiff had stated a valid antitrust claim on refusal-to-deal facts similar to those in the present case. In *Stein*, according to the plaintiff, Pacific Bell "entered into these optional and voluntary [1996 Act] agreements and then breached them or proceeded **[*1290]** to engage in bad faith conduct in carrying them out, without any business justification and with the intent to destroy its competitors . . . so as to unlawfully maintain its monopoly." *Id.* Citing *Aspen*, the plaintiff claimed that such conduct violated *Section 2* of the Sherman Act because Pacific Bell was "attempting **[**43]** to exclude rivals on some basis other than efficiency," thus making its conduct "predatory." *Id.*

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[15] BellSouth argues that Covad's complaint contains no specific allegation that BellSouth has forgone any economic advantage by failing to provide Covad with the accommodations it desires. Although it may be true that there is no specific allegation of this sort, the entire complaint alleges that BellSouth's failure to live up to its contractual duties was motivated by its will to monopolize, and showing that BellSouth has forgone an economic advantage is simply a fact that, if true, would tend to support the contention of monopolistic intent in the fact of a proffered legitimate business justification. Here, on motion to dismiss, there is no proffered legitimate business justification for Covad to refute, so the absence of specific factual allegation is irrelevant. *See, e.g.,* *Eastman Kodak, 504 U.S. at 483-84* (ruling on a summary judgment motion and noting that after plaintiff's presentation of evidence of Kodak's exclusionary action with monopolistic intent, Kodak bore the initial burden of presenting evidence of "valid business reasons" to justify its actions).

The *Stein* court held that even accepting *Goldwasser* in its entirety, the plaintiff had stated a valid claim. *Id. at 983-84* ("*Goldwasser* did not consider whether violations of the 1996 Act, if done in a 'predatory' manner as defined in *Aspen Skiing*, can make up an independent basis for liability under the Sherman Act. The plaintiffs in *Goldwasser* did not allege, as Stein alleges here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices.").

In essence, BellSouth asks this Court to conclude that it is impossible to find a refusal to deal where the defendant has formed an agreement with the plaintiff, in this case an agreement pursuant to the strictures of the 1996 Act. For the reasons stated above, we conclude that ***HN30***[] allegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws. [16]

[44]** 3. *Price Squeeze*

Covad also alleges that BellSouth manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze." BellSouth argues that Covad's allegations must fail because, as the district court stated, "there is no allegation that [BellSouth] set accompanying low retail prices for its own DSL services." BellSouth argues that in light of the 1996 Act's regulatory scheme, Covad's failure to allege accompanying low retail prices is fatal because BellSouth has no discretion over the prices it charges Covad for unbundled loops and other "inputs" that Covad uses; those charges are set by state commissions after extensive proceedings in accordance with the Act's standards. BellSouth maintains that these rates are not "merely tariffed" and BellSouth is not free to lower those rates unilaterally. *Compare* Br. of Amici Curiae Competitive Telecommunications Ass'n at 29 n.11. In addition, BellSouth argues that *section 252* provides that all network element rates must be "based on cost," *47 U.S.C. § 252(d)(1)*; accordingly, Covad's failure to allege that the rates **[**45]** BellSouth charges for its retail DSL service are below cost forecloses Covad's claim. BellSouth argues that ***antitrust law*** cannot possibly force a company to raise above-cost retail prices to give competitors a greater margin, because such a rule would hurt, rather than help, consumers. In essence, BellSouth contends that Covad's claim boils down to a complaint that the network element rates set by state commissions are too high. BellSouth further asserts that the appropriate remedy for this complaint is not a collateral antitrust action, but judicial review under *Section 252(e)(6)*.

Covad responds by stating that its complaint in fact did allege that BellSouth's retail prices "are set so low related to its unbundled wholesale loop prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on its investment." More important, **[*1291]** Covad maintains, this issue is irrelevant because whether or not there is a price squeeze should not depend on whether retail prices are "too low," but rather on the "squeeze" created by the disparity between the wholesale prices Covad must pay BellSouth upstream and the prices Covad must charge downstream to remain competitive **[**46]** with BellSouth. *See, e.g.*, *City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1176 n.4 (8th Cir. 1982)*. The presence of an illegal differential, Covad states, is precisely what Covad alleged. Covad also states that commission or other regulation at the wholesale end (or even both ends) of the price squeeze is no defense.

Both sides cite a number of cases in support of these positions, [17] but BellSouth's response to the claim is essentially factual in nature, and therefore it is inappropriate to grant BellSouth's motion to dismiss under *Rule 12*.

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[16] Again, this case is presented to us on a motion to dismiss. BellSouth's response that it has not *in fact* refused to deal, while an appropriate issue for consideration on motion for summary judgment or at trial, is not open to consideration here.

[17] BellSouth cites *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (rejecting "the notion that above-cost prices that are below . . . the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws"); *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 978-79 (6th Cir. 2000)* (plaintiff "has no statutory right to compete in the economic marketplace on [its] own terms and in such a manner as to accumulate expected profits"). *Compare* Br. of Amici Curiae Competitve Telecomm. Ass'n at 29 n.11 (arguing that BellSouth should have raised retail prices to protect competitors).

Whether or not BellSouth has any control over the wholesale prices it charges, or whether the differential between the wholesale and retail prices is such that Covad and other would-be DSL competitors are squeezed out--these are questions of fact. BellSouth may very well prevail on summary judgment, but for the purposes of the pleading stage, Covad's complaint states a claim under ***antitrust law***.

[47] II. *Breach of Contract Claims***

*The district court dismissed Covad's breach of contract claims for lack of jurisdiction, finding that they must first be presented to PSCs. This Court, however, recently held that "**HN31**[] state commissions . . . are not authorized under section 252 to interpret interconnection agreements" at all. Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Servs. Inc., 278 F.3d 1223, 1237 (11th Cir. 2002)*. BellSouth concedes that the trial court's reasoning is "inconsistent with *Bellsouth v. MCImetro*." In light of *MCImetro*, the trial court's dismissal for lack of jurisdiction must be reversed.

III. *The 1996 Act Claim*

***The trial court dismissed Covad's 1996 Act claim because it found any claims "related directly to duties under the 1996 Act" must be submitted to PSCs. R3-25-38. For the same reasons that apply to Covad's breach of contract claims, this ruling is inconsistent with MCIMetro* and must be reversed.**

IV. *State Law Claims*

***The trial court concluded that HN32[] Covad's state tort law claims were "preempted by the 1996 Act." This holding is irreconcilable with the Act's express "No Implied* [**48] Effect" clause, which set forth Congress' intent not to "modify, impair, or supercede Federal, State or local laws." Telecommunications Act of 1996, sec. 601(c)(1), *§ 152* note, 110 Stat. 56, 143 (1996).**

[*1292] *BellSouth does not attempt to defend the trial court's ruling, but argues instead that Covad has failed to plead any tort claims, asserting that conduct that constitutes a breach of contract can never support an interference claim. The cases BellSouth cites, St. Mary's Hosp. of Athens, Inc. v. Radiology Prof'l Corp., 205 Ga. App. 121, 421 S.E.2d 731, 735 (Ga. Ct. App. 1992)*, and *International Telecomm. Exch. Corp. v. MCI Telecomms. Corp., 892 F. Supp. 1520, 1543 n.19 (N.D. Ga. 1995)*, do not support that broad proposition. Rather, they were summary judgment cases where plaintiffs had failed to produce evidence that the defendant had actually induced any third party not to contract with the plaintiff. At the *Rule 12* stage, the only proper inquiry is whether Covad has alleged such direct interference. It has, in claiming that BellSouth "interfered with Covad's existing and prospective business relations with customers." Therefore, the dismissal of Covad's tort claims [49] must also be reversed.**

CONCLUSION

For the reasons stated above, the decision of the district court granting BellSouth's motion to dismiss is **REVERSED**, and the case is **REMANDED** for further proceedings in light of this opinion.

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Covad responds with *City of Kirkwood, 671 F.2d at 1179*, and *Fed. Power Comm'n v. Conway Corp., 426 U.S. 270, 279 (1976)* ("When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves.") (citation omitted).

Fresh Made, Inc. v. Lifeway Foods, Inc.

United States District Court for the Eastern District of Pennsylvania

August 8, 2002, Decided ; August 9, 2002, Filed

CIVIL ACTION NO. 01-4254

Reporter

2002 U.S. Dist. LEXIS 15098 *; 2002-2 Trade Cas. (CCH) P73,779

FRESH MADE, INC., Plaintiff v. LIFEWAY FOODS, INC., et al., Defendants

Disposition: [*1] Motion of Defendants Lifeway Foods, Inc. and Michael Smolyansky to dismiss amended complaint in its entirety or in alternative for more definitive statement was granted in part and denied in part.

Core Terms

alleges, amended complaint, antitrust, kefir, relevant market, argues, antitrust claim, unfair competition, conspiracy, Sherman Act, distributors, probability, specialty, products, parties, restraint of trade, civil conspiracy, dairy product, Lanham Act, contractual relationship, conspire, settlement agreement, lawsuit, anti trust law, containers, geographic, motion to dismiss, malicious abuse, interchangeability, manufacturers

LexisNexis® Headnotes

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Settlements > Releases From Liability > General Releases

HN1[] **Private Actions, Remedies**

The United States Court of Appeals for the Third Circuit has held that there is nothing in the public policy behind antitrust laws that prohibits general releases encompassing antitrust claims, provided that the release does not seek to waive damages from future violations of antitrust laws. A general release is sufficient to release antitrust claims.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

HN2[] Types of Contracts, Releases

The United States Court of Appeals for the Third Circuit has held that there is no federal policy which mandates a uniform national rule to govern the effect of a contractual release as applied to antitrust claims. Therefore, as long as state law guards against the antitrust violator's use of deception to avoid the federally-created cause of action, state law is properly applied to interpret releases of antitrust claims.

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

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Discharge, Release & Satisfaction

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN3[] Private Actions, Remedies

The part and parcel doctrine provides that a release is invalid if the release itself was an integral part of a scheme to violate the antitrust laws. To satisfy this standard, the release must be an object of the combination or conspiracy or an integral part of the scheme in restraint of trade. If the release is merely an outgrowth, rather than a cause of the violation, it is not part and parcel of the antitrust conspiracy. In addition, the part and parcel doctrine cannot be read so broadly as to render void all releases relating to conspiracies alleged to continue post-release. The part and parcel doctrine has been rarely discussed and more rarely applied. In fact, no court of appeals has ever applied the part and parcel theory to invalidate a release.

Civil Procedure > Settlements > Releases From Liability > General Overview

Contracts Law > Contract Interpretation > General Overview

HN4[] Settlements, Releases From Liability

Where release language is clear and unambiguous on its face, a court need not look to extrinsic evidence to give meaning to its terms.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN5[] Defenses, Demurrers & Objections, Motions to Dismiss

Under New York law, allegations of fraud in the inducement of a release warrant denial of a motion to dismiss that is grounded on a release.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Contracts Law > Remedies > Election of Remedies

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN6[] Types of Contracts, Releases

Because a release procured by fraud in the inducement is voidable at the option of the defrauded party, that party can choose to affirm or disaffirm the contract. In order to disaffirm the contract, the defrauded party must offer to return the consideration received. Under New York law, a party is entitled to affirm a contract and bring an action alleging fraud, while avoiding the defense of release.

Antitrust & Trade Law > Sherman Act > Claims

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN7[] Sherman Act, Claims

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. To establish a *§ 1* violation, a plaintiff must prove (1) concerted action by the defendants, (2) that produced anti-competitive effects within the relevant product and geographic markets, (3) that the concerted action was illegal, and (4) that the plaintiff was injured as a proximate result of the concerted action. To state a violation of *§ 1*, a plaintiff must allege that there has been an antitrust injury. An antitrust injury is the type of injury that the antitrust laws were enacted to prevent: an injury to competition rather than competitors. In order to allege an injury to competition, a plaintiff must allege an injury to competition in a particular relevant market. The plaintiff bears the burden of defining the relevant market. Failure to do so may result in the dismissal of an antitrust complaint. To recover damages, a private antitrust plaintiff must also allege that it has suffered an injury-in-fact that is attributable to something the antitrust laws were designed to prevent.

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

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

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

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

HN8[] Relevant Market, Geographic Market Definition

A relevant market for antitrust purposes is comprised of a geographic and a product market. The relevant product market is defined as those commodities reasonably interchangeable by consumers for the same purposes. The relevant geographic market is defined as the area in which a potential buyer may rationally look for the goods or services he or she seeks. This geographic market must conform to commercial reality.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

HN9[] **Market Definition, Relevant Market**

The United States Court of Appeals for the Third Circuit has instructed that although in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers, there is no prohibition against dismissal of antitrust claims for failure to plead a relevant market. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. Therefore, where a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand, a motion to dismiss may be properly granted.

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

HN10[] **Regulated Practices, Market Definition**

Reasonable interchangeability of use implies that one product is roughly equivalent to another for the use to which it is put. Reasonable interchangeability can be indicated by cross-elasticity of demand between the product itself and substitutes for it. Products in a relevant market are characterized by a cross-elasticity of demand; in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market.

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

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

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

Within a broad market, well-defined sub-markets may exist which, in themselves, constitute product markets for antitrust purposes. Factors indicating whether the finding of a sub-market is appropriate include industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. However, a complaint alleging a sub-market is not excused from grounding its allegations with facts regarding reasonable interchangeability and cross-elasticity of demand.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

HN12[] **Price Fixing & Restraints of Trade, Vertical Restraints**

If a plaintiff can show a per-se antitrust violation, market power in a relevant market need not be established. The United States Supreme Court has held that precedent limits the per-se rule in the boycott context to cases involving horizontal agreements among direct competitors. Therefore, ***antitrust law*** does not permit the application of the per-se rule in the boycott context in the absence of a horizontal agreement. In addition, no vertical restraint can be illegal per se unless it includes some agreement on price or price levels.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN13[] **Practices Governed by Per Se Rule, Boycotts**

An agreement between entities at different market levels is a vertical restraint, which is not illegal per se absent an agreement as to pricing levels.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

To state a federal antitrust claim under *15 U.S.C.S. § 1* of the Sherman Act, a plaintiff must allege a conspiracy or concerted activity by the defendant. A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Therefore, a plaintiff must plead the facts constituting the conspiracy, its object and accomplishment.

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

An internal agreement to implement a single firm's policies does not raise the antitrust dangers that *15 U.S.C.S. § 1* of the Sherman Act, was designed to police. Some courts have recognized that in cases where the agent is acting for personal reasons, an exception to the general rule that a corporation cannot conspire with its employees, officers or agents may exist. Where a plaintiff has not alleged that a defendant executive was acting to further his own economic interest in a marketplace actor which benefits from the alleged restraint, the personal interest exception does not apply.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN16[] Monopolies & Monopolization, Conspiracy to Monopolize

A corporation cannot conspire for antitrust purposes with a wholly-owned subsidiary.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Sherman Act, Claims

In order to prevail on an attempted monopolization claim under *15 U.S.C.S. § 2* of the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize, and with (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization, a court must inquire into the relevant product and geographic market and the defendant's economic power in that market. Under *§ 2*, as under *15 U.S.C.S. § 1*, the relevant market is defined by reasonable interchangeability and cross-elasticities of demand.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN18[] Consumer Protection, False Advertising

To establish a Lanham Act, *15 U.S.C.S. § 1051 et seq.*, violation, a plaintiff must prove that (1) the defendant has made false or misleading statements as to his own product or another's, (2) there is actual deception or at least a tendency to deceive a substantial portion of the intended audience, (3) the deception is material in that it is likely to influence purchasing decisions, (4) the advertised goods traveled in interstate commerce, and (5) there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, or the like.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN19[] Antitrust & Trade Law, Sherman Act

Pennsylvania courts have recognized that the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is merely the application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN20[] **Regulated Practices, Trade Practices & Unfair Competition**

Pennsylvania has recognized a common-law claim of unfair competition under the Restatement (Third) of Unfair Competition.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN21[] **Conspiracy, Elements**

A civil conspiracy under Pennsylvania law requires that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure is essential in proof of a conspiracy. In addition, under Pennsylvania law, as under federal ***antitrust law***, a corporation cannot conspire with itself, or with it officers or agents acting solely for the corporation.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN22[] **Inchoate Crimes, Conspiracy**

Under Pennsylvania law, a claim of civil conspiracy cannot be pled without also alleging an underlying actionable wrong. When a court dismisses the causes of action which underlie a civil conspiracy claim, the civil conspiracy claim must also be dismissed.

Torts > Intentional Torts > Abuse of Process > Elements

Civil Procedure > Parties > Joinder of Parties > General Overview

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

Torts > Negligence > Gross Negligence

HN23[] **Abuse of Process, Elements**

To establish a claim for malicious abuse of process under Pennsylvania law, it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff. Although the word "process" as used in this tort has been interpreted broadly to encompass the entire range of procedures incident to the litigation process, the gravamen of this tort is not the wrongful initiation of proceedings. Recognizing this fact, and the distinction between the tort of abuse of process and the tort of wrongful use of civil proceedings, courts have held that a complaint alleging only that one party initiated suit against another for improper purposes is insufficient to state a claim for malicious abuse of process. The tort of wrongful use of civil proceedings makes a person liable for initiating or continuing a civil proceeding if he acts (1) in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based, and (2) the proceedings have terminated in favor of the person against whom they are brought. Absent allegations that a party has abused the process after its issuance, an abuse of process claim cannot stand.

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

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN24[] **Intentional Interference, Elements**

To establish a claim for interference with contractual or prospective contractual relations under Pennsylvania law, a plaintiff must show (1) the existence of a contractual or prospective contractual relationship between the plaintiff and a third party, (2) a purpose or intent to harm an existing relationship or to prevent a prospective relationship from accruing, (3) the absence of privilege or justification on part of the defendant, and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct. When alleging interference with existing contractual relations, a plaintiff should identify which existing contractual relationships were hindered. When alleging interference with prospective contractual relations, the allegations need not be as precise. A plaintiff must not, however, rest a claim for tortious interference with prospective contractual relations on a mere hope that additional contracts or customers would have been forthcoming but for defendant's interference.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN25[] **Types of Contracts, Express Contracts**

A complaint for tortious interference with prospective contractual relations must allege facts that, if true, would give rise to a reasonable probability that particular anticipated contracts would have been entered into. Such a probability may arise from an unenforceable express agreement or an offer, or where there is a reasonable probability that a contract will arise from the parties' current dealings. However, merely pointing to an existing business relationship or past dealings does not reach this level of probability.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN26[] **Causes of Action, Interference With Business Relations**

Although the federal rules require only a short and plain statement of the claim, that statement must be sufficient to give the defendants notice of the claim and the grounds upon which it is based.

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN27[] **Intentional Interference, Elements**

Allegations of interference with business advantage must identify any particular potential relationships, or provide a basis for concluding that there was an objectively reasonable probability that such relationships would come into existence.

Counsel: For FRESH MADE, INC., PLAINTIFF: ELY GOLDIN, GRAYSON & GOLDIN, P.C., PHILA, PA USA.

For LIFEWAY FOODS, INC., MICHAEL SMOLYANSKY, DEFENDANTS: LOUIS W. SCHACK, MICHAEL T. SCOTT, REED, SMITH, SHAW & MC CLAY, PHILA, PA USA.

For LIFEWAY FOODS, INC., MICHAEL SMOLYANSKY, DEFENDANTS: RICHARD N. KESSLER, HARRIS KESSLER & GOLDSTEIN, LLC, CHICAGO, IL.

Judges: MARY A. McLAUGHLIN, J.

Opinion by: MARY A. McLAUGHLIN

Opinion

MEMORANDUM AND ORDER

McLaughlin, J.

August 8, 2002

The present case arises out of a long-running business and legal dispute between two competing manufacturers of specialty dairy products such as kefir, a fermented yogurt-style drink. Plaintiff Fresh Made, Inc. alleges that the defendants have engaged in unfair competition and have violated federal antitrust laws, various state laws, and the Lanham Act. Defendants Lifeway Foods, Inc. and Michael Smolyansky have filed a Motion to Dismiss the Amended Complaint.

Because the Court concludes that the Amended Complaint does not **[*2]** sufficiently allege a relevant antitrust market, the federal antitrust claims will be dismissed. The Court also finds that the state law claims, which are largely predicated upon the conduct underlying the federal antitrust claims, are insufficiently pled and must also be dismissed. However, the Amended Complaint does state a valid claim under the Lanham Act, and the motion to dismiss will be denied insofar as it seeks to dismiss that claim. The Court will grant Fresh Made leave to amend the complaint.

I. Background

Plaintiff Fresh Made, Inc. ("Fresh Made") is a closely held Pennsylvania corporation which has, since 1982, been engaged in the business of manufacturing, distributing and selling certain specialty dairy products, such as kefir, a fermented yogurt-style drink. Fresh Made targets these products to immigrants from the former Soviet Union. Defendant Lifeway Foods, Inc. ("Lifeway") is a publicly traded Illinois corporation that is a principal competitor of Fresh Made. Defendant Michael Smolyansky is the President and CEO of Lifeway.

Fresh Made alleges that Lifeway has been engaged in an illegal campaign of unfair competition designed to suppress and stifle Fresh **[*3]** Made's attempt to compete with Lifeway in the sale of kefir and other specialty dairy products. As part of this campaign, Fresh Made alleges that Lifeway threatened to pull its business from distributors who also did business with Fresh Made, threatened legal proceedings against distributors who did business with Fresh Made, and threatened to "call in" lines of credit it had provided to certain specialty food markets if they did not stop carrying Fresh Made products. Fresh Made further alleges that Lifeway conspired with manufacturers of kefir containers to restrict the sale of such containers to Fresh Made in an effort to restrict competition.

The Amended Complaint states that 20% of Lifeway's outstanding common stock is owned by Danone Foods, Inc. ("Danone"), which allegedly either controls or exercises significant influence over Lifeway's business activities. It also states that Danone and Lifeway entered into an agreement not to compete with each other. This agreement allegedly gave Lifeway direct entry into Danone's extensive distribution network.

In addition, Fresh Made alleges that Lifeway has filed a series of lawsuits against it, with the intent of driving Fresh Made out **[*4]** of business by forcing it to expend large amounts of money on legal fees. The first of these lawsuits, filed in the Northern District of Illinois, claimed that Fresh Made had copied Lifeway's use of milk-bottle shaped kefir containers. That suit was dismissed for want of personal jurisdiction in October of 1996. Shortly thereafter, Lifeway filed a similar lawsuit against Fresh Made in the Eastern District of Pennsylvania. That suit was ultimately dismissed in June of 1997 because Lifeway failed to serve a timely complaint.

In March of 1998, Lifeway once again filed suit over Fresh Made's use of milk-bottle shaped kefir containers, again in the Eastern District of Pennsylvania. The parties ultimately settled this lawsuit for a modest sum.

In August of 1999, Lifeway filed a fourth lawsuit against Fresh Made, this time in the Eastern District of New York. The suit alleged that Fresh Made was improperly marketing some of its dairy products under a Russian term that had been trademarked by Lifeway. [1] In that action, Fresh Made brought a counterclaim seeking to invalidate Lifeway's trademark. In April of 2000, the parties entered into a settlement agreement and mutual release. Pursuant **[*5]** to the terms of the release, the parties dismissed their claims against each other, and Lifeway agreed to purchase from Fresh Made all unused product labels for Fresh Made cheese products bearing the disputed Russian term. Fresh Made alleges that the $ 30,000 paid by Lifeway for these labels was really compensation for Fresh Made's agreement not to prosecute its trademark invalidation counterclaim.

Following the execution of the settlement agreement, Fresh Made alleges that Smolyansky threatened to make Fresh Made pay back the $ 30,000. Smolyansky also allegedly said that in America, it was the destiny of a big company to swallow up a little company like Fresh Made.

In May of 2001, Lifeway brought another lawsuit against Fresh Made, this time in Illinois state court. The suit alleges that Fresh Made has breached the terms of the settlement agreement by using labels on its butter products that are **[*6]** not in conformity with the terms of the agreement. This action is still pending in Illinois.

In the present action, Fresh Made alleges that Lifeway has violated *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*, by conspiring to restrict competition and attempting to obtain a monopoly in the market which includes kefir and other specialty dairy goods (Counts I and II). Fresh Made also brings state law claims for Restraint of Trade (Count III), Malicious Abuse of Process (Count IV), Interference with Existing and Prospective Business Relationships (Count V), Civil Conspiracy (Count VI), and Unfair Competition and Attempted Monopoly (Count VII). Finally, Fresh Made alleges that Lifeway has violated the Lanham Act, *15 U.S.C. § 1125(a)*, through the use of an advertisement for kefir that contains allegedly false representations (Count VIII). [2]

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[1] The Russian term is КРЕСТъЯНСКИЙ. The English transliteration of this term is Krest'yanskiy.

[2] The Amended Complaint also includes a claim for violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (Count X). Fresh Made, however, wishes to withdraw the claim, and it will be dismissed.

[*7] Presently before the Court is a Motion to Dismiss the Amended Complaint filed by defendants Lifeway and Smolyansky. [3] They argue that this suit is barred by the terms of the settlement agreement and release signed by the parties in April of 2000. The defendants also argue that Counts I through VII should be dismissed for failure to state a claim. Finally, the defendants have moved for a more definitive statement on Count VIII, should the Court find that the Lanham Act claim is not barred by the settlement agreement and release.

II. Settlement Agreement and Release

The settlement agreement entered into by the parties in April of 2000 was intended not only as a settlement **[*8]** of the trademark suit that was then pending in the Eastern District of New York, but also as a global settlement of all differences between the parties. Am. Compl. P 87. Indeed, the release language of the agreement is broad and global in scope. The release provides that Lifeway and Freshmade release each other from "any and all actions, causes of actions, [and] suits . . . [which the parties] now know of or which should have been known for, upon, and by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Settlement Agreement and Mutual Release." Ex. A. to Def.'s Mot. to Dismiss ("Agreement"), P 12.

Fresh Made makes several arguments about why the release should not bar its claims in the instant suit. First, Fresh Made argues that to read the release to bar its antitrust claims would be against public policy. [4] **[*10]** ***HN1***[] The Third Circuit, however, has held that "there is nothing in the public policy behind antitrust laws that prohibits general releases encompassing antitrust claims, provided that the release does not seek to waive damages from future violations of antitrust laws." *Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 896 n.27 (3d Cir. 1975)*. **[*9]** See *Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1310 (5th Cir. 1983)* (recognizing that "a general release [is] sufficient to release antitrust claims"). Because the release language in question does not seek to immunize future antitrust violations, applying the release to Fresh Made's antitrust claims is not against public policy. [5]

The plaintiff also argues that the release is part and parcel of the larger pattern of antitrust activity, and as such the release is illegal and invalid. ***HN3***[] The part and parcel doctrine provides that a release is invalid if the release itself was "an integral part of a scheme to violate the antitrust laws." *VKK Corp., 244 F.3d at 125* (citations omitted). To satisfy this standard, the "release must be an object of the combination or conspiracy or an integral part of the scheme in restraint of trade." Id. (citation and internal quotation marks omitted). If the release is "merely an outgrowth, rather than a cause of the violation, it is not part and parcel of the antitrust conspiracy." Id. (citation and

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[3] Lifeway and Smolyansky joined in the motion to dismiss, but the Court will refer throughout this memorandum to the parties collectively as "Lifeway." Danone was originally a defendant as well, but Fresh Made moved to dismiss Danone as a defendant, and by order of March 11, 2002, Danone was dismissed from the case. See Docket # 25.

[4] The settlement agreement has a choice of law clause which selects New York law to govern the terms of the agreement. See Agreement at P 17. At oral argument, Fresh Made's counsel conceded that New York law governs the agreement. Tr. of March 8, 2002 Hr'g ("Tr."), 3. However, in supplemental briefing, Fresh Made argued that federal common law should govern the agreement insofar as it is applied to bar any antitrust claim. ***HN2***[] The Third Circuit has held that there is no federal policy which mandates a uniform national rule to govern the effect of a contractual release as applied to antitrust claims. *Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 889 (3d Cir. 1975)*. Therefore, as long as state law "guards against the antitrust violator's use of deception to avoid the federally-created cause of action", state law is properly applied to interpret releases of antitrust claims. *Id. at 892* (applying Pennsylvania law). Because contractual releases procured by fraud are not enforceable under New York law, the Court finds that New York law appropriately governs the interpretation of the release at issue. See *Ladenburg Thalmann & Co. v. Imaging Diagnostic Sys., Inc., 176 F. Supp. 2d 199, 204 (S.D.N.Y. 2001)*; *Steen v. Bump, 233 A.D.2d 583, 649 N.Y.S.2d 731, 732 (N.Y. App. Div. 1996)*. See also, *VKK Corp. v. Nat'l Football League, 244 F.3d 114, 121-22 (2d Cir. 2001)* (applying New York law to determine the validity of a release encompassing antitrust claims).

[5] By its terms, the release does not bar any cause of action arising after the date of the release agreement. For that reason, to the extent that Fresh Made alleges claims that post-date the release, such claims survive Lifeway's motion to dismiss based on the release.

internal quotation marks omitted). In addition, "the part and parcel doctrine [cannot] be read so broadly **[*11]** as . . . to render void all releases relating to conspiracies alleged to continue post-release." *Id. at 126*. [6]

Fresh Made argues that its allegations "establish that Lifeway entered into the agreement solely because it sought to procure a release of Fresh Made's challenge to [Lifeway's] trademark and not because it intended to end all litigation and claims between the parties." Plf.'s Supp. Br. at 5. Even if true, this does not establish that the release itself was an integral part of the allegedly illegal antitrust activity. The plaintiff does not explain how the release was integral to the vexatious use of litigation or the attempts to prevent Fresh Made from competing **[*12]** with Lifeway, nor does the plaintiff argue that the alleged conspiracy could not have proceeded without the release. *VKK Corp., 244 F.3d at 126*. For that reason, the Court finds that Fresh Made cannot invoke the part and parcel doctrine to avoid the terms of the release.

Fresh Made also asserts that Lifeway's filing of the May 2001 suit in Illinois breached the terms of the settlement agreement, suspending Fresh Made's obligations under the release. Fresh Made alleges that although the Illinois lawsuit is styled as a breach of contract action, Lifeway is seeking to revisit the trademark infringement issues that were settled and released by the April 2000 agreement. However, as that action is currently pending in Illinois, it would be improper for this Court to look beyond the pleadings in an effort to examine the substance of that proceeding.

Similarly, Fresh Made asserts that by filing the May 2001 suit in Illinois, Lifeway violated the forum selection clause of the April 2000 agreement. However, the clause in question does not mandate New York as the exclusive forum for litigating issues pertaining to the agreement. The clause only provides that the parties "consent[] **[*13]** to the jurisdiction [of] the United States District Court of the Eastern District of New York" and "waive any rights to challenge [that] jurisdiction and venue". Agreement at P 17. Therefore, Lifeway did not, simply by filing in Illinois, plainly violate the terms of the settlement agreement. [7]

[*14] Finally, Fresh Made argues that the agreement is unenforceable because it was procured by fraud. ***HN5***[] Under New York law, "allegations of fraud in the inducement of a release warrant denial of a motion to dismiss that is grounded on a release." *Ladenburg Thalmann & Co. v. Imaging Diagnostic Sys., Inc., 176 F. Supp. 2d 199, 205 (S.D.N.Y. 2001)*. See *Steen v. Bump, 233 A.D.2d 583, 649 N.Y.S.2d 731, 732 (N.Y. App. Div. 1996)*.

In the Amended Complaint, Fresh Made alleges that even when negotiating the April 2000 settlement agreement that was supposed to be a settlement of all differences between the parties, Lifeway intended to bring further litigation against Fresh Made. Am. Compl. at PP 87, 92. This allegation of fraud is sufficient, at this point, to avoid Lifeway's motion to dismiss insofar as it is based on the settlement agreement and release. [8]

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[6] As the Second Circuit recently noted, the "part and parcel" doctrine has been "rarely discussed and more rarely applied." *VKK Corp., 244 F.3d at 125*. In fact, the VKK Court observed that no court of appeals "has ever applied the part and parcel theory to invalidate a release." *Id. at 126*.

[7] At oral argument, Fresh Made also argued that the release should not be applied at the motion to dismiss stage to bar its claims. Under New York law, Fresh Made argues, courts interpreting broad release language are required to go behind the language to determine what the intent of the parties to the agreement was. The caselaw relied on by Fresh Made, however, merely holds that when parties enter into a release "purporting to exempt a party from liability for injuries *which may occur in the future*", the release covers only those claims which were "within the contemplation of the parties at the time" of execution. *Bradley Realty Corp. v. State of New York, 54 A.D.2d 1104, 389 N.Y.S.2d 198, 199 (N.Y. App. Div. 1976)* (emphasis added). See *Beardslee v. Blomberg, 70 A.D.2d 732, 416 N.Y.S.2d 855, 856-57 (N.Y. App. Div. 1979)*. The release in this case does not seek to exempt either party from liability for future conduct, but releases only past claims. Therefore, because the ***HN4***[] release language is clear and unambiguous on its face, the Court need not look to extrinsic evidence to give meaning to its terms. See, e.g., *Goldberg v. Mfr's Life Ins. Co., 242 A.D.2d 175, 672 N.Y.S.2d 39, 44 (N.Y. App. Div. 1998)*.

[8] ***HN6***[] Because a release procured by fraud in the inducement is voidable at the option of the defrauded party, that party can choose to affirm or disaffirm the contract. See Laudenberg, 176 F. Supp. 2d at 204. In order to disaffirm the contract, the defrauded party must offer to return the consideration received. Id. Fresh Made asserts that it may maintain the current action

[*15] III. Sherman Act *Section 1*

HN7[] *Section 1* of the Sherman Act Provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Fresh Made alleges that Lifeway's agreements with manufacturers of kefir containers, distributors, and store owners to restrict Fresh Made's access to the market constitute a continuing conspiracy in restraint of trade that violations *Section 1*.

To establish a *Section 1* violation, a plaintiff must prove (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997)*. Lifeway argues that Fresh Made has failed to sufficiently allege a relevant antitrust market, antitrust injury, or concerted action.

To state a violation of *Section 1*, a plaintiff must allege that there has been an antitrust injury. **[*16]** [9] An antitrust injury is the type of injury that the antitrust laws were enacted to prevent - an injury to competition rather than competitors. See *Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours and Co., 826 F.2d 1235, 1241 (3d Cir. 1987)* ("***antitrust law*** aims to protect competition, not competitors"). In order to allege an injury to competition, a plaintiff must allege an injury to competition in a particular relevant market. See *Eichorn v. AT & T Corp., 248 F.3d 131, 147-48 (3d Cir. 2001)*. The plaintiff bears the burden of defining the relevant market. *Queen City, 124 F.3d at 436*. Failure to do so may result in the dismissal of an antitrust complaint.

[*17] ***HN8***[] A relevant market for antitrust purposes is comprised of a geographic and a product market. The relevant product market is defined as "those commodities reasonably interchangeable by consumers for the same purposes." *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1992)*. The relevant geographic market is defined as the "area in which a potential buyer may rationally look for the goods or services he or she seeks." *Id. at 726*. This geographic market must "conform to commercial reality." *Eichorn, 248 F.3d at 147*.

Lifeway argues that Fresh Made has failed to define a proper product or geographic market, and that the *Section 1* claim must, therefore, be dismissed. Fresh Made counters that it has fairly alleged a relevant market. It asserts that

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without returning the $ 30,000 it received under the agreement because it is entitled to affirm the contract and seek to recover damages in an amount equal to the difference between the actual value of the contract and the value as fraudulently represented by Lifeway. Fresh Made argues that there is a question of fact about whether or not the $ 30,000 was given by Lifeway as consideration for the release or consideration for the purchase of labels. For that reason, Fresh Made believes that it is entitled to affirm the contract for the purchase of labels and to maintain its suit while avoiding the release. Under New York law, a party is entitled to affirm a contract and bring an action alleging fraud, while avoiding the defense of release. See *Goldsmith v. Nat'l Container Corp., 287 N.Y. 438, 442-43, 40 N.E.2d 242 (N.Y. Ct. App. 1942)* ("the releases given by the plaintiff, which the defendants' answer pleads as a defense, do not bar the present action at law whereby the plaintiff seeks damages due to alleged fraudulent misrepresentations and concealments which induced him to give such releases"). For that reason, Fresh Made need not, at this point, return the $ 30,000 received under the April 2000 agreement in order to avoid the release through its allegations of fraud.

[9] To recover damages, a private antitrust plaintiff must also allege that it has suffered an "injury in fact" that is attributable to something the antitrust laws were designed to prevent. See *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. The Amended Complaint alleges that Fresh Made suffered economic losses such as "lost income, revenues and profits", that it has been deprived of the opportunity to expand, grow or otherwise become more profitable, and that its participation in the market has been restricted or reduced. Am. Compl. at PP 100, 101, 105(b). These allegations sufficiently state that Fresh Made has suffered an injury in fact. See ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments, 762 (4th ed. 1997). In addition, as a direct competitor of Lifeway, the injuries to Fresh Made's business and participation in the market fall into the category of injuries that flow from the conduct that the antitrust laws were intended to prevent. See *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 & n.14 (3d Cir. 1983)*.

the relevant geographic market is the United States, and the relevant product market is specialty Russian dairy foods, including kefir. [10] See Am. Compl. PP 17, 19, 116.

[*18] *HN9*[] The Third Circuit has instructed that although "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers", there is no "prohibition against dismissal of antitrust claims for failure to plead a relevant market". *Queen City, 124 F.3d at 436*. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." Id. Therefore, where a "complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand" a motion to dismiss may be properly granted. *Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)* (cited by *Queen City, 124 F.3d at 437*).

In the Amended **[*19]** Complaint, Fresh Made does not ground its allegations regarding product market with reference to the rule of reasonable interchangeability and cross-elasticity of demand. [11] **[*20]** Fresh Made does not allege facts establishing that the market for specialty Russian dairy products, such as kefir, is distinct from the market for yogurt, other drinkable yogurt products, or from other dairy products in general. [12] The amended complaint contains no allegations relating to the price of and/or the demand for kefir and other specialty Russian dairy products relative to products in the larger dairy market as a whole. Fresh Made simply fails to allege whether there are reasonably interchangeable alternatives for its products. It is also unclear from the allegations what relationship kefir has to other specialty Russian dairy products or why they are appropriately in the same product market.

[*21] Without pleadings asserting otherwise, the Court cannot at this point conclude that the proposed market of kefir and other specialty Russian dairy products is an appropriately separate and distinct market, and therefore a relevant market for antitrust purposes. See, e.g., *Queen City, 124 F.3d at 436-37*, citing, *B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 172 (S.D.N.Y. 1995)* (dismissing antitrust claim because there were no pleadings that the "chest equalization radiography" market was independent from the "overall X-ray market"); *E. & G. Gabriel v. Gabriel Bros., Inc. 1994 U.S. Dist. LEXIS 9455*, No. 93 Civ. 0894 (PKL), 1994 WL 369147, at **3-5 (S.D.N.Y. July 13, 1994) (dismissing antitrust claim because proposed market contained varied items with no cross-elasticity of demand); *Re-Alco Indus., 812 F. Supp. at 392* (dismissing antitrust claim where the

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[10] The United States can, in appropriate instances, be a relevant geographic market. See, e.g., *United States v. Grinnell Corp., 384 U.S. 563, 575, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

[11] *HN10*[] Reasonable interchangeability of use implies that "one product is roughly equivalent to another for the use to which it is put." *Queen City, 124 F.3d at 437*. Reasonable interchangeability can be indicated by cross-elasticity of demand between the product itself and substitutes for it. Id. Products in a relevant market are "characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market." Id. (quoting *Tunis Bros., 952 F.2d at 722*).

[12] Fresh Made does allege that its products serve the needs of the "Russian-speaking immigrant community that has taken residence in the United States." Am. Compl. P 17. Fresh Made also alleges that it is these immigrants who represent the market for the "niche or specialty dairy products" that it produces. Id. at P 19. These allegations suggest that Fresh Made may be able to plead a relevant sub-market within the overall dairy market. See *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* *HN11*[] (holding that within a "broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes"). Factors indicating whether the finding of a sub-market is appropriate include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Id. See *Tower Air, Inc. v. Federal Express Corp., 956 F. Supp. 270, 280 (E.D.N.Y. 1996)*; *Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1258 (E.D. Pa. 1987)*. However, a complaint alleging a submarket is not excused from grounding its allegations with facts regarding reasonable interchangeability and cross-elasticity of demand.

complaint failed to "discuss the existence or nonexistence" of alternate products "and any relevant differences in demand"). The Court concludes that the Amended Complaint fails to sufficiently define a relevant product market in support of the *Section 1* claim.

Fresh **[*22]** Made argues that even if the Amended Complaint fails to adequately allege a relevant market, it has alleged activity that constitutes a *per se* antitrust violation, and as such, it need not plead or establish a relevant market. ***HN12***[] If a plaintiff can show a *per se* antitrust violation, market power in a relevant market need not be established. See *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 431-35, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)*; *Eichorn, 248 F.3d at 147 n.4*; In re: *Mercedes-Benz AntiTrust Litig., 157 F. Supp. 2d 355, 359 (D. N.J. 2001)*. Fresh Made argues that because the complaint alleges a concerted refusal to deal (a boycott), it has alleged a *per se* violation, and any failure to plead a relevant market is immaterial.

The Supreme Court has, however, held that "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*. Therefore, "***antitrust law*** does not permit the application of the *per se* rule in the boycott context **[*23]** in the absence of a horizontal agreement." *Id. at 138*. In addition, no vertical restraint can be "illegal *per se* unless it includes some agreement on price or price levels." *Id. at 136* (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735-36, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*).

The Amended Complaint alleges only a vertical boycott between Lifeway, the kefir container manufacturers, distributors and store owners. [13] See, e.g., *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 (10th Cir. 1992)* ***HN13***[] (agreement between "entities at different market levels" is a vertical restraint, which is not illegal *per se* absent an agreement as to pricing levels). In addition, there is no allegation that this boycott was designed to affect the price of kefir or other specialty dairy goods. For these reasons, the Amended Complaint does not properly allege a *per se* antitrust violation. Therefore, the failure to sufficiently allege a relevant antitrust market is fatal to Fresh Made's claim under *Section 1* of the Sherman Act.

[*24] Lifeway also argues that Fresh Made has failed to sufficiently allege an antitrust conspiracy or concert of action. ***HN14***[] To state a federal antitrust claim under *Section 1*, a plaintiff must allege a conspiracy or concerted activity by the defendant. See *Queen City, 124 F.3d at 442*. A "general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action". *Fuentes v. South Hills Cardiology, 946 F.2d 196, 201-202 (3d Cir. 1991)* (citation omitted). Therefore, a plaintiff "must plead the facts constituting the conspiracy, its object and accomplishment." Id.

The Amended Complaint alleges that Lifeway conspired, with the "express or implicit consent" of Danone, with manufacturers of kefir containers, with distributors, and with store owners, in violation of *Section 1*.

To the extent that a conspiracy is alleged to exist between Lifeway and Smolyansky, such allegation is insufficient. ***HN15***[] Such an internal agreement "to implement a single firm's policies does not raise the antitrust dangers that *[Section 1*] was designed to police." *Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1132 (3d Cir. 1995)* **[*25]** (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*). Although some courts have recognized that in cases where the agent is acting "for personal reasons", an "exception to the general rule that a corporation cannot conspire with its employees, officers or agents" may exist, any such exception is not applicable here. *54 F.3d at 1135*. Because Fresh Made has not alleged that Smolyansky was acting to "further his own economic interest in a marketplace actor which benefits from the alleged restraint", the personal interest exception does not apply. *54 F.3d at 1136-37*.

In addition, to the extent that Fresh Made alleges a *Section 1* conspiracy between Lifeway and Danone, such allegations may be insufficient. Copperweld held that ***HN16***[] a corporation cannot conspire for antitrust purposes with a wholly-owned subsidiary. *Copperweld, 467 U.S. at 771-72*. The Amended Complaint states that Danone is

[13] There is no allegation that Danone is a competitor of Lifeway in the relevant market, so any argument that any alleged agreement between those two parties is sufficient to state a horizontal boycott would be unavailing.

the owner of 20% of Lifeway's outstanding common stock. Danone's alleged 20% interest in Lifeway does not appear to be enough to invoke the Copperweld rule. [14] However, the allegation that Danone controls **[*26]** or exercises significant and substantial influence over Lifeway arguably makes Danone and Lifeway a single entity with unity of interests, incapable of conspiring under Copperweld. [15] See *Eichorn, 248 F.3d at 138* (recognizing that a parent and its wholly owned subsidiary cannot conspire because they have "complete unity of interest" and one "corporate consciousness").

[*27] In any event, Fresh Made also alleges that Lifeway has conspired with manufacturers of kefir containers, distributors, and store owners. [16] Am. Compl. PP 97(a)-(d). No Copperweld problem arises with regard to these entities. [17]

[*28] Fresh Made has requested leave to amend its complaint to the extent that it has failed to adequately allege a proper market in support of its antitrust allegations. Plf.'s Br. at 50. Although the Court recognizes that Fresh Made has already amended its complaint once as a matter of right and has yet to plead a valid antitrust claim, the Court will permit Fresh Made an opportunity to amend its complaint. If Fresh Made can, in good faith, plead a relevant antitrust market with appropriate well-founded allegations to support a Sherman Act claim, it may attempt to do so.

IV. Sherman Act *Section 2*

HN17[↑] In order to prevail on an attempted monopolization [18] claim under *Section 2* of the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize, and with (3) a dangerous probability of achieving monopoly power. *Queen City Pizza, 124 F.3d at 442*; *Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir. 1992)*. "In order to determine whether there is a dangerous probability of monopolization, a court must inquire into the relevant product and geographic market and **[*29]** the defendant's economic power in that market." *Queen City, 124 F.3d at 442* (citations and internal quotation marks omitted). Lifeway argues that the *Section 2* claim must be dismissed because Fresh Made cannot establish a dangerous probability of achieving monopoly power without defining the relevant product and geographic markets. [19]

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[14] Courts have, however, extended Copperweld to situations where the parent corporation owned all but a *de minimis* portion of the subsidiary. See *Siegel Transfer, 54 F.3d at 1132-33* (applying Copperweld because 99.92% stock ownership was *de minimis* variation from 100% ownership); Julian O. von Kalinowski, et al., 1 Antitrust Laws and Trade Regulation, § 11.02[2][a][iii] at 11-16 through 11-17 (2d Ed. Matthew Bender, 2001) (citing cases).

[15] Fresh Made also cites a pre-Copperweld case from the Northern District of California to support its argument that single firm behavior can be litigated under *Section 1* under a "thin conspiracy" theory. See *Gen. Communications Eng'g, Inc. v. Motorola Communications and Elecs., Inc., 421 F. Supp. 274 (N.D. Cal. 1976)*. However, as it pre-dates Copperweld, it is of little value.

[16] Lifeway argues that because these persons or entities are unnamed, the allegation is insufficient. At oral argument, Fresh Made stated that if granted leave to amend the complaint, it would name at least some of the manufacturers, distributors, and store owners involved in the conspiracy. Tr. at 52. Such an amendment should alleviate Lifeway's concern.

[17] Lifeway also argues that Fresh Made's allegations of conspiracy between Lifeway and manufacturers, distributors, and store owners describe statements made exclusively by Lifeway, and action by the other entities only under duress. See Am. Compl. PP 36-40. However, "even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator" for purposes of *Section 1*. E.g., *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 261 F. Supp. 381, 385 (E.D. Pa. 1966)*, aff'd *388 F.2d 789 (3d Cir. 1967)*.

[18] *Section 2* can support a claim for monopolization or attempted monopolization. The Amended Complaint states only a claim for attempted monopolization. Am. Compl. PP 112-117.

[19] Lifeway did not challenge the Amended Complaint's allegations of anti-competitive conduct. In addition, Fresh Made alleges that Lifeway had specific intent to achieve monopoly power, and the alleged statements of Smolyansky are a sufficient factual basis for this assertion. See Am. Compl. PP 74 & 112.

Under *Section 2*, as under *Section 1*, the relevant market is defined by reasonable interchangeability and cross-elasticities of demand. *Id., at 442 n. 18*. Because **[*30]** the Court has found that Fresh Made has not alleged a sufficient market in terms of reasonable interchangeability and cross-elasticity of demand, the *Section 2* claim will also be dismissed. See *id. at 442*.

Even had Fresh Made sufficiently described a relevant antitrust market, the Amended Complaint has not sufficiently alleged that there is a dangerous probability that Lifeway would achieve monopoly power. Although the Amended Complaint states that there "exists a dangerous probability that Lifeway will succeed in achieving a monopoly over the Russian specialty dairy product market in the United States", such a conclusory allegation standing alone is insufficient to state a *Section 2* attempted monopolization claim. See, e.g., *E. & G. Gabriel, 1994 U.S. Dist. LEXIS 9455, 1994 WL 369147* at *5 (allegation that defendant had "a dangerous probability of achieving monopoly power" insufficient where claim was otherwise deficient).

The Amended Complaint alleges that Lifeway's gross annual revenues are five times as large as Fresh Made's, that Lifeway has achieved access to Danone's large distribution network, and that Lifeway has used its influence to threaten distributors and food **[*31]** markets who did not agree to its demands. Am. Compl. at PP 6, 10, 113 & 117. Fresh Made does not, however, allege the overall size of the proposed market, identify Lifeway's percentage share of the proposed market, identify other participants and competitors in the market, or allege what percentage of Lifeway's gross annual revenues are derived from the proposed market. Therefore, the allegations regarding the relative size of the parties do not sufficiently illustrate that Lifeway has a dangerous probability of achieving monopoly power in the relevant market.

V. Lanham Act

Count VIII of the Amended Complaint alleges that Lifeway has violated the Lanham Act by publishing certain advertisements for kefir that are false and misleading. The allegedly false advertisements state that Lifeway's kefir is "America's only real kefir." Am. Compl. P 170 & Ex. C.

Lifeway does not argue that Fresh Made has failed to plead the requisite elements of a Lanham Act claim. [20] Rather, Lifeway argues that because the Amended Complaint does not allege that the advertisements were published after the date of the April 2000 settlement agreement, the claim is barred by the release. The Amended **[*32]** Complaint does, however, allege that "Lifeway represents that it sells 'America's only real kefir.'" Am. Compl. at P 170. Read in a light most favorable to the plaintiff, this allegation asserts on-going conduct. As such, it alleges that the advertisements post-date the release. [21]

[*33] Lifeway also claims that because Count VIII incorporates by reference the previous allegations contained in the Amended Complaint, "it is impossible" for Lifeway to respond to the allegations as presently pled. Def.'s Br. at 23. Therefore, Lifeway argues that Fresh Made should be required to re-plead Count VIII. The Court disagrees. The allegations in Count VIII, standing alone, are sufficient to put Lifeway on notice as to the nature of Fresh Made's Lanham Act claim. Lifeway's request that Fresh Made be required to re-plead the claim will be denied.

VI. Unfair Competition and Restraint of Trade

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[20] ***HN18***[] To establish a Lanham Act violation, a plaintiff must prove that: (1) the defendant has made false or misleading statements as to his own product or another's; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods traveled in interstate commerce; and (5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, or the like. *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922-23 (3d Cir. 1990)*.

[21] Of course, because Fresh Made has alleged that the release was procured by fraud, the release cannot, at this stage, act to bar the Lanham Act claim.

Lifeway argues that because Fresh Made is unable to state a valid federal antitrust claim, Counts III (Restraint of Trade) and VII (Unfair Competition) should also be dismissed. The Court agrees.

Fresh Made alleges that the actions underlying its Sherman Act claims also constitute an unreasonable restraint of trade under Pennsylvania law. Am. Compl. P 125. ***HN19***[] Pennsylvania Courts have recognized that the Sherman Act is "merely the application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce." *Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A.2d 493, 496 (Pa. 1973)*. **[*34]** See *Yeager's Fuel, Inc. v. Pa. Power & Light Co., 953 F. Supp. 617, 668 (E.D. Pa. 1997)*; Lakeview Ambulance & Med. Servs., Inc. v. Gold Cross Ambulance & Med. Serv., Inc., No. 1994-2166, 1995 WL 842000, *4 (Pa. Ct. Comm. Pleas, Oct. 18, 1995). Therefore, the restraint of trade claim will be dismissed for the reasons given in the Court's Sherman Act discussion. [22] See *Yeager's Fuel, 953 F. Supp. at 668* ("the Court's decision regarding Plaintiffs' common-law restraint of trade claim mirrors the conclusion reached in assessing Plaintiffs' claim under *§ 1* of the Sherman Act").

[*35] ***HN20***[] Pennsylvania has recognized a common-law claim of unfair competition under the Restatement (Third) of Unfair Competition. See *Yeager's Fuel, 953 F. Supp. at 668*; Lakeview Ambulance, 1995 WL 842000 at *2; *Restatement (Third) Unfair Competition § 1(a)* & *Comment g*. Fresh Made alleges that Lifeway's efforts to "restrict [Fresh Made's] market share" and to "establish a monopoly over the specialized dairy products" market constitute acts of unfair competition. Am. Compl. PP 156 & 157. As these allegations essentially mirror Fresh Made's Sherman Act claims, they suffer from the same deficiencies in how Fresh Made has attempted to define market share and the relevant market. For that reason, the Unfair Competition claim will also be dismissed. Cf. *Yeager's Fuel, 953 F. Supp. at 668* (allowing unfair competition claim to go forward because there were "fact issues concerning whether [the defendant] violated the various federal antitrust statutes").

VII. Civil Conspiracy

Count VI of the Amended Complaint alleges that the "defendants have, among themselves, agreed to embark on a course of conduct with the specific intent of **[*36]** restraining Fresh Made's business." Am. Compl. P 150. Lifeway argues that this claim should be dismissed because it is merely a restatement of Fresh Made's antitrust claims, because the defendants, having unity of interest, cannot conspire with one another, and because Fresh Made has failed to allege the requisite degree of malice.

HN21[] "A civil conspiracy under Pennsylvania law requires that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure is essential in proof of a conspiracy." *Keating v. Bucks County Water & Sewer Auth., 2000 U.S. Dist. LEXIS 18690*, *No. Civ. A. 99-1584, 2000 WL 1888770*, *16 (E.D. Pa. Dec. 29, 2000) (citing *Skipworth by Williams v. Lead Indus. Ass'n., Inc., 547 Pa. 224, 690 A.2d 169, 174 (Pa. 1997)* and *Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979))*. In addition, under Pennsylvania law, as under federal ***antitrust law***, a corporation cannot conspire with itself, or with it officers or agents acting solely for the corporation. See, e.g., *Keating, 2000 U.S. Dist. LEXIS 18690, 2000 WL 1888770* at *16; *Fox v. Keystone Turf Club, Inc., 1997 U.S. Dist.*

[22] The Court also recognizes that it is questionable whether a plaintiff can recover damages under a common law restraint of trade theory in Pennsylvania. Some courts have concluded that there is no private remedy for damages under a common law restraint of trade theory, while others have left the question open. See *Collins, 304 A.2d at 498* (finding an agreement in restraint of trade to be invalid, but awarding only injunctive relief, holding that the record did "not provide any legal basis for an award of damages"); Lakeview Ambulance, 1995 WL842000 at *4 (recognizing that certain courts have recognized a common law anti-trust cause of action, "but only in the limited circumstances of trademarks, trade secrets, or restraint of trade pursuant to statute"); *XF Enters. Inc. v. BASF Corp., 47 Pa. D. & C.4th 147*, No. 9906-1477, 2000 WL 33155746, *1 (Pa. Ct. Comm. Pleas July 13, 2000) ("No court to date has held that a private remedy is available for damages under Pennsylvania's common law on antitrust violations."). Even if a private plaintiff in Pennsylvania could recover under common law restraint of trade theory, the Amended Complaint has failed to state such a claim. Therefore, the Court need not, at this point, decide whether it would be possible for a plaintiff to recover under such a theory.

LEXIS 19370, No. Civ. A. 97-1424, 1997 WL 793590,*2 (E.D Pa. Dec. 4, 1997); **[*37]** . Thompson Coal, 412 A.2d at 473.

Because there are no allegations that Smolyansky was acting outside of his role as a director of Lifeway, any alleged conspiracy between him and Lifeway fails as a matter of law. See, e.g., Fox, 1997 U.S. Dist. LEXIS 19370, 1997 WL 793590 at *2. Similarly, because Fresh Made alleges that Danone controls and exercises significant influence over Lifeway, any allegation of conspiracy between Danone and Lifeway raises similar concerns. [23]

[*38] In any event, ***HN22***[] under Pennsylvania law, a claim of civil conspiracy cannot be pled without also alleging an underlying actionable wrong. See Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 405 (3d Cir. 2000). When a court dismisses the causes of action which underlie a civil conspiracy claim, the civil conspiracy claim must also be dismissed. See, e.g., Samuel v. Clark, 1996 U.S. Dist. LEXIS 11487, No. Civ. A. 95-6887, 1996 WL 448229, *4 (E.D. Pa. Aug. 7, 1996) (dismissing conspiracy claim where underlying claims for fraud and discrimination were dismissed); Rose v. Wissinger, 294 Pa. Super. 265, 439 A.2d 1193, 1199 (Pa. Super. Ct. 1982) (dismissing conspiracy claim where defamation and outrageous conduct claims were dismissed); Raneri v. Depolo, 65 Pa. Commw. 183, 441 A.2d 1373, 1376 (Pa. Cmwlth. 1982) (dismissing conspiracy claim where underlying claim for defamation was dismissed); see generally Boyanowski, 215 F.3d at 405 (overturning civil conspiracy verdict where jury found no liability on underlying tortious interference claim); GMH Assocs., Inc. v. Prudential Realty Grp., 2000 PA Super 59, 752 A.2d 889, 905 (Pa. Super. 2000) **[*39]** (setting aside civil conspiracy verdict where underlying fraud verdict was reversed on appeal).

Fresh Made's civil conspiracy claim is predicated upon the same conduct underlying the antitrust, unfair competition, and restraint of trade claims. Because the Court will dismiss those claims, the claim for civil conspiracy must also be dismissed. See, e.g., Samuel, 1996 U.S. Dist. LEXIS 11487, 1996 WL 448229 at *4.

VIII. Malicious Abuse of Process

In Count IV of the Amended Complaint, Fresh Made alleges that the series of lawsuits filed against it by Lifeway constitute the tort of malicious abuse of process. ***HN23***[] To establish a claim for malicious abuse of process under Pennsylvania law, it must be shown that "the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff." Hart v. O'Malley, 436 Pa. Super. 151, 647 A.2d 542, 551 (Pa. Super. Ct. 1994) (citing Restatement (Second) Torts § 682). Although the word "process" as used in this tort "has been interpreted broadly [to] encompass the entire range of procedures incident to the litigation process", **[*40]** the restatement makes clear that the gravamen of this tort is not "the wrongful initiation" of proceedings. Restatement (Second) Torts § 682, Comment a.

Recognizing this fact, and the distinction between the tort of abuse of process and the tort of wrongful use of civil proceedings, [24] courts have held that a complaint alleging only that one party initiated suit against another for

[23] To the extent that Fresh Made's conspiracy claim is based on a conspiracy between Fresh Made and the unnamed manufacturers, distributors and store owners, the claim is also on unsound footing. See, e.g., Fox, 1997 U.S. Dist. LEXIS 19370, 1997 WL 793590 at *2 (dismissing civil conspiracy claim where the identity of the co-conspirators was "unclear at best"). As mentioned above, Fresh Made has indicated that it would name certain of the manufacturers, distributors and store owners if granted leave to amend. Tr. 52. This could cure any defect in the identification of any such conspirators.

[24] The tort of wrongful use of civil proceedings makes a person liable for initiating or continuing a civil proceeding if he acts (1) in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (2) the proceedings have terminated in favor of the person against whom they are brought. See Rosen v. Am. Bank of Rolla, 426 Pa. Super. 376, 627 A.2d 190, 191-92 (Pa. Super. Ct. 1993) (citing 42 Pa. Cons. Stat. Ann. § 8351). Here there are no allegations that any of the

improper purposes is insufficient to state a claim for malicious abuse of process. See *Todi v. Stursberg, 2001 U.S. Dist. LEXIS 20098*, *No. Civ. A. 01-2539, 2001 WL 1557517*, *2 (E.D. Pa. Dec. 4, 2001).

[*41] The Amended Complaint alleges only that the lawsuits at issue were "commenced" by Lifeway with an improper purpose. Am. Compl. P 133. In the absence of allegations that process was abused after the suits were commenced, Fresh Made has not adequately stated a claim for malicious abuse of process. See *2001 U.S. Dist. LEXIS 20098*, [WL] at *2 ("Absent allegations that a party has abused the process *after* its issuance . . . an abuse of process claim cannot stand.") (citations and internal quotation marks omitted). Therefore, the Court will dismiss Count IV of the Amended Complaint.

IX. Interference with Business Relationships

In Count V, Fresh Made alleges that Lifeway "with purposeful intent to interfere with [Fresh Made's] business, induced merchants and distributors to cease doing business with [Fresh Made] under threat of economic sanctions." Am. Compl. P 142. Fresh Made also alleges that Lifeway "interfered with Fresh Made's ability to develop future or prospective contractual business relationships with merchants and distributors. *Id. at P 143*. Lifeway argues that Count V must be dismissed because Fresh Made has not identified the specific existing and prospective business relationships **[*42]** which have been harmed by Lifeway's conduct.

HN24[] To establish a claim for interference with contractual or prospective contractual relations under Pennsylvania law, a plaintiff must show: (1) the existence of a contractual or prospective contractual relationship between the plaintiff and a third party; (2) a purpose or intent to harm an existing relationship or to prevent a prospective relationship from accruing; (3) the absence of privilege or justification on part of the defendant; and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct. See *Pellegrino Food Prods. Co. v. City of Warren, 136 F. Supp. 2d 391, 408 (W.D. Pa. 2000)*; *Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc., 1992 U.S. Dist. LEXIS 6479*, *Civ. No. 90-7952, 1992 WL 97826*, *10 (E.D. Pa. Apr. 30, 1992).

When alleging interference with existing contractual relations, a plaintiff should identify which existing contractual relationships were hindered. See *Allstate Transp. Co. v. Southeastern Pa. Transp. Auth., 1997 U.S. Dist. LEXIS 16638*, *No. 971482, 1997 WL 666178*, **10-11 (E.D. Pa. Oct. 20, 1997). When alleging interference with prospective contractual relations, the allegations need **[*43]** not be as precise. A plaintiff must not, however, "rest a claim for tortious interference with prospective contractual relations on a mere hope that additional contracts or customers would have been forthcoming but for defendant's interference." *Advanced Power Sys, 1992 U.S. Dist. LEXIS 6479, 1992 WL 97826* at *11. ***HN25***[] The complaint "must allege facts that, if true, would give rise to a reasonable probability that particular anticipated contracts would have been entered into." Id. Such a probability "may arise from an unenforceable express agreement or an offer", or where "there is a reasonable probability that a contract will arise from the parties' current dealings." *Allstate Transp., 1997 U.S. Dist. LEXIS 16638, 1997 WL 666178* at *11. However, "merely pointing to an existing business relationship or past dealings does not reach this level of probability." Id.

Fresh Made alleges that its existing contractual relationships with certain distributors and stores were interfered with by Lifeway. Fresh Made does not further identify any of the stores or distributors, or otherwise identify any contractual relationships that were interfered with. ***HN26***[] Although the federal rules require only a short and plain statement **[*44]** of the claim, that statement "must be sufficient to give the defendant[s] notice of the claim and the grounds upon which it is based." Id. Because the potential universe of identified relationships is enormous, [25] **[*45]** the Court concludes that the Amended Complaint does not give sufficient notice of the existing business relationships at issue here. [26] See, e.g., Id. (claim dismissed where claim identified relationships with "essential

court proceedings initiated by Lifeway terminated in favor of Fresh Made (indeed, the parties settled two of the lawsuits and one is ongoing), and the tort of wrongful initiation of civil proceedings is not applicable.

[25] As an illustration, Lifeway distributes its products to some 15,000 stores nationwide. Tr. at 55. Because the proposed relevant market encompasses the entire country, each of these stores is potentially implicated by Fresh Made's allegations.

contractors" and "other ParaTransit business relationships"); Centennial Sch. Dist. v. Independence Blue Cross, 885 F. Supp. 683, 688 (E.D. Pa. 1994) (claim dismissed where complaint "failed to identify what contractual relationships were threatened"); see generally, Fluid Power, Inc. v. Vickers, Inc., 1993 U.S. Dist. LEXIS 2012, Civ. A. No. 92-0302, 1993 WL 23854, *4 (E.D. Pa. Jan. 28, 1993) (claim sufficient where one contract was identified with particularity and where plaintiff provided customer lists with the names of plaintiff's other existing and prospective customers).

Fresh Made's allegations with regards to prospective business relationships are also insufficient. The Amended Complaint states only that Fresh Made "was developing future or prospective business relationships" with certain distributors and merchants, and that Lifeway interfered with Fresh Made's "ability to develop" those contractual relationships. Am. Compl. PP 141 & 143. **HN27**[] These allegations do not identify any particular potential relationships, nor do they provide any basis for concluding that there was "an objectively reasonable probability that [such relationships would] come into existence". Allstate Transp., 1997 U.S. Dist. LEXIS 16638, 1997 WL 666178 at *11. For that reason, Fresh Made's claim for interference with potential business relationships will be dismissed. See, e.g., Jaramillo v. Experian Inf. Solutions, Inc., 155 F. Supp. 2d 356, 365 (E.D. Pa. 2001) (claim dismissed where plaintiff failed to plead the "existence of any specific contract or prospective **[*46]** contract"); Advanced Power Sys., 1992 U.S. Dist. LEXIS 6479, 1992 WL 97826 at *12 (claim dismissed where plaintiff "failed to either identify particular potential customers or to allege the existence of a mechanism that would routinely bring it new customers"); see generally, Joyce v. Alti Am., Inc.,2001 U.S. Dist. LEXIS 17432, No. Civ. A. 00-5420, 2001 WL 1251489, *4 (E.D. Pa. 2001) (claim sufficient where plaintiff identified a "specific third party" with whom it had been attempting to enter a contract); Pellegrino, 136 F. Supp. 2d at 408 (claim sufficient where plaintiff alleged that it received inquiries about potential contracts from certain entities).

X. Request for Leave to Amend

In its Brief in Opposition to the Motion to Dismiss, Fresh Made reports that it has discovered another potential Lanham Act violation allegedly committed by Lifeway. Fresh Made states that Lifeway has been using a limited trademark which does not apply to butter on its butter products. Fresh Made has requested leave to amend the complaint to include additional claims, under the Lanham Act and common law unfair competition, for this alleged conduct. Lifeway did not oppose this request in its reply **[*47]** brief. The Court will grant Fresh Made's request for leave to amend to add these claims. See Fed. R. Civ. P. 15(a) ("leave shall be freely given when justice so requires").

An appropriate Order follows.

ORDER

AND NOW, this 8th day of August, 2002, upon consideration of the Motion of Defendants Lifeway Foods, Inc., and Michael Smolyansky to Dismiss the Amended Complaint in its Entirety, or in the Alternative for a More Definitive Statement as to Count VIII (Docket # 15), the plaintiff's Memorandum of Law in Opposition thereto, various supplemental filings by the parties, and after oral argument, IT IS HEREBY ORDERED that said Motion is GRANTED IN PART and DENIED IN PART, as follows, in accordance with the Memorandum of today's date:

1. The Motion is GRANTED as to Counts I (Sherman Act Section 1), II (Sherman Act Section 2), III (Restraint of Trade), IV (Malicious Abuse of Process), V (Interference with Existing and Prospective Business Relationships), VI (Civil Conspiracy), VII (Unfair Competition), and X (Unfair Trade Practices Act). Those counts are HEREBY DISMISSED.

2. The Motion is DENIED insofar as it seeks to dismiss Count VIII (Lanham Act).

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[26] Fresh Made's intention to name certain stores and distributors in any amended pleading could address this shortcoming.

3. The Motion is DENIED **[*48]** insofar as it seeks a more definitive statement as to Count VIII (Lanham Act).

4. The plaintiff shall be permitted to file an amended complaint within forty-five (45) days.

BY THE COURT:

MARY A. McLAUGHLIN, J.

[Apani Southwest, Inc. v. Coca-Cola Enters.](#)

United States Court of Appeals for the Fifth Circuit

August 12, 2002, Decided

No. 01-11026

Reporter

300 F.3d 620 *; 2002 U.S. App. LEXIS 16169 **; 2002-2 Trade Cas. (CCH) P73,769

APANI SOUTHWEST, INC., Plaintiff-Appellant, versus COCA-COLA ENTERPRISES, INC., Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Texas. 5:00-CV-228-C. Sam R Cummings, US District Judge.

Disposition: AFFIRMED.

Core Terms

geographic, district court, relevant market, antitrust, argues, tortious interference, purchaser, products, business relationship, antitrust claim, anti trust law, facilities, beverage, alleges, exclusive right, monopoly, exclusive agreement, bottled water, Sherman Act, violations, seller, civil conspiracy, summary judgment, matter of law, Clayton Act, foreclosed, Airport, markets, courts, geographic area

LexisNexis® Headnotes

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

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

An appellate court reviews a district court's ruling on a *Fed. R. Civ. P. 12(b)(6)* motion de novo. In reviewing the dismissal of a claim pursuant to 12(b)(6), this court must accept all of the plaintiff's factual allegations as true. The motion may be granted only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

HN2[] **Summary Judgment, Entitlement as Matter of Law**

A district court's grant of summary judgment is reviewed de novo. Summary judgment is proper where the pleadings and summary judgment evidence present no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. A factual dispute will preclude an award of summary judgment if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN3[] **Tying Arrangements, Clayton Act**

Section 3 of the Clayton Act makes it unlawful to sell goods on the condition, agreement, or understanding that the purchaser refrain from dealing with competitors of the seller if the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *15 U.S.C.S. § 14 (1997)*. Two types of restrictions on competition may be challenged under § 3: tying restraints and exclusive-dealing arrangements. Tying restraints occur when a seller agrees to sell one product on the condition that the buyer also agree to purchases a different, or tied product, or the buyer agrees that he will not purchase the same product from another supplier. Exclusive dealing, in contrast, occurs when a seller agrees to sell its output of a commodity to a particular buyer, or when a buyer agrees to purchase its requirements of a commodity exclusively from a particular seller. United States Court of Appeals for the Fifth Circuit has recognized that an exclusive-dealing arrangement does not violate § 3 of the Clayton Act unless the probable effect of the agreement will foreclose competition in a substantial share of the line of commerce affected.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN4[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

When assessing whether an exclusive-dealing arrangement has the probable effect of substantially lessening competition, the United States Supreme Court has identified a three-part inquiry. First, the relevant product market must be identified by considering interchangeability and cross-elasticity of demand. Second, the relevant geographic market must be identified, by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies. Finally, a plaintiff must show that the competition foreclosed by the arrangement constitutes a substantial share of the relevant market. That is, the opportunities for other traders to enter into or remain in that market must be significantly limited.

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

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

HN5[] Relevant Market, Product Market Definition

In ascertaining the relevant product market, courts consider the extent to which the seller's product is interchangeable in use, and the degree of cross-elasticity of demand between the product itself and substitutes for it. Within the product market, there may exist submarkets which, in themselves, represent product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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

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

HN6[] Relevant Market, Geographic Market Definition

The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies. The geographic market must correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area. The tests for determining a geographic market under §§ 3 and 7 of the Clayton Act are similar. Thus, cases determining a geographic area under § 7 are equally applicable to cases brought under § 3.

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

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

Banking Law > Federal Acts > General Overview

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

HN7[] Regulated Practices, Market Definition

When determining whether a geographic market corresponds to commercial realities, courts have taken into account practical considerations such as the size, cumbersomeness, and other characteristics of the relevant product. In addition, determinants that affect the behavior of market participants may also be considered such as regulatory constraints impeding the free flow of competing goods into the area, perishability of products, and transportation barriers. On the other hand, the economic significance of a geographic area does not depend upon singular elements such as population, income, political boundaries, or geographic extent, but rather upon the relationship between these elements and the characteristics of competition in the relevant product market within a particular area.

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

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

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

HN8[] Regulated Practices, Market Definition

In order for an area to qualify as being economically significant, it must contain an appreciable segment of the product market. Whether a segment is appreciable depends upon whether it includes either an appreciable proportion of the product market as a whole, or a proportion of the product market which is largely segregated from, independent of, or not affected by competition elsewhere. Therefore, it is not required that an area encompass a large percentage of all business activity in the relevant product market to be considered economically significant. An area containing only a small percentage of business activity may qualify as being economically significant if the relevant competition in that specific area is insulated from equivalent competition elsewhere.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

HN9[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

After the relevant market has been identified, it must then be determined whether the arrangement foreclosed competition in a substantial share of the established market.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Sherman Act, Claims

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1 (1997)*. In order to demonstrate a claim of unreasonable restraint of trade under *§ 1*, a plaintiff must establish that: (1) the accused parties engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) trade was restrained in the relevant market. The plaintiff has the burden of proving all the elements of a *§ 1* violation.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

If, as an initial matter, a plaintiff does not contend an anti-trust defendant's actions were per-se illegal, the rule of reason analysis is applied. Under this rule, the plaintiff must demonstrate that the complained-of actions unreasonably restrained trade. The court must then balance the anticompetitive evils of a restrictive practice against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason. Thus, as under the Clayton Act, the first step in analyzing a Sherman Act, *15 U.S.C.S. § 1*, claim is defining the relevant product and geographic markets. The same test applied for determining the relevant product and geographic markets for Clayton Act claims is also used for alleged violations of the Sherman Act.

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

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

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

The Texas Free Enterprise and Antitrust Act (TFEAA) was enacted to establish antitrust laws for the State of Texas. *Tex. Bus. & Com. Code Ann. § 15.01 et seq.* (Vernon 1987). Each provision of the TFEAA is modeled after a corresponding provision of federal ***antitrust law***. As such, Texas courts are statutorily instructed to interpret the TFEAA in harmony with federal judicial interpretations of equivalent federal laws. *§ 15.04*. Accordingly, Texas courts have adopted federal standards for determining violations of the TFEAA, including the use of a relevant market to determine whether substantial reductions in competition have occurred.

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

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

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

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

Whether a relevant market has been identified is usually a question of fact; however, in some circumstances, the issue may be determined as a matter of law. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.

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

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

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

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

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

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

When assessing economic significance, a court must determine whether the geographic area contains an appreciable segment of the product market. Whether a segment is appreciable depends on whether the segment includes either an appreciable proportion of the product market as a whole, or a proportion of the product market largely segregated from, independent of, or not affected by, competition elsewhere.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN15[] **Regulated Practices, Monopolies & Monopolization**

Monopsony refers to price fixing or monopolization by a single buyer.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN16[] **Pleadings, Heightened Pleading Requirements**

A heightened pleading standard may not be applied to antitrust claims, however, a less stringent standard of pleading does not relieve a plaintiff from its obligation to allege facts sufficient to support an antitrust violation. Leatherman bars a district court from applying a heightened pleading standard in antitrust cases. However, to survive a motion to dismiss, plaintiffs still must set forth facts sufficient to create an inference that defendant had enough market power to create a monopoly.

Real Property Law > Landlord & Tenant > Lease Agreements > Subleases

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN17[] **Lease Agreements, Subleases**

The essential elements of a tortious interference with an existing business relationship cause of action are (1) unlawful actions undertaken without justification or excuse; (2) with intent to harm; and (3) actual damages. In proving this claim, the plaintiff does not need to prove the existence of a valid contract, but only that the defendant's interference is motivated by malice.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN18[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Where a party has not violated any antitrust laws, entering into an exclusive agreement, in and of itself, does constitute an unreasonable restraint on trade.

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN19[] **Intentional Interference, Elements**

Although the Texas Supreme Court has not specifically set forth all of the elements necessary for a tortious interference with prospective business relations cause of action, it has recognized that to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful. The court clarified that "independently tortious" means conduct that would violate some other recognized tort duty.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN20[] **Conspiracy, Elements**

To prove a cause of action for civil conspiracy under Texas law, a plaintiff must establish the following elements: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as the proximate result.

Business & Corporate Law > Agency Relationships > General Overview

Constitutional Law > State Constitutional Operation

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN21[] Business & Corporate Law, Agency Relationships

Article I, Section 26 of the Texas Constitution provides that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this state. *Tex. Const. art. I § 26*. Texas courts, however, have recognized several exceptions to this general rule of law. These exceptions are: (1) contracts between an agent and its principal wherein the agent is prohibited from dealing for himself or representing others besides his principal, (2) contracts involving the sale of a business in which the seller agrees not to engage in a competing business for a limited time, (3) lease agreements that require the lessee to sell only certain products on the leased premises, and (4) cases in which an exclusive right or privilege is granted only upon the property or premises of the grantor.

Governments > Local Governments > Finance

Public Contracts Law > Bids & Formation > Competitive Proposals

Public Contracts Law > Bids & Formation > Sealed Bids > General Overview

HN22[] Local Governments, Finance

See *Tex Loc. Gov't. Code § 252.021(a)(1)* (Vernon 1999).

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN23[] Conspiracy, Elements

In Texas, a civil conspiracy requires specific intent. Proof that a defendant intended to engage in the conduct is insufficient. Instead, for a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement.

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

HN24[] Reviewability of Lower Court Decisions, Preservation for Review

If a party did not present any evidence at the district court level on an issue, nor argue this question in its brief, the issue is not properly before the appellate court.

Counsel: For APANI SOUTHWEST INC, Plaintiff - Appellant: Harold Houston Pigg, Clifford, Field, Krier, Manning, Stone & Wilkerson, Lubbock, TX.

For COCA COLA ENTERPRISES INC, Defendant - Appellee: Jerry L Beane, Kay Lynn Brumbaugh, Strasburger & Price, Dallas, TX.

Judges: Before STEWART and CLEMENT, Circuit Judges. [1]

Opinion by: CARL E. STEWART

Opinion

[*623] CARL E. STEWART, Circuit Judge:

Plaintiff-Appellant, Apani Southwestern, Inc. ("Apani"), appeals from the district court's dismissal of its antitrust claims against Coca-Cola Enterprises, Inc. ("CCE") arising out of a contract between CCE and the city of Lubbock, Texas (the "City"), which granted CCE the exclusive right to sell bottled water on property owned by the City. For the reasons stated herein, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Apani is a manufacturer of purified bottled water operating in and around the Lubbock, Texas area. Prior to the events in question, Apani had developed a business relationship with the City, which permitted Apani to sell its product in facilities owned and operated by the City. On August 26, 1999, however, the City entered **[**2]** into an exclusive contractual agreement with CCE allowing CCE to supply non-alcoholic beverages to all facilities "owned and operated" by the City and precluding the City from purchasing beverages from other parties. [2] The agreement, therefore, effectively eliminated the City's business relationship with Apani. [3] The contract between the City and CCE arose from a proposal by the City that CCE donate approximately one million dollars for the construction of two new scoreboards at the Lubbock Municipal Coliseum. CCE agreed to provide the funds for the scoreboards **[*624]** as long as it would be permitted to recoup some of its investment. Accordingly, a contract was drafted giving CCE "the exclusive right to advertise and promote Exclusive Beverages in and with respect to the Territory(s), the Locations and Sites, and with respect to the CITY of LUBBOCK, events at the Locations. . . ." The agreement, however, provided for several exceptions, including the following:

> (1) the right of the city to make available fresh-squeezed juice, tea, coffee products, water drawn from the public water supply, and milk products as long as CCE does not distribute a similar product;
>
> (2) permit trade **[**3]** show exhibitors who have an exclusive agreement for competitive products to advertise, display, serve, or sample products during trade show events;
> (3) allow customers with a single beverage serving for immediate consumption to drink but not refill them;
>
> (4) *permit local water bottling (Apani) company, that is the official sponsor of the Cotton Kings, to sell bottled water at professional hockey games. This water will not be chilled or iced down*; and
> (5) allow amateur sports leagues in city parks the option to sell concessions using competing products.

Apani filed suit against CCE seeking damages for violations of § 3 of the Clayton Act, *15 U.S.C. § 14*, and the Texas Free Enterprise and Antitrust Act ("TFEAA"), *TEX. BUS. & COM.* **[**4]** *CODE ANN. § 15.01 et seq.* It also alleged claims of tortious interference with existing and prospective business relations. CCE filed a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. The district court granted CCE's motion as to the state and federal antitrust claims, but denied the motion with regard to the tortious interference claims. Subsequent to the partial dismissal, the court allowed Apani to file a Second Amended Complaint adding causes of action under the Sherman Act, *15 U.S.C. §§ 1* and *15*, and a civil conspiracy claim. The district court again dismissed all of the antitrust claims pursuant to *Rule 12(b)(6)*. CCE then filed a Motion for Summary Judgment as to

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[1] Judge Politz was a member of the panel that heard oral arguments. However, due to his death on May 25, 2002, he did not participate in this decision. This case is being decided by a quorum pursuant to 28 U.S.C. § 46(d) (1996).

[2] In its complaint, Apani stated that the property "owned and operated" by the City consisted of twenty-seven facilities.

[3] This contract provided for a ten-year term and the automatic right to renew for an additional five years.

the tortious interference and civil conspiracy claims. The district court granted the motion as to both claims. Thereafter, Apani filed a motion to Alter or Amend Summary Judgment, which the district court denied.

STANDARD OF REVIEW

HN1[] We review a district court's ruling on a *Federal Rule of Civil Procedure 12(b)(6)* motion *de novo*. *Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 618 (5th Cir. 1992)*. In reviewing the dismissal of a claim **[**5]** pursuant to 12(b)(6), this court must accept all of the plaintiff's factual allegations as true. *Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995)*. "The motion may be granted only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Jackson, 958 F.2d at 618* (quotation marks and citations omitted). "Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn, 42 F.3d at 931* (citation omitted).

HN2[] A district court's grant of summary judgment is also reviewed *de novo*. *Melton v. Teachers Ins. & Annuity Ass'n of Am., 114 F.3d 557, 559 (5th Cir. 1997)*. Summary judgment is proper where the pleadings and summary judgment evidence present no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *FED. R. CIV. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265,* ***[*625]*** *106 S. Ct. 2548 (1986)*. A factual dispute will preclude an award of summary judgment if the evidence is such that a reasonable jury could **[**6]** return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

DISCUSSION

Apani asserts antitrust violations against CCE under the Clayton Act, the Sherman Act, and the TFEAA. Specifically, in its Second Amended Complaint, Apani asserted that "the Agreement, having a duration of ten (10) years, represents a contractual agreement resulting from an illegal combination or conspiracy by the City of Lubbock and Coca-Cola, and which constitutes a restraint of trade in violation of the Sherman Antitrust Act, the Clayton Antitrust Act, and the Texas Free Enterprise and Antitrust Act of 1983."

1. Clayton Act

HN3[] Section 3 of the Clayton Act makes it unlawful to sell goods on the "condition, agreement, or understanding" that the purchaser refrain from dealing with competitors of the seller if the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *15 U.S.C. § 14 (1997)*. Two types of restrictions on competition may be challenged under § 3: tying restraints and exclusive-dealing arrangements. *Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 194, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974)*. **[**7]** Tying restraints occur when a seller agrees to sell one product on the condition that the buyer also agree to purchases a different, or tied product, or the buyer agrees that he will not purchase the same product from another supplier. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1048 n.5 (5th Cir. 1982)*. Exclusive dealing, in contrast, occurs when a seller agrees to sell its output of a commodity to a particular buyer, or when a buyer agrees to purchase its requirements of a commodity exclusively from a particular seller. WILLIAM C. HOLMES, ***ANTITRUST LAW*** HANDBOOK § 4.02[3] (1999). Here, Apani's claim under § 3 arises from the exclusive arrangement between the City and CCE in which the City agreed to permit CCE to sell its products exclusively on property owned and operated by the City. This court has recognized that an exclusive-dealing arrangement does not violate § 3 of the Clayton Act unless the probable effect of the agreement "will foreclose competition in a substantial share of the line of commerce affected." *Bob Maxfield, Inc. v. Am. Motors Corp., 637 F.2d 1033, 1036 (5th Cir. 1981)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961))*. **[**8]**

HN4[] When assessing whether an exclusive-dealing arrangement has the probable effect of substantially lessening competition, the Supreme Court has identified a three-part inquiry. *Tampa Elec. Co., 365 U.S. at 327-28*. First, the relevant product market must be identified by considering interchangeability and cross-elasticity of demand. Second, the relevant geographic market must be identified, "by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies." Id. Finally, a plaintiff must show that the "competition foreclosed by the arrangement constitutes a 'substantial share of the relevant market.' " Id. That is, "the opportunities for other traders to enter into or remain in that market must be significantly limited." Id.

In applying this three-step analysis, it is clear that in order to determine whether a **[*626]** substantial portion of the competition has been foreclosed, Apani must first identify the relevant product and geographic markets.

A. Product Market

HN5[] In ascertaining the relevant product market, courts consider the extent to which the seller's product is "interchangeable in use" and **[**9]** the degree of "cross-elasticity of demand between the product itself and substitutes for it." *C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1245 (5th Cir. 1985)* (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. Within the product market, there may exist submarkets which, in themselves, represent product markets for antitrust purposes. *Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964, 980 (5th Cir. 1977)* (citing *United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 593-595, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957))*. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Heatransfer Corp., 553 F.2d at 980* (quoting *Brown Shoe Co., 370 U.S. at 325*). The district court properly determined, and neither of the parties contest, that **[**10]** the relevant product market is bottled water.

1. Geographic Market

We focus on the area of "effective competition" in determining the relevant geographic market. *Jim Walter Corp. v. F. T. C., 625 F.2d 676, 682 (5th Cir. 1980)*. ***HN6***[] The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies. *Tampa Elec. Co., 365 U.S. at 327*. The geographic market must " 'correspond to the commercial realities' of the industry and 'be economically significant.'" *Brown Shoe Co., 370 U.S. at 336-337*. "Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." Id. (citation omitted). [4]

[11]** ***HN7***[] When determining whether a geographic market corresponds to commercial realities, courts have taken into account practical considerations such as the size, cumbersomeness, and other characteristics of the relevant product. In addition, determinants that affect the behavior of market participants may also be considered such as regulatory constraints impeding the free flow of competing goods into the area, perishability of products, and transportation barriers. EARL W. KINTNER, FEDERAL ***ANTITRUST LAW***: VOLUME IV THE CLAYTON ACT SECTION 3; SECTION 7; MERGERS AND MARKETS § 38.3 (1984); *United States v. Conn. Nat'l Bank, 418 U.S. 656, 669-671, 41 L. Ed. 2d 1016, 94 S. Ct. 2788 (1974)*; *United States v. Gen. Dynamics Corp., 341 F. Supp. 534 (N. D. Ill. 1972)*.

On the other hand, the economic significance of a geographic area "does not **[*627]** depend upon singular elements such as population, income, political boundaries, or geographic extent, but rather upon the relationship between these elements and the characteristics of competition in the relevant product market within a particular area." EARL W. KINTNER, FEDERAL ***ANTITRUST LAW***: VOLUME IV THE CLAYTON ACT SECTION **[**12]** 3; SECTION 7; MERGERS AND MARKETS § 38.2 (1984). ***HN8***[] Put differently, in order for an area to qualify as being economically significant, it must contain an "appreciable segment of the product market." Id. "Whether a segment is 'appreciable' depends upon whether it includes either an appreciable proportion of the product market as a whole, or a proportion of the product market which is 'largely segregated from, independent of, or not affected by' competition elsewhere." Id. Therefore, it is not required that an area encompass a large percentage of all

[4] Although Brown Shoe Co. involved a violation of § 7 of the Clayton Act, the tests for determining a geographic market under §§ 3 and 7 of the Act are similar. *Brown Shoe Co., 370 U.S. at 329*; *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 366, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. Thus, cases determining a geographic area under § 7 are equally applicable to cases brought under § 3. *Brown Shoe Co., 370 U.S. at 329-330*.

business activity in the relevant product market to be considered economically significant. An area containing only a small percentage of business activity may qualify as being economically significant if the relevant competition in that specific area is insulated from equivalent competition elsewhere.

2. Foreclosure of Competition

HN9[] After the relevant market has been identified, it must then be determined whether the arrangement foreclosed competition in a substantial share of the established market. *Tampa Elec. Co., 365 U.S. at 327-38*.

2. Sherman Act

HN10[] *Section 1* of the Sherman Act provides that "every contract, **[**13]** combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1 (1997)*. In order to demonstrate a claim of unreasonable restraint of trade under *Section 1*, Apani must establish that: (1) the City and CCE engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) trade was restrained in the relevant market. *Spectators' Comm. Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001)*; *Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 392 (5th Cir. 1996)*. Apani, as the plaintiff, has the burden of proving all the elements of a *Section 1* violation. Id. (citing *Jefferson Parish Hosp. Dist. No. 2, v. Hyde, 466 U.S. 2, 29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984))*.

HN11[] As an initial matter, Apani does not contend on appeal that CCE's actions were *per se* illegal. Thus, the rule of reason analysis is applicable to Apani's claim. *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 307 (5th Cir. 1997)*. Under **[**14]** this rule, Apani must demonstrate that the "complained-of actions unreasonably restrained trade." Id. The court must then balance the "anticompetitive evils of a restrictive practice . . . against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant's activities, on balance, adversely affected competition in the appropriate *product and geographic markets* is essential to recovery under the rule of reason." Id. (citing *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1392 (5th Cir.1983))* (emphasis added). Thus, as under the Clayton Act, the first step in analyzing a *Section 1* claim is defining the relevant product and geographic markets. The same test applied for determining the relevant product and geographic markets for Clayton Act claims is also used for alleged violations of the Sherman Act. *Bob Maxfield, Inc., 637 F.2d at 1036*.

[*628] 3. Texas Free Enterprise and Antitrust Act

HN12[] The TFEAA was enacted to establish antitrust laws for the State of Texas. *TEX. BUS. & COMM. CODE § 15.01 et seq.* (Vernon 1987). Each provision of the Act is modeled after a corresponding provision **[**15]** of federal ***antitrust law***. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1388 (5th Cir. 1994)*; *Caller-Times Pub. Co., Inc. v. Triad Communications, Inc., 826 S.W.2d 576, 580 (Tex. 1992)*. As such, Texas courts are statutorily instructed to interpret the TFEAA in harmony with federal judicial interpretations of equivalent federal laws. *TEX. BUS. & COMM. CODE § 15.04*; *Caller-Times Pub. Co., Inc., 826 S.W.2d at 580*. Accordingly, Texas courts have adopted federal standards for determining violations of the TFEAA, including the use of a relevant market to determine whether substantial reductions in competition have occurred. *Roy B. Taylor Sales, Inc., 28 F.3d at 1388*; *Caller-Times Pub. Co., Inc., 826 S.W.2d at 580*.

4. Dismissal of Antitrust Claims

The district court dismissed all of Apani's antitrust claims, finding Apani's geographic market definition legally insufficient as a matter of law. ***HN13***[] Whether a relevant market has been identified is usually a question of fact; however, in some circumstances, the issue may be determined as a matter of law. *Seidenstein v. Nat'l Med. Enters., Inc., 769 F.2d 1100, 1106 (5th Cir. 1985)*. **[**16]** Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted. See, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (affirming the district court's dismissal of an antitrust claim for failure to plead a relevant market because the definition of the proposed market was too narrow); *TV Comms. Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)* (upholding the district court's dismissal of a claim for failure to plead a relevant market where the alleged market consisted of only one specific television channel). Because a relevant geographic market must be identified for Apani's claims under the Clayton Act, the Sherman Act, and the TFEAA, this court's analysis of the relevant market shall be equally applicable to all of Apani's **[**17]** antitrust claims.

As stated previously, the alleged geographic market must correspond to the commercial realities of the industry and be economically significant. *Brown Shoe Co., 370 U.S. at 336-337*. After giving careful consideration to each of the factors identified for determining whether a geographic area corresponds to the commercial realities of the industry, the district court concluded that the relevant geographic market could not consist of only the twenty-seven facilities owned by the City as Apani suggests. The court pointed out that Apani had done business in and throughout Lubbock, Texas with customers other than the City, such as Texas Tech University. Thus, it concluded that there were no limitations on Apani's geographic sales market by the size, cumbersomeness, or perishability of its bottled water that would warrant restricting the geographic market to the City facilities covered by the exclusive agreement. The court further noted that there were no regulatory requirements, or inherent shipping limitations affecting Apani's product distribution that would support confining **[*629]** the geographic market of competition to the twenty-seven City-owned facilities. **[**18]** Thus, the court found that Apani's relevant geographic market definition did not comport with the commercial realities of the industry. It stated that, at the very least, the commercial realities of the industry suggest that the relevant geographic market must include the entire city of Lubbock.

The district court next considered whether the restraint on the alleged geographic market was economically significant. ***HN14***[] When assessing economic significance, a court must determine whether the geographic area contains an appreciable segment of the product market. EARL W. KINTNER, FEDERAL ***ANTITRUST LAW***: VOLUME IV THE CLAYTON ACT SECTION 3; SECTION 7; MERGERS AND MARKETS § 38.2 (1984). As discussed supra, "whether a segment is appreciable depends on whether the segment includes either an appreciable proportion of the product market as a whole, or a proportion of the product market largely segregated from, independent of, or not affected by, competition elsewhere." Id. The district court found that "no unique limitation on competition would suggest that competition for the City of Lubbock bottled water business is separate from competition for bottled water business elsewhere in the Lubbock, **[**19]** Texas bottled water market." Because Apani failed to allege that an appreciable proportion of the sale of bottled water in the Lubbock area was affected by the agreement, the court determined that Apani's geographic market definition also failed to meet the economic significance test. Thus, the court concluded that "there is no set of facts under which Apani can recover; either the relevant geographic market is too small to meet the requirements set forth by the Supreme Court, or the injury to competition is not sufficiently significant to be a violation of the Act."

In the alternative, the court determined that Apani's geographic market definition was inadequate because the City is a "single purchaser," and "one purchaser in a market of competing purchasers cannot constitute a relevant geographic market, absent exceptional market conditions." See *Jayco Sys., Inc. v. Savin Bus. Mach. Corp., 777 F.2d 306, 319 n.43 (5th Cir. 1985)*. In Jayco, the plaintiff, a distributor for a major copier manufacturer, alleged that the defendant attempted to monopolize the copier business of one customer, the State of Texas. The plaintiff defined the relevant market as "low and **[**20]** medium volume copiers" for the State of Texas copier business. *Id. at 319*. We explained that "as a matter of common sense a single purchaser of a product cannot generally be considered a relevant market, lest we wish to clothe each and every sale with an antitrust suit." *Id. at 320*. However, this court noted that "we hazard the suggestion that a single purchaser could not be considered a relevant market unless plaintiff made some showing of the purchaser's monopsony power." [5] Id. at n. 46. The district court reasoned that Apani's asserted geographic market alleges a "single purchaser" within the meaning of Jayco and therefore, as a matter of law, it failed to properly define a relevant geographic market upon which relief may be granted.

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[5] ***HN15***[] Monopsony refers to price fixing or monopolization by a single buyer. *In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir.1979)*.

In addition, the district court found that Apani's argument was deficient **[**21]** because it, in effect, suggested that a seller or owner of property to which potential buyers come, may not decide what products it will sell or permit to be sold on the property. **[*630]** In support of this proposition, the court relied on the Seventh Circuit's opinion in *Elliott v. United Ctr., 126 F.3d 1003 (7th Cir. 1997)*. In Elliott, a licensed peanut vendor, who formerly sold peanuts outside the United Center, an entertainment complex, sued the United Center on the grounds that its policy of prohibiting patrons from bringing food into the complex violated the Sherman Act. The vendor alleged that the "market for food concessions within and around the United Center itself" constituted a relevant market for antitrust purposes. *Id. at 1005*. The district court dismissed the claim finding that the vendor failed to adequately identify a relevant geographic market. In affirming the district court's ruling, the Seventh Circuit stated that

> The logic of Elliott's argument would mean that exclusive restaurants could no longer require customers to purchase their wines only at the establishment, because the restaurant would be "monopolizing" the sale of **[**22]** wine within its interior. Movie theaters, which traditionally (and notoriously) earn a substantial portion of their revenue from the sales of candies, popcorn, and soda, would be required by the antitrust laws to allow patrons to bring their own food.

Id.

In the instant case, the district court stated that Apani's argument, like the one presented in Elliott, would deny property owners the right to determine for themselves what products they will sell on their property. It reasoned that the antitrust laws are not designed to preclude businesses from selling what they choose on their property, rather the laws are intended to prevent persons from manipulating the marketplace in restraint of trade. The court concluded that Apani's claims fell outside the realm of injuries for which the antitrust laws were enacted to protect, and therefore Apani failed to state a claim upon which relief could be granted.

Apani asserts several points of error in connection with the district court's conclusion that it failed to sufficiently allege a relevant geographic market. First, Apani challenges the district court's determination that the "territory(s)" and "locations" owned by the **[**23]** City within the meaning of the exclusive dealing agreement are too narrow from a geographic standpoint to constitute a relevant market. It argues that the district court erroneously designated the relevant property as that "owned" by the City, which consists of twenty-seven locations, rather than that "owned *or* operated" by the City, as alleged in Apani's complaint, or "owned *and* operated" by the City, as provided in the exclusive agreement. Apani explains that, had the district court considered all the property owned and/or operated by the City, the effect would have been an expansion of the alleged geographic area.

Next, Apani concedes that identifying a relevant market requires more than a determination of "metes and bounds,"[6] however, it argues that there is no existing case law that places such a restrictive view in a *Rule 12(b)(6)* context. It suggests that in construing the pleading requirement for a relevant geographic market, we look to the Seventh Circuit's decision in *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc., 62 F.3d 967 (7th Cir. 1995)*. In MCM Partners, Inc., MCM, a rental equipment company, brought an antitrust suit against **[**24]** exhibition contractors alleging that the contractors violated *Section 1* of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act, when they refused to rent forklifts and other material handling and personnel **[*631]** moving equipment from MCM. The district court dismissed MCM's antitrust claim with prejudice, finding that it failed to state a claim for which relief could be granted under *Section 1* because it had not sufficiently alleged a contract, combination, or conspiracy in restraint of trade. In the alternative, the court determined that MCM failed to plead facts supporting its definition of the relevant geographic market.

In its complaint, MCM defined the relevant market as "the rental of forklifts, material handling and personal moving equipment to the convention and trade show industry in Chicago, Illinois." *62 F.3d at 975*. It alleged that the "vast majority" of Chicago's convention and trade show activities take place at Chicago's McCormick **[**25]** Place Complex and that the consumers in that market consisted of "exhibition contractors who set up, install, and

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[6] *Tampa Elec. Co., 365 U.S. at 331-32*.

disassemble the booths and other physical items" used in the industry. Id. The district court stated that these allegations defined the relevant market too narrowly because MCM failed to include in its complaint facts demonstrating that the market for MCM's equipment was limited to exhibition contractors. In overturning the district court's ruling the Seventh Circuit held that

> The district court's willingness to look behind MCM's allegations because it believed MCM had not alleged facts to support the complaint's market definition is in considerable tension with our recent decision in *Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 778, 782 (7th Cir.1994)*. There, we explained that judicial attempts to apply *a heightened pleading standard* in antitrust cases had been "scotched" by the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993)*, and that after Leatherman, an antitrust plaintiff need not include "the particulars **[**26]** of his claim" to survive a motion to dismiss. *33 F.3d at 782*. It is instead sufficient for the plaintiff to include in its complaint only "a short and plain statement of the claim" showing an entitlement to relief. *FED .R. CIV. P. 8(a)(2)*; see *Leatherman, 507 U.S. at 168, 113 S. Ct. at 1163*; *Hammes, 33 F.3d at 778*. . . . It is not inconceivable to us that MCM could prove a set of facts supporting the relevant market definition alleged in its complaint. See *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957)*. It was therefore erroneous for the district court . . . to dismiss MCM's *section 1* claim on this ground.

62 F.3d at 976-77 (emphasis added).

Apani asserts that an application of the standard set out in MCM Partners, Inc., to the present case would compel a reversal of the district court's ruling. It directs our attention to the fact that the Seventh Circuit specifically determined that it is not inconceivable that MCM could prove a set of facts supporting the relevant market definition alleged in its complaint. Apani argues that its complaint indicated a more defined geographic **[**27]** area than that in MCM Partners, Inc. and involved absolute preclusion of competition as opposed to mere restraint. Thus, Apani submits that its allegations of a relevant market fully comply with *Federal Rule of Civil Procedure 8(a)(2)*'s "short and plain statement" requirement. However, Apani claims that in dismissing its complaint, the district court erroneously applied a heightened pleading standard to its antitrust claims, rather than that set forth in *Rule 8(a)(2)*. It argues that such an application is inconsistent with the Supreme Court's admonishment in Leatherman.

[*632] Lastly, Apani argues that the district court erroneously applied this court's reasoning in Jayco to the instant case. Specifically, Apani maintains that with regard to the relevant geographic market, the pertinent inquiry is not whether there is a "single purchaser," rather the court should consider the geographic area, and degree of market activity controlled by the City, which has been foreclosed by the agreement. It claims that by foreclosing competition in all public facilities owned, or controlled by the City, the agreement had the effect of totally eliminating competition in those venues in which **[**28]** there are mass gatherings of people, including conventions, trade shows, entertainment events, sports events, and other activities. Apani concludes that any reference to the City as a "single purchaser" mischaracterizes the offensive nature of the subject agreement, as the City may or may not be a purchaser of the product, but the City granted the "exclusive dealing arrangement," which dictates the beverage product offered to the captive persons in attendance at the defined properties, and forecloses any other competition at the public venues.

With respect to the district court's reliance on Ellliot, Apani argues that Ellliot can be distinguished from the present case. First, it points out that Ellliot presented claims of only antitrust violations under the Sherman Act. Second, Apani asserts that the alleged antitrust violation in Elliott was not based on an anti-competitive agreement entered into between the owner of the facility and a beverage or food supplier, but rather involved a complaint that the arena policy prohibited sale of peanuts outside of the arena to its patrons, which could not then be brought into the arena. It claims that such a factual situation **[**29]** is distinguishable from the instant case in that the agreement between CCE and the City represents a definite written agreement to foreclose competition through an "exclusive dealing arrangement," relating to all beverages sold or distributed by CCE within a defined geographic market.

In addition, Apani argues that the district court has failed to take into consideration that a patron attending an event at a City-owned facility will not likely cross the street to purchase a beverage at a convenience store where competing products may be displayed. It states that the patron is compelled by physical and/or time limitations to purchase the products of the entity that has obtained the exclusive right to sell the product within the specific building or area. Apani further argues that, as a practical matter, the elements of interchangeability and cross-elasticity of demand are of little significance because any analysis that determines the "relevant geographic market" only on the basis of square footage or acreage, ignores the intended prohibitions of the antitrust statutes. After reviewing the record on appeal, and considering Apani's arguments in light of the applicable law and standards, **[**30]** we conclude the district court correctly decided to dismiss the antitrust claims. With regard to Apani's criticism of the district court for purportedly misstating the scope of the alleged geographic market, we find that no error was committed. In its Second Amended Complaint, Apani alleged as the relevant market "all City of Lubbock owned or operated facilities, numbering approximately *twenty-seven (27) separate properties*." Apani now argues that the district court erroneously referred to the twenty-seven locations owned by the City as the claimed relevant market. Specifically, it maintains that the district court only considered property "owned" by the City, rather than "owned or operated" by the City. This argument is without merit. Whether the property at issue is referred **[*633]** to as the property "owned" by the City, or the property "owned or operated" by the City, according to the facts stated in Apani's complaint, the subject property consists only of twenty-seven locations. Thus, the "owned or operated" issue raised by Apani is no more than an exercise in semantics and does not alter the correctness of the district court's decision to dismiss the antitrust claims.

We reject **[**31]** Apani's claim that the language of the exclusive agreement itself expands the relevant market beyond the geographic area identified by the district court. The operative language of the agreement defines the relevant property as that "owned *and* operated by CITY OF LUBBOCK, except City Hall and Lubbock International Airport." Apani claims that the number of properties covered by the agreement would have been "expanded" had the district court considered properties both "owned and operated" by the City. This argument makes little logical sense. Given the use of the conjunction "and," there can be no subset of properties that might fit within the "owned and operated" category but not within the "owned" category since every facility "owned and operated" by the City must also be "owned" by the City.

Having concluded that the district court properly identified the twenty-seven City-owned facilities as the alleged relevant geographic market, we must now consider whether the defined market is insufficient as a matter of law. As an initial matter, Apani is correct in its assertion that ***HN16***[] a heightened pleading standard may not be applied to antitrust claims, however, a less stringent standard **[**32]** of pleading does not relieve Apani from its obligation to allege facts sufficient to support an antitrust violation. See *Endsley v. City of Chicago, 230 F.3d 276, 382 (7th Cir. 2000)* ("It is true that *Leatherman v. Tarrant County, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*, bars the district court from applying a heightened pleading standard in antitrust cases. . . . However, to survive a motion to dismiss, plaintiffs still must set forth facts sufficient to create an inference that defendant had enough market power to create a monopoly." (citation omitted)).

In insisting that the relevant geographic market requirement has been met, Apani relies heavily on MCM Partners, Inc. That reliance is sorely misplaced. In MCM Partners, Inc., the alleged geographical market, i.e. the convention and trade show industry, is obviously broader than the geographic market alleged by Apani, even though most of the convention and trade show activity took place at Chicago's McCormick Place. Here, Apani has simply attempted to artificially narrow a broader economic market, the City of Lubbock, to specific venues. Such pleading maneuvers may not be **[**33]** used for the purpose of creating a fictitious market. Thus, we find Apani's geographic market definition insufficient as a matter of law.

Because we find that the district court's initial reason for dismissing Apani's claim, i.e. the alleged geographic market did not correspond to the commercial realities of the industry and was not economically significant, was proper, we do not reach the issue of whether the City is a "single purchaser" under the Jayco analysis.

5. Tortious Interference

Next, Apani argues that the district court erred in granting CCE summary judgment on its claims of tortious interference with both existing and prospective business relations.

1. Tortious Interference with Existing Business Relations

HN17[] The essential elements of a tortious interference with an existing business **[*634]** relationship cause of action are (1) unlawful actions undertaken without justification or excuse; (2) with intent to harm; and (3) actual damages. *Morris v. Jordan Fin. Corp., 564 S.W.2d 180, 184 (Tex. App. 1978)*. In proving this claim, the plaintiff does not need to prove the existence of a valid contract, but only that the defendant's interference is motivated by **[**34]** malice. *CF & I Steel Corp. v. Pete Sublett & Co., 623 S.W.2d 709, 715 (Tex. App. 1981)*. The district court dismissed Apani's claim because it concluded that Apani had failed to demonstrate the first element of the claim-an unlawful act. Apani argues that it produced credible evidence that the existing business relationship between Apani and the City would have continued had CCE not entered into a contract with the City, effectively eliminating the City's business relationship with Apani. Thus, it concludes that CCE was not entitled to summary judgment on this issue. In its brief, Apani does not point to any unlawful act supporting its claim. However, in its Second Amended Complaint, Apani alleges that CCE's conduct in entering into an exclusive contract with the City was "wanton, improper, unlawful, and unfair, in that the structure of the Agreement constituted an illegal restraint of trade and intentional interference with [its] business relations, both existing and prospective. . . . Such conduct constitutes a violation of the antitrust laws . . . and/or such conduct was illegal in causing the City of Lubbock to refuse to deal with Apani." ***HN18***[] Having already concluded **[**35]** that CCE has not violated any antitrust laws, and that entering into an exclusive agreement, in and of itself, does constitute an unreasonable restraint on trade, we affirm the district court's ruling on this issue.

B. Tortious Interference with a Prospective Business Relationship

The Texas Supreme Court has not yet set out all the elements of a tortious interference with a prospective business contract or relations claim, and the appellate courts have not been uniform in their characterization of such actions. Tortious interference with business relationships, in the context of prospective relationships, has been identified with two sets of elements. Some courts have found that such a claim requires: (1) a reasonable probability that the parties would have entered into a *business relationship*, (2) an intentional and malicious act by the defendant that prevented the relationship from occurring, with the purpose of harming the plaintiff, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference. *Robles v. Consolidated Graphics, Inc., 965 S.W.2d 552, 561 (Tex. App. 1997)*. Other courts **[**36]** differ with regard to the first element by demanding that the plaintiff establish a reasonable probability that the parties would have entered into a *contractual relationship*. *Santa Fe Energy Operating Partners, L.P. v. Carrillo, 948 S.W.2d 780, 784 (Tex. App. 1997)*. The district court adopted the standard set out in Santa Fe Energy Operating Partners, L.P. and concluded that Apani failed to establish that there was a reasonable probability it would have entered into a *contractual relationship* with the City, but for the exclusive agreement. Apani argues that the district court improperly determined that it could not establish its claim, absent proof of a prospective contract.

HN19[] Although the Texas Supreme Court has not specifically set forth all of the elements necessary for a tortious interference with prospective business relations cause of action, it has recently recognized that "to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it **[*635]** was harmed by the defendant's conduct that was either independently tortious or unlawful." See *Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713, 44 Tex. Sup. Ct. J. 486 (Tex. 2001)*. **[**37]** The court clarified that "by 'independently tortious' we mean conduct that would violate some other recognized tort duty." Id. Based on Sturges, the district court alternatively concluded that CCE was entitled to judgment as a matter of law since Apani had not shown any unlawful conduct on the part of CCE. Apani concedes that Sturges requires it to show that CCE's conduct was independently tortious or unlawful. However, Apani claims that it has met this burden because it alleged violations of state and federal antitrust statutes, the Texas Constitution, and municipal statutory bidding laws. As stated previously, we have found no violations of ***antitrust law***. Further, for the reason discussed below, Apani has also failed to establish claims under either the Texas Constitution, or municipal bidding statutes. Thus, we agree with the district court that Apani's claim must fail for the same reason its existing business relations claim fails-the absence of an unlawful act. Because a determination of whether a prospective contract is required to establish a claim for tortious interference of prospective business relations will not affect the outcome of this case, we find it unnecessary **[**38]** to decide the issue today, and decline to do so.

6. Civil Conspiracy

HN20[] To prove a cause of action for civil conspiracy under Texas law, a plaintiff must establish the following elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983)*. Solely at issue here is whether Apani raised a fact issue with regard to an unlawful overt act to support its conspiracy cause of action. Apani alleges three independent unlawful acts, each of which Apani contends would individually support the civil conspiracy claim. First, it alleges that the creation of the agreement between CCE and the City violates *Article I, Section 26 of the Texas Constitution*. Second, Apani avers that the exclusive agreement was created in violation of Texas statutory bidding requirements under Section 252.021 of the Texas Government Code. Lastly, Apani contends that its separate claims for tortious interference with business relations may also support a civil conspiracy claim. Having concluded that **[**39]** Apani has not met the essential elements of a tortious interference claim, we will address only the alleged violations of the Texas Constitution and the statutory bidding laws.

1. Texas Constitution

HN21[] *Article I, Section 26 of the Texas Constitution* provides that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State." *TEX. CONST. art. I § 26*. Texas courts, however, have recognized several exceptions to this general rule of law. These exceptions are: (1) contracts between an agent and its principal wherein the agent is prohibited from dealing for himself or representing others besides his principal, (2) contracts involving the sale of a business in which the seller agrees not to engage in a competing business for a limited time, (3) lease agreements that require the lessee to sell only certain products on the leased premises, and (4) "cases in which an exclusive right or privilege is granted only upon the property or premises of the grantor." Airport Coach Serv., **[*636]** *Inc. v. City of Fort Worth, 518 S.W.2d 566, 572 (Tex. App. 1974)*.

Apani **[**40]** asserts that the exclusive agreement violates Section 26's prohibition against states and their political subdivisions granting monopolies. CCE argues that the TFEAA provides the exclusive cause of action for claims concerning monopolies and that Apani's claim under the TFEAA had been previously found by the district court to be without merit. Alternatively, it contends that if this court concludes that Apani can assert a claim under the Texas Constitution independent of the TFEAA, Apani is still unable to prove a violation because CCE has met one or more of the exceptions under the constitutional provision. Lastly, CCE contends that its agreement with the City does not fall within the meaning of "monopoly" established by the Texas Supreme Court. [7]

[41]** After analyzing the cases relied on by Apani in support of its proposition that the exclusive right granted by the agreement violated Section 26, the district court concluded that the factual pattern here is totally distinguishable from the cases cited by Apani. See *Jones v. Carter, 45 Tex. Civ. App. 450, 101 S.W. 514 (Tex. App. 1907)*; see also *Ennis Waterworks v. City of Ennis, 136 S.W. 513 (Tex. 1911)* (holding that under *Article I, Section 26 of the Texas Constitution*, a municipal corporation is without the power to grant an exclusive franchise to a water company); *Lea County Elec. Co-op., Inc. v. City of Plains, 373 S.W.2d 90, 93 (Tex. App. 1963)* (finding that a city does not have a right to grant an exclusive franchise to itself or anyone else for the furnishing of electric energy to its inhabitants). Specifically, the court noted that these cases

> involved a city making an agreement with a third party, providing exclusive right to that party to provide either water, electric, or all utilities to that city and all of its inhabitants. The citizens of those cities were forced to purchase electrical, water or other utilities **[**42]** for their private consumption in their homes from a party the city chose to grant an exclusive franchise. In the instant action, however, the agreement is limited to the purchase of non-alcoholic beverages at 27 City facilities. Coke was not granted an exclusive right to sell its products throughout the City to the exclusion of other companies, including Apani.

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[7] CCE also claims that in order to show a violation of *Article I, Section 26 of the Texas Constitution*, Apani must establish the elements necessary to sustain a cause of action under federal antitrust laws, namely, a relevant market. The district did not address this issue. Because we find that Apani has failed to demonstrate a viable cause of action under Section 26, we need not address this alternative basis for affirmance.

We agree that this case does not involve the degree of exclusivity required to constitute a "monopoly" under the Texas Constitution. We therefore uphold the district court's conclusion on this issue.

In addition to finding that Apani has failed to show a monopoly, the district court also determined that the agreement fell within one of the exceptions to Section 26. The court reasoned that since the subject property was owned by the City, the fourth exception under Airport Coach Services, Inc., i.e. cases in which an exclusive right or privilege is granted upon the property of the grantor, applies to this case. We agree. In Airport Coach Services, Inc., a Texas appellate court was presented with the issue of whether Dallas and Fort Worth, Texas, violated Section 26 by granting exclusive rights to a single business **[**43]** to provide ground transportation services at Dallas/Fort Worth Regional **[*637]** Airport. Finding that the airport was owned exclusively by the two cities, the court concluded that the agreement fell within the fourth exception, and therefore the grant of the exclusive contract for ground transportation services was not a prohibited monopoly. Apani argues that the court's reliance on Airport Coach Services, Inc. was misplaced because the court failed to take into consideration that the agreement gives CCE exclusive rights on property not only owned by the City, but also operated by the City. As stated previously, Apani has not shown that the facilities operated by the City are not also owned by the City. Thus, this argument is without merit. Finding no meaningful distinction between the situation presented here, and that addressed in Airport Coach Services, Inc., we conclude that the exclusive agreement met the fourth exception to Section 26. Because Apani is unable to show a violation of the Texas Constitution independent of the TFEAA, a determination of whether the TFEAA provides the exclusive remedy in Texas for monopoly claims is unnecessary.

2. Statutory Bidding Laws

Lastly, **[**44]** Apani alleges that CCE and the City negotiated a contract for the sale of beverages without complying with statutory bidding requirements set forth in Section 252.001 et. seq. of the Texas Local Government Code. ***HN22***[] Section 252.021(a) provides in relevant part that "Before a municipality may enter into a contract that requires an expenditure of more than $ 25,000 from one or more municipal funds, the municipality must . . . comply with the procedure prescribed by this chapter for competitive sealed bidding or competitive sealed proposals." *TEX LOC. GOV'T. CODE § 252.021(a)(1)* (Vernon 1999). Primarily, Apani contends that the statutory bidding laws were violated because no bidding was permitted on the exclusive beverage contract. In the district court, CCE presented several arguments as to why the court should not allow this claim to form the basis of Apani's conspiracy cause of action. The district court rejected all of CCE's contentions except for one. The court agreed with CCE that Apani failed to submit any evidence that CCE intentionally conspired with the City to violate the bidding laws. ***HN23***[] In Texas, a "civil conspiracy requires specific intent." *Triplex Comms., Inc. v. Riley, 900 S.W.2d 716, 719, 38 Tex. Sup. Ct. J. 765 (Tex. 1995)*. **[**45]** Proof that a defendant "intended to engage in the conduct" is insufficient. Id. Instead, "for a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement." Id. CCE argues that it not only was unaware of any violation, but it specifically negotiated a provision in the agreement requiring the City to represent that it had full authority to enter into the agreement. A review of the record reveals that Apani has not presented any evidence countering CCE's assertion of lack of intent. Therefore, the district court properly granted CCE judgment as a matter of law on this issue. [8]

[46]** **[*638]** CONCLUSION

For the foregoing reasons, we AFFIRM the district court's rulings dismissing all of Apani's claims.

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[8] With respect to Apani's assertion that the alleged violation of the bidding laws is an unlawful act, which may support its tortious interference claim, we find this argument meritless. As the district court correctly stated, in denying Apani's motion to alter or amend summary judgment, Apani had failed to address or provide any authority supporting its conclusion that an independent cause of action under the Texas bidding statutes may be asserted against a third party who enters into a contract with a governmental entity. ***HN24***[] Since Apani did not present any evidence at the district court level on this issue, nor argue this question in its brief, we conclude that the issue is not properly before us. *St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 445 (5th Cir. 2000)* ("We deem abandoned those issues not presented and argued in an appellant's initial brief, nor do we consider matters not presented to the trial court.").

AFFIRMED.

Verizon N.J., Inc. v. Ntegrity Telecontent Servs.

United States District Court for the District of New Jersey

August 12, 2002, Decided

Civ. No. 99-5366(GEB)

Reporter
219 F. Supp. 2d 616 *; 2002 U.S. Dist. LEXIS 14741 **; 2002-2 Trade Cas. (CCH) P73,787

VERIZON NEW JERSEY, INC. and VERIZON PENNSYLVANIA, INC., Plaintiffs, v. NTEGRITY TELECONTENT SERVICES, INC., Defendant, v. VERIZON MARYLAND, INC., Third Party Defendant.

Subsequent History: As Corrected August 13, 2002.

Disposition: [1]** Plaintiffs' motion to dismiss granted in part and denied in part. Defendant's cross-motion to dismiss denied.

Core Terms

customers, allegations, interconnection, anti trust law, Telecommunications, contracts, bills, antitrust claim, argues, antitrust, parties, motion to dismiss, negotiated, contends, carrier, competitors, plaintiffs', switching, district court, duties imposed, violations, consumers, Network, local telephone, state law claim, Sherman Act, discriminatory, Complaints, facilities, monopoly

LexisNexis® Headnotes

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN1[] **Introducing Competition, Duties of Incumbent Carriers & Resellers**

Under the Telecommunications Act of 1996 (1996 Act), *47 U.S.C.S. § 151 et. seq.*, states are no longer permitted to enforce laws prohibiting entry into the local telephone market. In order to generate competition in the local telephone service market, the Act imposes affirmative duties upon existing incumbent local exchange carriers (ILECs). These duties include providing access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers. *47 U.S.C. S.§ 251(b)(4)*). Additionally, the 1996 Act requires that ILECs provide interconnection with their networks to the competing local exchange carriers that is at least equal in its quality to that provide by the local exchange carrier to itself. *47 U.S.C.S.§ 251(c)(2)(C)*).

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN2[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. A court may not dismiss a complaint unless the plaintiff can prove no set of facts that would entitle him or her to relief. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Complaints, Requirements for Complaint**

In setting forth a valid claim, a party is required only to plead a short plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN4[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 12(b)(6)*, a court must accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. The motion can be granted only if no relief could be granted under any set of facts that could be proved. A complaint may be dismissed for failure to state a claim where it appears beyond any doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations.

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

HN5[] **Motions to Dismiss, Failure to State Claim**

A complaint should not be dismissed unless it appears beyond doubt that the facts alleged in the complaint, even if true, fail to support the claim. Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness.

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

HN6[] **Motions to Dismiss, Failure to State Claim**

A district court reviewing the sufficiency of a complaint has a limited role. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his or her claims. Generally, when conducting such an inquiry, material beyond the pleadings should not be considered.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Communications Law > Federal Acts > Telecommunications Act > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Purchasers, Direct Purchasers**

The United States Court of Appeals for the Seventh Circuit finds that the duties in the Telecommunications Act of 1996 (1996 Act), *47 U.S.C.S. § 151 et. seq.*, are not coterminous with the duties imposed by the antitrust laws. In other words, the appeals court finds that the 1996 Act imposes burdens on monopolists that are more comprehensive than the general duties under the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

HN8[] **Antitrust & Trade Law, Sherman Act**

The United States Court of Appeals for the Second Circuit observes that it is clear that a plaintiff would not state an antitrust claim against a defendant simply by alleging that the defendant violated its duties under *§ 251* of the Telecommunications Act of 1996, *47 U.S.C.S. § 151 et. seq.* *47 U.S.C.S. § 251*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

The essential facilities doctrine requires a monopolist to give access to necessary equipment so that competitors are able to compete in the market.

Antitrust & Trade Law > Regulated Industries > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN10[] **Antitrust & Trade Law, Regulated Industries**

The United States Court of Appeals for the Second Circuit finds that there is no inherent conflict with the regulatory scheme of the Telecommunications Act of 1996, *47 U.S.C.S. § 151 et. seq.*, if a plaintiff only seeks monetary damages. The appeals court does not find a conflict with making incumbent local exchange carriers subject to the antitrust laws as well as their interconnection agreements. The appeals court observes courts may not be suited to order particular actions by telecommunications carriers to make the local markets more competitive, particularly when there is a specific regulatory scheme meant to serve the same purpose.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN11[] **Federal Acts, Telecommunications Act**

The United States Courts of Appeals for the Seventh, Second, and Eleventh Circuits are in agreement on one principle; that violations of the Telecommunications Act of 1996, *47 U.S.C.S. § 151 et. seq.*, standing alone, do not create liability under the general antitrust laws.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN12[] **Federal Acts, Telecommunications Act**

The United States District Court for the District of New Jersey agrees with the conclusion reached by the United States Court of Appeals for the Second, Seventh, and Eleventh Circuits; that allegations of a breach of an interconnection agreement, standing alone, do not state an antitrust claim. Parties to an interconnection agreement with claims that the making incumbent local exchange carrier has failed to honor that contract may not resort to antitrust litigation to resolve those claims.

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

The obligations arising under the express terms of interconnection agreements alone cannot form the basis of an antitrust action.

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Orders & Hearings > Complaints & Charges > Rates

HN14[] **Antitrust & Trade Law, Sherman Act**

Allegations that an incumbent local exchange carrier lowered its own retail rates in an effort to make service with a competitor appear unattractive to consumers states a claim under the general antitrust laws even absent the existence of the Telecommunications Act of 1996, *47 U.S.C.S. § 151 et. seq.*

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

Implied immunity is not created simply because a plaintiff's claims might also arise under the Telecommunications Act as well as the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Sherman Act, Claims**

In order to establish a claim under *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*, a plaintiff must demonstrate: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Monopolies & Monopolization, Attempts to Monopolize**

Even a monopolist does not have a general duty to cooperate with a competitor. However, a company's right to select its business associates is not unqualified. The alleged monopolist may not refuse to deal with a competitor if it has the specific intent to either maintain or create a monopoly. Evidence of this specific intent is abundant when a business refuses to engage in a deal that would profit both the business and the competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN18[] **Robinson-Patman Act, Claims**

Section 2(a) of the Clayton Act, commonly referred to as the Robinson-Patman Price Discrimination Act, codified at *15 U.S.C.S. § 13 (a)*, can be established by a showing of different prices charged to different customers. Price discrimination in and of itself is not illegal. Rather a plaintiff must show a reasonable probability of competitive injury. Monopoly power, simply put, is the power to control prices and exclude competition.

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

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN19[] **Motions to Dismiss, Failure to State Claim**

Where documents are relied upon and referred to in a complaint, the United States District Court for the District of New Jersey may refer to the contents of these contracts in ruling on a motion to dismiss.

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

The New Jersey antitrust statutes are to be construed consistently with federal antitrust regulations. The Pennsylvania and Maryland antitrust laws are also construed in line with the federal antitrust provisions.

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN21[] **Introducing Competition, Duties of Incumbent Carriers & Resellers**

Section 251 of the Telecommunications Act of 1996, *47 U.S.C.S. § 151 et. seq.*, requires incumbent local exchange carriers (ILECs) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. *47 U.S.C.S. § 251(a)(1)*. It also imposes the duty of resale on ILECs. *47 U.S.C.S. §§ 251(c)(4)*. In providing its services, the ILEC must offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. *§ 251(c)(4)(a)*. The incumbent must do so without the imposition of unreasonable or discriminatory conditions. *§ 251(c)(4)(B)*.

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN22[] **Introducing Competition, Duties of Incumbent Carriers & Resellers**

An incumbent local exchange carrier may chose to fulfill the obligations set forth in *§ 251* of the Telecommunications Act of 1996 (1996 Act), *47 U.S.C.S. § 151 et. seq.*, codified at *47 U.S.C.S. § 251*, by entering into a negotiated agreement as specified in 47 U.S.C.S. § 252. If the parties negotiate an interconnection agreement, they may enter a binding agreement without regard to the standards set forth in 47 U.S.C.S. § 251(b), (c). 47 U.S.C.S. § 252(a)(1). The 1996 Act expressly allows for agreements to be negotiated which do not necessarily define the same duties contemplated by 47 U.S.C.S. § 251.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN23[] **Federal Acts, Telecommunications Act**

Rather than negotiating agreements alleged to be discriminatory, a party can avail itself of the arbitration process to implement the duties imposed on incumbent local exchange carriers as enumerated under 47 U.S.C.S. § 251(b) and (c). 47 U.S.C.S. § 252(b)(1), (c)(1).

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN24[] **Federal Acts, Telecommunications Act**

Where a party has not properly pled violations of the 47 U.S.C.S. § 251, there is no violation of the Telecommunications Act of 1996, 47 U.S.C.S. § 151 et. seq., which would be cognizable under 47 U.S.C.S. §§ 206 and 207.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN25[] **Pleadings, Crossclaims**

Counterclaim allegations are properly before a court and cannot be dismissed for the lack of an independent jurisdictional basis. 28 U.S.C.S. § 1367(a).

Antitrust & Trade Law > Regulated Industries > Communications > State Regulation

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > General Overview

HN26[] **Communications, State Regulation**

47 U.S.C.S. § 152 expressly preserves antitrust and additional causes of action in light of the Telecommunications Act of 1996, 47 U.S.C.S. § 151 et. seq.

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

HN27[] **Parties, Capacity of Parties**

See *Fed. R. Civ. P. 17(a)*.

Civil Procedure > Parties > Real Party in Interest > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN28[] **Parties, Real Party in Interest**

There is a preference for a determination of a dispute on its merits rather than on a technicality.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN29[] **Complaints, Requirements for Complaint**

A party may plead alternative causes of action. *Fed. R. Civ. P. 8(e)(2)*.

Counsel: Karol Corbin Walker, Esquire, St. John and Wayne, L.L.C., Newark, New Jersey, John Thorne, Esquire, Ajit Pai, Esquire, Verizon, Arlington, Virginia, Dan K. Webb, Esquire, Charles B. Molster, III, Esquire, Winston & Strawn, Washington, D.C., Aaron M. Panner, Esquire, Kellog, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, D.C., Attorneys for Plaintiffs and Counterclaim Defendants and Third Party Defendants.

Steven G. Sanders, Esquire, Arseneault & Fassett, Chatham, New Jersey, Diana D. Parker, Esquire, Law Offices of Diana D. Parker, New York, New York, Edward Rubin, Esquire, Law Offices of Edward Rubin, New York, New York, Attorneys for Defendant and Counterclaim Plaintiff and Third Party Plaintiff.

Judges: GARRETT E. BROWN, JR., U.S.D.J.

Opinion by: GARRETT E. BROWN, JR.

Opinion

[*617] BROWN, District Judge

This matter comes before the Court upon the motion of Verizon for **[**2]** dismissal of **[*618]** Ntegrity's antitrust Counterclaim and Third Party Complaint, and upon Ntegrity's cross-motion to dismiss plaintiffs' collection action. The Court exercises jurisdiction over this matter pursuant to *28 U.S.C. § 1332* and having considered the submissions and the arguments of the parties, grants in part and denies in part Verizon's motion, and denies Ntegrity's motion.

I. BACKGROUND

A. Legislative and Factual Background

As it serves as the basis for the instant litigation and motion practice, the Court must first review the history and purpose of the Telecommunications Act of 1996 ("1996 Act" or "the Act"), which amended the Communications Act of 1934, 47 U.S.C. § 151 et. seq. At one point in history, local telephone service was a sanctioned monopoly. *See* Trinko v. Bell Atlantic Corp., 294 F.3d 307 (2d Cir. 2002). However, in 1996, Congress enacted the Telecommunications Act in an effort to create competition in the once monopolized market. *See* id. at 312. **HN1**[] Under the Act, states are no longer permitted to enforce laws prohibiting entry into the local telephone market. *See id.* **[**3]** In order to generate competition in the local telephone service market, the Act imposes affirmative duties upon existing incumbent local exchange carriers ("ILECs") such as Verizon. *See id.* These duties include providing "access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers." *Id.* (quoting 47 U.S.C. § 251 (b)(4)). Additionally, the Act requires that ILECs provide interconnection with their networks to the competing local exchange carriers ("CLECs") "that is at least equal in its quality to that provide by the local exchange carrier to itself." *Id.* (quoting 47 U.S.C. § 251 (c)(2)(C)).

The 1996 Act therefore imposed a duty upon Verizon, an ILEC, to provide services to CLECs such as Ntegrity. *See* Amended Answer Counterclaims and Third Party Complaint of Ntegrity ("Am. Answer") PP 16 - 17. Ntegrity was founded as a minority owned CLEC in 1998, with the goal of providing local telephone services to the general public. *See id.* P 17. Pursuant to the 1996 Act, Ntegrity entered into contracts with Bell Atlantic New Jersey, Bell Atlantic Pennsylvania and Bell Atlantic Maryland. [1] *See* **[**4]** *id.* Each of the interconnection agreements were filed with and approved by the respective state commissions. *See* Verizon's Brief in Support of Dismissal ("Verizon Br.") at 5. The negotiated contracts each provided for a one year term, after which either party could terminate the agreement by providing written notice 90 days in advance of the desired termination date. *See id.*

Ntegrity describes the local exchange services they sought to provide as the "originating or terminal point for interstate telephone and data transmission services." Am. Answer P 17. Ntegrity acquired its first customer in July 1998, and added more than 1,000 customers by September of that year and nearly 8,000 customers in both November **[**5]** and December of 1998. *See id.* P 18. The contracts created by Ntegrity and the Verizon entities serve as the basis for the instant disputes.

B. Procedural History

The parties in the instant matter have been engaged in this litigation for nearly three years. In November 1999, Verizon, **[*619]** formerly known as Bell Atlantic, filed two separate Complaints against the defendant, Ntegrity Telecontent Services. *See* Ntegrity's Brief in Opposition ("Ntegrity's Br.") at 6. Verizon Pennsylvania, claimed that defendant failed to pay overdue bills in violation of the resale agreement between the parties. *See id.* Similarly, Verizon New Jersey filed a complaint alleging that Ntegrity failed to pay its bills according to their contract. *See id.* In response, Ntegrity filed a Counterclaim alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 2(a) of the Clayton Act, 15 U.S.C. § 13 (a), as well as New Jersey and Pennsylvania state law antitrust statutes. *See* Am. Answer PP 84 - 181. Additionally, Ntegrity included a Third Party Complaint against Verizon Maryland alleging similar violations. *See id.* Ntegrity **[**6]** also included a number of state law breach of contract and tortious interference claims against all three Verizon parties. *See id.*

The parties consented to the consolidation of the Verizon Pennsylvania and Verizon New Jersey claims and this Court entered an Order to that effect on April 11, 2000. Shortly thereafter, Verizon filed a motion to dismiss Ntegrity's Counterclaim and Third Party Complaint in its entirety. The Court considered whether Ntegrity had properly asserted the necessary elements of an antitrust claim.

1. Decision of the Court in the Previous Motion to Dismiss

[1] Bell Atlantic is now known as Verizon. For the purposes of this Opinion, the Court will refer to the collective plaintiffs and the Third Party defendant as Verizon. When necessary, the Court will refer to the individual parties as Verizon Pennsylvania, Verizon New Jersey and Verizon Maryland.

In the prior Memorandum and Order of the Honorable Anne E. Thompson, U.S.D.J., the Court concluded that Ntegrity had sufficiently pled the elements of a section 2 Sherman Act claim for abuse of monopoly power. [2] *See* October 31, 2000 Memorandum and Order ("10/31/00 Order") at 3. Specifically, the Court found that Ntegrity alleged that Verizon "willfully acquired and maintained monopoly power" through various anti-competitive techniques. *Id.* at 3-4.

The **[**7]** Court also sustained Ntegrity's claims for Sherman Act liability for attempted monopolization. *See id.* at 5. The Court found that Ntegrity relied upon the same allegations as set forth in their alternate Sherman Act claim, and thus sustained Ntegrity's allegations. *See id.* Similarly, the Court allowed Ntegrity's claim of price discrimination under section 2 of the Clayton Act. *See id.* To do so, the Court inferred that Ntegrity defined telephone service as a commodity. *See id.*

However, Ntegrity's allegations of illegal tie-ins under Section 1 of the Sherman Act were dismissed. *See* id. at 6. The Court determined that Ntegrity had failed to state a claim because it did not allege that it was denied telephone service because it refused to buy other services from Verizon. *See id.* Ntegrity's claim under Section 206 of the Telecommunications Act was also dismissed. *See id.* at 7. The Court found that Section 206 did not create a separate cause of action, and dismissed that portion of the Counterclaim. *See id.*

Moving on to Ntegrity's state law claims, the Court determined that it had adequately pled claims for breach of contract and malicious interference **[**8]** with business relations. *See id.* at 7-8. Similarly, the Court sustained Ntegrity's claims for breach of good faith and fair dealing. *See id.* at 8-9. In conclusion, the Court allowed Ntegrity the opportunity to amend its Counterclaim and Third Party Complaint. *See id.* at 9. Ntegrity subsequently filed its amended pleading.

[*620] 2. Ntegrity's Amended Answer, Counterclaim and Third Party Complaint

Ntegrity alleges that at the time of its Counterclaim, Verizon controlled approximately 97% of the local telephone service in New Jersey, Pennsylvania and Maryland. *See* Am. Answer P 19. Ntegrity states that Verizon engaged in a number of anti-competitive tactics in an effort to maintain its monopoly market share. *See id.* Those alleged practices included illegal tie-ins; unjust discriminatory switching fees; discriminatory denial of access to pricing information; intentionally error-prone and discriminatory computer interface systems; error prone billing; and preventing Ntegrity customers from placing long-distance phone calls. *See id.*

Specifically, Ntegrity alleges that Verizon intentionally utilized a discriminatory and error prone billing method for CLECs like Ntegrity. **[**9]** *See id.* P 21. Ntegrity claims the billing errors created the need for it to extensively audit the bills submitted by Verizon, and this process utilized more than 100 hours per week. *See id.* PP 21, 25. Additionally, Ntegrity asserts that the error rate on the bills generated by Verizon for the CLECs was substantially higher than the error rate for Verizon's own large retail customers. *See id.* P 21. Ntegrity maintains that the billing errors made it impossible to conduct an actual accounting of the money it owes to Verizon. *See id.* P 24. Ntegrity contends that electronic billing would have alleviated some of the problems with the billing errors, but Verizon would only offer that service at "a prohibitive cost." *Id.*

Ntegrity also claims that the bills it received from Verizon were inaccurate because the tariffs assessed against Ntegrity were set by regulation based on the value of Verizon's equipment. *See id.* P 28. Ntegrity points to an audit conducted in 1999 by the FCC, which determined that the value of Verizon's equipment was overstated in New Jersey, Pennsylvania and Maryland. *See id.* P 29. Ntegrity maintains that this resulted in excess charges of more **[**10]** than $ 65,000,000.00 to Verizon customers. *See id.* Based on those figures, Ntegrity assumes that it has been overcharged by approximately $ 300,000.00. *See id.* P 31.

Further, Ntegrity alleges that Verizon charged new Ntegrity customers a switching penalty when they transferred their service from Verizon. *See id.* P 34. Ntegrity alleges that this was called a Record Order Charge, but that it was

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[2] This matter was originally assigned to the Honorable Anne E. Thompson, U.S.D.J. and subsequent to her decision on Verizon's original motion, this matter was transferred to the undersigned.

actually "without justification and unreasonable." *Id.* Ntegrity contends that the Record Order Charge is not specifically enumerated in the contract between the parties, and is only indirectly incorporated into those agreements. *See id.* P 35. Ntegrity maintains that there is not a viable reason for the imposition of this charge, even though it is normally charged when a new customer establishes service with Verizon. *See id.* P 36. Ntegrity states "Third Party Defendants said they would charge only a $ 3.00 - $ 6.00 switching fee," and alleges that if Verizon had only charged a $ 4.00 switching fee, then it has been over billed for approximately $ 125,000.00. *Id.* P 38. Ntegrity also maintains that Verizon occasionally waives this Record Order fees for its retail customers, **[**11]** and thus alleges that these charges are discriminatory. *See id.* P 40.

Ntegrity also contends that Verizon has repeatedly cut off long distance service prior to switching customers from Verizon to Ntegrity. *See id.* P 43. Ntegrity alleges that when it switched its own long distance provider, its customers were unable to place long distance phone calls because Verizon failed to make that change in a timely manner. *See id.* P 45. Ntegrity provided its customers with dial **[*621]** around numbers to correct the problem and alleges that Verizon blocked those codes. *See id.* P 47. Ntegrity also complains of poor and late data it received about its customers from Verizon. *See id.* P 49.

Ntegrity alleges that Verizon refused to supply it with meaningful billing information that could be used to bill Ntegrity customers. *See id.* P 51. Ntegrity contends that Verizon refused to supply such information between April 1998 until August 1999, and that it was required to comb through Verizon's tariff books before it could decode the bills it received. *See id.* Ntegrity claims an 84% error rate on its bills and a consequent customer loss. *See id.* P 53.

Ntegrity also alleges that **[**12]** Verizon requires manual processing by resellers whenever a CLEC wins a new customer. *See id.* P 54. Defendant maintains that this processing must occur before it can switch a customer from Verizon to Ntegrity, and that it drives up the costs to the reseller. *See id.* Ntegrity contends that it should not have to provide such detailed information before a customer can be switched because Verizon already has all the relevant information about its current customers. *See id.* P 56. Ntegrity challenges that this process is cumbersome and creates numerous opportunities for human error. *See id.* P 57. Slow provisioning or switching is another issue addressed by defendant. *See id.* P 62. Ntegrity complains that it can take up to 30 days for Verizon to switch a customer over to Ntegrity and it only takes three days for them to add a new retail customer. *See id.*

Another complaint is that Verizon created illegal tie-ins between its Bell Atlantic Yellow Pages company and the provision of local telephone service. *See id.* P 63. Ntegrity claims that Verizon would offer month-to-month payment plans to its retail customers, and would require up-front payment for Yellow Pages **[**13]** ads for any customers that switched to a CLEC such as Ntegrity. *See id.* P 63. Ntegrity also contends that Verizon withheld voice mail services from Ntegrity customers, and that such services have since been required by legislation in New York, Delaware and Vermont. *See id.* P 64. Ntegrity alleges that it can only purchase voice mail service in New Jersey, Pennsylvania and Maryland if it signs a volume and term agreement. *See id.* P 65.

Ntegrity contends that its customers have been confronted with continuous attempts to win back their business. *See id.* P 66. Ntegrity maintains that Verizon has attempted to win back its customers before it even switched those customers over to Ntegrity's service. *See id.* Related is Ntegrity's claim that Verizon made repeated material misrepresentations about Ntegrity to its existing and potential customers. *See id.* P 67.

Ntegrity also sets forth complaints about the text and content of the contracts that the parties negotiated pursuant to the Act. *See id.* PP 69 - 79. Defendant claims that enforcement of the contracts "would permit the continuation of Third Party Defendants' anti-competitive conduct and violations of the Telecommunications **[**14]** Act under the protective umbrella of the contracts." *Id.* P 70. Ntegrity complains that the contracts require it to use the allegedly discriminatory computer interface system described in the Amended Answer. *See id.* P 71. Ntegrity also dislikes the requirement that it provide an irrevocable letter of credit guaranteeing payment of any disputed billing amounts. *See id.* P 72. Ntegrity states that the contracts obligate Verizon to provide daily customer usage records which were not immediately provided. *See id.* P 73. Ntegrity also maintains that the contracts allow Verizon **[*622]** to unilaterally determine what ancillary services, such as voice mail, could be provided "without unreasonable expense." *Id.* P 74. Ntegrity contends that Paragraph 32 of the contract "purports to limit the services that Subsidiary Third Party

Defendants will provide." *Id.* The contracts also specify that untimely and inaccurate bills are not considered breaches of the interconnection agreements. *See id.* P 78.

Based on these allegations, Ntegrity asserts claims for abuse of monopoly power under *Section 2* of the Sherman Act as well as under the New Jersey and Maryland antitrust statutes. **[**15]** *See id.* PP 84 - 102. Ntegrity also asserts claims alleging attempted monopolization under *Section 2* of the Sherman Act as well as the Maryland and New Jersey antitrust statutes. *See id.* PP 102 - 121. In addition, Ntegrity alleges a price discrimination claim under *Section 2(a)* of the Clayton Act, commonly known as the Robinson-Patman Act, and a claim under *Section 251(b)* and *(c)* of the Telecommunications Act. [3] *See id.* PP 122-130. Finally, Ntegrity asserts claims under the state laws of New Jersey, Maryland and Pennsylvania for breach of contract; tortious interference with business relationships and breach of the implied duty of good faith and fair dealing. *See id.* PP 130 - 181.

3. Ntegrity's Application for a Preliminary Injunction

Subsequent to the decision on plaintiff's **[**16]** first motion to dismiss, Verizon notified Ntegrity that it intended to discontinue service to Ntegrity's customers after January 31, 2000 because of its failure to pay overdue bills. *See* Verizon Br. at 6. On January 31, 2000, Verizon stopped providing service to any new Ntegrity customers and informed the state commissions of its decision to stop offering new service. *See id.* Verizon, however, continued to provide service for Ntegrity's already existing customers. *See id.* On May 11, 2001, Ntegrity filed a motion for a preliminary injunction to prevent Verizon from terminating service to those existing customers. *See id.* at 8.

This Court rejected Ntegrity's application, as did the New Jersey Board of Public Utilities. *See id.* at 8-9. The Board required a letter of credit from Ntegrity in the amount of $ 500,000.00, which Ntegrity declined to prepare. *See id.* at 9. The Board authorized termination of service upon proper notice to Ntegrity's existing customers. *See id.* After the required notice was provided, the Board authorized termination of service. *See id.* at 10. On July 25, 2001, Verizon stopped providing service to all remaining Ntegrity's customers. **[**17]** *See id.*

4. Instant Motions to Dismiss

Verizon filed the instant motion to dismiss subsequent to Ntegrity's submission of its Amended Answer Counterclaim and Third Party Complaint. Verizon asks this Court to re-visit the sufficiency of Ntegrity's antitrust claims based on newly decided precedent that was not considered in the prior Memorandum and Order. *See id.* at 11. Ntegrity opposes the motion and seeks to dismiss Verizon's collection claims based on a lack of prudential standing pursuant to *Fed. R. Civ. P. 17(a)*.

II. DISCUSSION

A. Standard for Motion to Dismiss

HN2[] A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* may be granted only if, **[*623]** accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *See* *Oran v. Stafford, 226 F.3d 275, 279 (3d Cir. 2000)* (citation omitted); *Langford v. City of Atlantic City, 235 F.3d 845, 850 (3d Cir. 2000)* (citation omitted). The Court may not dismiss a complaint unless the plaintiff can prove no set of facts that would entitle him or her to relief. *See* *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. **[**18]** "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Op. 2d 474 (1974)*. ***HN3***[] In setting forth a valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*.

[3] As highlighted by Verizon, *Section 252(c)(4)* of the Telecommunications Act does not exist. *See* Verizon Br. at 11 n.5. Ntegrity confirms that it intended to cite *§ 251(b)* and *(c)*. *See* Ntegrity Br. at 38 n.5.

HN4[] Under *Rule 12(b)(6)*, the Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." *Turbe v. Government of the Virgin Islands, 938 F.2d 427, 428* (citing *Unger v. National Residents Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1991)*; *see also* *Langford, 235 F.3d at 850*; *Dykes v. Southeastern Pennsylvania Transp. Auth., 68 F.3d 1564, 1565 n.1 (3d Cir. 1995)*. A complaint may be dismissed for failure to state a claim where it appears beyond any doubt that no relief could be granted under any set of facts which could be proved consistent **[**19]** with the allegations. *See* *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*.

HN5[] A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the claim." *Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)*. Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. *See* *Papasan v. Allain, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)*; *see also* *Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997)* ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss").

HN6[] A district court reviewing the sufficiency of a complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his [or her] claims." *Scheuer, 416 U.S. at 236*. Generally, when conducting such an inquiry, material beyond the pleadings should not be considered. *See* *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir.1997)*; **[**20]** *Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196* (3d Cir.), *cert. denied, 510 U.S. 1042, 126 L. Ed. 2d 655, 114 S. Ct. 687 (1994)*.

B. Verizon's Motion to Dismiss

1. Ntegrity's Antitrust Claims

Verizon urges this Court to re-examine the claims pled by Ntegrity in light of *Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)*. Verizon argues that this Court should dismiss Ntegrity's Counterclaim because the Telecommunications Act imposes affirmative duties on ILECs which reach beyond the requirements found in the antitrust laws. *See* Verizon Br. at 15. Verizon contends that *Goldwasser* provides direction because it recognized the conflict between the general antitrust laws and the more specific legislation of the 1996 Act. *See id.*

Verizon argues that the Seventh Circuit properly upheld dismissal of the antitrust claims in that case because it correctly **[*624]** recognized that the Telecommunications Act duties are not coterminous with the duties imposed upon monopolies under the antitrust laws. *See id.* at 16. Verizon contends that the antitrust laws do not oblige a service provider to make **[**21]** its services available to a competitor, at a wholesale price, so that the competitor can then resell those services to the general public. *See id.* at 17. Verizon points to practice in other regulated industries which does not require the sale of commodities to "non-competitive middlemen" under the antitrust laws. *See id.* (citing *HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877-78 (6th Cir. 1991))*.

Further, Verizon argues that antitrust litigation in the face of the regulatory scheme would be interruptive to the experts that have been put in place to resolve the disputes between ILECs and their competitors. *See id.* at 19. Verizon contends that Ntegrity's claims all relate to matters that are specifically required by the 1996 Act and the interconnection agreement between the parties. *See id.* at 20. Verizon maintains that each allegation is directed at the terms of the interconnection agreements, which Ntegrity helped to draft. *See id.* at 21. Verizon points out that Congress has entrusted oversight of the interconnection agreements created under the 1996 Act to state created commissions. *See id.*

Verizon also argues that it does not have **[**22]** a duty under the antitrust laws to sell its services to a re-seller who in turn sells those same services to the general public. *See id.* at 22. Verizon contends that this makes the duties imposed by the Telecommunications Act more onerous than those created by the antitrust laws. Thus, it argues that the antitrust laws must not be applied to enforce obligations that were only created by very specific regulatory legislation. *See id.*

Ntegrity responds first that a motion to dismiss the antitrust claims has already been decided by the Honorable Anne E. Thompson during previous motion practice, and that the decision is binding law of the case. *See* Ntegrity Br. at 13. Ntegrity points out that the doctrine is not designed to limit the federal court's power, but that courts in the Third Circuit have applied the doctrine to interlocutory decisions. *See id.* at 13-14. Ntegrity argues that the holding in *Goldwasser* was made a subject of Verizon's reply brief in the previous motion practice, and that it submitted a letter in response to those arguments. *See id.* at 15-16.

Addressing the substance of the motion, Ntegrity argues that *Goldwasser* is not persuasive and **[**23]** does not create binding authority that this Court must follow. *See id.* at 21. Ntegrity also seeks to distinguish the holding in *Goldwasser* because that antitrust case was brought by consumers rather than a competitor. *See id.* Ntegrity argues that *Goldwasser* should have been decided on more limited grounds, and is inapplicable to claims brought by competitors. *See id.* at 22. Ntegrity contends that the Seventh Circuit did not need to reach the issue of whether violations of the 1996 Act alone would be sufficient to state an antitrust claim. *See id.* at 23. It also argues that the Seventh Circuit went even further in holding that antitrust claims that are related, but not identical, to claims under the 1996 Act are not cognizable. *See id.* at 24. Ntegrity maintains that Judge Thompson must have "necessarily decided not to follow this *dicta* from an out-of-circuit consumer case." *Id.* (alteration in original).

Ntegrity argues that its Counterclaim alleges conduct that violates the general antitrust laws. *See id.* at 25. It also argues that Verizon interprets its claims as alleging only conduct which violates the **[*625]** 1996 Act in an effort to make the Counterclaim **[**24]** amenable to dismissal on the grounds set forth in *Goldwasser. See id.* However, Ntegrity asserts that its claims are not limited only to plaintiffs' violations of the affirmative duties created by the 1996 Act. *See id.* at 26.

Ntegrity argues that it also alleges pernicious anti-competitive conduct such as fraudulent billings, illegal cancellation notices, misrepresentations made to Ntegrity customers, and illegal charges. *See id.* It contends that the antitrust laws were established to address plaintiffs' behavior. *See id.* Ntegrity asserts that it is irrelevant if Verizon's actions also violate the 1996 Act, and that this fact should not preclude its pursuit of an antitrust claim. *See id.*

Further, Ntegrity argues that the Telecommunications Act contains an express savings clause which states "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." *Id.* at 33 (quoting 47 U.S.C. § 152). Ntegrity also points to recent submissions by the Federal Communications Commission and the Department of Justice, both of whom have concluded that private actions **[**25]** seeking damages were not repealed by the 1996 Act. *See id.* at 34. Ntegrity notes that the opinion of an agency, on a matter within its jurisdiction, is entitled to great deference. *See id.* Ntegrity argues that deferral by this Court to a state commission essentially creates an abstention, and deprives it of a federal forum. *See id.* at 35. Ntegrity contends that state Public Utility Commissions ("PUCs") have only a very limited role in the negotiating and approval of interconnection agreements. *See id.* It further maintains that this role does not create a pervasive regulatory scheme that should divest this Court of jurisdiction. *See id.*

The instant motion presents narrow issues which have not already been considered by this Court. [4] Plaintiffs request that this Court dismiss defendant's antitrust Counterclaim arguing that the 1996 Act requires affirmative duties from ILECs that reach above and beyond the duties imposed by the antitrust laws. Ntegrity argues that its

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[4] Ntegrity urges this Court to disregard the instant motion to dismiss the Counterclaim arguing that Judge Thompson has already considered the sufficiency of the Counterclaim and impliedly rejected the holdings of the Seventh Circuit in Goldwasser 222 F.3d 390. However, the holding in *Goldwasser* was not mentioned in the prior opinion, nor was the origin of the relationship between the these two parties. As such, this Court is obligated to consider issues of law which might preclude the antitrust causes of action. Further, Ntegrity's Counterclaim and Third Party Complaint were amended after the previous motion practice, thus inviting review of the revised pleading. Therefore, the Court will consider the instant motion because the rule of law created by *Goldwasser* was not fully briefed or considered in the prior motion to dismiss.

claims are not based solely upon the duties imposed by the 1996 Act, and that the allegations are sufficient to state a Sherman Act claim because Verizon engaged in general anti-competitive conduct. **[**26]**

Verizon brought the instant motion based upon the precedent set by *Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)*. While the instant **[**27]** motion was under the consideration of this Court, the Second Circuit decided *Trinko v. Bell Atlantic Corp., 294 F.3d 307 (2d Cir. 2002)*, and the Eleventh Circuit decided *Covad Communications Co. v. Bellsouth Corp., 299 F.3d 1272, 2002 U.S. App. LEXIS 15486, 2002 WL 1777009 (11th Cir. 2002)*. All three cases examine the interplay between the antitrust laws and the more specific legislation of the Telecommunications Act of 1996.

[*626] In *Goldwasser,* the Seventh Circuit encountered a lawsuit brought by consumers who had purchased their telephone service from an incumbent local exchange carrier, Ameritech. *See* *Goldwasser, 222 F.3d at 392*. As purchasers of telephone services, the plaintiffs therein filed a lawsuit alleging antitrust violations for Ameritech's failure to comply with the 1996 Telecommunications Act. *See* *id. at 392, 395-96*.

The *Goldwasser* plaintiffs claimed that Ameritech controlled more than 90% of the markets for local telephone service in their states. *See* *id. at 394*. They also alleged that Ameritech operated in such a manner so as to exclude competition and did not provide competitors with access to the **[**28]** facilities as contemplated by the Act. *See id.* The plaintiffs alleged that Ameritech did not provide its competitors with access to quality service, unbundled services and nondiscriminatory access to its operational support systems. *See id.* Further, the *Goldwasser* plaintiffs claimed that Ameritech failed to fully unbundle its network elements, and that competitors have experienced undue delays in switching and fees for originating and terminating phone service. *See* *id. at 395*. The plaintiffs in *Goldwasser* asserted that Ameritech continued to bill customers that had been transferred to competitors and this caused some former Ameritech customers to be double-billed. *See id.*

The District Court dismissed the complaint holding that the filed rate doctrine barred the claims for damages under the antitrust statutes. *See id.* The District Court went on to find that the plaintiffs lacked standing under the antitrust laws, and that the consumers were not able to sue for enforcement of the duties imposed upon ILECs by the Telecommunications Act. *See* *id. at 396*.

On appeal, the Seventh Circuit affirmed the dismissal of the plaintiffs' complaint, **[**29]** but based upon a different rationale. *See* *id. at 399*. The Seventh Circuit determined that the *Goldwasser* plaintiffs did in fact have standing to allege antitrust claims. *See* *id. at 398*. The Court found that as direct purchasers of Ameritech's products, they had sufficiently alleged an antitrust injury, specifically, the overcharges they experienced as a result of the monopoly. *See id.* However, ***HN7***[] the Court found that the plaintiffs could not pursue their claim because the duties in the 1996 Act are not coterminous with the duties imposed by the antitrust laws. *See* *id. at 399*. In other words, the Seventh Circuit found that the 1996 Act imposed burdens on monopolists that were more comprehensive than the general duties under the antitrust laws. *See id.*

The Court reasoned that Congress could have simply lifted any existing regulatory prohibitions on phone service competition and allowed the antitrust laws to provide a solution for the existing telephone monopoly. *See* *id. at 399-400*. Rather, the Court observed, that Congress created a complex regulatory scheme to foster competition and ultimately enhance customer **[**30]** pricing for local phone service. *See id.* The Seventh Circuit determined that the plaintiffs' complaint alleged violations of duties which went beyond any requirements created by the antitrust laws. *See* *id. at 400*. The Court stated "we think it both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws." *Id.*

The Court went on to clarify that it did not find that the 1996 Act conferred an implied immunity from the antitrust laws. *See* *id. at 401*. The Seventh Circuit noted that the savings clause set forth in the legislation would seriously complicate such a determination, and held only that the more specific regulations in the 1996 Act should control. *See id.* Finally, the Court addressed whether any allegations in the **[*627]** plaintiffs' complaint could be divorced from the claims under the 1996 Act. *See id.* The Seventh Circuit reviewed plaintiffs' complaint and the contention that Ameritech's control of essential facilities stated a violation of the general antitrust laws. *See id.* The Court determined that those allegations, when read with the complaint as a whole, were **[**31]** inextricably linked to the duties required of the ILEC under the Act, and therefore could not create liability under the general antitrust rules. *See id.*

Also recently decided, is *Trinko, 294 F.3d at 329-30*, in which the Second Circuit determined that the consumer plaintiffs therein were entitled to maintain an antitrust action against an incumbent local exchange carrier. The plaintiffs in *Trinko* were purchasers of local telephone service from a competing carrier. *See Trinko, 294 F.3d at 310-11*. Those plaintiffs claimed they were damaged when Bell Atlantic denied their local service carrier, AT&T, equal access to the local network. *See id.* They alleged violations of section 202(a) of the Communications Act of 1934; violations of subsections (b) and (c) of section 251 of the Telecommunications Act of 1996; violations of section 2 of the Sherman Antitrust Act; and tortious interference with contract. *See id.*

After reviewing the legislative history of the 1996 Act, the Second Circuit reviewed the procedural history of the case under its review. *See id. at 312*. The Court observed that AT&T had negotiated and arbitrated **[**32]** an interconnection agreement with Nynex, the ILEC in the New York area. *See id. at 313*. Shortly after the creation of that agreement, AT&T filed complaints with the regulatory authorities alleging lost and delayed orders. *See id.* Nynex and AT&T entered into a consent decree and resolved their dispute in its entirety. *See id.*

Bell Atlantic moved to dismiss the plaintiffs' claims, and the District Court granted the motion with respect to the antitrust and 1934 Act claims and declined to retain jurisdiction over the remaining state law claims. *See id. at 314*. The District Court, relying on *Goldwasser,* found that the duties imposed by the Telecommunications Act alone did not create antitrust liability. *See id. at 314*. The District Court characterized the claims as solely alleging violations of the duties imposed by the 1996 Act, and thus insufficient to state an antitrust claim. *See id.*

Further, the District Court considered the claims under the Telecommunications Act and concluded that private lawsuits are generally incompatible with the regulatory scheme established by the Act. *See id.* The Court ultimately found **[**33]** that the consumer plaintiffs lacked prudential standing to pursue claims under the 1996 Act because § 251 created duties on behalf of an ILEC that must be rendered to a competing local exchange carrier, and not to a CLEC's customers. *See id.* Similarly, the District Court determined that only the customers of an incumbent carrier could state a claim under section 202(a) of the Communications Act because that section creates duties for the carrier with respect to its own customers. *See id.* The plaintiffs' complaint was dismissed in its entirety, with leave to re-plead. *See id. at 315*. Upon submission of the new complaint, the defendants once again moved to dismiss, and the District Court also granted that motion. *See id.*

The Second Circuit first considered whether the *Trinko* plaintiffs had standing to bring a claim under section 202(a) of the Communications Act and section 251(b) and (c) of the Telecommunications Act. *See id.* The Second Circuit found that the District Court had incorrectly dismissed the claims on the grounds of prudential standing and re-instated the section 202(a) claims. *See id. at 318-19*. However, the **[*628]** Court agreed **[**34]** with the dismissal of the section 251(b) and (c) claims, but for reasons other than those offered by the District Court. *See id. at 319-20*.

The Court examined the claims under section 251 and determined that they only alleged violations of the duties imposed on ILECs regarding the creation of interconnection agreements mandated by the Telecommunications Act. *See id.* Additionally, the Court found that AT&T and Bell Atlantic had already utilized the contracting process created by the 1996 Act, and arrived at a fully approved interconnection agreement. *See id. at 321*. Therefore, the Second Circuit found that the consumer plaintiffs would be unable to state a claim under section 251 of the Act. *See id. at 322*.

As for the plaintiffs' antitrust claims, the Circuit Court disagreed with the dismissal of those allegations. *See id. at 324*. The Court agreed, however, that the plaintiffs did have standing to allege antitrust violations. *See id. at 325*. ***HN8***[] The Second Circuit observed "it is clear that a plaintiff would not state an antitrust claim against a defendant simply by alleging that the defendant violated **[**35]** its duties under section 251." *Id. at 326*. However, parting company with the Seventh Circuit, the Court determined that the complaint did not solely describe activities which would violate section 251, but also made allegations "that may support an antitrust claim under a number of theories." *Id.*

Specifically, the amended complaint stated a claim under ***HN9***[] the essential facilities doctrine, which requires a monopolist to give access to necessary equipment so that competitors are able to compete in the market. *See id.* The plaintiffs also adequately alleged a monopoly leveraging claim. *See id.* Finally, they sufficiently alleged an attempted monopolization claim, which the Court found was derivative of the essential facilities and leveraging claims. *See* *id. at 327*.

The Second Circuit also discussed the result in the *Goldwasser* case. *See id.* The Court observed that an antitrust action cannot be precluded simply because the facts alleged might also state a claim under the 1996 Act. *See id.* An opposite determination would create an implied immunity that would override the legislative intent behind the specific savings clause in the **[**36]** Act. *See id.* However, the Court was careful to clarify that the *Trinko* plaintiffs would be unable to pursue a claim under *section 251* of the 1996 Act because they were not parties to the interconnection agreements, and needed protection under the antitrust laws. *See* *id. at 328*.

HN10[] The Court also found that there is no inherent conflict with the regulatory scheme of the 1996 Act if a plaintiff only sought monetary damages. *See* *id. 329*. The Court did not find a conflict with making ILECs subject to the antitrust laws as well as their interconnection agreements. *See id.* Finally, the Court observed "courts may not be suited to order particular actions by telecommunications carriers to make the local markets more competitive, particularly when there is a specific regulatory scheme meant to serve the same purpose." *Id.*

The most recent case to review antitrust claims raised in the context of the 1996 Act, is *Covad Communications, 299 F.3d 1272, 2002 U.S. App. LEXIS 15486, 2002 WL 1777009*. The plaintiff in *Covad,* a competing local exchange carrier, alleged that the defendant had violated their interconnection agreement and had engaged in broad exclusionary behavior. **[**37]** *See* *Covad, 299 F.3d 1272, 2002 U.S. App. LEXIS 15486, 2002 WL 1777009*, at * 1. Covad alleged that Bellsouth had denied them access to essential facilities, namely its network of phone lines. *See id.* at * 7. Further, Covad claimed that Bellsouth had refused to deal with it regarding those essential facilities. *See id.* Covad claimed the defendant had refused to deal with it because of an intent **[*629]** to maintain its local telephone service monopoly. *See id.* Finally, Covad alleged that Bellsouth had manipulated its role as a ILEC to create a price squeeze to eliminate Covad's competition by lowering its own retail prices to a level that was detrimental to itself. *See id.*

The District Court, relying on *Goldwasser,* dismissed the plaintiff's complaint. *See* *2002 U.S. App. LEXIS 15486*, at * 3. The Court found that in the absence of an affirmative duty to assist competitors, the plaintiffs had not stated a claim for an antitrust violation. *See id.* Further, the Court held that the remaining allegations could not be divorced from the duties imposed under the 1996 Act. *See id.* The District Court also dismissed Covad's 1996 Act claims under *sections 206* and *207*, finding that the regulatory scheme prohibited the filing of **[**38]** such claims in federal court. *See id.*

Reversing, the Eleventh Circuit found that the plaintiff had in fact stated claims arising under the general antitrust laws. *See id.* at * 10, * 13, * 14. Initially, the Court found that the plain language of the 1996 Act states that nothing in the legislation should be construed as a preemption of the antitrust laws. *See id.* at * 5. The Court examined each of plaintiff's claims for denial of access to essential facilities, refusal to deal, and price squeezing. *See* *2002 U.S. App. LEXIS 15486*, at * 10 - * 14. Each of Covad's theories stated a claim under the general antitrust laws absent the existence of the 1996 Act and the duties created thereunder. *See id.* The Court also reinstated the Telecommunications Act and common law claims based on recent authority which determined that state commissions were not authorized to interpret interconnection agreements. *See id.* at * 15.

Essentially, ***HN11***[] the Seventh, Second and Eleventh Circuits are in agreement on one principle; that violations of the 1996 Act, standing alone, do not create liability under the general antitrust laws. All three Courts of Appeal considered whether any of the allegations could be separated **[**39]** from the duties arising under that Act. Neither *Goldwasser* nor *Trinko* is directly on point with the issue before this Court. Both of those cases involved the application of antitrust litigation in the context of interconnection agreements as those agreements affected consumers, not the contracting parties. The holding in *Trinko* was expressly conditioned on the fact that the lawsuit at issue was brought by consumers, who had no recourse under the interconnection agreement between the ILEC and the CLEC. *See* *Trinko, 294 F.3d at 328*. The Court in *Covad* directly addressed the issue of whether a CLEC may state an antitrust claim against the ILEC with which it has formed an interconnection agreement. However, as will be discussed, the facts alleged in Covad's complaint are distinguishable from the allegations *sub judice.*

HN12[] This Court agrees, with the conclusion reached in all three cases; that allegations of a breach of an interconnection agreement, standing alone, do not state an antitrust claim. Parties to an interconnection agreement with claims that the ILEC has failed to honor that contract may not resort to antitrust litigation to resolve those claims. **[**40]** Essentially what is before this Court is Ntegrity's disappointment with the interconnection agreements that it negotiated with Verizon. The parties negotiated the terms of their own agreements, and those contracts were approved by the Public Utility Commissions in the respective states. *See* Am. Answer P 17; Verizon Br. at 4.

Ntegrity's antitrust claims stem only from Verizon's performance under the express terms of the interconnection agreements. *See* Am. Answer PP 21 - 67. **HN13**[] Those obligations alone cannot form the basis of an antitrust action. *See* *Covad, **[*630]** 299 F.3d 1272, 2002 U.S. App. LEXIS 15486, 2002 WL 1777009*, at * 7; *Trinko, 294 F.3d at 326*; *Goldwasser, 222 F.3d at 401*; *Cavalier Telephone, LLC. v. Verizon Virginia, Inc., 208 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 11131*, No. Civ. A. 3:01CV736 CV736, 2002 WL 1008380, at *6 (March 27, 2002); *MGC Communications, Inc. v. Bellsouth Telecommunications, Inc., 146 F. Supp. 2d 1344, 1352 (S.D. Fla. 2001)*. Ntegrity has not made any allegations that Verizon denied it access to essential facilities, or that Verizon refused to deal with it on that basis. Further, although Ntegrity complains about the charges it received from Verizon, there is not an **[**41]** allegation that Verizon lowered its own retail rates in an effort to make service with Ntegrity appear unattractive to consumers. Such **HN14**[] allegations would state a claim under the general antitrust laws even absent the existence of the 1996 Act. *See Covad,* 2002 U.S. App. LEXIS 15486, 2002 WL 1777009, at * 10 - * 14; *Trinko, 294 F.3d at 326*.

It is abundantly clear that **HN15**[] implied immunity is not created simply because a plaintiff's claims might also arise under the Telecommunications Act. *See* *Essential Communications Systems, Inc. v. AT & T, Inc., 610 F.2d 1114, 1120 (3d Cir. 1979)*; *Covad, 299 F.3d 1272, 2002 U.S. App. LEXIS 15486, 2002 WL 1777009*, at * 6 - * 7; *Trinko, 294 F.3d at 326*. Therefore, the remaining question before the Court is whether any of Ntegrity's allegations state a valid claim for anti-competitive conduct under the antitrust laws. **HN16**[] In order to establish a claim under *Section 2* of the Sherman Act, *15 U.S.C. § 2*, a plaintiff must demonstrate: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business **[**42]** acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*; *see also* *Pastore v. Bell Telephone Co., 24 F.3d 508, 512 (3d Cir. 1994)*.

It must also be noted that **HN17**[] even a monopolist does not have a general duty to cooperate with a competitor. *See* *Aspen Skiing, Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. However, a company's right to select its business associates is not unqualified. *See* *id. at 602*. The alleged monopolist may not refuse to deal with a competitor if it has the specific intent to either maintain or create a monopoly. *See id.* Evidence of this specific intent is abundant when a business refuses to engage in a deal that would profit both the business and the competitor. *See* *id. at 601-603*.

Ntegrity also alleges a violation of **HN18**[] *section 2(a)* of the Clayton Act, commonly referred to as the Robinson-Patman Price Discrimination Act, *15 U.S.C. § 13* **[**43]** *(a)*. Such a claim can be established by a showing of different prices charged to different customers. *See Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267, 1271 (3d Cir. 1995)*. Price discrimination in and of itself is not illegal. *See id.* Rather a plaintiff must show a reasonable probability of competitive injury. *See id.* Monopoly power, simply put, is "the power to control prices and exclude competition." *See* *Lansdale v. Philadelphia Electric Co., 692 F.2d 307, 311 (3d Cir. 1982)* (citation omitted).

A close reading of Ntegrity's allegations demonstrates that its claims stem only from Verizon's performance under the interconnection agreements based on the 1996 Act. The Counterclaim specifies Ntegrity's dissatisfaction with Verizon's performance, but does not allege behavior that would otherwise constitute an antitrust violation.

Ntegrity complains that Verizon refused to provide it with electronic bills so it could more efficiently audit its bills. *See* Am. **[*631]** Answer PP 21 - 25. However, as alleged in the Counterclaim, the interconnection agreement negotiated by the parties clearly stated that Ntegrity would only receive paper **[**44]** bills from Verizon. *See* id. P 72; Contracts PP 5.1, 5.5. [5] The same is true of Ntegrity's complaints regarding the allegedly discriminatory computer database that the Contracts require Ntegrity to utilize. Paragraph Seven specifically requires that Ntegrity utilize Verizon's processes and procedures for setting up new service and making service changes for its customers. *See* Contracts P 7. The Counterclaim alleges that Verizon discriminated against it as a competitor in the filing and pricing of its tariffs. *See* Am. Answer PP 28-32. However, the Counterclaim also states that these allegedly fraudulent tariffs were imposed on Verizon's regular customers, not solely on competing CLECs. *See id.* Ntegrity merely extrapolates what it believes it would have been overcharged if Verizon had only billed them the lowest fee contemplated by the Contracts. The same is true of Ntegrity's price discrimination claim. Ntegrity clearly states that all of Verizon's customers were subject to the same fees and alleged accounting errors that Ntegrity experienced. *See id.* PP 31-40. This allegation establishes that Verizon has not charged Ntegrity higher prices and fees than it has charged **[**45]** to its retail customers.

Additionally, the range, availability and quality of service provided by Verizon are all issues **[**46]** covered under the Contracts. *See id.* P 9.1. The interconnection agreements require Ntegrity to provide dedicated customer service to its customers and explicitly state that Verizon would not field any service or inquiry calls from Ntegrity's customers. *See id.* P 34.2. This express provision proscribes Ntegrity's complaints about Verizon's handling of Ntegrity customer inquiries. The same is true of Ntegrity's claims about the dial-around numbers it contends Verizon re-routed. The Contracts explicitly reserve the right for Verizon to "change the telephone numbers used by an end user." *Id.* P 38.3. This provision precludes Ntegrity's allegations based on Verizon's provision of service for particular numbers.

Although Ntegrity claims that the cancellation notices and billings it received were "illegal," the Counterclaim clearly establishes that those circumstances were created by the parties in the course of their negotiations under the Act. Ntegrity's complaint merely alleges that Verizon complied with the terms of the interconnection agreements that Ntegrity now finds objectionable. The Counterclaim confirms this reading because Ntegrity seeks cancellation of the contracts **[**47]** in order to discontinue "Third Party Defendants' anti-competitive conduct and violations of the Telecommunications Act under the … contracts." Am. Answer P 70. Sanctioning the use of antitrust lawsuits to resolve disputes under an interconnection agreement would invite CLECs to negotiate poor agreements and then allege antitrust violations in order to seek treble damages based on the ILECs' failings under, or, as **[*632]** in this case, compliance with those agreements. The antitrust laws were designed to promote free competition and enhance consumer access to services, not to be an end-run around legislation imposing very specific duties. Therefore, Ntegrity's antitrust claims will be dismissed.

Similarly, Ntegrity's state law antitrust claims will also be dismissed. ***HN20***[] The New Jersey antitrust statutes are to be construed consistently with federal antitrust regulations. *See* Nanavati v. Burdette Tomlin Mem. Hosp., 857 F.2d 96, 111 (3d Cir. 1988). The Pennsylvania and Maryland antitrust laws are also construed in line with the federal antitrust provisions. *See* Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir. 1994);

[5] Each of the three interconnection agreements between the parties have been included in the pleadings of each plaintiff. The contract between Verizon Pennsylvania and Ntegrity was attached to plaintiff's initial Complaint, as was the contract between Verizon New Jersey and Ntegrity. Verizon Maryland included a copy of its interconnection agreement along with its Third Party Counterclaim. ***HN19***[] As these documents are relied upon and referred to by each of the Complaints and the Counterclaim, this Court may refer on the contents of these contracts in ruling on the instant motion to dismiss. *See* In re Burlington Coat Factories Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997). Each of the agreements are substantively similar, and the Court will refer to the collective agreements as the "Contracts" unless a specific provision varies in the context of an individual contract.

Hinkleman v. Shell Oil Co., 962 F.2d 372, 379 (4th Cir. 1992). **[**48]** Ntegrity does not offer any claims in support of its state law antitrust claims that are not proffered in support of its allegations under the federal antitrust laws. Therefore, Ntegrity's state law antitrust claims are also dismissed.

2. Ntegrity's Telecommunications Act Claim

Verizon also requests that this Court dismiss Ntegrity's allegations under *47 U.S.C. § 251 (b)* and *(c)(4)*. Verizon urges dismissal of Ntegrity's second attempt to plead a claim under the Telecommunications Act. *See* Verizon Br. at 23. The Verizon companies contend that the only authority this Court may exercise in relation to a dispute under the interconnection agreements arises when and if "a State commission makes a determination." *Id.* (quoting *47 U.S.C. § 252 (e)(6)*). Verizon maintains that Ntegrity's Counterclaim under the Act must be dismissed because they have not first attempted resolution through the state commissions. *See id.* at 24.

Ntegrity argues that it has stated a proper claim under the 1996 Act. *See id.* at 37. Defendant maintains that *sections 206* and *207* of the 1934 Telecommunications Act vest federal courts with jurisdiction to **[**49]** hear claims of violations of that act. *See* Ntegrity Br. at 35. Ntegrity asserts that Judge Thompson did not rule to the contrary in dismissing its original claim under the Telecommunications Act. *See id.* at 38. Rather, Ntegrity highlights that Judge Thompson granted it leave to re-plead its claims. *See id.* Ntegrity presumes that Judge Thompson granted defendant leave to re-plead because the Court did not find the claims to be futile. *See id.* at 39. Defendant argues that the amendments to the Act in 1996 do not operate independently of the original 1934 Act, and *sections 206* and *207* still provide a basis for a private cause of action under the Telecommunications Act. *See id.* at 40.

Ntegrity argues that it does not allege that the interconnection agreements at issue fail to meet the requirements of *sections 251* and *252* of the Act. *See id. at 42*. Rather, Ntegrity states that Verizon failed to fulfill the duties imposed by *section 251* of the Act. *See* Am. Answer PP 69-79. Ntegrity alleges that Verizon provided its own customers with better service than it provided for Ntegrity's customers. *See id. P 129*. Ntegrity complains that Verizon failed to provide **[**50]** it with the pricing information, and intentionally caused a loss of phone service to Ntegrity customers. *See id.*

HN21[] *Section 251* of the 1996 Act requires ILECs "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." *47 U.S.C. § 251 (a)(1)*. It also imposes the duty of resale on ILECs. *See id. § 251(c)(4)*. In providing its services, the ILEC must "offer for resale at wholesale rates any telecommunications service that **[*633]** the carrier provides at retail to subscribers who are not telecommunications carriers." *Id. § 251(c)(4)(a)*. The incumbent must do so without the imposition of unreasonable or discriminatory conditions. *See id. § 251(c)(4)(B)*.

HN22[] An ILEC may choose to fulfill the obligations set forth in *section 251* by entering into a negotiated agreement as specified in *section 252*. *See Trinko, 294 F.3d at 321*. If the parties negotiate an interconnection agreement, they may enter a binding agreement "without regard to the standards set forth in subsections (b) and (c) of *section 251*." *47 U.S.C. § 252 (a)(1)*. The Act expressly allows for agreements to be negotiated **[**51]** which do not necessarily define the same duties contemplated by *section 251*. *See Trinko, 294 F.3d at 322*. As set forth previously, Verizon negotiated with Ntegrity and agreed upon the terms of the interconnection agreements.

The Verizon companies complied with the requirements of *section 251(b)* and *(c)* by entering into a negotiated interconnection agreement with Ntegrity. *See 47 U.S.C. § 252 (a)(l)*. Upon the approval of the agreements, the duties of each party are defined by the parameters of their agreement rather than *section 251(b)* and *(c)*. *See Trinko, 294 F.3d at 323*. Ntegrity may not rely upon the general duties imposed by *section 251* to litigate around the specific language provided in the negotiated contracts. *See id.* ***HN23***[] Rather than negotiating agreements that Ntegrity now alleges are discriminatory, Ntegrity could have availed itself of the arbitration process to implement the duties enumerated under *section 251(b)* and *(c)*. *See 47 U.S.C. § 252 (b)(1)* and *(c)(1)*. Ntegrity has not stated a claim under *section 251* of the 1996 Act. [6] Therefore, plaintiffs' motion to dismiss the Counterclaim **[**52]** is granted as to Ntegrity's Telecommunications Act claim.

3. Ntegrity's State Law Claims

Finally, Verizon argues that if this Court dismisses Ntegrity's federal claims, it should also dismiss the remaining state law claims for a lack of jurisdiction because Verizon Maryland and Ntegrity are both citizens of Maryland. *See* Verizon Br. at 24. Verizon maintains **[**53]** that a dismissal of the federal question claims, and a lack of diversity, necessitates dismissal of Ntegrity's Counterclaim. *See id.* Verizon further argue that the remaining state law claims rely upon allegations similar to those asserted in support of Ntegrity's antitrust claims. *See id.* Ntegrity argues against dismissal of the state law claims. *See* Ntegrity Br. at 43. Ntegrity maintains that Verizon fails to set forth any new arguments that were not presented to this Court in the prior determination of the legal sufficiency of those claims. *See id. at 43*.

Initially, it must be noted that dismissal of the state law Counterclaims is not appropriate based on plaintiffs' suggestion of a lack of jurisdiction. ***HN25***[] As Counterclaims, Ntegrity's allegations are properly before this Court, and cannot be dismissed for the lack of an independent jurisdictional basis. *See 28 U.S.C. § 1367 (a)*. Additionally, Verizon does not provide any support for the dismissal of Ntegrity's state **[*634]** law claims beyond the reasons asserted for dismissal of the antitrust allegations.

Ntegrity alleges that Verizon violated the interconnection agreements by providing false and **[**54]** inaccurate billing. Ntegrity also alleges that Verizon failed to provide telephone service to its customers in accordance with its contracts. Finally, Ntegrity claims that Verizon contacted its customers and attempted to intercept their decision to switch to an alternate service provider. These factual allegations are sufficient to state claims for breach of contract, and tortious interference. The interconnection agreements give rise to these independent contractual obligations by virtue of their existence. The state law claims cannot be dismissed simply because they rely on the same factual allegations as the antitrust claims. [7] Therefore, Verizon's motion to dismiss is denied as to Ntegrity's remaining state law claims.

[55]** B. Ntegrity's Motion to Dismiss Verizon's Complaints

Ntegrity also moves to dismiss Verizon's collection actions for lack of standing pursuant to *Fed. R. Civ. P. 17(a)*. *See* Ntegrity Br. at 44. Ntegrity states that the original Complaints detail that Verizon Pennsylvania and Verizon New Jersey assigned their rights to enforce the contracts to Bell Atlantic Network Services ("Network Services"). *See id.* Ntegrity maintains that Network Services is the only proper plaintiff capable of prosecuting the instant collection actions. *See id.* Ntegrity argues that the Amended Complaint does not make any reference to Network Services as a plaintiff, and that this omission is fatal to the collection actions. *See id.*

Finally, Ntegrity seeks dismissal of the quasi-contractual claims. *See id. at 48*. Ntegrity argues that the existence of the contracts between the parties prevents Verizon from proceeding on an alternate theory of unjust enrichment.

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[6] Ntegrity argues that its claim is cognizable under *sections 206* and *207* of the 1934 Act because those provisions provide for federal court jurisdiction over violations of the Act. However, as stated, ***HN24***[] Ntegrity has not properly pled violations of the *section 251*. Therefore, there is no violation of the Act which would be cognizable under *§§ 206* and *207*. This conclusion also moots the question of whether this Court may address disputes arising under interconnection agreements, or if it may only act once a state commission has made a final determination as Verizon urges. As Ntegrity has failed to state a claim, the Court does not need to reach this issue.

[7] Verizon does not argue that Ntegrity's state law claims are precluded under the Telecommunications Act. However, the Contracts between the parties specifically provide for dispute resolution by any means "that may be available under this Agreement or at law or in equity." *See* Contracts P 22. Although the issue has not been briefed by the parties, it does not appear that *section 252(e)(6)* precludes Ntegrity's state law claims. *See* ***HN26***[] *47 U.S.C. § 152* (expressly preserving antitrust and additional causes of action in light of the Act). Further, the Court notes that if Ntegrity's state law claims for breach of contract are precluded by the Telecommunications Act, Verizon's breach of contract actions would also be precluded.

See id. Ntegrity maintains that because Verizon has not alleged recision of the contract, it cannot proceed on a quasi-contractual theory. *See id.*

Verizon responds that all of the plaintiffs are subsidiaries of Verizon **[**56]** Communications, Inc., and any potential standing problem can be easily resolved. *See* Verizon Reply Brief ("Verizon Reply") at 28. In response to Ntegrity's request for dismissal of the quasi-contractual claims, Verizon states that it has pled the *quantum meruit* claim in the alternative, as is contemplated by *Federal Rule of Civil Procedure 8(a)*. *See id.* at 29. Verizon highlights that Ntegrity has justified its failure to pay the amounts due under the agreements by referring to an alleged prior breach by Verizon. *See id.* Verizon maintains that they are not seeking to alter the terms of the interconnection agreements through a quasi-contractual claim, but rather to ensure its ability to seek restitution if the contracts are deemed void. *See id.*

Federal Rule of Civil Procedure 17(a) states ***HN27***[] "every action shall be prosecuted in the name of a real party in interest." The rule also states "no action shall be dismissed on the ground that it is not **[*635]** prosecuted in the name of a real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." *Fed. R. [**57] Civ. P. 17(a)*.

The purpose of requiring the real party in interest to prosecute a lawsuit is to avoid prejudice and the possibility of duplicate lawsuits. *See* *Metal Processing, Inc. v. Humm, 56 F. Supp. 2d 455, 461 (D.N.J. 1999)*. The Rule also exists to allow a defendant to set out all of its defenses in one action. *See id.* ***HN28***[] There is obviously a preference for a determination of a dispute on its merits rather than on a technicality. The facts in this case do not support dismissal under *Fed. R. Civ. P. 17(a)*. There is certainly no risk that Ntegrity might be subject to multiple actions because Verizon owns all of the claims against defendant in one form or another. Further, since the filing of Ntegrity's cross-motion to dismiss for failure to name a proper party, Verizon has filed a ratification by Network Services Inc., which was the assignee of its interest in prosecuting the collection actions. *See* Transcript of Oral Argument ("Tr.") at 30:17 - 31:1-11. Network Services has also re-assigned the collection claims to Verizon Pennsylvania and Verizon New Jersey. *See id.* at 31:2-5. This ratification and re-assignment corrects any potential issue presented **[**58]** by the Amended Complaint. Therefore, Ntegrity's *Rule 17(a)* motion is denied.

Finally, as to Ntegrity's motion to dismiss the *quantum meruit* claim, it is clear that ***HN29***[] Verizon may plead alternative causes of action. *See* *Fed. R. Civ. P. 8(e)(2)*. Verizon may state two alternative claims in order to preserve its rights, especially in light of Ntegrity's request for contract cancellation *See* Am. Answer P 70. As such, Ntegrity's motion to dismiss Verizon's *quantum meruit* claim is denied without prejudice.

III. CONCLUSION

Therefore, for the reasons expressed herein, plaintiffs' motion to dismiss is granted in part and denied in part and defendant's cross-motion to dismiss is denied. An appropriate form of Order shall be filed herewith.

GARRETT E. BROWN, JR., U.S.D.J.

ORDER

This matter having come before the Court upon the motion of the plaintiffs to dismiss defendant's Counterclaim; and upon the motion of the defendant to dismiss plaintiffs' Complaints; and the Court having considered the submissions and oral argument of the parties; and for the reasons expressed in the Memorandum Opinion filed herewith;

IT IS THIS 12th Day of August, 2002

ORDERED that plaintiffs' **[**59]** motion to dismiss [71-1] and [71-2] be and hereby is GRANTED in part and DENTED in part; and it is further

ORDERED that defendant's cross-motion to dismiss [72-1] be and hereby is DENIED.

GARRETT E. BROWN, JR., U.S.D.J.

Berlyn, Inc. v. Gazette Newspapers, Inc.

United States District Court for the District of Maryland

August 13, 2002, Decided

CV NO. S-01-606

Reporter

214 F. Supp. 2d 530 *; 2002 U.S. Dist. LEXIS 15789 **; 2002-2 Trade Cas. (CCH) P73,788; 31 Media L. Rep. 1129

BERLYN, INC., MONTGOMERY SENTINEL PUBLISHING, INC., KENNETH C. ROSSIGNOL, Plaintiffs, v. THE GAZETTE NEWSPAPERS, INC., THE WASHINGTON POST CO., THE BALTIMORE SUBURBAN PRESS NETWORK, Defendants.

Subsequent History: Summary judgment granted by, Judgment entered by *Berlyn, Inc. v. Gazette Newspapers, 223 F. Supp. 2d 718, 2002 U.S. Dist. LEXIS 27570 (D. Md., 2002)*

Prior History: *Berlyn, Inc. v. Gazette Newspapers, Inc., 157 F. Supp. 2d 609, 2001 U.S. Dist. LEXIS 11814 (D. Md., 2001)*

Disposition: **[**1]** Motion to exclude expert testimony GRANTED IN PART and DENIED IN PART.

Core Terms

antitrust, relevant market, newspapers, training, pricing, reliable, deposition, geographic, analyses, purposes, Press, qualifications, advertisers, expert testimony, defendants', methodology, costs, marginal, skill, lost profits, plaintiffs', principles, economist, markets, career, weekly, business administration, expert opinion, predatory, damages

LexisNexis® Headnotes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN1[] **Testimony, Expert Witnesses**

See *Fed. R. Evid. 702*.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN2[] **Testimony, Expert Witnesses**

In the context of admitting expert testimony, a two-step inquiry is relevant: (1) whether the witness is qualified, and (2) if qualified, whether his opinion is reliable, in that it is based on sufficient facts and sound methodology.

Evidence > Admissibility > Expert Witnesses

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN3[] Admissibility, Expert Witnesses

In the context of admitting an expert witness' testimony, the first prerequisite demands that the witness have specialized knowledge, skill, experience, training, or education regarding the subject to which he will offer an opinion. *Fed. R. Evid. 702*. The witness' qualifications to render an expert opinion are liberally judged by *Fed. R. Evid. 702*. Indeed, when a witness's qualifications are challenged, the test for exclusion is a strict one, and the purported expert must have neither satisfactory knowledge, skill, experience, training nor education on the issue for which the opinion is proffered. One knowledgeable about a particular subject need not be precisely informed about all details of the issues raised in order to offer an opinion. However, a district court must not accept without scrutiny any witness with knowledge of a topic greater than that of a jury's.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN4[] Testimony, Expert Witnesses

It is clear that although the first prerequisite (specialized knowledge, skill, etc.) is to be applied liberally, general business experience unrelated to antitrust economics does not render a witness qualified to offer an opinion on complicated antitrust issues such as defining relevant markets.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN5[] Expert Witnesses, Daubert Standard

In the context of admitting expert testimony, the second prerequisite to admissibility is the reliability test embodied in *Fed. R. Evid. 702* and developed through Daubert. In applying the rule, a district court acts as a gatekeeper to ensure that any and all scientific testimony is not only relevant, but reliable. Even if a witness is qualified to offer an expert opinion, that opinion can be excluded if it is based on inadequate facts or flawed methodology. Nothing in either Daubert or the Federal Rules of Evidence require a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. When the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6[] **Admissibility, Expert Witnesses**

In the context of admitting expert witness testimony, courts must consider whether the principles and methods used by the experts in reaching his opinions are reliable, and whether the expert has applied the principles and methods faithfully to the facts of the case. In making this assessment, a district court must make certain that an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Evidence > Admissibility > Expert Witnesses

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN7[] **Admissibility, Expert Witnesses**

In applying the admittance of expert testimony standards, a district court may exercise wide discretion in admitting or excluding proposed expert testimony. A witness's qualifications are liberally judged under *Fed. R. Evid. 702*. Of course, expert testimony in general, and a witness's qualifications in particular, also must be judged in light of the potential for the finder of fact to accept blindly the testimony of a witness who the court has qualified as an expert.

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

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

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

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

HN8[] **Relevant Market, Geographic Market Definition**

The relevant market generally can be defined as the framework within which the competitive impact of conduct is assessed and a reliable definition of relevant market is an obvious prerequisite to determining whether a defendant has market power. A relevant market in antitrust analysis consists of a product market and a geographic market. The relevant product market identifies the products that compete with each other as defined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. The relevant geographic market is defined as the area in which buyers or sellers of the product effectively compete and the area to which their customers can practicably turn for alternative sources of such products. Defining such specific product and geographic markets is no simple task.

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

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

HN9[] **Market Definition, Relevant Market**

Market analyses for antitrust markets generally require some expertise in the field of industrial organization. Individuals with experience in defining markets for a given product generally will not possess the skill and training of a professional economist necessary to define relevant market for antitrust purposes.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN10[] **Admissibility, Expert Witnesses**

In the context of admitting expert testimony, the experience one has in a given trade, however extensive and however closely related to the business side of that industry, does not render one presumptively qualified to define that industry's relevant markets.

Counsel: For The Gazette Newspapers, Inc, The Washington Post Company, DEFENDANTS: Charles O Monk, II, Daniel R Chemers, Gretchen L Klebasko, Saul Ewing LLP, Baltimore, MD USA.

For Washington and Baltimore Suburban Press Network, Inc, DEFENDANT: William J Kolasky, Alice M Stoeppelwerth, Fiona W Huang, Kyle M Deyoung, Wilmer Cutler and Pickering, Washington, DC USA.

For Washington and Baltimore Suburban Press Network, Inc, DEFENDANT: David P Donovan, Wilmer Cutler and Pickering, Tysons Corner, VA USA.

For Montgomery Sentinel Publishing, Inc, PLAINTIFF: George W Liebmann, Law Office, Melvin J Sykes, Law Office of Melvin J Sykes, Baltimore, MD USA.

Judges: Frederic N. Smalkin, Chief U.S. District Judge.

Opinion by: Frederic N. Smalkin

Opinion

[*531] MEMORANDUM OPINION AND ORDER

This case is before the Court on the defendants' motion to exclude the testimony of James B. Shaffer, whom the plaintiffs have designated as an expert qualified to testify to relevant matters in this case.

The plaintiffs are Berlyn, Inc. (Berlyn), Montgomery Sentinel Publishing, Inc. (Sentinel), and Kenneth C. Rossignol **[**2]** (Rossignol). Berlyn is wholly owned by Lynn Kapiloff (Kapiloff) and her husband. Kapiloff has served as the CEO and primary **[*532]** manager of Sentinel's newspapers in Montgomery and Prince George's Counties (the *Montgomery County Sentinel* and the *Prince George's Sentinel*) since December 1987. Plaintiff Rossignol publishes *St. Mary's Today,* a weekly paid newspaper published in Lexington Park, Maryland, which has a circulation of approximately 5,000, with most subscribers and advertisers located in St. Mary's County, Maryland.

The defendants in this case are The Washington Post Company (the Post), The Gazette Newspapers, Inc. (Gazette), and Baltimore Suburban Press Network, Inc. (Press Network). The Post is a publicly-held Delaware corporation. One of its operating units publishes the *Washington Post* newspaper. The Post owns all the stock of Gazette, but requires that Gazette operate as an independent entity. Gazette is a Maryland corporation that publishes approximately 44 newspapers in Montgomery, Frederick, Prince George's, Calvert, Charles, and St. Mary's Counties.

Press Network is a Delaware corporation which offers regional and national advertisers a "one contact/ one **[**3]** bill" method of placing advertising in multiple newspapers around Washington, D.C.

The plaintiffs Berlyn and Sentinel operated the *Prince George's Sentinel* in that county and received advertising clients through defendant Press Network. Eventually, Gazette launched publications in Prince George's County as well, and Press Network, which is half owned by Gazette, began recommending that advertisers direct their business to Gazette's publications instead of Sentinel's. The plaintiffs allege that the defendants' conduct amounts to an unreasonable restraint on trade, a conspiracy and an attempt to monopolize, unfair competition, breach of contract, and tortious interference. Also at issue is the defendants' acquisition of the Southern Maryland Division of The Chesapeake Publishing Company, which the plaintiffs argue resulted in a violation of Section 7 of the Clayton Act.

The events which gave rise to the plaintiffs' claims will be described with greater detail in the Opinion dealing with the defendants' motion for summary judgment, where the specific facts of this case are of greater importance. Clearly, the facts now relevant deal with Shaffer's qualifications to testify as an **[**4]** expert and the reliability of his opinions.

The defendants seek to prevent Shaffer from offering three opinions: (1) that the relevant product market, for antitrust purposes, is community newspapers and the zoned editions of metropolitan newspapers, and that the relevant geographic market is defined by county; (2) that, in a predatory pricing analysis, the value of certain of the Post's assets should be taken into account when determining whether the defendants were pricing below marginal cost; and (3) that Berlyn suffered lost profits, estimated between $ 700,000 and $ 850,000, as a result of Press Network's activities from 1997 to the present.

I. <u>Shaffer's Background</u>

Shaffer, a long-time friend of the Kapiloffs, was employed in the newspaper business from 1970 to 1998. His only employment in Maryland involved a two-year stint from 1977-1979 at Stromberg Publications, the publisher of 13 weekly newspapers in Baltimore, Carroll, and Howard Counties. He considers himself an expert in the business side of the newspaper business.

Shaffer is not an economist or attorney by education, training, or experience, and, upon his first deposition in November, 2001, he had almost no **[**5]** knowledge of antitrust economics. His undergraduate degree **[*533]** was in engineering. He took a few economics courses between 1967-1969, after which he received a master's degree in business administration with a financial specialty from Indiana University. He has no other training in economics.

Shaffer has never published anything related to economics or the law of antitrust, nor has he taught any courses in either field. He subscribes to no journals (and, upon his first deposition, knew of no journals) that cover <u>***antitrust law***</u> or antitrust economics. He did not know what journals might be helpful in a case like this. He has read only the articles provided to him by plaintiffs' counsel.

Before this case, Shaffer had never performed a relevant market analysis. He was not conversant with economic formulae; he said if he spent enough time, he thought he "could figure [them] out," but that he would have to "go back to … college textbooks and dig out some of the chapters on those kinds of equations." He was unfamiliar with basic terminology and concepts used by economists who deal with antitrust issues. Shaffer has never testified as an expert in economics or antitrust damages, and he has **[**6]** never been qualified as an expert on any subject in any court.

Shaffer, however, has performed and reviewed predatory pricing analyses for major national newspapers throughout his career. His positions with these newspapers were prominent, requiring a high level of business and financial sophistication. Shaffer served, for example, as Vice President and Chief Financial Officer (CFO) of The Los Angeles Times, Executive Vice President and CFO of the Sun Times Company (Chicago), and Chief Executive of Guy Gannett Communications. Shaffer also has taught media economics and newspaper costs and pricing structures at various colleges and universities throughout his career.

II. A Brief History of Shaffer's Relevant Market Opinion

Shaffer's first opinion, dealing with relevant market, and his knowledge of that subject have evolved over the course of litigation. At his first deposition on November 20, 2001, Shaffer demonstrated that he had just recently been exposed to antitrust economics and was unfamiliar with several economic terms. [1] Shaffer **[*534]** Dep. I at 165. Shaffer indicated, however, that he intended to study materials dealing with economics and relevant markets furnished to **[**7]** him by plaintiffs. On March 15, 2002, after this first deposition, Shaffer submitted an affidavit concluding that "the relevant product market for purposes of pricing and monopolization analysis [is] the market consisting of weekly community papers and the weekly zoned editions of daily papers, and that the relevant geographic market [is], in this instance, a market defined by county." Shaffer Aff. I at 3, P 11. From all outward appearances, Shaffer made this conclusion based on a simple review of documents: "Subsequent inspection of the newspapers concerned and of documents confirms this view, as do recognized studies." *Id.*

[8]** After offering this opinion, Shaffer was deposed again, and he admittedly was just beginning to learn how to approach the questions of this case from an economist's viewpoint. Shaffer Aff. II at 116. Shaffer had not done any independent research on relevant markets and was relying on the plaintiffs' attorneys to furnish him with economic literature to study. *Id.* at 116-17.

Finally, after the defendants challenged his qualifications, Shaffer submitted a supplemental affidavit. This affidavit again expressed his conclusion that the relevant markets were community newspapers and the zoned editions of metropolitan newspapers (product market) and individual counties (geographic market). Although he had already

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[1] Shaffer's deposition testimony makes clear that it wasn't until just days before being deposed that he had ever read about some of the crucial economic issues in this case. When asked to "define the relevant market for antitrust purposes," Shaffer replied, "You asked that question, and I was asking for some definition, because I know of relevant market … primarily from what I read of the materials that you saw earlier, so you're basically asking me to parrot … back something that I've just learned just over the last few days." Shaffer Dep. I at 215. Shaffer's lack of knowledge as to other specific economic issues was apparent later in the deposition:

> Q. What is a diversion ratio for market definition purposes?
>
> A. I don't know.
>
> Q. Have you ever heard of the Elzinga-Hogarty procedure for a geographic market definition?
>
> A. I have not.
>
> Q. Do you know what the price correlation test for market definition is?
>
> A. No.
>
> Q. Do you know how an economist would define market power?
>
> A. I read some things about that in the material that you saw this morning, and from that I can tell you I do not know how an economist would define it, but I intend to investigate that further.
>
> Q. Do you know how an economist goes about diagnosing the presence or absence of market power?
>
> A. No. Although, again, I did see some tests. I mean, you will see in that literature that you saw this morning there will be tests that give some bullet points about the presence or absence of market power, and so I would - I'm not an economist, but I would start with that list.
>
> Q. I take it you're not familiar, then, other than what you've read, or what you were supplied with by Mr. Sykes, with any standard reference literature on the presence or absence of market power; is that correct?
>
> A. Correct.

Id. at 226-28.

reached this conclusion in his first affidavit, he explained in this second affidavit that, since his first two depositions, he had reviewed numerous deposition transcripts and exhibits submitted during discovery in this case.

III. Standards for Admitting Expert Testimony

Under *Federal Rule of Evidence 702*, if

> ***HN1***[] specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, **[**9]** skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In short, ***HN2***[] a two-step inquiry is relevant here: (1) whether the witness is qualified, and (2) if qualified, whether his opinion is reliable, in that it is based on sufficient facts and sound methodology.

(A) Witness Qualifications

HN3[] This first prerequisite demands that the witness have specialized "knowledge, skill, experience, training, or education" regarding the subject to which he will offer an opinion. *FED. R. EVID. 702*. As the Fourth Circuit has pointed out, "the witness' qualifications to render an expert opinion are … liberally judged by *Rule 702*." *Kopf v. Skyrm, 993 F.2d 374, 377 (4th Cir. 1993)*. Indeed, when a witness's qualifications are challenged,

> the test for exclusion is a strict one, and the purported expert must have neither satisfactory knowledge, skill, experience, training nor education on the issue for **[**10]** which the opinion is proffered. One knowledgeable about a particular subject **[*535]** need not be precisely informed about all details of the issues raised in order to offer an opinion.

Thomas Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 799 (4th Cir. 1989).

However, the Court must not accept without scrutiny any witness with knowledge of a topic greater than that of the jury's. In *Kline* -- a case particularly relevant here due to its convergence of expert testimony and antitrust issues -- the Fourth Circuit held that the trial court abused its discretion in permitting a witness to testify as to whether the defendant's shift in credit practices was unjustified credit discrimination and price discrimination under § 13(a) of the Robinson-Patman Act. *Id.* The witness (who was employed as a professional expert) held a master's degree in business administration, but was not an economist. *Id.* She had published only one article in her career, but the piece had no relevance to the issues on which she was to testify. *Id.* Her work experience and experience as an expert witness had only tenuous relation to credit decisions and antitrust. *Id.* Moreover, she **[**11]** was admittedly unfamiliar with certain basic concepts related to credit discrimination. *Id.*

In reversing the trial court, the Fourth Circuit explained:

> Certainly no single one of these facts disqualifies [the witness] from giving opinions about the legitimacy of the justifications for [the defendant's] credit decisions. In combination, however, they lead us to the conclusion that this witness cannot satisfy even the minimal requirements of *FED. R. EVID. 702*. There was no indication, for example, that [her] general business education included *any* training in the area of antitrust or credit. Similarly, [the witness] admitted that she lacked *any* other experience in such matters. Although it would be incorrect to conclude that [her] occupation as a professional expert alone requires exclusion of her testimony, it would be absurd to conclude that one can become an expert simply by accumulating experience in testifying.

Id. at 800.

Kline was recently examined in *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn. & the Historic Green Springs, Inc., 98 F. Supp. 2d 729 (W.D. Va. 2000)*. In that case, the district **[**12]** court held that a proposed expert was unqualified to offer an opinion as to relevant market due to his lack of training and expertise in economics and antitrust and that the proposed expert's testimony was unreliable due to methodological flaws. *See* id. at 732-35, 736-40. The plaintiffs (competitors of the defendant mining company) sued on state and federal antitrust grounds. The plaintiffs designated Mr. Seth Schwartz as a purported expert witness on market analyses, and Schwartz offered an expert opinion as to the relevant market for antitrust purposes. Schwartz's educational background was in geological engineering, which included a course in "micro-macro mineral economics." He had "devoted most of his professional career to advising energy companies about various matters, some of which required [him] to perform market research analyses, including identifying and forecasting prices as well as business analyses for investment decisions." Id. at 730. In his business role, Schwartz had prepared market analyses for numerous businesses, which were used "to define a market for investment purposes to best understand the ability to earn profits on different **[**13]** investments in different market situations." Id. at 732. Although Schwartz had testified as an expert in numerous non-antitrust cases, "none of these cases involved antitrust **[*536]** matters requiring the rigorous defining of a relevant market." *Id.*

As to Schwartz's education, the court explained that "though the curriculum of geological engineering, including [the] sole course in mineral economics, may provide some insight to vermiculite mining and the constraints of a market …, this curriculum cannot be assumed to provide its graduates with an economics background necessary to define a relevant market in an antitrust case." *Id.* As for Schwartz's experience in generating market analyses, the court explained that "though related to a relevant market determination in an antitrust issue, there are differences between an analysis for business investment and an analysis for antitrust purposes." *Id.* Relying on *Kline,* the court found that Schwartz lacked the necessary qualifications to testify as an expert on antitrust issues.

Thus, **HN4**[] it is clear that although this first prerequisite (specialized knowledge, skill, etc.) is to be applied liberally, general business **[**14]** experience unrelated to antitrust economics does not render a witness qualified to offer an opinion on complicated antitrust issues such as defining relevant markets.

(B) Reliability of the Opinion

HN5[] The second prerequisite to admissibility is the reliability test embodied in Rule 702 and recently developed through Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999). In applying this rule, the Court acts as a gatekeeper to "ensure that any and all scientific testimony … is not only relevant, but reliable." Daubert, 509 U.S. at 588; *see* Kumho, 526 U.S. at 141 (holding that *Daubert* "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge"). Even if a witness is qualified to offer an expert opinion, that opinion can be excluded if it is based on inadequate facts or flawed methodology. As noted by the Supreme Court, "nothing in either *Daubert* or the Federal Rules of Evidence requires **[**15]** a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997). The Fourth Circuit has explained further that "when the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court." Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 144 (4th Cir. 1994).

HN6[] Courts also must consider whether the principles and methods used by the experts in reaching his opinions are reliable, and whether the expert has applied the principles and methods faithfully to the facts of the case. In making this assessment, this Court must "make certain that an expert … employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 200 (4th Cir. 2001) (quoting Kumho, 526 U.S. at 152)).

IV. The Court's Discretion

HN7[] In applying the above standards, this Court may exercise wide discretion **[**16]** in admitting or excluding proposed expert testimony. *See* Gen. Elec. Co., 522 U.S. at 142; United States v. Dorsey, 45 F.3d 809, 814 (4th Cir. 1995). As noted above, a witness's qualifications are liberally judged under Rule 702. *See* Kopf, 993 F.2d at 377. Indeed, Rule 702 was drafted **[*537]** and adopted "to relax traditional barriers to expert opinion testimony." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 702.02[1] (2002). Of course, expert testimony in general, and a witness's qualifications in particular, also must be judged in light of the potential for the finder of fact to accept blindly the testimony of a witness who the Court has qualified as an expert. *See* Daubert, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." (citation omitted)); Dorsey, 45 F.3d at 815-16 (quoting *Daubert*).

With this evidentiary framework **[**17]** in mind, the Court now must consider whether Shaffer may offer the opinions in dispute.

V. Shaffer's Relevant Market Opinion

Defining the relevant market is essential to the plaintiffs' antitrust claims. **HN8**[] The relevant market generally can be defined as the "framework within which the competitive impact of conduct is assessed." 2 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 24.01[1] (2002), and a reliable definition of relevant market is an obvious prerequisite to determining whether a defendant has market power. A relevant market in antitrust analysis consists of a product market and a geographic market. The relevant product market identifies the products that compete with each other as defined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). The relevant geographic market is defined as "the area in which buyers or sellers of the product effectively compete," Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 495 (4th Cir. 1986), and the area "to which **[**18]** their customers could practicably turn for alternative sources of such products." M & M Med. Supplies & Serv. v. Pleasant Valley Hosp., 981 F.2d 160, 170 (4th Cir. 1993). Defining such specific product and geographic markets is no simple task. *See, e.g.,* Cogan v. Harford Memorial Hosp., 843 F. Supp. 1013, 1020 (D. Md. 1994) ("To allow a jury to make a finding as to the geographic market, [the plaintiff] must provide the Court with expert testimony on this highly technical economic question."); Victus, Ltd. v. Collezione Europa U.S.A., Inc., 26 F. Supp. 2d 772, 786 (M.D.N.C. 1998) (noting that defining relevant product markets is a "difficult economic question").

Shaffer's proposed opinion, which he set forth in his first affidavit of March 15, 2002, and reaffirmed in his second affidavit of June 11, 2002, is "that the relevant product market for purposes of pricing and monopolization analysis was the market consisting of weekly community papers and the weekly zoned editions of daily newspapers, and that the relevant geographic market was, in this instance, a market defined by county." Shaffer Aff. I, at 3, P 11.

Shaffer is not **[**19]** qualified to offer this opinion. Shaffer's background is completely devoid of specific education, training, or experience in economics or antitrust analysis. His education is in engineering and business administration. Admittedly, his experience is in "the business side of the newspaper industry," and not in antitrust or economic analysis. He has never performed a relevant market analysis for antitrust purposes, and at the time he was retained as an expert in this case, he was **[*538]** entirely unaware of how an economist would perform such a study. Clearly, Shaffer cannot qualify under the general requirements of Rule 702, which requires "knowledge, skill, experience, training or education."

Nor can Shaffer survive under any reading of *Thomas Kline, Inc., supra,* in which the Fourth Circuit held that it was an abuse of the trial court's discretion to allow a witness to offer expert testimony as to unlawful credit practices when the witness only had a master's degree in business administration and no personal experience in making credit decisions. 878 F.2d at 799-800. This case is clearly analogous as the plaintiff intends to establish relevant market through Shaffer, **[**20]** whose highest level of education is an MBA, who has minimal formal training in applied economics, and who admittedly has no experience in performing relevant market analyses. *See also* Va. Vermiculite, 98 F. Supp. 2d at 733 (**HN9**[] "Market analyses for antitrust markets generally require some expertise in the field of industrial organization. Individuals with experience in defining markets for [a given product] generally would not possess the skill and training of a professional economist necessary to define relevant market for antitrust purposes.").

Plaintiffs assert that Shaffer has taught "media economics" at various colleges, universities, or professional schools of journalism. There is, however, no evidence that such courses involved analysis of relevant markets for antitrust purposes. Moreover, unlike this Court, these institutions need not apply the criteria of *Rule 702* in deciding who will teach their students.

Shaffer's extensive background in the publishing industry certainly qualifies him to offer expert opinions as to the "business side of the newspaper industry." However, it does not give him license to offer opinions as to antitrust economics and relevant **[**21]** market analysis simply because these topics relate to newspapers in this particular case. ***HN10***[] The experience one has in a given trade, however extensive and however closely related to the "business side" of that industry, does not render one presumptively qualified to define that industry's relevant markets. *See* *Thomas Kline, Inc., 878 F.2d at 799-800*; *Va. Vermiculite, 98 F. Supp. 2d. at 732-33, 736*.

It is clear from the record that the plaintiffs anticipated that Shaffer would be able to learn the necessary mechanics of performing a relevant market analysis simply by reviewing the texts and articles they presented him. This clearly is a flawed approach, considering that Shaffer has had no formal training or actual experience in the area. Shaffer's experience in the publishing industry and his training and education in business does not make him especially capable of becoming an expert and learning the complex mechanics of antitrust economics within a few days (Shaffer stated in his second deposition that he worked ten days on this case, and that half of that time was devoted to work on his damages analysis, Shaffer Dep. II at 99-100). To accept Shaffer **[**22]** as an expert on this issue would be to recognize that, with minimal training and experience in antitrust economics, a person can *become* qualified to offer an expert opinion on the complex topic of defining relevant markets by applying himself to the topic for five or fewer days. The Court makes no such finding, and, for the reasons stated above, concludes that Shaffer is entirely unqualified to offer an opinion as to market definition.

Even if Shaffer were properly qualified by knowledge, skill, experience, training, or education, the plaintiffs have offered no evidence to show that his opinion is based on proper facts and data and that **[*539]** his methods in forming his opinion are reliable. Shaffer initially set forth his opinion as to the relevant product market in his first affidavit of March 15, 2002. According, to his second deposition, however, which took place on April 4, 2002, this conclusion was based on extremely thin and unscientific data. Shaffer based this opinion to a great extent on his own experience in the newspaper industry, drawing on instinct and intuition to patch holes in his methodology that properly should be filled with specific facts, research, and established **[**23]** economic principles.

Plaintiffs now argue that the lack of data at that time is moot because Shaffer now has reaffirmed these conclusions, after reviewing portions of deposition testimony and exhibits produced in discovery. According to the plaintiffs' opposition and Shaffer's final conclusion as set forth in his supplemental affidavit, his final opinions as to relevant market were based on: (1) review of the deposition testimony of several witnesses in this case, most of whom work for the Post or Gazette; (2) review of market studies completed by the defendants; (3) a visual review of the newspapers involved; and (4) unspecified "independent market analyses." All of this was colored by (indeed it relies upon) Shaffer's extensive experience in the publishing industry and his recent review of economics articles provided to him by the plaintiffs. The plaintiffs make no reasonable attempt to explain how this is a reliable methodology for defining a precise product or geographical market. Indeed, the lack of any specific and independent market research seems to indicate a decidedly unreliable route to determining the specific outer boundaries of markets. *See, e.g.,* *Va. Vermiculite, 98 F. Supp. 2d at 736-37* **[**24]** (discussing the complex research methods typically utilized in defining relevant markets); *Victus, Ltd., 26 F. Supp. 2d at 786* (same). Plaintiffs have offered no evidence that the methods Shaffer drew upon to reach his ultimate conclusion are of the type that other experts would use to determine the relevant markets in an antitrust case.

The plaintiffs make much of statements in the *defendants'* internal memoranda and deposition testimony which indicate that the defendants' independent market research reaches the same conclusion as Shaffer as to market definition. There is no indication, however, of the methods used to reach these conclusions or whether these market surveys were compiled with an eye toward determining relevant market *for antitrust purposes.* [2] To the extent that Shaffer relied on market research done by defendants or statements by the defendants regarding their perceptions of competition, market, and the like, there is no indication that these assessments were based on proper research methods.

[25]** In sum, aside from drawing on his own experience when reviewing the discovery materials in this case, Shaffer's methods are wholly lacking in independent research. There is absolutely no evidence now before the Court that indicates that Shaffer's opinion is the product of reliable **[*540]** principles and methods, and is based upon sufficient facts or data. For these reasons, the Court will exclude Shaffer's proposed opinions as to relevant product and geographic markets, and, thus, market power *vel non.*

VI. Shaffer's Pricing Opinion

The defendant also claims that the Court should exclude the following opinion:

> Assuming The Post purchased its presses and equipment partly for the purpose of zoning legal advertisements, then (a) an unspecified portion of the press and equipment costs should be considered in determining whether The Post's pricing for certain trustee advertisements was above marginal costs, and (b) The Post's pricing for trustee advertisements in Washington, D.C. for an unspecified period of time would not be above marginal costs."

Def.'s Mot. to Exclude at 8 (citing Shaffer Depo. II at 149-50).

Shaffer is qualified to offer his opinion as to pricing **[**26]** below marginal costs, which is relevant to plaintiffs' claims of predatory behavior. Shaffer has conducted and reviewed predatory pricing analyses for several major publications. He has studied finance and business administration and has served as a senior financial executive for several prominent companies. Moreover, from a review of the record, it appears that Shaffer's teaching experiences specifically deal with topics such as newspaper costs and price structuring. He is thus qualified by training and experience to offer the above opinion.

As for Shaffer's methods, the defendants identify specific steps which they believe Shaffer should have taken in reaching his conclusion. Defendants also note, not surprisingly, that their retained expert, Mr. Kenneth Baseman, disagrees with Shaffer's analysis. However, the defendants do not identify any widely-accepted tests for determining marginal costs, nor do they specifically substantiate that Shaffer's methodology as a whole is completely without rational basis. In short, although defendants disagree with Shaffer's methods and conclusions as to determining marginal costs, they have not convinced this Court that said conclusions are unreliable **[**27]** as a matter of law.

VII. Shaffer's Lost Profits Opinion

Finally, the defendants argue against the admissibility of Shaffer's opinion as to Berlyn's lost profits as a result of Press Network's actions. Shaffer concluded that Berlyn's lost profits, depending on certain assumptions, could be estimated at $ 700,000 to $ 852,000. These figures represent the amount Berlyn would have made but for the actions of Press Network, which, according to the plaintiffs, wrongfully directed advertisers away from Berlyn's publications and toward Gazette.

Shaffer is objectively qualified to offer an opinion as to lost profits, essentially for the same reasons he is qualified to discuss pricing below marginal cost. Shaffer has spent most of his career dealing with the financial aspects of the newspaper industry, has obtained a graduate MBA, and has taught on the business aspects of publishing

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[2] *See* Va. Vermiculite, 98 F. Supp. 2d at 732-33 ("Though related to a relevant market determination in an antitrust issue, there are differences between an analysis for business investment and an analysis for antitrust purposes. For one, market analyses performed for business usually provide information regarding the various places a product would be sold, uses for which it might be sold, and the regions in which it might be traded. These analyses do not go into the detail required for antitrust matters. For instance, defining where a product could be sold is only a small part of defining a geographic market as there can be relevant markets that are narrower or broader than where individual producers sell their products.").

throughout his career. These qualifications render him capable under *FED. R. EVID. 702* to offer opinion evidence on general financial matters of newspaper business, including projected profits.

The defendants focus their challenge on Shaffer's methodology in reaching his lost-profits opinion. As with **[**28]** the "predatory pricing" opinion, the defendants identify alleged flaws which, they argue, lead to inaccurate assessments of damages. This Court, however, finds no specific flaw in Shaffer's methodology that renders his **[*541]** analysis of lost profits unreliable as a matter of law. Shaffer's opinion cannot be excluded simply because the defendants' expert has reached a different conclusion or applied different methods for assessing damages. Certainly, the defendants may argue and present evidence showing that theirs is a more accurate statement of damages, but, at this time, the Court is not persuaded to exercise its discretion and to exclude the testimony in its entirety.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that the defendants' motion to exclude the expert testimony of James B. Shaffer BE, and it hereby IS, GRANTED IN PART and DENIED IN PART as stated above.

Date: August 13, 2002

Frederic N. Smalkin

Chief U.S. District Judge

Dagher v. Saudi Ref., Inc.

United States District Court for the Central District of California

August 13, 2002, Decided ; August 13, 2002, Filed; August 14, 2002, Entered

CV 99-6114-GHK (JWJx)

Reporter

2002 U.S. Dist. LEXIS 27935 *; 2002 WL 34099815

FOUAD N. DAGHER, et al., Plaintiffs, v. SAUDI REFINING, INC., et al., Defendants.

Prior History: Dagher v. Saudi Ref., Inc., 2002 U.S. Dist. LEXIS 27936 (C.D. Cal., May 21, 2002)

Disposition: **[*1]** Defendants' Motion Granted. Defendants' purported Copperweld defense denied as moot. Plaintiffs' Motion denied.

Core Terms

brands, prices, anticompetitive, joint venture, price fixing, ventures, quick-look, marketing, gasoline, cost saving, combinations, products, savings, rule of reason, competitors, conspiracy, formation, compete, newspapers, resources, forming, condemn, effects, set price, post-formation, provisions, Antitrust, realized, refining, downstream

Counsel: For Fouad N Dagher, Bisharat Enterprises Inc., Alfred Buczkowski, Esequiel Delagado, Mahwash Farzaneh, Nasser El-Radi, G G&R Petroleum Inc, H J F Inc., Kaleco Co, Carlos Marquez, Sami Merhi, Edgardo R Parungao, Ron Abel Serv Center Inc, Gullermo Ramirez, Jerry's Shell Serv Center Inc, Leopoloo Ramirez, Nazar Sheibaini, Sitara Management Corporation, Tinsel Enterprises Inc, Quang Truong, Steven Ray Vezerian, Los Feliz Shell Inc, Nassim Hanna, Plaintiffs: Daniel R Shulman, David M Sullivan, Shulman Law Offices, Minneapolis, MN; John H Boone, John H Boone Law Offices, San Francisco, CA; Joseph M Alioto, Alioto Law Firm, San Francisco, CA; Thomas P Bleau, Bleau Fox & Fong, Los Angeles, CA.

For Saudi Refining Inc, Defendant: Brian Arnold, Kirkland & Ellis, Los Angeles, CA; Bryan A Merryman, White & Case, Los Angeles, CA; Michael Shuster, White & Case, New York, NY.

For Texaco Inc, Defendant: Alan M Grimaldi, Eric J McCarthy, Kristen S Scammon, Patricia G Butler, Victor J Miller, William R O'Brien, Howrey Simon Arnold & White, Washington, DC; Dale J Giali, Howrey, **[*2]** Los Angeles, CA; Thomas J Nolan, Skadden Arps Slate Meagher and Flom, Los Angeles, CA.

For Shell Oil Company, Defendant: Bradley S Phillips, Ronald L. Olson, Stuart N Senator, William D Temko, Munger Tolles & Olson, Los Angeles, CA.

Judges: GEORGE H. KING, United States District Judge.

Opinion by: GEORGE H. KING

Opinion

MEMORANDUM AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT (PART TWO: Re: § 1 PER SE & QUICK-LOOK LIABILITY)

I. Introduction

This matter is before the court on the parties' cross-motions for summary judgment. The motions came on regularly for hearing on December 10, 2001. On May 21, 2002, we issued an order with respect to Plaintiffs' standing against SRI. We hereby adopt Sections II (Procedural History), III (Undisputed Facts), IV (Summary Judgment), and V.A (Antitrust Conspiracy Cases) of that May 21, 2002 order. We now rule on the remaining issues after considering the joint briefs, all pertinent papers, the evidence, and oral argument:

II. Per se and/or Quick-Look Antitrust Liability

The parties divide per se and/or quick-look liability into two subissues: (1) "Are Equilon and Motiva integrated such that SRI, Shell and Texaco are not subject **[*3]** to per se or "quick look" liability?" (2) "Are Equilon's and Motiva's claimed efficiencies sufficient such that SRI, Shell and Texaco are not subject to per se or quick look liability?" Joint Argument at i.

The parties appear to have borrowed this formulation from language in our *Rule 12(b)(6)* order. At that stage, we accepted Plaintiffs' allegations as true and identified any possible factual basis for § 1 per se or quick-look liability. That categorical framework is not as helpful at the summary judgment stage. We can now analyze the relevant legal principles in the context of a significant body of evidence.

In light of the admitted cost savings and significant commitment of resources into what appear to be legitimate joint ventures, joint Fact PP39, 48, we address two ultimate questions: (1) whether a reasonable trier of fact could conclude that Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or (2) whether they are otherwise patently anticompetitive.

Since Plaintiffs waived any reliance on the rule of reason, we will not weigh all of the claimed benefits and purported anticompetitive effects to determine if the anticompetitive effects predominate. **[*4]** See, e.g., *Cal. Dental Ass'n v. FTC, 224 F.3d 942, 947 (9th Cir. 2000)*; *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (describing shifting burdens under rule of reason). The question is not whether Defendants violated § 1, but whether their conduct falls under the exceptional § 1 per se or quick-look doctrines. Moreover, Plaintiffs abandoned the per se or quick-look theory of market division.

A. Per se Analysis

To establish per se liability, Plaintiffs must do more than prove that Equilon and Motiva "more likely than not" affected competition negatively. *Am. Ad Mgmt. v. GTE Corp., 92 F.3d 781, 787 (9th Cir. 1996)*. The "per se approach can only be applied to an agreement which 'facially appears to be one that would almost always tend to restrict competition and decrease output.'" Id. (quoting *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))*; see also *Eichorn v. AT&T Corp., 248 F.3d 131, 138 (3d Cir. 2001)* ("0n its face, [it] has 'no purpose except stifling competition.'"). Stated another way, if the conduct "does not invariably have anticompetitive **[*5]** effects," we will not condemn it under a per se analysis. *United States v. United States Gypsum Co., 438 U.S. 422, 441, 98 S. Ct. 2864, 57 L. Ed. 2d 854 & n.16 (1978)*; see also 1 Von Kalinowski et al., Antitrust Laws and Trade Regulation § 13.04, at 13-21 (2d ed. 1996).

For example, true price fixing is so "plainly anticompetetive," and so lacking in "any redeeming virtue," that we automatically condemn such arrangements as presumptively unreasonable. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *NCAA, 468 U.S. at 100*; see also *Eichorn, 248 F.3d at 142-43*. Courts have repeatedly treated horizontal price fixing among competitors as per se violations. *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999)*.

However, the concept of "price fixing" cannot be applied literally. *BMI, 441 U.S. at 9*. Price fixing "will often, but not always, be a simple matter." Id. "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." Id. Efficient joint ventures often entail agreements on prices **[*6]** and output as well as restrictions on competition, yet do not violate the prohibition against price fixing. See XI Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ("Hovenkamp") P1908, at 229-30 (1998).

If an agreement arguably promotes efficiency or productivity at the time adopted, we should apply the rule of reason and perform a more discriminating assessment. *Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985)*. For example, competitors should be free to combine resources to create products that each could not develop alone. See *BMI, 441 U.S. at 23*. The joint operation may administratively require former competitors to set a single price, but this does not indicate a naked price fixing restraint. The price fixing is "merely ancillary to the main purpose" of producing the new product. See id.

Thus, the per se rule is less likely to apply when an agreement to set prices or impose some other restraint is part of a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332, 356-57, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; **[*7]** see also *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (noting joint ventures are usually subject to rule of reason analysis since they unlock potential efficiencies); *Addamax Corp. v. Open Software Found., 152 F.3d 48, 52 (1st Cir. 1998)* ("Joint venture enterprises . . . unless they amount to complete shams, are rarely susceptible to per se treatment."); XIII Hovenkamp P2100g, at 14 ("In our relatively open market system we begin with the premise that joint productive activity is socially valuable and it is not antitrust's job to 'approve' joint ventures.").

Because per se violations settle the question of liability without any inquiry into anticompetitive impact, the Supreme Court has cautioned against expanding the per se rule to new business arrangements with which we have little experience. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (citing *Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 458-59, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. "Where the conduct at issue is not garden-variety . . ., we have eschewed a per se rule and instead have utilized a rule of reason analysis. **[*8]** " *Metro Indus. v. Sammi Corp., 82 F.3d 839, 844 (9th Cir. 1996)*; see also *Am. Ad Mgmt., 92 F.3d at 784*. As a result, when conduct falls outside typical per se categories of "horizontal price fixing, division of markets, group boycotts, tying arrangements, and output limitations," we generally apply a rule of reason analysis. See *Am. Ad Mgmt., 92 F.3d at 784*; *Big Bear Lodging Ass'n, 182 F.3d at 1101*.

B. Quick-Look Analysis

Conduct outside the narrow per se categories can be condemned short of a full rule of reason analysis if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Much like per se treatment, quick-look analysis applies "when the great likelihood of anticompetitive effects can easily be ascertained." Id. Our experience with such combinations must be so clear that we can confidently conclude the principal result will be anticompetitive. *Id. at 781*. If the potential **[*9]** anticompetitive effects are "far from intuitively obvious," we resort to a complete rule of reason analysis. *Id. at 759*.

C. **Initial Assessment of Evidence** [1]

Several undisputed facts appear to foreclose the conclusion that Equilon and Motiva are nothing but window-dressings for an old-fashioned price fixing cartel or are otherwise patently anticompetitive. Though the parties dispute the exact extent of integration, both ventures control significant refining and marketing assets. See Joint Facts P48. Both entail risk sharing based on the Defendants' respective capital investments. Id. PP43, 47; see also *Maricopa County, 457 U.S. at 356-57*. Both have in fact achieved cost savings, Pls.' Facts PP39-41, and each manufactures and markets **[*10]** branded gasoline. Joint Facts PP10, 42, 45, 53. In other words, Equilon and

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[1] The parties address per se and quick-look together in their analysis. We do the same to avoid needless repetition and because the principles are substantially similar. See *Cal. Dental. Ass'n, 526 U.S. at 779*.

Motiva have achieved their parents' stated goals. On its face then, the undisputed evidence shows potential and realized efficiencies occurring within functioning and integrated enterprises.

Plaintiffs contend that every combination, whether efficient or anticompetitive, realizes cost savings from "closing offices, eliminating positions, and avoiding capital expenditures . . . ." Joint Argument at 25-26. Plaintiffs argue that Defendants cannot avoid per se or quick-look liability by identifying cost savings alone. However, businesses regularly combine resources to realize cost savings through elimination of redundant workers, capital, and overhead expenses. See, e.g., Fed. Trade Comm'n and U.S. Dep't of Justice, 1992 Horizontal Merger Guidelines § 4 (revised April 8, 1997); XIII Hovenkamp P2100, at 4, P2121b, at 117. So long as the newly formed business maintains a comparable level of production, it makes more efficient use of the remaining resources. Here, we have no evidence that Defendants decreased their overall level of production after forming Equilon and Motiva.

In any event, the undisputed evidence **[*11]** shows that Defendants anticipated operating efficiencies beyond cost savings alone. Defendants predicted that Equilon and Motiva would benefit from greater economies of scale. See, e.g., Vol 2, Tab 3 at 35; Vol. 3, Tab 25 at 820-21. The physical proximity of some refineries meant Defendants could improve overall efficiency through, among other things, the sharing of inputs and transportation costs. See, e.g., Defs.' Vol. 1, Tab 11 at 242, Tab 12 at 280; Vol. 2, Tab 19 at 454; Vol. 3, Tab 25 at 819, 844. Defendants also expected to tap into the capacity of previously unused pipelines, simultaneously eliminating the need to rely on third-party carriers. See, e.g., Defs.' Vol. 3, Tab 25 at 854, Tab 35 at 1205. Though in some instances Defendants expected to close refineries, those refineries were operating well below capacity, allowing Defendants to increase the efficiency of the remaining ones. See, e.g., Tab 25 at 843, Tab 29 at 971.

In addition to improved use of physical resources, Defendants anticipated economic benefits from an expanded knowledge base. They anticipated reductions in the number of plant failures from exchanges regarding best practices. See, e. **[*12]** g., Defs.' Vol. 3, Tab 25 at 791, 822-23. Defendants also could share knowledge and technologies acquired through research and development programs. See, e.g., id. at 809. Consequently, the claimed savings from forming Equilon and Motiva did not relate solely to the elimination of redundant costs.

Plaintiffs next argue that all such cost savings and efficiencies are legally irrelevant in the context of anticompetitive combinations. Joint Argument at 26. However, this argument takes for granted the existence of a per se or quick-look violation. [2] Unless and until Plaintiffs establish a per se or quick look violation, such as price fixing, we cannot categorically ignore identified and realized efficiencies. See, e.g., *Copperweld, 467 U.S. at 768*; *Polk Bros., 776 F.2d at 189*.

[*13] D. Plaintiffs' Arguments

1. Plaintiffs' Price Fixing Theory

Plaintiffs approach the question of price fixing too literally. Though Equilon and Motiva charge different prices for Shell and Texaco branded gasoline, according to Plaintiffs, both "fix" prices because each has decided to price the brands together. As a hypothetical, Equilon may sell Shell and Texaco branded gasoline for $ 1.50 a gallon, while Motiva sells the same gallon for $ 1.75, but both "fix" prices because, whatever price they charge, each prices Shell and Texaco branded gasolines the same.

Plaintiffs' theory would impose artificial and unnecessary requirements on joint ventures. Whether Equilon and Motiva charge the same or different prices for both brands, each literally "fixes" a price where Defendants formerly

[2] Moreover, Plaintiffs rely on § 2 monopoly cases for this proposition of law. In § 2 cases, cost savings and efficiencies are irrelevant because we are concerned with the dangers inherent in overwhelming market power. Plaintiffs have not brought a § 2 claim. See XIII Hovenkamp P2101, at 17 ("Joint ventures are analyzed under the 'restraint of trade' standard rather than the monopoly standard.").

set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell. See *BMI, 441 U.S. at 9*.

Because almost any price setting constitutes price fixing under Plaintiffs' theory, Defendants would violate § 1 per se even if Equilon and Motiva had absolutely no connection to or interaction with each other. To avoid **[*14]** price fixing according to Plaintiffs' theory, Shell, Texaco and SRI would have to independently price the branded gasoline for Equilon or Motiva. While this may be possible temporarily, or in particular circumstances, there is no basis for imposing such an artificial arrangement indefinitely as a matter of law. [3] "[A] producer is free to fix and publish a retail price for his product and solicit business at that price." See *Dunn v. Phoenix Newspapers, Inc., 735 F.2d 1184, 1187 (9th Cir. 1984)*.

[*15] Plaintiffs would only allow joint ventures to establish prices for products that were somehow fundamentally new or different from those made by the parents. Requiring joint ventures to invent fundamental new products to operate independently or justify their existence would eliminate several types of efficient and pro-competitive combinations. Companies regularly combine assets for the legitimate purpose of realizing cost savings through economies of scale and information exchange, not only to develop new products.

In addition, Plaintiffs' price fixing theory is contrary to the undisputed facts. One person at Equilon and one person at Motiva set prices for both brands according to market conditions within their respective territories. Joints Facts PP18-21, 62-63. Shell, Texaco and SRI did not jointly agree pre- or post-formation on one universal price that would be applied nationally through Equilon and Motiva. Furthermore, they had no reason to fix prices because once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States. Equilon and Motiva **[*16]** operate in different regions of the country and thus also do not compete against each other. Id. PP42, 45, 62-63. A decision by Equilon to raise prices throughout the West Coast would not enable Motiva to raise prices on the East Coast.

Plaintiffs' theory has less to do with price fixing than with combinations in general. In essence, Plaintiffs seek per se or quick-look treatment because of the loss of a competitor. With few exceptions, Plaintiffs' theory would act as a per se rule against joint ventures between companies that produce competing products. Every such venture deprives the market of a competitor to the extent that where there were two or more entities producing a product, now there is one. Because of this, and the reasons stated above, we decline to adopt Plaintiffs' theory of price fixing.

2. Equilon and Motiva as Shams

As an alternative to their per se price fixing theory, Plaintiffs contend the ventures have an overall and presumptively anticompetitive purpose or structure. We address Plaintiffs' numerous arguments on this subject individually and then as a whole.

a. Pre-formation Conduct and Decisions

i. Regulatory Review and Confidentiality **[*17]** *Agreements*

According to Plaintiffs, Defendants from the outset expected that any combination would be subject to regulatory review. Pls.' Facts P14. They executed confidentiality agreements, which included provisions to return or destroy information exchanged during the discussion / negotiation stage. Id. P15. Defendants purportedly failed to produce

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[3] At oral argument, Plaintiffs pointed out that Equilon and Motiva at least temporarily relied on their parents' former pricing systems. Equilon and Motiva apparently relied on the old pricing systems until new ones could be developed. Developing a new system would be one of the challenges faced by the joint ventures as they combined the considerable assets of their parents. The fact they temporarily relied upon the old systems does not explain why, as a matter of law, they should be required to do so indefinitely.

confidential documents exchanged during negotiations for government regulators. Id. P17. Thus Plaintiffs argue Defendants must have had an anticompetitive purpose.

Given Defendants' size, the nature of the oil industry, and the magnitude of the contemplated ventures, any business person would anticipate regulatory review. Defendants' foresight proves nothing. Second, confidentiality agreements serve an important business purpose. They protect sensitive financial information from dissemination or misuse by competitors, while enabling companies to explore potential collaborative efforts.

Withholding information from regulators could suggest an illegitimate motive. Id. P17. However, Plaintiffs have no evidence that Defendants concealed documents. Plaintiffs cite two depositions: one deponent states she has no knowledge on **[*18]** the matter, Pls.' Vol. 2, Tab 17, at p. 356, and the other was not asked about the production of documents for regulators, id. at pp. 358-60. Without such evidence, Plaintiffs have failed to make any showing of an anticompetitive purpose based on the confidentiality agreements.

ii. Exclusion of Assets

Plaintiffs claim the exclusion of various assets from Equilon and Motiva reveals that Defendants never intended Equilon or Motiva to operate as integrated joint ventures. However, the purpose of joint ventures is to combine particular productive assets without undertaking complete mergers. See, e.g., Fed. Trade Comm'n and U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors § 1.1, at 2, § 3.2, at 8 (April 2000) ("Antitrust Guidelines"). To realize the full benefits of a joint venture, the parents must of necessity exclude unrelated assets. [4] As always, the parents attempt to allocate resources where they will be most productive.

[*19] Here, Defendants formed Equilon and Motiva for the purpose of combining their downstream refining and marketing operations for branded gasoline. Joint Facts PP12, 31, 33, 36, 39, 40, 42, 45, 45. They did not include their worldwide businesses, upstream operations, marine fuels, aviation fuels, or chemical production plants, if any, because those assets and entities are not part of Defendants' downstream operations in the United States.

When selecting which assets to include in a joint venture, a parent company may reserve assets that serve vital functions in other businesses. Here, Defendants did not transfer ownership of the Shell and Texaco brands to Equilon and Motiva because they rely on those brands in other businesses around the globe. Because of the brands' international importance and value, forcing Shell and Texaco to transfer the brands to Equilon or Motiva is akin to requiring them to choose between merging or abandoning any joint venture. Joint venture parents are not required to abandon or devalue long-standing investments in brand good-will to avoid per se or quick-look condemnation. Furthermore, Equilon and Motiva have an exclusive right to license Shell and Texaco **[*20]** branded gasoline in the United States, Defs.' Fact P47, which is more than sufficient to enable each to fulfill its purpose.

A joint venture parent may also exclude assets because of prior commitments. In this case, the uncontroverted evidence is that Shell could not contribute Deer Park because it was a joint venture with PEMEX - the Mexican national oil company - and PEMEX rejected the proposal. Pls.' Facts P22 (Defs.' Response); Defs.' Facts P44. This is a legitimate reason for excluding Deer Park. Moreover, Shell's inability to include Deer Park explains why Texaco and SRI received the right to operate one comparable refinery independently. Pls.' Facts P27 and Defs.' Response. In any event, Plaintiffs have not explained how the exclusion of one relevant asset renders either Equilon or Motiva a sham. No reasonable trier of fact could conclude that the exclusion of Deer Park under these circumstances demonstrates that the joint ventures were shams designed to conceal price fixing.

iii. SRI's Ability to Compete Against Equilon

Since the formation of Equilon and Motiva, SRI has remained free to compete against Equilon. Joint Facts P60. This right, however, does not indicate **[*21]** that Equilon and Motiva are shams: It would be unnecessary to limit

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[4] To the extent Plaintiffs believe *Citizen Publishing Co. v. United States, 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969)*, requires complete mergers, we disagree. Citizen Publishing did not "prevent all forms of joint operation." *Id. at 135*; see also infra Section II.D.3.

SRI's ability to compete against Equilon since SRI held no financial stake in Equilon. Given the absence of any financial connection between SRI and Equilon, an agreement restricting SRI's ability to compete in the Western United States might instead raise an inference of improper collusion.

iv. "Sole Risk" Provisions

Plaintiffs consider the presence of "sole risk" provisions evidence that Defendants still compete in the downstream market in the United States, and thus the ventures' only purpose was to drive up prices. To the contrary, the presence of "sole risk" provisions bolsters our initial conclusion that Equilon and Motiva are not patently anticompetitive. The "sole risk" provisions permit Defendants to engage in refining opportunities [5] rejected by either Equilon or Motiva. Defs.' Response to Pls.' Facts P25. Rather than unnecessarily constrain competition, this ensures efficient allocation of resources and promotes beneficial competition. If Shell, Texaco or SRI perceives an opportunity where Equilon and Motiva do not, market principles dictate that they should be free to invest accordingly.

[*22] *v. Brand Management Protocol*

At the time Equilon and Motiva were formed, Defendants entered into Brand Management Protocol agreements. For example, Motiva's Brand Management Protocol "recognize[s] that coordination between Equilon and [Motiva] of uniform standards established by Texaco for the Texaco Symbols and by Shell for the Shell Symbols . . . , enhances and protects the value, reputation, prestige and goodwill associated with" those symbols and brands. Pls.' Vol. 1, Tab. 3 at 141. The Protocol agreements regulate the use of the Shell and Texaco brands in the ventures' respective regions. See id. at p. 140. Plaintiffs view these agreements as evidence of Defendants' intent to eliminate competition.

The Brand Management Protocol agreements do not reveal an invidious anticompetitive purpose. Defendants had a mutual and legitimate interest in promoting both brands since they were the principal method for marketing Equilon's and Motiva's products. Since Defendants chose not to merge, they adopted a program to ensure that Equilon's and Motiva's use of the brands would not diminish their value in the United States or abroad.

An agreement defining and regulating **[*23]** acceptable practices for brands does not invariably result in anticompetitive harms. Nor does it reveal a patently anticompetitive purpose. As such, these agreements do not validate Plaintiffs' position.

vi. Ease of Dissolution

Plaintiffs assert that Equilon and Motiva can be "easily unraveled and dissolved," providing evidence that neither was intended to operate as a productive and integrated economic collaboration. Joint Argument at 17.

Equilon and Motiva are not "fly-by-night" operations. Defendants negotiated for over a year before forming Equilon and Motiva, Joint Facts PP6-7, 33-34, which would be unnecessary if they simply intended to fix prices. Plaintiffs do not suggest that the negotiations leading up to the formation of Equilon and Motiva were perfunctory or that Defendants failed to undertake adequate due diligence regarding the potential costs or benefits of formation.

In addition, the right to dissolve Equilon and Motiva upon mutual consent must be evaluated alongside the substantial financial commitments made when forming the ventures. Equilon and Motiva control numerous refineries, lubricant plants, research laboratories, terminals, thousands of service stations, **[*24]** miles of pipeline, and employees. Id. P48. If Defendants wanted the ability to readily dissolve Equilon and Motiva, they would not have entrusted the ventures with such extensive resources. The significant integration of assets itself suggests that Defendants intended Equilon and Motiva to function as true joint ventures, rather than covers for price fixing. In any event, joint venture agreements frequently provide for dissolution upon mutual consent. The presence of such clauses does not indicate an intent to illegally fix prices.

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[5] The "sole risk" provisions apply to refining, not marketing.

Other than by mutual consent, Equilon and Motiva can only be dissolved after five years, effective two years after notice. Id. P51. A five-year minimum with two-years notice would allow Defendants to move forward with Equilon and Motiva, hopefully recouping their investments, while leaving room should changes occur in the market or Defendants' individual circumstances. [6] Five years represents a significant commitment to the future of Equilon and Motiva.

[*25] Consequently, the above-described dissolution provisions are not per se illegal, and we do not see how an observer with only a rudimentary understanding of economics could view them as presumptively anticompetitive, especially in light of the time, effort, and resources invested into Equilon and Motiva. See *Cal. Dental. Ass'n, 526 U.S. at 770*.

b. Post-formation Conduct

i. Members Committee Meetings

Plaintiffs believe that Defendants "govern" Equilon and Motiva through Members Committees, presumably to carry out their price fixing conspiracy. Pls.' Facts P30. The Members Committee for Equilon consists of four Shell representatives and three Texaco representatives. Id. Motiva's Members Committee consists of two representatives from Shell, Texaco and SRI. Id. The Members Committees set "policies, business plans, and budgets" for the CEOs and officers running the ventures. Id. P32. Representatives on the Equilon and Motiva Members Committees have separate staffs at their own companies. Id P42.

To begin, Defendants had a legitimate interest in forming Members Committees to protect their substantial investments in Equilon and Motiva. In fact, **[*26]** it would be difficult to conceive of another method of management of a joint venture where the parents wish to maintain an actual, not passive, role in the advancement of their mutual interests.

Even assuming the same representatives from Shell and Texaco served on both committees, we cannot infer a conspiracy merely because Plaintiffs identified an opportunity to conspire. *In re Citric Acid Litig., 191 F.3d 1090, 1103 (9th Cir. 1999)* (refusing to "infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity."). The existence of Members Committees does not tend to exclude the equally likely inference of legitimate conduct, such as to protect and promote the Defendants' shared interest in the Shell and Texaco brands.

ii. Relationship Between Pricing & Purpose

Plaintiffs claim the practice of pricing Shell and Texaco brands the same is not sufficiently related to the joint ventures' beneficial efficiency-producing activities. Joint Argument at 26-28; Pls.' Facts PP45, 47. Plaintiffs argue that since Defendants did not identify any cost savings related **[*27]** to pricing at the time of formation, they had no reason for subsequently pricing both brands the same, except to raise prices. Id.

The fact that Defendants did not identify cost savings related to pricing at the time of formation does not negate the other substantial savings and efficiencies anticipated from formation. ***Antitrust law*** does not require every business decision to generate additional identifiable savings to survive per se or quick look scrutiny. Plaintiffs also do not explain how the decision to set the same price for Shell and Texaco branded gasoline after formation is inconsistent with permissible business practices.

Defendants offer a plausible and justifiable reason why Equilon and Motiva would independently choose to set the price of Shell and Texaco branded gasoline the same: from the perspective of the ventures, the products are fungible. While the brands appeal to different customers, Joint Facts P66, and contain different additives, Pls.' Fact

[6] Plaintiffs allege that Texaco is currently negotiating its withdrawal from the "Alliance, necessitated by Texaco's agreement to be acquired by Chevron." Joint Argument at 17. Chevron's acquisition of Texaco, resulting in Texaco's need to withdraw, serves as an example of why joint venturers provide for dissolution upon consent or reasonable notice.

P46, Plaintiffs provide no evidence that the costs of producing the brands, whether related to physical production, marketing, or advertising, would lead an efficient venture to set different prices for Shell and Texaco **[*28]** branded gasoline.

iii. Parallel Pricing

Plaintiffs assert that "within a relatively short time after their formation, Equilon and Motiva implemented a practice of charging the same price for the Shell and Texaco brands of gasoline in each of the pricing areas into which Equilon and Motiva had divided their geographic spheres of operation." Pls.' Facts P36. "Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable." *In re Citric Acid, 191 F.3d at 1102*.

This is not a case of parallel pricing. Equilon and Motiva do not charge identical prices across the country, and the evidence does not reveal an agreement about what prices the other should charge. The parties stipulate that one person at Equilon sets prices for Equilon's territory, one person at Motiva sets prices for Motiva's territory, and each sets prices based on local market conditions. Joint Facts PP62, 63. [7]

[*29] The conduct in question is consistent with the practical consequences of forming Equilon and Motiva. Once formed, Equilon and Motiva had the power to establish any price for their products, just as any other business does, without collaborating with each other or Defendants. It is arbitrary to infer a conspiracy from the decision to charge the same versus different prices for both brands, since in any event, Equilon and Motiva produce both products and receive all of the revenues. In effect, Plaintiffs want the joint ventures to charge different prices for the brands and thus compete against themselves. "Yet no law requires competition within a company." See *Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 56 (1st Cir. 2002)*.

Furthermore, Plaintiffs have failed to overcome an additional burden. If the intent and plan to "fix" prices arose after formation, one cannot immediately assume that Defendants consciously committed themselves to such a scheme either pre- or post-formation. We are not suggesting, as Defendants do, that the post-formation conduct of Equilon and Motiva can never be considered evidence of pre-formation anticompetitive intent. See Joint **[*30]** Argument at 44-48 (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. Copperweld did "not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." *467 U.S. at 767*; see also *Fraser, 284 F.3d at 56-60* (rejecting argument that LLC members could not violate § 1 when the only complained of conduct occurred post-formation). But just as we do not attribute the acts of a subsidiary to a parent in other contexts, after a certain point it would be improper to attribute the post-formation conduct of Equilon or Motiva to Defendants for purposes of proving a § 1 conspiracy absent other evidence that the ventures are shams. [8]

[*31] In this case, Equilon and Motiva had a separate and legitimate reason for pricing Shell and Texaco branded gasoline the same - they were fungible. See supra discussion. Like any other business, they may set prices for their products. See *Dunn v. Phoenix Newspapers, Inc., 735 F.2d 1184, 1187 (9th Cir. 1984)*.

iv. Strategic Marketing Initiative and "Price Optimization"

According to Plaintiffs,

> Defendants implemented their price fixing in conjunction with a joint program called the Strategic Marketing Initiative, which was developed by Equilon, Motiva, and related service companies as an Alliance-wide

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[7] At most, Defendants have exchanged information relating to the marketing of Shell and Texaco branded gasoline. However, information exchange is not per se illegal. *United States Gypsum Co., 438 U.S. at 440-41* & n.16. Some information exchange between Equilon and Motiva is necessary to protect and develop the jointly shared brands as resources.

[8] We recognize that a price fixing conspiracy offends § 1 whether former competitors agree beforehand to fix prices immediately upon formation or agree to wait eight months after formation to raise prices. Here, Plaintiffs have not raised a triable issue of fact as to a price fixing conspiracy.

> program; [it] called for price fixing as a means of "price optimization"; and [it] was regularly reviewed with the Members Committees of both Equilon and Motiva.

Pls.' Facts P37.

Plaintiffs reliance on the Strategic Marketing Initiative combines arguments we have already rejected. First, Plaintiffs rely on the theory that any setting of price by Equilon or Motiva constitutes "price fixing." If this were true, few joint ventures would survive § 1 scrutiny. Second, Plaintiffs attach significance to the fact that the Strategic Marketing **[*32]** Initiative was presented to the Members Committees for Equilon and Motiva. The fact Members Committees considered the same information does not automatically establish a nationwide conspiracy. See *In re Citric Acid, 191 F.3d at 1103*.

Plaintiffs also overlook the stated purpose of the Initiative, to develop the Shell and Texaco brands. Equilon and Motiva had a separate and legitimate interest in marketing the brands. Since Equilon and Motiva produce and market both brands, they have a legitimate reason to consider similar information and strategies. The Strategic Marketing Initiative, much like the Brand Management Protocol agreements, supports maintenance of the brands and their use by the ventures, something which we cannot lightly condemn as unavoidably anticompetitive. See *United States Gypsum Co., 438 U.S. at 440-41* & n.16.

v. Price Anomalies

Plaintiffs want us to assume an anticompetitive purpose or structure from the fact that Equilon and Motiva's wholesale prices rose when crude oil prices hovered around historic lows. Pls.' Facts P38.

If Equilon and Motiva were the only participants in the downstream market who raised prices during **[*33]** this period, one might suspect that they engaged in some type of anticompetitive collaboration. Yet we cannot determine whether all other downstream refiners also enjoyed higher wholesale prices despite the record low prices for crude oil. As a result, we might condemn Equilon and Motiva for benefitting from a phenomenon experienced across the entire downstream market at that time. [9]

vi. Failure to "Pass" Savings onto Consumers

Plaintiffs accuse Defendants of never explicitly directing that cost savings be passed onto consumers. **[*34]** Id. P41. Companies are not required to "pass on" savings to consumers in the form of lower prices. Absent monopoly power or a proven anticompetitive restraint, every business has the legitimate option of passing savings onto consumers in the form of lower prices or to shareholders in the form of increased stock values. The decision to retain all or some of any realized savings does not raise a triable issue on Plaintiffs' contention that the ventures were created for the purpose of fixing prices or that they almost certainly had anticompetitive effects.

vii. Post-formation Cost Savings

Plaintiffs also complain that "The Alliance" eliminated duplicative or redundant expenses and avoided capital expenditures. Pls.' Facts PP39, 40. The fact Defendants achieved cost savings bolsters one of their stated legitimate reasons for forming the ventures. The fact they actually commenced such programs indicates Equilon and Motiva were not simply fronts for an illegal conspiracy or combination. Hence, this provides no basis for inferring an anticompetitive purpose.

C. *Summary*

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[9] Even if we assume Equilon and Motiva controlled over twenty-five (25) percent of the branded gasoline in specific markets, Pls.' Facts P33, we have no evidence that Equilon and Motiva contributed to the national rise in wholesale prices. Even in a concentrated market, "rising prices do not themselves permit an inference of a collusive market dynamic." See *Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 236-37, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

After carefully reviewing and considering Plaintiffs' evidence and arguments, and drawing all reasonable **[*35]** inferences in Plaintiffs' favor, we nonetheless conclude a reasonable trier of fact could not find that Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive. None of the conduct identified by Plaintiffs is of the type that "always tend[s] to restrict competition and decrease output . . . ." *Am. Ad Mgmt., 92 F.3d at 787*. Our conclusion is reinforced by the fact that Defendants shared risks based on capital contributions, see *Maricopa County Med. Soc'y., 457 U.S. at 356-57*, and the fact that Equilon and Motiva achieved greater efficiency, productivity, and savings, see *Polk Bros., Inc., 776 F.2d at 189*.

3. Citizen Publishing

Despite the evidence of efficiencies and savings, Plaintiffs believe we must follow *Citizen Publishing Co. v. United States, 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969)*, and hold Defendants liable under the per se and/or quick-look doctrines. The defendants in Citizen formed a joint venture to sell and distribute newspapers, yet maintained separate news and editorial departments. *Citizen, 394 U.S. at 134.* **[*36]** The newspapers realized considerable savings from combining their circulation and advertising departments. *United States v. Citizen Publ'g Co., 280 F. Supp. 978, 982 (D. Ariz. 1968)*. In spite of the savings, the Supreme Court concluded the joint venture violated § 1 per se. *Citizen, 394 U.S. at 135*. In so doing, the Court relied primarily on three facts: the newspapers pooled profits according to a fixed ratio, agreed not to compete, and improperly divided the market for daily newspapers. Id.

The profit pooling and non-compete arrangements in Citizen differ in several substantial respects from those in the instant case. First, the defendants, the *Star* and the *Citizen,* were the only daily newspapers in Tucson, Arizona. *Id. at 133*. By joining their circulation and advertising departments, they eliminated all competition for daily papers in Tucson. *Id. at 133-34*. In contrast, Equilon and Motiva continue to compete with several major oil companies in their relevant markets.

Second, the *Star* and the *Citizen* combined for the specific purpose of restricting competition and fixing prices. *Citizen Publ'g, 280 F. Supp. at 993.* **[*37]** Before forming the venture, the *Star* and the *Citizen* agreed to raise advertising rates within one year and in fact raised rates within that period. *Id. at 982*. The Supreme Court could safely presume anticompetitive harms since that was the express purpose from the outset. Without evidence of such an intent here, we cannot lightly ignore the legitimate and significant reasons offered by Defendants.

Third, the non-compete provision in Citizen was part of an agreement to divide the market for daily newspapers. It prohibited the *Star,* the *Citizen,* or any of their stockholders or executives from forming a competing daily newspaper in Pima County, the metropolitan area of Tucson. *Citizen, 394 U.S. at 135-36*. It effectively divided the market because there were only two competitors. Id. Here, Equilon and Motiva operate in diverse markets with several competitors. In addition, their non-compete provisions are not nearly as broad. [10]

[*38] Consequently, the three reasons supporting the Citizen Court's conclusion do not apply to Equilon and Motiva. Still, Plaintiffs note a possible organizational similarity between the joint venture in Citizen and Equilon and Motiva. The joint venture in Citizen priced, sold and distributed newspapers, yet the *Star* and Citizen maintained separate news and editorial departments. Equilon and Motiva market and refine gasoline, yet Shell and Texaco retain the ultimate rights to the Shell and Texaco brands and additives.

This organizational similarity, if any, does not compel per se condemnation. The joint venture in Citizen performed one aspect of producing newspapers, the physical printing and distribution, yet set prices and advertising rates as if it was responsible for all aspects of production. In this case, Equilon and Motiva have responsibility for purchasing necessary inputs and then refining and marketing Shell and Texaco branded gasoline. It is therefore appropriate that they set prices for Shell and Texaco branded gasoline.

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[10] Even if Defendants' non-compete clauses were analogous, Plaintiffs waived any right to recover under a § 1 theory of market division. Thus, this aspect of Citizen is inapposite.

To the extent other similarities may exist between the venture in Citizen and Equilon and Motiva, they do not justify per se condemnation. **[*39]** Citizen did not elaborate on its § 1 per se analysis, and Plaintiffs cite no authorities building upon this part of the analysis. [11] We are reluctant to hypothesize about its application given recent Supreme Court admonitions against expanding the scope of per se liability. *Khan, 522 U.S. at 10* (citing *Ind. Fed'n of Dentists, 476 U.S. at 458-59*); see also *Sammi Corp., 82 F.3d at 844*.

4. Summary of Per se / Quick-Look

We recognize that upon a full rule of reason analysis the anticompetitive effects attendant to the formation of Equilon and Motiva, if any, might outweigh the benefits Defendants realized in cost savings and efficiencies. However, Plaintiffs have eschewed an exhaustive rule **[*40]** of reason analysis. We conclude Plaintiffs have failed to raise a triable issue of material fact on either price fixing or the presumptively anticompetitive nature of Equilon and Motiva. As a result, Plaintiffs failed to raise a triable issue of fact as to Defendants' liability under the per se or quick-look doctrines.

III. Disposition

Accordingly, Defendants' Motion is **GRANTED** as Plaintiffs failed to raise a triable issue of fact as to per se or quick-look § 1 liability. Defendants' purported Copperweld defense is **DENIED** as moot. Plaintiffs' Motion is **DENIED.** [12]

IT IS SO ORDERED.

Dated: 8/13/02

GEORGE H. KING

United States District Judge

JUDGMENT

By **[*41]** separate orders dated May 21, 2002, and August 13, 2002, we ruled that Defendants Shell Oil Company ("Shell"), Texaco, Inc. ("Texaco"), and Saudi Refining, Inc. ("SRI") were entitled to judgment as a matter of law pursuant to *Rule 56 of the Federal Rules of Civil Procedure.*

Accordingly, pursuant to those orders, it is hereby **ADJUDGED, DECREED** and **ORDERED** that Defendants Shell, Texaco, and SRI shall have judgment against Plaintiffs, and Plaintiffs shall recover nothing on their complaint.

IT IS SO ORDERED.

DATED: August 13, 2002

George H. King

United States District Judge

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[11] Congress overruled Citizen by statute as it applied to combinations between newspapers. See *Haw. Newspaper Agency v. Bronster, 103 F.3d 742, 744 (9th Cir. 1996)* (citing Newspaper Preservation Act, *15 U.S.C. §§ 1801-04 (1970)*).

[12] Plaintiffs carry the ultimate burden of proof at trial and have the burden of showing entitlement to judgment as a matter of law. See *Fed. R. Civ. P. 56(c)*. Because we conclude they failed to even raise a triable issue of material fact, they cannot show entitlement to judgment as a matter of law.

Donnelly Corp. v. Reitter & Schefenacker USA L.P.

United States District Court for the Western District of Michigan, Southern Division

August 13, 2002, Decided ; August 13, 2002, Filed

Case No. 1:00-CV-751

Reporter

2002 U.S. Dist. LEXIS 15205 *; 2002-2 Trade Cas. (CCH) P73,817

DONNELLY CORPORATION, Plaintiff, v. REITTER & SCHEFENACKER USA LIMITED PARTNERSHIP and REITTER & SCHEFENACKER GmbH & CO. KG, Defendants.

Disposition: [*1] Plaintiff's Motion to Dismiss Defendants' Michigan Common Law Unfair Competition Counterclaim and for Separate Trials and Stay of Certain Discovery granted in part and denied in part.

Core Terms

unfair competition, patent, counterclaims, antitrust, patent misuse, discovery, patent infringement, common law, separate trial, infringement, bifurcation, allegations, patentee, customers, unfair, violations, cases, anti trust law, invalid, misuse, Defendants', convenience, competitor

LexisNexis® Headnotes

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

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

HN1[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 12(b)(6)*, a district court may dismiss a claim only if it is clear that no relief can be granted under any set of facts that can be proven consistent with the allegations. The allegations must be construed in the light most favorable to a plaintiff. The rules generally require only a short and plain statement of the claim and not detailed allegations. The complaint, however, must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.

Civil Procedure > Trials > Separate Trials

HN2[] **Trials, Separate Trials**

A district court may order a separate trial for any number of claims to promote convenience, expediency, economy, or to prevent prejudice. *Fed. R. Civ. P. 42(b)*. In order for a court to grant bifurcation, the party seeking bifurcation has the burden of demonstrating that judicial economy will be served and that no party will be prejudiced by separate trials, based on the circumstances of the individual case.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] Regulated Practices, Trade Practices & Unfair Competition

Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor. The rule is generally recognized that no one shall by imitation or unfair device induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own product or merchandise.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN4[] Trade Dress Protection, Causes of Action

An allegation that a company is threatening to assert its right to a product's trade dress, and therefore bar a plaintiff from entry into the market in that product, is not enough to state a claim for unfair competition under Michigan law. Few, if any, cases exist wherein a claim of unfair competition involve something other than the protection of names of corporations, buildings and other businesses.

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Patent Law > Remedies > Equitable Relief > Injunctions

Torts > Business Torts > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

HN5[] Sales of Goods, Remedies

There are many ways, other than by interference with contract, of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition, in the broadest sense of the term. The business of another may be unlawfully obtained by harassing his customers and salesmen, just as effectively as by passing off his goods as those of another. There may be also interference by bringing a multiplicity of suits. There is no question that it is lawful and proper for the owner of a patent to give a notice of infringement of his patent to any infringer thereof, or to any user of an infringing article. It is also his legal right to bring and prosecute a suit for recovery of damages against an infringer or user. Such suit, however, must be honestly brought and prosecuted in good faith, and not commenced and prosecuted to harass, annoy, intimidate, financially embarrass, and drive out of business a competitor, for such acts and conduct would amount to unlawful and unfair competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

Michigan follows the general principles of unfair competition. Regarding the scope of ab unfair competition law, there is no hard and fast rule by which it can be determined when a district court will interfere by injunction to prevent what is practically a fraud upon a person engaged in business by unfair methods of business. Each case must depend upon its own facts, but where it is clearly established that an attempt is being made by one person to get the business of another by any means that involves fraud or deceit, a court of equity will protect an honest trader and restrain a dishonest one from carrying out his scheme.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Torts > Procedural Matters > Preemption > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Regulated Practices, Intellectual Property**

State law unfair competition claims are not preempted by federal patent or ***antitrust law*** so long as bad faith is an element of the state law claim. This is because the protection otherwise afforded by the patent laws to a patentee's conduct in enforcing its patent may be lost if the patentee acts in bad faith.

Civil Procedure > Trials > Separate Trials

HN8[] **Trials, Separate Trials**

A district court may order separate trials of claims or issues in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. *Fed. R. Civ. P. 42(b)*. In deciding whether to bifurcate, the major consideration is directed toward the choice most likely to result in a just final disposition of the litigation.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Civil Procedure > Trials > Separate Trials

HN9[] **Pleadings, Counterclaims**

In cases where there is a patent claim and an antitrust defense or counterclaim, it is acceptable procedure to sever the antitrust claims from the patent claims and to provide for separate trials of each. This practice is common because both issues require voluminous and complex proof and because the proof is non-duplicative.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Trials > Separate Trials

HN10[] **Pleadings, Counterclaims**

In the context of determining whether to separate a trial, because patent infringement and antitrust matters involve two completely different and highly complex bodies of law, a single trial for both a patent infringement claim and an antitrust counterclaims will likely cause some degree of jury confusion. A trial requiring the determination of patent validity, infringement, and antitrust violations places a heavy burden on any jury.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN11[] **Regulated Practices, Intellectual Property**

Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article, and is thus a contributing factor in thwarting the public policy underlying the grant of the patent. Patent misuse is an equitable doctrine which prevents a patentee from enforcing its rights through wrongful action. The patentee may not claim the protection of the patent's grant of exclusivity given for reasons of public policy where the patentee uses the grant to subvert the public policy underlying patents.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN12[] **Misuse of Rights, Patent Misuse Defense**

To successfully assert a misuse defense, a defendant must prove the plaintiff has impermissibly broadened the physical or temporal scope of the patent grant with anticompetitive effect. While one who misuses a patent does not also necessarily violate antitrust laws, one who violates antitrust laws by using a patent is necessarily guilty of patent misuse.

Counsel: For DONNELLY CORPORATION, Plaintiff: Thomas R. Behm, Gruel, Mills, Nims & Pylman, Grand Rapids, MI.

For DONNELLY CORPORATION, Plaintiff: John Augustine O'Brien, Fitzpatrick, Cella, Harper & Scinto, Nicholas Philip Groombridge, Weil, Gotshal & Manges, LLP, New York, NY.

For REITTER & SCHEFENACKER GMBH & CO. KG, REITTER & SCHEFENACKER USA LIMITED PARTNERSHIP, defendants: James R. Redford, Plunkett & Cooney, PC, Grand Rapids, MI.

For REITTER & SCHEFENACKER USA LIMITED PARTNERSHIP, defendant: Timothy J. O'Hearn, Jones, Day, Reavis & Pogue, Cleveland, OH.

For MERCEDES BENZ US INTERNATIONAL, INC., 3rd-party defendant: Howard P. Walthall, Jr., Burr & Forman, LLP, Birmingham, AL.

For REITTER **[*2]** & SCHEFENACKER USA LIMITED PARTNERSHIP, counter-claimant: Timothy J. O'Hearn, Jones, Day, Reavis & Pogue, Cleveland, OH.

For REITTER & SCHEFENACKER USA LIMITED PARTNERSHIP, REITTER & SCHEFENACKER GMBH & CO. KG, counter-claimants: James R. Redford, Plunkett & Cooney, PC, Grand Rapids, MI.

For DONNELLY CORPORATION, counterdefendant: Thomas R. Behm, Gruel, Mills, Nims & Pylman, Grand Rapids, MI.

For DONNELLY CORPORATION, counterdefendant: John Augustine O'Brien, Fitzpatrick, Cella, Harper & Scinto, Nicholas Philip Groombridge, Weil, Gotshal & Manges, LLP, New York, NY.

Judges: RICHARD ALAN ENSLEN, United States District Judge.

Opinion by: RICHARD ALAN ENSLEN

Opinion

This matter is before the Court on Plaintiff Donnelly Corporation's Motion to Dismiss Defendants' Michigan Common Law Unfair Competition Counterclaim Pursuant to *Rule 12(b)(6)* and for Separate Trials and Stay of Certain Discovery Pursuant to *Fed. R. Civ. P. 42(b)*. The Court will deny Plaintiff's Motion to Dismiss Defendant Reitter & Schefenacker USA Limited Partnership's [1] ("R&S USA LP") Michigan common law unfair competition counterclaim. The Court will grant Plaintiff's request to bifurcate the trial of R&S USA LP's antitrust **[*3]** and unfair competition counterclaims and the patent misuse defense from the current patent infringement case. The Court will not, however, stay any discovery in this matter.

I. Standard of Review

A. Motions to Dismiss

HN1[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a court may dismiss a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*; *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. The allegations must be construed in the light most favorable to the plaintiff. *Gregory v.*

[1] The Amended Answer and Counterclaims were filed on February 1, 2002 by Defendant R&S USA LP only and were not joined by Defendant Reitter & Schefenacker GmbH & Co. KG ("R&S GmbH"). (*See* Amended Answer and Counterclaims, Dkt. No. 147.)

Shelby County, Tenn., 220 F.3d 433, 446 (6th Cir. 2000) **[*4]** (citations omitted). The rules generally require only a "short and plain statement of the claim" and not detailed allegations. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993). The complaint, however, "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988) (quotations omitted) (emphasis in original).

B. Motions For Separate Trials

HN2[] The Court may order a separate trial for any number of claims to promote convenience, expediency, economy, or to prevent prejudice. Fed. R. Civ. P. 42(b). In order for a court to grant bifurcation, the party seeking bifurcation has the burden of demonstrating that judicial economy would be served and that no party would be prejudiced by separate trials, based on the circumstances of the individual case. Real v. Bunn-O-Matic Corp., 195 F.R.D. 618, 620 (N.D. Ill. 2000); Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998).

[*5] II. Facts

On October 5, 2000, Plaintiff Donnelly Corporation ("Donnelly") filed its Complaint for patent infringement against R&S GmbH and R&S USA LP ("Defendants" collectively), alleging that Defendants' manufacture, use, sale, and offering for sale to customers of lighted interior rearview mirrors infringed three Donnelly patents. [2] In their original Answer submitted on January 8, 2001, Defendants denied the infringement claim.

On February 1, 2002, R&S USA LP filed an Amended Answer and Counterclaims, alleging that Donnelly is: (1) guilty of patent misuse; [3] (2) in violation of the Sherman Act § 2 due to Walker Process fraud; [4] **[*7]** (3) in violation of the Sherman Act § 2 due to Donnelly's alleged filing of "sham litigation"; [5] and (4) in violation of Michigan's unfair competition common law. First, Donnelly requests dismissal of R&S USA LP's Michigan common **[*6]** law unfair competition counterclaim for failure to state a claim. Second, Donnelly asks for bifurcation of the trial of the Sherman Act antitrust counterclaims, the unfair competition counterclaim in the event that the Court denies the motion to dismiss it, and the patent misuse defense. Finally, Donnelly requests a stay of any litigation concerning these issues pending the resolution of the on-going patent infringement case that Donnelly originally brought against Defendants.

III. Analysis

A. Unfair Competition Under Michigan Common Law

In its Michigan common law unfair competition counterclaim, R&S USA LP alleges Donnelly: (1) obtained patents by fraud and inequitable conduct; (2) filed and maintained the current, allegedly baseless patent infringement

[2] These patents are U.S. Patent Nos. 4, 733, 336 ("the '336 patent"); 5, 671, 996 ("the '996 patent"); and 5, 938, 321 ("the '321 patent").

[3] When a patent infringement suit is used for the purpose of stifling competition with the patent holder's sale of an *unpatented* product, the defendants in the patent infringement suit are entitled to the *patent misuse* defense. Kolene Corp. v. Motor City Metal Treating, Inc., 440 F.2d 77, 84 (6th Cir. 1971). This defense has been subsequently limited by other case law. *See, e.g.,* Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 868-871 (Fed. Cir. 1997).

[4] *Walker Process* fraud is the enforcement of a patent procured by fraud on the patent office and may constitute a violation of the Sherman Act § 2, provided the other elements necessary to a Sherman Act case are present. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965).

[5] R&S USA LP's "sham litigation" claim made under § 2 of the Sherman Act seeks to demonstrate Donnelly undertook litigation against Defendants for the sole purpose of hindering and disrupting R&S USA LP's business operations. *See* Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1005 (6th Cir. 1999).

action; (3) publicized the pending action to R&S USA LP's actual and potential customers; and (4) advised R&S USA LP's actual and potential customers that R&S USA LP "will be unable to supply lighted interior automotive rearview mirrors because such mirrors infringe the patents in suit." (R&S USA LP's Amended Answer and Counterclaim at P 56.) Donnelly asserts that none of this conduct, even if true, gives rise to a claim under Michigan's unfair competition common law. However, **[*8]** the Court will deny Plaintiff's Motion to Dismiss this counterclaim.

In 1933, the Michigan Supreme Court described a principle of unfair competition law as follows:

> ***HN3***[] Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor. The rule is generally recognized that no one shall by imitation or unfair device induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own product or merchandise.

Schwannecke v. Genesee Coal & Ice Co., 262 Mich. 624, 247 N.W. 761, 762 (Mich. 1933). This description is oft-quoted. *See, e.g., Love v. New York Times Co., 691 F.2d 261, 265 (6th Cir. 1982)*; *Pennwalt Corp. v. Zenith Labs., Inc., 472 F. Supp. 413, 418 (6th Cir. 1979)*; *Cawley v. Swearer, 936 F.2d 572, 1991 U.S. App. LEXIS 19971, 1991 WL 108725*, at *2-3 (6th Cir. 1991); *Marion Labs., Inc. v. Michigan Pharmacal Corp., 338 F. Supp. 762, 767 (E.D. Mich. 1972)*, *aff'd without op., 473 F.2d 910 (6th Cir. 1973)*; *Moon Bros. v. Moon, 300 Mich. 150, 1 N.W.2d 488, 493 (Mich. 1942)*. As a result, Donnelly asserts Michigan's common law unfair competition claim encompasses only trademark violations described in the passage in *Schwannecke,* particularly those violations known as "palming off," where one attempts to disguise his or her goods as those of another in order to trade on the other's business goodwill. [6] In essence, Donnelly asserts that Michigan's common law of unfair competition does not include claims for bad faith assertion of patent actions.

[*10] Donnelly also bases its argument that R&S USA LP's allegations are insufficient to state a claim on *Letica Corp. v. Sweetheart Cup Co., Inc., 790 F. Supp. 702 (E.D. Mich. 1992)*. In *Letica,* another federal court held that ***HN4***[] an allegation that a company was threatening to assert its right to a product's trade dress, and therefore bar the plaintiff from entry into the market in that product, was not enough to state a claim for unfair competition under Michigan law. *See id. at 706*. After so holding, the *Letica* Court noted that "few, if any, cases exist wherein a claim of unfair competition involved something other than the protection of names of corporations, buildings and other businesses." *Id.* In addition, the *Letica* Court noted there was no allegation of any improper business activity, like prosecuting baseless litigation for the purpose of harassing a competitor. *See id. at 706-07*. Unlike in *Letica,* however, R&S USA LP alleges that Donnelly has prosecuted the current patent litigation in bad faith to steal its customers.

Moreover, R&S USA LP counters that other Michigan cases have considered similar conduct to constitute **[*11]** unfair competition and that none of the cases cited by Donnelly conclude that Michigan's common law absolutely excludes a claim based on R&S USA LP's allegations. For example, the Michigan Supreme Court has said,

> ***HN5***[] There are many ways, other than by interference with contract, of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition, in the broadest sense of the term. The business of another may be unlawfully obtained by harassing his customers and salesmen, just as

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[6] Another federal court in this District has held that Michigan's unfair competition claim is mostly limited to "palming off," although recognizing unauthorized duplication and deception of the public are also theories under which unfair competition claims have been sustained. *See Action Publ'ns, Inc. v. Panax Corp., 1984 U.S. Dist. LEXIS 24846, 1984 WL 2268*, at *11 (W.D. Mich. Nov. 30, 1984) (Miles, J.) (citing *Schwannecke, 247 N.W. at 762* (main source of "palming off" theory); *A & M Records, Inc. v. M.V.C. Distributing Corp., 574 F.2d 312 (6th Cir. 1978)* (unauthorized duplication theory); *Clairol, Inc. v. Boston Discount Center of Berkley, 608 F.2d 1114, 1119-20 (6th Cir. 1979)* (deception of public theory)).

> effectively as by passing off his goods as those of another .... There may be also interference by bringing a multiplicity of suits. The bringing of a multiplicity of suits, started not in good faith, but for the purpose of deterring the public from purchasing from a rival and ruining his trade was enjoined in Wisconsin .... There is no question that it is lawful and proper for the owner of a patent to give a notice of infringement of his patent to any infringer thereof, or to any user of an infringing article. It is also his legal right to bring and prosecute a suit for recovery of damages against an infringer or user. Such suit, however, must be honestly brought **[*12]** and prosecuted in good faith, and not commenced and prosecuted to harass, annoy, intimidate, financially embarrass, and drive out of business a competitor, for such acts and conduct would amount to unlawful and unfair competition.

Attorney Gen. ex rel. James v. Nat'l Cash Register Co., 182 Mich. 99, 148 N.W. 420, 428 (Mich. 1914). These statements would appear to recognize a cause of action in Michigan for common law unfair competition to have been stated with the allegations made by R&S USA LP.

Donnelly counters that the above discussion concerned only whether the defendants in that case violated Michigan's anti-monopoly statute and did not relate to Michigan's common law of unfair competition. (*See* Donnelly's Reply to Motion to Dismiss, at 5 n.3 (citing *Nat'l Cash Register, 148 N.W. at 422*).) It is true that the only apparent claim at issue was a claim that defendants violated the anti-monopoly statute, probably owing to the fact that the case was brought by the State of Michigan on the relation of a private individual, instead of directly by the private individual. However, the *National Cash Register* Court's discussion of why defendants' **[*13]** conduct constituted unfair competition is still relevant to the issue of what may constitute a properly stated unfair competition claim in Michigan. Certainly, it can be inferred from *National Cash Register* that had there been a claim against defendants for unfair competition, the Michigan Supreme Court may very well have found such a claim to have been properly stated. *148 N.W. 420, 428*.

In another case, the Michigan Supreme Court affirmed a trial court decree enjoining the defendants from continuing to engage in practices found to constitute "unfair and immoral competition." *See Schwanbeck Bros. v. A. Backus, Jr., & Sons, 148 Mich. 508, 111 N.W. 1046, 1047 (Mich. 1907)*. There, the defendants wrote letters to the plaintiff's customers who purchased plaintiff's allegedly infringing product, threatening them with suit for infringement of defendants' patent. *111 N.W. 1046, 1046-47*. In addition, the defendants refused to litigate the matter of the patent infringement after the plaintiff invited them to do so, and engaged in other activities apparently leading the *Schwanbeck* Court to conclude that "unfair and immoral competition" was present. *See id.*

Donnelly **[*14]** responds that *Schwanbeck* "more closely approximates a tortious interference with business relations claim," not an unfair competition claim, and cites another federal district court who dismissed unfair competition claims because of a lack of evidence in the plaintiff's favor. *See Nagle Indus., Inc. v. Ford Motor Co., 173 F.R.D. 448, 456-57 (E.D. Mich. 1997)*. However, the *Nagle* Court asserted that the plaintiff's reliance on *Schwanbeck* was "misplaced" because Nagle had no evidence Ford interfered with its business relationships by threatening its customers with a patent infringement action, whereas "the *Schwanbeck* Court upheld an unfair competition claim against defendant because plaintiff had presented the court with evidence that defendant had interfered with its business relationships by threatening its customers with a patent infringement action if they purchased plaintiff's products ...." *Id. at 457*. Thus, the *Nagle* Court did *not* hold that these allegations could only constitute a tortious interference claim and not an unfair competition claim under Michigan law. *Cf. id. at 457*.

In addition, ***HN6***[] Michigan follows **[*15]** general principles of unfair competition. *Marion Labs., 338 F. Supp. at 767* (citing *Clipper Belt Lacer Co. v. Detroit Belt Lacer Co., 223 Mich. 399, 194 N.W. 125, 128 (Mich. 1923)*); *see also Clairol, Inc., 608 F.2d at 1120* ("measuring [the facts of the case] against principles of law which obtain in Michigan as throughout the United States"). Regarding the scope of unfair competition law, the *Clipper Belt* Court said,

> There is no hard and fast rule by which it can be determined when the court will interfere by injunction to prevent what is practically a fraud upon a person engaged in business by unfair methods of business. Each case must depend upon its own facts, but where it is clearly established that an attempt is being made by one

> person to get the business of another by any means that involves fraud or deceit, a court of equity will protect an honest trader and restrain a dishonest one from carrying out his scheme.

Clipper Belt, 194 N.W. at 128. [7] This statement leads this Court to believe that R&S USA LP's allegations state a cognizable claim under Michigan unfair competition law. IfR&S **[*16]** USA LP proves its allegations, it would be established that Donnelly attempted to take R&S USA LP's business by means involving fraud or deceit, both unfair methods of conducting business. *See id.*

Finally, this interpretation of Michigan law is consistent with the common law of other states. *See, e.g., Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1355 (Fed. Cir. 1999)* (referring to the claim both **[*17]** as a state law [8] unfair competition claim and a tortious interference claim); *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1472, 1478-79 (Fed. Cir. 1998)* (same). In *Zenith,* the Federal Circuit had occasion to hold that ***HN7***[] state law unfair competition claims are not preempted by federal patent or ***antitrust law*** so long as bad faith is an element of the state law claim. *Zenith, 182 F.3d at 1355*. "This is because the protection otherwise afforded by the patent laws to a patentee's conduct in enforcing its patent may be lost if the patentee acts in bad faith." *182 F.3d 1340, 1343*.

Donnelly can present no case or other source stating that Michigan common law unfair competition claims *absolutely* cannot **[*18]** be sustained on the allegations at issue in this case. Moreover, other Michigan cases have recognized similar unfair competition claims under Michigan common law, and federal law apparently does not preempt such a claim. Therefore, Donnelly's Motion to Dismiss the unfair competition counterclaim will be denied.

B. Bifurcation

Donnelly further moves that the trial of all antitrust counterclaims, the patent misuse defense, and the unfair competition counterclaim be bifurcated from the current patent case to promote convenience, expediency, and economy for all participants in these matters. Donnelly further argues that conducting one trial on all issues poses the risk of unfairly prejudicing Donnelly's patent infringement claims by adding many new issues, documents, and witnesses, as well as a great deal more time and complexity to the patent proceedings.

HN8[] A court may order separate trials of claims or issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." *Fed. R. Civ. P. 42(b)*. In deciding whether to bifurcate, the major consideration is directed toward the choice most likely to result in a just final **[*19]** disposition of the litigation. *In re Innotron Diagnostics, 800 F.2d 1077, 1084 (Fed. Cir. 1986)*. In the interests of justice, the Court will order two separate trials in this matter -- the first trying issues pertaining to the patent infringement claim, and the second trying issues pertaining to the antitrust and unfair competition counterclaims and the patent misuse defense.

1. Antitrust and Unfair Competition Counterclaims

HN9[] In cases where there is a patent claim and an antitrust defense or counterclaim, it is "acceptable procedure to sever the antitrust claims from the patent claims and to provide for separate trials of each." *Standard Pressed Steel Co. v. Astoria Plating Corp., 1969 U.S. Dist. LEXIS 10541, 162 U.S.P.Q. 441, 442 (E.D. Ohio 1969)*. This practice is common because both issues require voluminous and complex proof and because the proof is non-duplicative. *Id.*

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[7] *Clipper Belt* cites from 2 Nims on Unfair Competition § 4, at 12-16 (1917), which is apparently from where the statement quoted *supra* was reported. *See Clipper Belt, 194 N.W. at 128*. Also, *Clipper Belt* takes note of the statement which was later quoted and made famous in Michigan law by *Schwannecke* in 1933, *see supra,* which came from a different treatise or source identified as 26 R.C.L. 826 *et seq.* See id. The *Clipper Belt* Court uses both statements in a manner suggesting they both constitute Michigan common law of unfair competition. *See id.*

[8] This Court presumes that Illinois state law was at issue in *Zenith,* although the Federal Circuit did not specify. *Cf. Zenith, 182 F.3d at 1342* (referring to "the state's unfair competition laws," where the case originated in the Northern District of Illinois).

R&S USA LP's antitrust counterclaims are specifically dependant on a finding that Donnelly's patents in question are invalid and unenforceable since "antitrust laws do not negate a patentee's right to exclude others from patent property." In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000). **[*20]** Furthermore, R&S USA LP's counterclaims require the examination of many issues outside the scope of the current patent case. In order to prove an antitrust violation, in addition to demonstrating the core assertion of patent invalidity, R&S USA LP must first establish the relevant market and then demonstrate the indicia of monopoly power, including (but not limited to) the existence of barriers of entrance into the relevant market, the power to exclude others, the power to raise prices, the lack of product substitutability, predatory intent, market dominance, and guilty knowledge on the part of Donnelly. *See* Innotron Diagnostics, 800 F.2d at 1085.

R&S USA LP argues that because the evidence and proofs needed in the current patent infringement claim and the evidence and proofs needed in the antitrust counterclaim overlap considerably and have largely the same patent "invalidity and unenforceability" basis, bifurcation would result in an excess of redundant litigation. However, if a determination is made that Donnelly's patents are invalid and unenforceable, neither party in this case need again prove the same issues at the antitrust hearing, but need only establish **[*21]** other issues not previously determined, such as the relevant market or predatory intent. Furthermore, although the antitrust counterclaim depends heavily on a determination that Donnelly's patents in question are invalid, the amount of evidence, testimony, and presentation that R&S USA LP must show in addition to the basic determination of patent invalidity in order to successfully claim antitrust violations is considerable.

If the Court or a jury finds that Donnelly's patents in question were valid and enforceable, R&S USA LP's counterclaims will be weakened if not obviated altogether. *See* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d at 1325. Although the possibility that antitrust and patent misuse counterclaims may be obviated does not alone warrant bifurcation, it does offer substantial support for it.

Moreover, ***HN10***[] because patent infringement and antitrust matters involve two completely different and highly complex bodies of law, a single trial for both the patent infringement claim and the antitrust counterclaims will likely cause some degree of jury confusion. A trial requiring the determination of patent validity, infringement, and antitrust violations places **[*22]** a heavy burden on any jury. Henan Oil Tools, Inc. v. Eng'g Enters., Inc., 262 F. Supp. 629, 631 (S.D. Tex. 1966). For all these reasons, the Court will bifurcate the possible trial of R&S USA LP's antitrust counterclaims from the current patent infringement proceedings.

The same reasoning applies to the unfair competition counterclaim here, since most of the conduct alleged underlying the unfair competition counterclaim is quite similar to that underlying the antitrust counterclaims. Therefore, trial of the unfair competition counterclaim will also be bifurcated from the patent infringement proceedings and tried together with the antitrust counterclaims.

2. Patent Misuse Defense

Finally, bifurcation of the patent misuse defense is also appropriate under Rule 42(b). The patent misuse defense has been explained as follows:

> ***HN11***[] Where the patent is used as a means of restraining competition with the patentee's sale of an *unpatented* product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the *unpatented* article, and is thus **[*23]** a contributing factor in thwarting the public policy underlying the grant of the patent.

Kolene Corp. v. Motor City Metal Treating, Inc., 440 F.2d 77, 84 (6th Cir. 1971) (emphasis added). Patent misuse is an equitable doctrine which prevents a patentee from enforcing its rights through wrongful action. Hunter Douglas, Inc. v. Comfortex Corp., 44 F. Supp. 2d 145, 156 (N.D.N.Y. 1999). The patentee may not claim the protection of the patent's grant of exclusivity given for reasons of public policy where the patentee uses the grant to subvert the public policy underlying patents. *Id.* (quoting Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492-95, 86 L. Ed. 363, 62 S. Ct. 402, 1942 Dec. Comm'r Pat. 733 (1942)). [9]

R&S USA LP, **HN12**[] to successfully assert its misuse defense, must prove Donnelly "has impermissibly broadened the physical or temporal scope of **[*24]** the patent grant with anticompetitive effect." Hunter Douglas, Inc., 44 F. Supp. 2d at 156. While one who misuses a patent does not also necessarily violate antitrust laws, one who violates antitrust laws by using a patent *is* necessarily guilty of patent misuse. *Id.*

This Court adopts the reasoning of the *Hunter Douglas* Court in its conclusion that the patent misuse defense should be bifurcated and tried with antitrust counterclaims. *See* Hunter Douglas, Inc., 44 F. Supp. 2d at 156. Simply stated, this is primarily because the patent misuse defense and the antitrust claims involve the same essential operative facts. *See id.*

In more significant detail, the *Hunter Douglas* Court explained the benefits of trying the patent misuse defense separately from the question of infringement, all of which apply to the matter before this Court:

> In the abstract, the ultimate issue in determining the merit of a patent misuse defense is whether the patentee has sought to wrongfully extend the rights granted under the patent statute; not whether the patentee has violated the antitrust laws per se. Read in that light, it would in all cases **[*25]** make perfect sense as a matter of law to group the patent misuse defense with patent rather than antitrust issues. Practically speaking, however, a party claiming patent misuse predicated on alleged antitrust violations will present its most forceful case which will entail showing the patentee to be a violator of the antitrust laws. Thus, one missing the primary target of establishing antitrust liability may nonetheless meet the lesser burden of showing misuse. Antitrust and patent misuse, therefore, are connected as a matter of fact.
> Juries are fact-finders and as such are called upon to apply the relevant law to the facts presented. In cases involving complex issues, legal or otherwise, the interest of promoting the most orderly presentation of facts takes on added significance …. Given the foregoing, the patent misuse defense is better grouped with … antitrust counterclaims.
>
> Further, patent misuse is more logically connected to antitrust and state tort issues rather than issues of patent liability. As presently constructed, the first phase of the trial will involve presentation of infringement, validity, and enforceability matters. Each of these pertains to (1) the **[*26]** formalities of the … patents [in suit] as they existed on their respective dates of issuance and (2) the actions of [the patent holder] during the prosecution of the … patents …. Antitrust claims as well as the misuse defense, on the other hand, relate to [the patent holder's] conduct in practicing the patents.
>
> Moreover, placing the misuse defense with the antitrust counterclaims maintains the economies derived from separating the patent liability issues from … counterclaims. That is, grouping the misuse defense with the patent liability issues would inject antitrust issues into the patent liability phase when it has already been found that the interests of judicial economy, convenience, and minimizing prejudice are better served when the patent and antitrust issues remain separate.

Hunter Douglas, Inc., 44 F. Supp. 2d at 156. Accordingly, the Court will bifurcate R&S USA LP's patent misuse defense from the current patent infringement proceedings. The patent misuse defense will be tried with the antitrust counterclaims.

C. Stay on Discovery

The Court will not issue a stay on discovery of any issues which may solely relate to the **[*27]** antitrust or unfair competition counterclaims or the patent misuse defense. All discovery will continue so that it will completed prior to the two separate trials.

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[9] Further discussion of the limits of this defense may be found in Virginia Panel Corp., 133 F.3d at 868-871.

The Court believes that such a course is best in this matter for several reasons. For one, it will eliminate disagreement between the parties about what is and is not related to which claims and thus what discovery is permitted now and what discovery has been stayed. This will permit the focus to be on the collection of discovery information instead of bickering.

Second, full discovery now, thus permitting the parties to have the complete picture of all available evidence, facilitates settlement of this matter more than a stay would. A more likely chance of settlement serves the interests of justice, convenience, expediency, and conservation of resources of all involved.

Third, full discovery now eliminates the possibility of unfair prejudice to the parties inuring from interpretation of a stay on discovery. For instance, the Court could deny a discovery request on the basis that it did not appear to be calculated to lead to pertinent information in the patent infringement phase. If, in actuality, the request would have **[*28]** led to relevant information in the infringement phase, it would be unfair to the requesting party but there would likely be no way to correct the unfairness.

Fourth, full discovery now will permit quicker resolution of this dispute. Conducting two separate rounds of discovery would undoubtedly delay resolution of the entire dispute assuming the second, antitrust trial is necessary after the patent trial. If the second, antitrust trial is not necessary after the patent trial, the length of the entire proceeding will likely be only slightly longer, if longer at all, than it would have been under a stay of antitrust and unfair competition discovery. Such a course of action will also permit the two separate trials to be conducted in swifter succession, allowing the issues to be fresher in all minds involved and increasing the likelihood of a fully fair resolution of this complex dispute.

III. Conclusion

For the reasons stated, the Court will deny Donnelly's Motion to Dismiss R&S USA LP's Michigan common law unfair competition counterclaim. The Court will grant Donnelly's request for a separate trial of R&S USA LP's antitrust and unfair competition counterclaims and patent **[*29]** misuse defense. However, the Court will not grant Donnelly's request for a stay of discovery. An Order consistent with this Opinion will be entered.

DATED in Kalamazoo, MI:

aug 13, 2002

RICHARD ALAN ENSLEN

United States District Judge

ORDER

In accordance with an Opinion issued this day,

IT IS HEREBY ORDERED that Plaintiff Donnelly Corporation's Motion to Dismiss Defendants' Michigan Common Law Unfair Competition Counterclaim Pursuant to *Rule 12(b)(6)* and for Separate Trials and Stay of Certain Discovery Pursuant to *Fed. R. Civ. P. 42(b)* (Dkt. No. 153) is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that Donnelly's Motion to Dismiss R&S USA LP's Michigan common law unfair competition counterclaim is DENIED.

IT IS FURTHER ORDERED that Donnelly's request for separate trials is GRANTED. Two separate trials will be held in this matter. The first will determine the patent infringement claim. The second will determine all antitrust and unfair competition counterclaims and the patent misuse defense.

IT IS FURTHER ORDERED that Donnelly's request for a stay of discovery is DENIED.

IT IS FURTHER ORDERED that the parties **[*30]** are to contact Magistrate Judge Ellen S. Carmody within 4 days of the date of this Order to schedule a status conference in this matter.

DATED in Kalamazoo, MI:

aug 13, 2002

RICHARD ALAN ENSLEN

United States District Judge

End of Document

Berlyn, Inc. v. Gazette Newspapers

United States District Court for the District of Maryland

August 16, 2002, Decided

Civ. No. S 01-606

Reporter

223 F. Supp. 2d 718 *; 2002 U.S. Dist. LEXIS 27570 **; 2003-1 Trade Cas. (CCH) P73,923; 2002 WL 2022615

BERLYN, INC., et al. Plaintiffs, v. THE GAZETTE NEWSPAPERS, et al., Defendants.

Subsequent History: Affirmed by *Berlyn Inc. v. Gazette Newspapers, Inc., 73 Fed. Appx. 576, 2003 U.S. App. LEXIS 16814 (2003)*

Prior History: *Berlyn, Inc. v. Gazette Newspapers, Inc., 214 F. Supp. 2d 530, 2002 U.S. Dist. LEXIS 15789 (D. Md., 2002)*

Disposition: Defendants' motion for summary judgment was granted. Judgment was entered. Plaintiffs' motion for preliminary injunctive relief was denied as moot.

Core Terms

Network, Press, advertising, Sentinel, plaintiffs', relevant market, newspapers, geographic, antitrust, markets, reasons, card, competitor, monopolize, pricing, defendants', summary judgment, no evidence, purposes, zoned, unfair competition, amended complaint, antitrust claim, matter of law, anticompetitive, circulation, documents, deposition, predatory, entitled to judgment

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] Summary Judgment, Entitlement as Matter of Law

Under *Fed. R. Civ. P. 56(c)*, summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Thus, a judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair--minded jury could return a verdict for the nonmoving party on the evidence presented. In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom in the light most favorable to the party opposing the motion, but the opponent must bring forth evidence upon which a reasonable factfinder could rely. The mere existence of a scintilla of evidence in support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] Sherman Act, Claims

A plaintiff bears the burden of proving relevant market in antitrust actions. Thus, this is essential to the success of any claim of conspiracy under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, attempted monopolization under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, unlawful acquisition under the Clayton Act, and any violation of the Maryland Antitrust Act. Subsections (a)(1) and (a)(2) of the Maryland Antitrust Act are substantially similar to *§§ 1*, *2* (*15 U.S.C.S. §§ 1*, *2*) of the Sherman Act, and courts' analysis of the former should be guided by federal decisions under the latter.

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

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

HN3[] Market Definition, Relevant Market

A relevant antitrust market has both a product and a geographic dimension, each of which is defined by its outer boundaries. The U.S. Supreme Court has explained that the outer boundaries of a product market can be proven through a showing of either of two market characteristics. First, a plaintiff may offer evidence of reasonable interchangeability of use, i.e., evidence that the products contained in the market are interchangeable for the consumer's purposes. Second, a plaintiff may offer evidence of cross-elasticity of demand, i.e., the responsiveness of the sales of one product to price changes of the other. Under either test, the key issue is whether and under what conditions consumers would substitute one product for another. The relevant geographic market, on the other hand, is the area in which buyers or sellers of the relevant product effectively compete. The important economic factors that delimit the boundaries of the geographic market or submarket include transportation costs, actual sales, localized demand, industry recognition, and price relationships. In sum, then, a relevant market is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN4[] Regulated Practices, Market Definition

Where they bear the burden of proving relevant market, to survive summary judgment on antitrust claims, a plaintiff must offer admissible evidence sufficient for a jury to find that the proposed relevant markets are accurate. Relevant market cannot be proved through generalizations about any given industry, but instead must be based on the economic and commercial realities of the particular market studied.

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN5[] Regulated Practices, Market Definition

To prove relevant market in antitrust actions, expert testimony is of utmost importance, and that testimony, or any other evidence, must be based on specific facts pertaining to the proposed market.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] Sherman Act, Claims

To prove a violation of *§ 1* (*15 U.S.C.S. § 1*) one of the Sherman Act, a plaintiff must show the existence of an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. To withstand summary judgment the plaintiff must: (1) establish that a defendant had a conscious commitment to a common scheme designed to achieve an unlawful objective, and (2) bring forth evidence that excludes the possibility that the alleged coconspirators acted independently or based upon a legitimate business purpose.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Evidence > Inferences & Presumptions > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Courts should not permit fact finders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

Courts proceed under the standard "rule of reason" for determining whether a restraint on trade is reasonable. In proving that conduct is unreasonable under this standard, a plaintiff has to show that the alleged conspiracy adversely affected competition, which requires a showing that one or more of the defendants had market power. To prove market power, the plaintiff first must establish the relevant product and geographic markets.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements. In determining whether conduct is per se unreasonable, the inquiry must focus on whether the effect and purpose of the practice are to threaten the proper operation of the predominately free market American economy--that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN11[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a) requires a statement of a claim showing that the pleader is entitled to relief.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

Under the "essential facility" theory of law, the elements are: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

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

HN13[] Regulated Practices, Monopolies & Monopolization

To establish "control by a monopolist," a plaintiff must demonstrate that a defendant has monopoly power in a properly defined relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN14[] Attempts to Monopolize, Elements

A threshold requirement for liability under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act is that an antitrust plaintiff must be able to prove a relevant market that a defendant attempted to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN15[] Monopolies & Monopolization, Conspiracy to Monopolize

A cause of action for conspiracy to monopolize requires a showing of concerted action.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN16[] **Sherman Act, Claims**

Even if a plaintiff can establish relevant market, to survive summary judgment on claims of attempting and conspiring to monopolize in violation of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, the plaintiff must provide evidence from which a reasonable jury could find the following: (1) that a defendant had a specific intent to monopolize a relevant market; (2) that the defendant engaged in predatory or anticompetitive acts designed to further their intent; and (3) that there is a dangerous probability that the defendant will succeed in its attempt. Also, to establish a willful attempt to acquire monopoly power, the plaintiff must show that a jury could find no valid business reason or concern for efficiency in the defendant's choice to act as it did.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Sherman Act, Claims**

Absent direct evidence, an antitrust plaintiff may raise an inference of specific intent to monopolize (the first element of a claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act) by offering evidence of predatory or anticompetitive acts (the second element of a claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act).

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN18[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Establishing predatory pricing requires a showing that complained of conduct lacked a business efficiency and that there was a likelihood of recoupment of losses. If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory. To show wilfulness under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, a plaintiff must show that a jury could find no valid business reasons or concern for efficiency in the defendants' allegedly anticompetitive act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN19[] **Robinson-Patman Act, Claims**

By its terms, the Robinson-Patman Act is limited to price discrimination in the sale of commodities. The majority of courts to consider the issue have concluded that newspaper advertising is not a commodity under the statute. Courts have held that newspapers are considered a commodity under the Act.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN20[] **Regulated Practices, Price Discrimination**

Maryland law does not distinguish between "commodity" and "service" with regard to price differentials.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

HN21[] **Antitrust & Trade Law, Clayton Act**

Section 7 (*15 U.S.C.S. § 18*) of the Clayton Act prohibits acquisitions whose effect may be substantially to lessen competition.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN22[] **Remedies, Damages**

The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN23[] **Regulated Practices, Trade Practices & Unfair Competition**

Maryland courts have defined unfair competition as damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods What constitutes unfair competition in a given case is governed by its own particular facts and circumstances.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN24[] **Regulated Practices, Trade Practices & Unfair Competition**

A violation of antitrust laws can itself constitute unfair competition.

Business & Corporate Law > ... > Establishment > Proof of Agency > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

HN25[] **Establishment, Proof of Agency**

To prove the existence of an agency relationship in the absence of a written agreement, a plaintiff must show conduct proving: (1) an agent was subject to a principal's right of control, (2) the agent had a duty to act primarily for the benefit of the principal, and (3) the agent held the power to alter the legal relations of the principal.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN26[] **Summary Judgment, Burdens of Proof**

The party who would bear the burden of proof on an issue at trial bears the similar burden of producing admissible evidence on that issue at the summary judgment stage.

Contracts Law > Breach > Anticipatory Repudiation > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN27[] **Breach, Anticipatory Repudiation**

Under Maryland law, a cause of action for breach of contract must be filed within three years from the date that the cause of action accrues. *Md. Code Ann., Cts. & Jud. Proc. § 5-101* (1998). A breach of contract claim accrues when the contract is breached or anticipatorily breached.

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

Torts > ... > Contracts > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN28[] **Employment Contracts, Breaches**

To prove tortious interference with contract in Maryland, plaintiffs must prove (1) the existence of a contract between the plaintiff and a third party; (2) a defendant's knowledge of that contract; (3) the defendant's intentional interference with that contract; and (4) resulting damages to the plaintiff. Even if the plaintiff can establish these elements, a competitor who induces a breach of an at-will contract to serve his own competitive purpose does not interfere improperly unless the competitor employs wrongful means or creates a restraint of trade.

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN29[] **Intentional Interference, Elements**

To prove a claim of tortious interference with a prospective economic relationship, a plaintiff must show (1) intentional and willful acts; (2) calculated to cause damage to the plaintiff in its lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of a defendant; and (4) actual damage and loss resulting. The tort requires conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships. Wrongful or unlawful acts include common law torts and violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN30[] **Robinson-Patman Act, Claims**

Md. Code Ann., Com. Law II § 11-204(a)(3) is in pari materia with the Robinson-Patman Act's prohibition of price discrimination, *15 U.S.C.S. § 13(a)*. To establish liability under the Robinson-Patman Act, a plaintiff bear the burden of proving a relevant market within which the consequences of a defendant's anticompetitive acts can be measured.

Counsel: [1]** For Berlyn, Inc., a Maryland Corporation, Plaintiff.

For Kenneth C. Rossignol, Plaintiff.

For The Gazette Newspapers, Inc., Maryland Corporation, Defendant: Gretchen L Klebasko, Saul Ewing LLP, Baltimore, MD. Charles O Monk, II, Saul Ewing LLP, Baltimore, MD. Daniel R Chemers, Saul Ewing LLP, Baltimore, MD.

For The Washington Post Company, a Body Corporate of the State of Delaware, Defendant: Gretchen L Klebasko, Saul Ewing LLP, Baltimore, MD. Charles O Monk, II, Saul Ewing LLP, Baltimore, MD. Daniel R Chemers, Saul Ewing LLP, Baltimore, MD.

For Washington and Baltimore Suburban Press Network, Inc., a Body Corporate of the State of Delaware, Defendant: Alice M Stoeppelwerth, Wilmer Cutler and Pickering, Washington, DC. David P Donovan, Wilmer Cutler and Pickering, Tysons Corner, VA. Fiona W Huang, Wilmer Cutler and Pickering, Washington, DC. Kyle M De

Young, Wilmer Cutler and Pickering, Washington, DC. William J Kolasky, Wilmer Cutler and Pickering, Washington, DC.

For Montgomery Sentinel Publishing, Inc., a Maryland Corporation, Plaintiff: Melvin J Sykes, Law Office of Melvin J Sykes, Baltimore, MD. George W Liebmann, Law Office of George W Liebmann, Baltimore, **[**2]** MD.

Judges: Frederic N. Smalkin, Chief U.S District Judge.

Opinion by: Frederic N. Smalkin

Opinion

[*722] MEMORANDUM OPINION

The plaintiffs in this case filed a nine-count complaint, alleging violations of the *Sherman Act*, the *Clayton Act*, the *Copyright Act*, and the *Maryland Antitrust Act*, and state law claims for unfair competition, breach of contract, and tortious interference with contract. The case is now before the Court on three separate motions. The defendants have moved to exclude the testimony of James B. Shaffer, arguing that he is not qualified to offer opinion testimony relevant to this case. That motion has been dealt with in a separate Memorandum Opinion and Order dated August 13, 2002, which excludes Shaffer's opinions as to relevant market and market power. The defendants also have moved for summary judgment on all of the remaining counts of the complaint. [1] The plaintiffs have opposed that motion, and they have moved for preliminary injunctive relief. All issues have been fully briefed, and no oral hearing is necessary. Local Rule 105.6 (D. Md. 2002). For the reasons set forth below, by separate order, the Court will GRANT the defendants' motion for summary judgment, and DENY AS **[**3]** MOOT the plaintiffs' motion for preliminary injunctive relief.

I. BACKGROUND

A. Press Network and the Sale of Advertising in Prince George's County

The plaintiffs in this case are Berlyn, Inc. (Berlyn), Montgomery Sentinel Publishing, Inc. (Sentinel), and Kenneth C. Rossignol (Rossignol). Berlyn is wholly owned by Lynn Kapiloff (Kapiloff) and her husband. Kapiloff also has served as the CEO and primary manager of Sentinel's newspapers in Montgomery and Prince George's Counties (the *Montgomery County Sentinel* and the *Prince George's Sentinel*) since December, 1987. Rossignol publishes St. *Mary's Today*, a weekly paid newspaper published in Lexington Park, **[*723]** Maryland, which has a circulation of approximately 5,000, with most subscribers and advertisers located in St. Mary's County, Maryland.

The Washington Post **[**4]** Company (the Post) is a publicly -- held Delaware corporation. One of its operating units publishes the *Washington Post* newspaper. The Post owns all the stock of The Gazette Newspapers, Inc. ("Gazette"), but requires that Gazette operate as an independent concern. [2] Gazette is a Maryland corporation that publishes approximately 44 newspapers in Montgomery, Frederick, Prince George's, Calvert, Charles, and St. Mary's counties.

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[1] Some counts of the plaintiffs' original complaint have already been dismissed. *See Berlyn, Inc. v. The Gazette Newspapers, Inc., 157 F. Supp. 2d 609 (D. Md. 2001)*.

[2] The plaintiffs argue that the Post exercises substantial control over Gazette, and that, in essence, the two function as one. The plaintiffs note that: (1) Gazette expenditures require the Post's approval; (2) Gazette's acquisitions were studied, strategized, negotiated, and funded by the Post; (3) Gazette regularly reported to the Post; (4) Gazette's CEO and CFO received their paychecks from the "Washington Post Newsweek Tech Media"; and (5) they had mutual interests in acquisitions of the assets of companies such as Comprint and the Chesapeake Publishing Company.

Baltimore Suburban **[**5]** Press Network, Inc. (Press Network or the Network), is a Delaware corporation, fifty percent of which is owned by Gazette. Press Network offers regional and national advertisers a "one contact/one bill" method of placing advertising in multiple newspapers around Washington, D.C.

Berlyn began publishing the *Montgomery County* and Prince *George's Sentinels* in the late 1980s, at which time both were small, paid -- circulation papers. By 1992, Kapiloff had added free, county -- wide papers in both counties based upon the advice of her advertising director, who believed advertisers would be attracted to the larger circulation of the free editions.

In 1992, Gaynelle Nuttall (Nuttall) was in the process of organizing Press Network. Nuttall invited several newspapers, including the Prince *George's Sentinel*, to become members of Press Network. She also sought to include strong community newspapers in the Washington suburbs, including Montgomery County, where she invited Gazette to become a member. At this time, Nuttall believed that the *Prince George's Sentinel* did not have the same level of circulation, penetration, and editorial quality as other Network members, but she hoped **[**6]** the paper would improve over time. According to the plaintiffs, Press Network contacted Kapiloff and nvited the Sentinel to become a member of the Network. The plaintiffs allege that Nuttall represented that Sentinel would be Press Network's only representative paper in Prince George's County and that she reiterated this assurance in November 1997 and April 1998. According to the plaintiffs, Press Network forbade Sentinel from directly dealing with advertisers procured by Press Network or advertisers Sentinel had served before joining Press Network. There was no written contract to this effect. The plaintiffs allege that their "agreement" prevented Berlyn from sustaining contracts with major accounts like Fashion Bug and Kay Bee Toys and caused the resignation of Sentinel sales representatives.

Nuttall testified that by 1995 the *sentinel* had not improved as she hoped, and that she had lost confidence in the paper's ability to measure up to the other publications included in the Network. Nuttall was concerned about the *Sentinel's* condition because she felt that a weak member could hurt the reputation of the entire Network. She came to believe that the Network would be best **[**7]** served by the addition of another member in Prince George's County, and she began to speak to other publishers about expanding into the County, **[*724]** including Chuck Lyons (Lyons), president of Gazette. At that time, none of the publishers she contacted was interested.

By 1997, Gazette had performed well in Montgomery County and had reached profitability in Frederick County. Around this time, Lyons became interested in possibly expanding into Prince George's County. Gazette formed a task force to examine the potential profitability of community -- specific weekly newspapers in the County. In so doing, the task force interviewed potential advertisers, reviewed the demographics of the communities in the county, compiled research and market information regarding potential competitors, and created comprehensive pro formas evaluating the financial aspects of Gazette's entry. Gazette considered potential revenues from several sources, including Press Network accounts. Gazette's pro formas focused on local advertising, which, according to Gazette, is the primary type of advertising that sustains the "community -- specific" model that Gazette had used with success in Montgomery County. According **[**8]** to the defendants, Gazette concluded that its most direct competition for advertising in the Prince George's County would be direct mailand shoppers, and that the *Prince George's Sentinel* was a weak product and was not considered a competitive factor.

Following its research, Gazette decided to enter Prince George's County with one or two community -- specific publications, and planned to launch additional publications only after its first two became successful. In October 1997, Gazette's made its first entry, The *Greenbelt/'College Park Gazette*. That publication became profitable in 1998, and Gazette began additional publications in other Prince George's County communities during the following three years.

According to the defendants, Gazette's new publications in Prince George's County were fast outperforming the Prince *George's Sentinel*, and Nuttall knew of Gazette's reliability first -- hand because Gazette had been the Network's representative in Montgomery County for years. Nuttall also testified on deposition that she believed Gazette could provide a superior product to advertisers, and therefore could generate higher revenues for Press Network. Press Network began **[**9]** presenting advertisers with both the Prince *George's Sentinel* and the *Prince George's Gazette* in late 1997 and included Gazette publications on its March 1, 1998 rate card. When asked to provide a recommendation, Press Network salespersons recommended Gazette's publications. According to the defendants, advertisers preferred these publications for their superior circulation, penetration, reliability, editorial quality, and overall advertising value.

The plaintiffs offer a different account of Gazette's entry into Prince George's County. The plaintiffs argue that Gazette and Press Network conspired to eliminate competition in Prince George's County, first by orchestrating Gazette's entry into the county. The plaintiffs argue that Press Network was conceived, and indeed operated, as Gazette's "corporate sales arm" to the detriment of other Network members. Plaintiffs also argue that Press Network's sales reps pressured advertisers to choose Gazette over the Sentinel, and that Press Network and Gazette conspired to give Gazette preferred treatment on the rate cards the Network provided to advertisers.

B. The Chesapeake Acquisition

St. *Mary's* Today began operating in **[**10]** St. Mary's County in 1990. During the years 1997 through 2000, the only years for which financial data are available, the newspaper's annual profits ranged from a low of $ 1,157 to a high of $ 16,138. These profits constituted the entire compensation that Rossignol took from the business, despite **[*725]** working more than 80 hours per week as a copywriter, delivery person, and general "one man band."

The Post first learned in October 2000 that the Chesapeake Publishing Company (Chesapeake) was for sale. Lyons, who had been president of Chesapeake from 1993 to 1998, was informed of this development and indicated Gazette's interest in acquiring Chesapeake's Southern Maryland Division. According to the defendants, Lyons believed that Chesapeake's Southern Maryland assets would compliment Gazette's existing operations, and that those assets likely would provide a solid return on investment if they could be acquired at a reasonable price.

The Post submitted a nonbinding offer of $ 40 million to $ 50 million on November 1, 2000. The Post was invited to submit a binding indication of interest, and it did so on December 15, 2001. The Post believed its bid (in the range of $ 46 million to $ 48 million) **[**11]** was so low that it had little likelihood of being accepted. The bid was accepted, however, and Gazette purchased the Division on February 28, 2002, for $ 46 million, with funds loaned by the Post and booked to Gazette as an intercompany payable.

The plaintiffs argue that this acquisition adversely affected (or had the potential to so affect) competition in southern Maryland, including Montgomery, Prince George's and St. Mary's Counties. The plaintiffs allege that following this acquisition, the Post and Gazette had a 99% market share in the three counties. Essentially, the plaintiffs argue that this acquisition was an intentional step toward eliminating a major competitor (Chesapeake) and seizing monopoly power.

II. THE STANDARD FOR SUMMARY JUDGMENT

HN1[] Under *Rule 56 (c) of the Federal Rules of Civil Procedure*, summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In Anderson *v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, the Supreme Court explained that, in considering a motion for summary judgment, **[**12]** "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. at 248*. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair -- minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id. at 252*. In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, but the opponent must bring forth evidence upon which a reasonable fact -- finder could rely. *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The mere existence of a "scintilla" of evidence in support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson, 477 U.S. at 252.* **[**13]**

III. DISCUSSION

A. Relevant Market

1. Product Market

In each of their antitrust claims, the HN2[] plaintiffs bear the burden of proving relevant market. Satellite Television & Assoc. Res., Inc. v. Cont'l Cablevision of Va., [*726] Inc., 714 F.2d 351, 355 (4th Cir. 1983). Thus, this is essential to the success of any claim of conspiracy under Section 1 of the Sherman Act, Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 528 (4th Cir. 1989); attempted monopolization under Section 2 of the Sherman Act, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993); M & M Med. Supplies & Serv. Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166 (4th Cir. 1993); unlawful acquisition under the Clayton Act, United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956); and any violation of the Maryland Antitrust Act, see Natural Design, Inc. v. Rouse Co., 302 Md. 47, 53-56, 485 A.2d 663 (1984) (explaining that subsections (a)(1) and (a)(2) of the Maryland Antitrust Act are substantially similar to Sections [**14] 1 and 2 of the Sherman Act, and that courts' analysis of the former should be guided by federal decisions under the latter); Martello v. Blue Cross & Blue Shield of Md., Inc., 143 Md. App. 462, 494, 795 A.2d 185 (2002) ("In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market.").

HN3[] The relevant market has both a product and a geographic dimension, each of which is defined by its outer boundaries. The Supreme Court has explained that the outer boundaries of a product market can be proven through a showing of either of two market characteristics. First, a plaintiff may offer evidence of reasonable interchangeability of use, i.e., evidence that the products contained in the market are interchangeable for the consumer's purposes. See du Pont, 351 U.S. at 395. Second, a plaintiff may offer evidence of cross -- elasticity of demand, i.e., "the responsiveness of the sales of one product to price changes of the other." Id. at 400. "Under either test, the key issue is whether and under what conditions consumers would substitute one product for another." **[**15]** 2 JULIAN O. VON KALINOWSKI, ET AL., ANTITRUST LAWS AND TRADE REGULATION § 24.02 (2d ed. 2002). The relevant geographic market, on the other hand, is "the area in which buyers or sellers of the relevant product effectively compete." Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 495 (4th Cir. 1986). "The important economic factors that delimit the boundaries of the geographic market or submarket include transportation costs, actual sales, localized demand, industry recognition, and price relationships." VON KALINOWSKI, *supra*, at § 24.03 2. In sum, then, a relevant market "'is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.'" Int'l Wood Processors v. Power Dry, Inc., 792 F.2d 416, 430 (4th Cir. 1986) (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 12, at 41 (1977)).

The plaintiffs contend that the relevant product market consists of community newspapers and the zoned edition of dailies. Plaintiffs further contend that the geographic market is defined by county, and thus, for its Sherman Act **[**16]** claims, the geographic markets are Prince George's and Montgomery County, and for its Clayton Act claim the geographic market is "the areas comprising" Prince George's and Montgomery Counties and "the southern Maryland counties of Charles, St. Mary's and Calvert." Pls.'s Opp. at 26. The defendants argue that this market definition is not supported by the evidence, and, in any case, that the relevant product market should include shoppers and direct mail.

Because HN4[] they bear the burden of proving relevant market, to survive summary **[*727]** judgment on their antitrust claims, the plaintiffs must offer admissible evidence sufficient for a jury to find that the proposed relevant markets are accurate. See Celotex Corp., 477 U.S. at 322. Defining markets for antitrust analysis is an extremely complex task. *See, e.g.,* Cogan v. Harford Memorial Hosp., 843 F. Supp. 1013, 1020 (D. Md. 1994) (characterizing the issue of relevant geographic market as a "highly technical economic question"); Victus, Ltd. v. Collezione Europa U.S.A., Inc., 26 F. Supp. 2d 772, 786 (M.D.N.C. 1998) (noting that defining relevant product markets is a "difficult economic **[**17]** question"). Relevant market cannot be proved through generalizations about any given industry, but instead must be based on the economic and commercial realities of the particular market studied. See Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 467, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992); Brown Shoe Co. v. United States, 370 U.S. 294, 335, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). Thus, HN5[] to prove relevant market, expert testimony is of utmost importance, and that testimony, or any other evidence, must be based on specific facts pertaining to the proposed market. [3] The plaintiffs' proposed expert in this case, James B. Shaffer, is not qualified to offer his opinion as to the relevant product or geographic markets, nor is he qualified to testify as to market power. See Memorandum Opinion and Order dated August 13, 2002. Thus, plaintiffs bear the difficult, if not impossible, burden of proving the outer boundaries of a relevant market and market power without the aid of an economic expert. Apart from Shaffer's testimony, the plaintiffs argue that other evidence supports their market definitions. The documents cited by the plaintiffs, however, are insufficient to support their **[**18]** proposed market definitions, as they are either inadmissible or irrelevant.

[19]** To demonstrate that the relevant product market excludes direct mail, shoppers, and any form of electronic broadcast media, the plaintiffs first cite a one -- page Press Network document of unknown origin stating that "Washington Is a Print Town" and explaining that Washington area residents look to suburban newspapers for product advertising more so than other media sources. The plaintiffs, however, offer no evidence as to the source of this document, thus raising technical problems of admissibility under FED. R. EVID. 802 and 901, see *Wilson v. Clancy, 747 F. Supp. 1154 (D. Md. 1990)*, *aff'd 940 F.2d 654 (4th Cir. 1991)*, nor do they assert that this document is the result of a careful inquiry aimed at defining relevant markets for antitrust purposes. See *Va. Vermiculite, **[*728]** Ltd. v. W.R. Grace & Co.Conn. & the Historic Green Springs, Inc., 98 F. Supp. 2d 729, 732-33 (W.D. Va. 2000)*. [4] Indeed, from all outward appearances, it was generated to attract advertisers to Press Network, and away from alternatives to newspaper advertising, including television, cable, **[**20]** radio, yellow pages and other forums for advertising.

[21]** The plaintiffs also cite two internal Post documents (WP003 & WP004). In short, these documents are irrelevant, as they are summaries of studies of metropolitan daily newspapers, and they do not focus specifically on the smaller product market proposed by the plaintiffs, viz., community newspapers and zoned editions of dailies. Moreover, the plaintiffs again failed to identify how these documents were generated, whether the methods used were reliable, or whether the researchers sought to determine market boundaries as defined in ***antitrust law***.

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[3] It is unclear whether expert testimony, as a matter of law, is a necessary predicate to finding a market definition. Courts within this Circuit (and some outside) have indicated that a plaintiff must provide expert testimony on this issue. See *Military Servs. Realty, Inc. v. Realty Consultants of Va., Ltd., 823 F.2d 829, 832 (4th Cir. 1987)* (affirming summary judgment because, *inter alia*, the plaintiff's experts "were simply unable, when deposed, to provide any facts concerning injury to competition, nor could they adequately identify the relevant market"); *Cogan v. Harford Memorial Hosp., 843 F. Supp. 1013, 1020 (D. Md. 1994)* ("To allow a jury to make a finding as to the geographic market, [the plaintiff] must provide the Court with expert testimony on this highly technical economic question."); Am. *Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 (11th Cir. 1985)* ("Construction of a relevant economic market or a showing of monopoly power in that market cannot . . . be based upon lay opinion testimony."). The Supreme Court has indicated otherwise. See Brooke Group, *Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."). As a practical matter, however, it would seem impossible to prove such a complex economic question without the assistance of a qualified expert, viz., an economist.

[4]

> The court in *Virginia Vermiculite* explained that the purpose behind an offered market study can be critical: Though related to a relevant market determination in an antitrust issue, there are differences between an analysis for business investment and an analysis for antitrust purposes. For one, market analyses performed for business usually provide information regarding the various places a product would be sold, uses for which it might be sold, and the regions in which it might be traded. These analyses do not go into the detail required for antitrust matters. For instance, defining where a product could be sold is only a small part of defining a geographic market as there can be relevant markets that are narrower or broader than where individual producers sell their products. In addition, market analyses for antitrust markets generally require some expertise in the field of industrial organization. Individuals with expertise in defining markets for [a given product] generally would not possess the skill and training of a professional economist necessary to define relevant market for antitrust purposes.

98 F. Supp. 2d at 732-33.

The plaintiffs also cite several cases and economic articles that recite factual findings as to the extent to which newspapers compete with other media sources for advertising revenues. These findings are also irrelevant. There is no evidence that any of these cases or articles dealt with a determination of the specific outer boundaries of the proposed markets in this case, and the plaintiffs cannot offer them as evidence of such. In short, these are exactly the type of generalized conclusions that must be rejected in favor of concrete data reflecting economic and commercial realities.

2. Geographic Market

The plaintiffs' evidence as to geographic **[**22]** market is similarly deficient. The plaintiffs again cite internal Post documents and deposition excerpts that do not directly speak to outer geographical boundaries and lines of competition for antitrust purposes. The Post documents are probative only in that they list business statistics by county. The deposition excerpts generally are statements of other nonexperts as to what the geographical lines of competition are. There is no evidence, however, that the Post's internal documents or the opinions of its employees are based on specific research aimed at determining relevant market for antitrust purposes. In short, the plaintiffs have not undertaken an admissible, independent study of the proposed markets, and they therefore fail to offer admissible evidence as to the specific geographical lines of competition.

The plaintiffs have not offered sufficient evidence on the highly technical and fact -- specific question of relevant market. Plaintiffs' arguments based on decisions from courts in other cases are unpersuasive, **[*729]** as those cases did not deal with the specific product or geographic markets involved in this case. Plaintiffs' reliance on studies conducted by the defendants is **[**23]** also misplaced, absent a showing that these studies dealt specifically with the markets alleged here or that they were aimed at defining relevant market for antitrust purposes. Due to the plaintiffs' failure to offer admissible evidence on which a jury could accept their definition of relevant market, each of the plaintiffs' antitrust claims (Counts I (*Sherman Act § 1*), *II* (*Sherman Act § 2*), III (Robinson -- Patman Act); IV (*Clayton Act § 7*) and IX (respective sections of the Maryland Antitrust Act) of the amended complaint) fails as a matter of law. As discussed below, however, even if the plaintiffs were capable of proving relevant market, their antitrust claims suffer from other fatal defects.

B. Amended Complaint Count I -- Sherman Act Section 1

The plaintiffs contend that Gazette and Press Network conspired to restrain trade in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. [5] ***HN6***[] "To prove a violation of section one of the Sherman Act, a plaintiff must show the existence of an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade." *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 702 (4th Cir. 1991).* **[**24]** Under *Monsanto Co. v. Spray -- Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, and Matsushita *Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, as interpreted in *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc., 924 F.2d 539, 542-43 (4th Cir. 1991)*, to withstand summary judgment the plaintiffs must: (1) establish that the defendants had a "'conscious commitment to a common scheme designed to achieve an unlawful objective'" id. (quoting *Monsanto, 465 U.S. at 768*); and (2) bring forth evidence that excludes the possibility that the alleged coconspirators acted independently or based upon a legitimate business purpose. *Id.*

Specifically, the plaintiffs allege that, "at the instance of and pursuant to an agreement **[**25]** with the other defendants," Press Network "revised its rate card so as to group all of the Gazette's newspapers together and quote a combined rate for them, thus encouraging advertisers to seek blanket coverage in the entire Gazette network." Am. Compl. 23(d). Plaintiffs also argue that "at the instance of and pursuant to an agreement with the other defendants," Press Network allegedly "followed inconsistent practices in listing members on its rate cards, in order to benefit the Gazette newspapers." Id. 23 (e). The plaintiffs also contend that, pursuant to the conspiracy, Gazette "abused their connection with Press Network by inducing [it] to agree to reduce the advertising obtained

[5] This Court has already found that "the Copperweld doctrine makes clear that Post and Gazette are incapable of conspiring under this statute." *Berlyn, Inc., 157 F. Supp. 2d at 615*.

from such network by the *Sentinel* and other independent newspapers, so as to build up Gazette's market power by allocating to it advertising volume and revenues the independent papers had before the conspiracies . . . were implemented." Id. 28(f).

1. Concerted Action

As evidence that there was concerted action as to the rate cards, the plaintiffs offer a 1992 letter from Davis Kennedy, the previous owner of Gazette, to Gay Nuttall, insisting that one of the Gazette's newspapers, the *Burtonsville* **[**26]** *Gazette*, be **[*730]** the "primary buy" for advertisers using Press Network. Plaintiffs also offer a copy of an email between two Gazette employees which describes Press Network as the "corporate sales arm" of Gazette. Finally, the plaintiffs offer a rate card, designed by Nuttall but never actually used, which placed the Gazette's publications first and listed the Sentinel only as "also available."

As for the alleged agreement to switch accounts from Sentinel to Gazette and the supposedly orchestrated entry of Gazette into Prince George's County, the plaintiffs offer the following: (1) evidence that, prior to entering the county, Gazette anticipated that it would eventually receive substantial revenue from future Press Network accounts; (2) testimony from a former sales representative who indicated that Press Network's sales reps were told to actively encourage advertisers to switch their ads to Gazette publications; (3) further testimony that there was a general feeling among sales reps that they were to switch accounts from Sentinel to Gazette because Gazette was the parent company, and that they worked for the parent company and not Sentinel; (4) a memo from Daniel N. Butcher (Gazette's **[**27]** CFO) to Nuttall (Press Network's CEO) indicating that he knew that Press Network intended to move business from Sentinel to Gazette when Gazette became more successful; (5) other evidence indicating that Press Network and Gazette knew of each other's goals in Prince George's and Montgomery Counties and that there was a general willingness to achieve those goals.

The plaintiffs' evidence as to a rate card conspiracy is irrelevant and cannot support a finding of concerted action, as a matter of law. The Kennedy letter was written six years before the rate card update, by a person who was no longer a representative of Gazette when the update took place. Moreover, it had nothing to do with Sentinel or any of the other plaintiffs. The email between Gazette employees is similarly irrelevant. It contains no references to either Press Network's rate cards or the *Prince George's Sentinel*, it is dated three years after the rate card update, and it reflects a communication between two Gazette employees, NOT between employees of Gazette and Press Network. Finally, evidence that Nuttall designed a rate card that listed Sentinel in a disadvantaged position is not probative of concerted action **[**28]** because (1) there is no evidence of any cooperative effort in designing this card (Nuttall, as president of Press Network, designed a rate card for Press Network); and (2) the card was never used.

The plaintiffs' evidence as to a concerted effort to switch accounts from Sentinel to Gazette also fails to raise a triable issue. First, plaintiffs cannot support an inference that Gazette's entry into Prince George's County was the result of some common scheme. The record clearly indicates that Gazette entered the county at least one year after rejecting Press Network's initial inquiries. The evidence that Gazette considered possible future income from Press Network accounts is not sufficient to prove that Gazette's entry was a communal effort with the Network or that the projected revenue would come as a result of switching accounts from Sentinel to Gazette. Most importantly, the plaintiffs have failed to provide evidence that it would be contrary to Gazette's business purposes to attempt an entry into Prince George's County, especially in light of Gazette's success in other nearby counties.

As for Press Network's efforts to cause advertisers switch from Sentinel to Gazette, the plaintiffs **[**29]** similarly have failed to show that such a recommendation was not consistent with Press Network's business interests. The evidence indicates that Gazette's offerings in Prince George's County **[*731]** had a higher circulation, deeper penetration, etc., and that Press Network viewed them as a superior product. Thus, it would be entirely consistent with Press Network's business purposes to recommend that their customers (advertisers) switch to a product more likely to reach their intended audience. The plaintiffs have failed to show that advertisers would not achieve better results by placing ads with Gazette.

As evidence that Press Network acted against its own interests, the plaintiffs point out that in 1997, Press Network's accounting department gave its owners, Gazette and Arundel, a 5% discount on commissions, resulting in a "loss" of $ 160,000. This evidence simply is not probative of whether Press Network's decision to recommend Gazette over Sentinel ran counter to the Network's independent interests.

For these reasons, the Court finds that there is no triable issue as to whether the defendants engaged in concerted action, as is necessary under *Section 1 of the Sherman Act.* In so finding, **[**30]** the Court is especially wary of permitting an inference of conspiracy where there is such a strong showing that the complained -- of acts were wholly consistent with the independent business interests of each alleged coconspirator. See *Matsushita Elec. Indus. Co., 475 U.S. at 593* ***HN7***[] ("Courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." (citing *Monsanto, 465 U.S. at 762-64*)).

2. Unreasonable Restraint on Trade

Even if plaintiffs could show that there was concerted action in this case between Gazette and Press Network, as a matter of law they could not establish an unreasonable restraint on trade. It first should be noted that if this step were necessary, ***HN8***[] the Court would proceed under the standard "rule of reason" for determining whether a restraint on trade is reasonable. In proving that conduct is unreasonable under this standard, the plaintiffs would have to show that the alleged conspiracy adversely affected competition, which requires a showing that one or more of the defendants had market power. *Murrow Furniture Galleries, Inc., 889 F.2d at 528*; **[**31]** *Military Servs. Realty, Inc. v. Realty Consultants of Va., Ltd., 823 F.2d 829, 832 (4th Cir. 1987)*. To prove market power, "the plaintiff first must establish the relevant product and geographic markets." *Murrow Furniture Galleries, Inc., 889 F.2d at 528* (citing *Satellite Television, 714 F.2d at 355*); *Military Servs. Realty, 823 F.2d at 832*. As discussed at length above, the plaintiffs have failed to define any relevant market, which obviously forecloses them from demonstrating any anticompetitive effects within a relevant market, or market power of a defendant. *Murrow, 889 F.2d at 528*.

The only way for the plaintiffs to prevail on the issue of unreasonable restraint, therefore, would be if the complained of conduct triggered "per *se"* analysis. As the Supreme Court has explained,***HN9***[]

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . **[**32]** Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958) **[*732]** (citations omitted). In determining whether conduct is *per se* unreasonable, the "inquiry must focus on whether the effect and . . . purpose of the practice are to threaten the proper operation of our predominately free -- market economy -- that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)* (quoting *United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*.

There is no per *se* unreasonable conduct here, and the plaintiffs' attempts to argue the existence of such conduct are extremely unconvincing. The plaintiffs argue that the defendants have engaged in market allocation. In so arguing, however, **[**33]** the plaintiffs essentially allege that there was an agreement not between Gazette and Press Network, but between Gazette and ArCom Publishing, Inc., which is not even a defendant in this case. This argument fails for obvious reasons. Moreover, on its face, the conduct complained of here (the allegedly orchestrated entry of Gazette into Prince George's County, or the alleged agreement between Gazette and Press Network to convince advertisers to move their ads into Gazette's papers) is not the type of conduct that would "always or almost always tend to restrict competition and decrease output." *Id.* Courts often recognize that the purpose of the antitrust laws is to protect consumers, not competitors. ***HN10***[] "It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (quoting *Brown Shoe Co., 370 U.S. at 320*). There is nothing in the record that indicates that the consumers in this case (advertisers) were disadvantaged by the introduction of a newspaper with higher circulation and deeper penetration, or that **[**34]** such an introduction was of the type that would "always or almost always tend to restrict competition and decrease output." Quite the opposite. Thus, the standard rule of reason would apply to the plaintiffs' *Section 1* claim, and that claim fails as a matter of law for the numerous reasons discussed above.

Presumably as part of their *Section 1* claim, the plaintiffs also now argue that Press Network illegally denied Rossignol and Sentinel access to an "essential facility," and in so doing opened itself to antitrust liability. The plaintiffs may not proceed on these grounds for a number of reasons. First, the theory of Press Network's liability for exclusion from an essential facility has not been properly put before the Court. It was not pleaded in the amended complaint, and it is well -- settled that a plaintiff cannot amend his complaint with a later filed brief. The plaintiffs argue that the "qualities" that make Press Network an essential facility are stated in the complaint, but that argument is unpersuasive. The paragraphs cited by the plaintiffs relate to theories entirely separate from those needed to allege a claim under the essential facility doctrine, and they therefore **[**35]** fail to comply with ***HN11***[] *FED. R. CIV. P. 8(a)*, which requires a statement of the claim showing that the pleader is entitled to relief. [6] **[*733]** Moreover, the plaintiffs have failed to produce evidence of elements required for establishing liability ***HN12***[] under this theory of law: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors. *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544 (4th Cir. 1991)*; *Advanced Health -- Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139, 151 (4th Cir. 1990)*. In short, the plaintiffs' inability to establish the first element above is enough to highlight the inapplicability of the "essential facility" doctrine to this case. ***HN13***[] To establish "control by a monopolist," plaintiffs obviously must demonstrate that Press Network has monopoly power in a properly defined relevant market. *Consul, Ltd., 805 F.2d at 494-95*. This Court previously found that "Press Network does not compete in **[**36]** the relevant market alleged by the plaintiffs in their complaint." *Berlyn, Inc., 157 F. Supp. 2d at 620*. Neither the plaintiffs nor their designated expert has made any attempt to define the relevant market in which Press Network competes or to show that it possesses market power, much less monopoly power. Finally, from the mere definition of the essential facility doctrine, it is apparent that said doctrine is inapplicable to this case: to prevail, the plaintiff must show that the facility be denied to a "competitor" -- a term that in no way describes any of the plaintiffs in this case.

[37]** Thus, for the several reasons stated above, it is clear that the plaintiffs' "essential facilities" argument cannot survive summary judgment.

C. Amended Complaint Count II -- Sherman Act Section 2

The plaintiffs next allege that the defendants, individually or in certain combinations, attempted and conspired to monopolize advertising in community weekly newspapers and the zoned editions of daily newspapers in Prince George's and Montgomery Counties, in violation of *Section 2 of the Sherman Act*. [7] From the outset, it is clear that

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[6] Plaintiffs' substantive argument that Press Network denied them access to an "essential facility" is found in their memoranda supporting preliminary injunctive relief. In arguing that their essential facility theory was adequately stated in the amended complaint, the plaintiffs cite the amended complaint at paragraphs 12, 23(d) & (e), 28 (f), 30(d), and 47-49. Paragraph 12 of the amended complaint describes how Press Network came to be half owned by Gazette and states the circulation and revenue figures for papers involved in the Network. Paragraphs 23(d) and 23(e) consist of allegations that Press Network conspired with Gazette to restrain trade due to unlawful rate card practices, an allegation which has nothing to do with plaintiffs' theory that Press Network was an essential facility or that it deliberately excluded Rossignol and Sentinel. Paragraph 28 (f) is similarly without reference to recovery on essential facility grounds. Paragraph 30(d) describes Sentinel's damages. Finally, paragraphs 47-49 relate to the plaintiffs' breach of contract cause of action.

[7] Because ***HN15***[] a cause of action for conspiracy to monopolize requires a showing of concerted action, see *Advanced Health -- Care Servs., 910 F.2d at 150*, and because the plaintiffs have failed to show concerted action between Press Network and any other defendant, see Section III.B.1, supra, the plaintiffs cannot prevail on a conspiracy to monopolize theory as a

the plaintiffs cannot proceed to trial on these claims, because HN14[] a threshold requirement for liability under Section 2 is that the antitrust plaintiff must be able to prove a relevant market that the defendant attempted to monopolize. Consul, Ltd., 805 F.2d at 493.

[38]** HN16[] Even if plaintiffs could establish relevant market, to survive summary judgment on these claims, plaintiffs must provide evidence from which a reasonable jury could find the following: (1) that the defendants **[*734]** had a specific intent to monopolize a relevant market; (2) that the defendants engaged in predatory or anticompetitive acts designed to further their intent; and (3) that there is a dangerous probability that the defendants will succeed in their attempt. Spectrum Sports, Inc., 506 U.S. at 456; Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 927 (4th Cir. 1990). Also, to establish a willful attempt to acquire monopoly power, the plaintiffs must show "'that a jury could find no valid business reason or concern for efficiency in the [defendants'] choice'" to act as it did. Oksanen, 945 F.2d at 710 (quoting White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 105 (4th Cir. 1987)). The plaintiffs cannot establish these elements in either of their proposed markets, or as to either the Post or Gazette.

HN17[] Absent direct evidence, an antitrust plaintiff may raise an inference of specific intent to monopolize (the first **[**39]** element of a Section 2 claim) by offering evidence of predatory or anticompetitive acts (the second element of a Section 2 claim). Thus, it makes logical sense to consider the plaintiffs' allegations of predatory conduct first. As discussed below, the plaintiffs' direct evidence of predatory pricing either is not relevant (as it does not relate to the markets alleged), or it is otherwise insufficient to raise an inference of specific intent in any of the proposed markets. Moreover, their attempt to satisfy the specific intent element through other circumstantial evidence, as well as their reliance on Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974), in doing so, is unavailing.

1. Weekly Newspapers / Zoned Editions of Dailies in Prince George's County

The plaintiffs allege that Gazette (and therefore the Post) attempted to monopolize this market. In opposition to summary judgment, as evidence of Gazette's intent to monopolize, the plaintiffs do not identify a specific pricing policy that they allege is predatory. Without direct evidence of suspicious pricing particular to Gazette in this market, the plaintiffs argue that other circumstances **[**40]** speak to the anticompetitive nature of Gazette's conduct and thus support an inference of monopolistic intent. The plaintiffs have offered evidence showing that: (1) the *Prince George's Gazette* projected and sustained losses in Prince George's County from 1998 through 2002; (2) during that time, the *Prince George's Gazette* was not "paying its own way," that is, it was funded by the Gazette as a whole, and thus by its larger owner, the Post; (3) during this time, the Gazette calculated the *Prince George's Gazette's* advertising price -- to -- cost ratio without factoring in numerous figures that, according to the plaintiffs, normally should be considered in calculating costs. The plaintiffs rely on *Greenville* for the proposition that where a plaintiff establishes that a business entity is losing money but not "paying its own way," there is a sufficient inference that the defendant's prices are designed to drive the plaintiff out of the market, and thus that the defendant has a specific intent to monopolize that market. The plaintiffs, however, have failed to identify any particular pricing policy that makes the *Prince George's Gazette's* losses suspicious. Moreover, **[**41]** *Greenville* is distinguishable on factual grounds. In *Greenville*, the defendant publishing company published a shopper, as a subsection to its larger publication. Id. at 393. The defendant offered advertisers a "combination advertising rate," which permitted advertisers who placed ads in the larger publication to rerun those ads in the shopper at half -- price. *Id.* In light of this discount, the expert opinion of an accountant, evidence that the defendant introduced the shopper for the specific purpose of competing with the plaintiff, **[*735]** and evidence that the defendant's shopper essentially was funded by the larger company, the Fourth Circuit found a sufficient inference of predatory pricing, and thus specific intent to monopolize. Id. at 398. Here, however, there is no evidence of questionable pricing policies. The plaintiffs have not, for example, identified Gazette's prices for advertising in Prince George's County and analyzed them with any specific cost accounting. Instead, the plaintiffs simply call attention to the fact that Gazette lost money in Prince George's County, and then cite language from *Greenville* stating that " proof **[**42]**

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matter of law. Also, as noted in this Court's August 2001 opinion, the *Copperweld* doctrine prevents a finding that Gazette and the Post are capable of conspiracy. Moreover, this Court previously held that Press Network could not be held liable for attempted monopolization, as it is not a competitor in the weekly newspaper market. Berlyn, Inc., 157 F. Supp. 2d at 620.

that [a defendant] is not paying its own way would support an inference that defendants' pricing policies were designed to drive [competitors] out of the market." *Id.* Simply losing money is not a "pricing policy."

Moreover, ***HN18***[] establishing predatory pricing requires a showing that the complained -- of conduct lacked a business efficiency and that there was a likelihood of recoupment of losses (a requirement which did not exist at the time Greenville was decided, see *Brooke Group, Ltd., 509 U.S. at 222-26*). The defendants have shown that the *Prince George's Gazette* was run according to a previously successful business strategy, and there is no evidence that any particular conduct was without efficiency and instead was aimed at driving out competitors and monopolizing the Prince George's County market. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)* ("If a firm has been attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."); *White, 820 F.2d at 105* (to show willfulness under *Section 2*, a plaintiff must show that a jury could find **[**43]** no valid business reasons or concern for efficiency in the defendants' allegedly anticompetitive act). In short, the plaintiffs have failed to establish a *Section 2* claim in this proposed relevant market.

2. Community Weekly Newspapers and the Zoned Editions of Daily Newspapers in Montgomery County

The plaintiffs also allege that Gazette and the Post attempted to monopolize this market. As for Gazette, the plaintiffs allege that Gazette "targeted the Sentinel's Montgomery County legal advertising." Pis.' Opp. at 40. Plaintiffs also allege that Gazette's "charges per page for legal and directory advertising were less than $ 200.00 per page -- equal to or less than its combined printing and editorial costs per page -- while its charges for other advertising categories ranged up to $ 1,000 per page." However, the evidence cited to support these allegations is insufficient to raise an inference of predatory conduct. First, the plaintiffs cite a handful of Gazette documents showing only that: (1) in 1998, the Gazette as a whole (not limited to its Montgomery County publications) received about $ 200 per page (a very liberal reading of the graph, in the plaintiffs favor) in revenue from **[**44]** "Directories/Legals" advertising; (2) the average 1998 cost per page for printing the Gazette as a whole was around $ 85; (3) the average 1998 "editorial" cost per page was close to $ 100. Thus, based on these three cited graphs, the defendant priced an average of $ 15 *above* cost for legal advertising. Moreover, these documents represent the costs and revenues of Gazette as a whole, not just its Montgomery County publications. The plaintiffs cannot proceed to trial based on such evidence, as it clearly is inadequate to show specific intent, anticompetitive conduct, and/or dangerous probability of success.

The plaintiffs also argue that the Post is liable under *Section 2*. The plaintiffs claim that, in an attempt to drive the *Montgomery* ***[*736]*** *Sentinel* out of the competitive pool, the Post reduced its legal advertising rates below those of Sentinel in March 1998 and accorded Montgomery County legal advertisers free advertising in Prince George's County. In support of this claim, the plaintiffs cite the deposition testimony of Rita Coopersmith, an advertising sales representative for the Post. Coopersmith states that between 1999 and 2001 the Post had recently acquired presses that **[**45]** would allow it to geographically zone the content of certain newspaper sections, including classifieds, at the county level. During these years, however, the Post was not yet able to implement the zoning process, but it offered advertisers the opportunity to take advantage of a zoned advertising rate. What this meant in practical terms was that an advertiser could pay a zoned rate, but their ad would be seen throughout the Post's entire circulation area. According to Coopersmith, legal advertisers benefitted from this practice beginning in 1999, until February 2000, when the presses were capable of producing zoned editions.

This evidence is insufficient to raise an inference of attempted monopolization. There is absolutely no evidence that this conduct was not carried out for independent and legitimate business reasons to promote advertising in the Post in general. There is certainly no evidence (other than the mere existence of the practice alone, and in combination with the plaintiffs' bare allegations of anticompetitive intent) to show that the practice was carried out specifically for anticompetitive purposes, or to eliminate any particular competitor or competition in general, **[**46]** in the relevant markets proposed by the plaintiffs.

Finally, in opposition to summary judgment, the plaintiffs attack the Post's cost calculations. The plaintiffs argue that in establishing "cost" for advertising pricing purposes, the Post takes only into account printing costs, and excludes substantial costs such as print labor, ink, composition labor, circulation costs, etc. In support of this, the plaintiffs cite the deposition of Stephen Hills, a vice president of sales and marketing for the Post. Hills testified that he receives rate proposals for advertising that indicate a cost calculation, to be taken into account when setting an advertising rate. According to Hill, as far as he knows, the cost figure is simply a representation of the printing cost alone (i.e., the newsprint paper). He also testified that he does not contribute to calculating those figures.

Based on this evidence, the plaintiffs wish to raise an inference of predatory pricing by the Post as to legal advertising in community newspapers in Montgomery County. As noted above, however, predatory pricing requires proof of predatory conduct (which raises an inference of intent), and likelihood of recoupment in that **[**47]** relevant market. The plaintiffs' citation to deposition testimony of Hills's personal concept of cost calculation for the Post in general is not sufficient to support a finding that the Post engaged in below -- cost pricing for legal advertising in Montgomery County and that there was a dangerous probability that it could recoup its losses after the competition was eliminated. The plaintiffs also rely on evidence relating to the Post that does not concern the plaintiffs' proposed product or geographic markets. The documents the plaintiffs cite to show pricing below cost deal with the Post's full -- run pricing as a metropolitan daily to customers for trustee advertising in areas such as Washington, D.C. This clearly falls outside of the plaintiffs' proposed relevant markets, viz., community weekly newspapers and the zoned editions of daily newspapers. Moreover, there is no evidence in the record that if the Post were to obtain the plaintiffs' share of legal advertising they would have market or monopoly power over advertising **[*737]** in any market, let alone those proposed by the plaintiffs.

In sum, the plaintiffs have failed to establish a *Section 2* case as to any defendant. Most obviously, **[**48]** plaintiffs' failure to offer admissible evidence as to the relevant markets prevents them from satisfying the first and third elements of a *Section 2* claim, as described above. Moreover, the plaintiffs have not identified relevant predatory conduct sufficient to create a triable issue as to either defendant's liability under this statute. [8]

[49]** D. Count III: Violations of the Robinson -- Patman Act

In its August 2001 decision, this Court explained that ***HN19***[] "by its terms, the [*Robinson --Patman Act*] is limited to price discrimination in the sale of commodities. The majority of courts to consider the issue have concluded that newspaper advertising is not a commodity under the statute. . . . Therefore, plaintiffs may not pursue their Robinson -- Patman claim with respect to newspape advertising, and may only pursue it to the extent that they allege price discrimination in the sale of newspapers themselves, as courts have held that newspapers are considered a commodity under the Act." *Berlyn, Inc., 157 F. Supp. 2d at 621*.

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[8] In arguing their *Section 2* claims, the plaintiffs also discuss "hiring allegations" and "merger and expansion allegations," presumably as evidence of specific intent on the part of the defendants to monopolize the proposed markets. The plaintiffs apparently wish this Court to find that Gazette's hiring of certain Sentinel employees in 1999 speaks to a specific intent to monopolize or to eliminate competition in general. The plaintiffs, however, offer insufficient evidence that these hires were anything but legitimate. The plaintiffs' other "hiring allegations" are plainly irrelevant. First, the plaintiffs offer evidence that Press Network (not a proper *Section 2* defendant) hired employees of the *Journal*, which is not a party to this case. Next, the plaintiffs offer evidence that the Post hired a Washington *Times* employee as a consultant concerning the market for legal advertising in the Washington, D.C. area.

As for the plaintiffs' "merger and expansion allegations," these are similarly irrelevant to the plaintiffs' *Section 2* claims. In short, the plaintiffs point to evidence that, over the years, the Post has considered a number of acquisitions, some of which it consummated. Most of these acquisitions had little to do with the specific markets alleged here, and the company's mere desire to expand is insufficient to raise an inference of anticompetitive intent. Moreover, the plaintiffs have failed to identify evidence which indicates that each of these acquisitions (or decisions not to acquire) were inconsistent with the Post's rational business purposes. Plaintiffs also describe a variety of agreements between the Post or Gazette and third parties, including facially appropriate marketing agreements and covenants not to compete. The plaintiffs have failed to show how such agreements were against the defendants' rational business interests, and they cannot support an inference that Gazette or the Post intended to monopolize any of the proposed relevant markets.

After discovery, the plaintiffs concede that their price discrimination claim relates to newspaper advertising, and that any remedy for plaintiffs on this count must come under ***HN20***[] Maryland law which does not distinguish between "commodity" and "service" with regard to price differentials. See *MD. CODE ANN., COM. LAW II § 11-204(a)(3)* (2000). For these reasons, the defendants are entitled to judgment as a matter of law on Count III of the amended complaint. Plaintiffs' **[**50]** state law price discrimination claims will be discussed *infra*, Section III.I.

E. Count IV: Section 7 of the Clayton Act -- The Chesapeake Acquisition

The plaintiffs also allege that the Post and Gazette violated ***HN21***[] Section 7 of the Clayton Act, which prohibits acquisitions whose effect "may be substantially to lessen competition." *15 U.S.C. § 18 (1997)*. The **[*738]** plaintiffs assert that through acquisition of the Chesapeake Publishing Company's southern Maryland division, the defendants may substantially lessen competition in Prince George's County and southern Maryland. The defendants have challenged this claim on a number of grounds, arguing that the plaintiffs lack standing, and that there is no evidence of a substantial lessening of competition or of damages. These arguments need not be dealt with in full, as the plaintiffs' Clayton Act claim fails for the same primary reason as its flawed Sherman Act claims: inability to offer sufficient evidence of a relevant market within which to judge the defendants' conduct. ***HN22***[] "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects **[**51]** of the combination on effective competition in the relevant market." *Brown Shoe, 370 U.S. at 343*; see also *United States v. Grinnell Corp., 384 U.S. 563, 573, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)* (analysis of relevant market is the same under *Section 7 and the Sherman Act*). As discussed at length above, the plaintiffs have failed to produce sufficient evidence of relevant market, and, for that reason, they cannot proceed to trial on the merits of their Clayton Act claim.

F. Count V: Unfair Competition

In opposition to the defendants' motion for summary judgment, the plaintiffs essentially argue that the conduct giving rise to their antitrust claims also supports a cause of action for unfair competition under Maryland law. More specifically, the plaintiffs claim that "the use of Sentinel to build up revenue for Gazette is one of the many acts that qualify" as unfair competition under Maryland law. Pls.' Opp. at 59.

The majority of Maryland cases concerning unfair competition deal with allegations of trade confusion. See, *e.g., Mascaro v. Snelling & Snelling of Balt., Inc., 250 Md. 215, 243 A.2d 1 (1968)*; *Avalon Hill Co. v. Gebhardt, 224 Md. 52, 166 A.2d 740 (1961)*; **[**52]** *Edmondson Village Theatre, Inc. v. Einbinder, 208 Md. 38, 116 A.2d 377 (1955)*; *Balt. Bedding Co. v. Moses, 182 Md. 229, 34 A.2d 338 (1943)*; *Sea Watch Stores LLC v. Council of Unit Owners of Sea Watch Condo., 115 Md. App. 5, 691 A.2d 750 (1997)*. ***HN23***[] Maryland courts have defined unfair competition as "damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods. . . . What constitutes unfair competition in a given case is governed by its own particular facts and circumstances." Balt. *Bedding Co., 182 Md. at 237*; see also *Trimed, Inc. v. Sherwood Med. Co., 977 F.2d 885, 891 (4th Cir. 1992)*.

The defendants are entitled to judgment on this claim for two reasons. First, in its August 2001 opinion, the Court noted that ***HN24***[] "'a violation of antitrust laws could itself constitute unfair competition,' and therefore, this count will not be dismissed so long as plaintiffs' antitrust claims remain viable." *Berlyn, Inc., 157 F. Supp. 2d at 624* (quoting *Sun Dun, Inc. of Wash v. CocaCola Co., 740 F. Supp. 381, 397 (D. Md. 1990)*. As discussed above, none of plaintiffs **[**53]** antitrust claims can prevail, which precludes any finding of liability on the ground that the defendants violated the antitrust laws.

Second, the plaintiffs have failed to substantiate any independent grounds for an unfair competition claim. The plaintiffs allege that the unfair practice here was collusion between Press Network and Gazette to build up advertising revenues for Sentinel in Prince George's County, only later to steal that business away and to assign it to Gazette upon its entry into Prince George's County. Above, the Court has found insufficient evidence of **[*739]** concerted action between Gazette and Press Network, and plaintiffs' assertion that Sentinel was used by the two to guarantee business upon Gazette's entry is supported only by an unjustifiably liberal reading of two excerpts from Nuttall's deposition. Moreover, the plaintiffs have failed to show that the defendants' actions in this case were anticompetitive, or that each complained -- of action was not taken with some independent and legitimate business purpose. This is not enough to proceed to trial on unfair competition grounds, especially in light of the Court's dismissal of all of the plaintiffs' antitrust claims, **[**54]** and the nearly exclusive historical application of this cause of action to trademark cases. Thus, the defendants are entitled to judgment as a matter of law on this count of the amended complaint.

G. Count VI: Breach of Contract

The only contract the amended complaint claims has been breached is an alleged agency contract between Press Network and Berlyn. The plaintiffs assert that in 1993:

> Press Network, through Gay Nuttall, its chief executive officer, promised Berlyn . . . that Press Network would function fairly as a faithful agent for Berlyn in consideration of the Sentinel's joining the Press Network as a member and adding its circulation to Press Network. Berlyn agreed to participate on these terms. As a result in substantial part of the P.G. County Sentinel's membership, Press Network attained a dominant position in P.G. County. Defendant Press Network, in breach of its contractual obligations to Plaintiffs, has allocated advertising so as to favor Gazette newspapers.

Amended Complaint 47-49.

Thus, the plaintiffs' breach of contract claim is premised on the existence of an unwritten agency agreement between Berlyn and Press Network. ***HN25***[] To prove the existence **[**55]** of an agency relationship in the absence of a written agreement, the plaintiffs must show conduct proving: "(1) the agent [was] subject to the principal's right of control, (2) the agent [had] a duty to act primarily for the benefit of the principal, and (3) the agent [held] the power to alter the legal relations of the principal." *Huntington Mort. Co. v. Mort. Power Fin. Servs., Inc., 90 F. Supp. 2d 670, 674 (D. Md. 2000)* (citing *United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 498 (4th Cir. 1998)*; *Patten v. Bd. of Liquor License Comm'rs, 107 Md. App. 224, 238, 667 A.2d 940 (1995))*.

In opposition to the defendants' motion for summary judgment, the plaintiffs have failed to specifically identify the evidentiary basis for any of these elements. In their opposition, the plaintiffs simply identify the paragraph of their complaint that asserted breach of contract, and state that "the breach has been fully proved by the evidence recited above." Assuming that "the evidence recited above" includes the preceding fifty -- nine pages of opposition, the only substantial discussion of the agreement between Kapiloff and Nuttall occurs **[**56]** in the plaintiffs' factual background section, which cites Kapiloff's deposition testimony to support the existence of an agreement. At best, the Kapiloff deposition shows that Nuttall orally agreed that the Sentinel would be "her paper" in Prince George's County, and that Press Network would "represent [Sentinel] for the corporate advertising." Kapiloff Dep. at 311-12. Kapiloff then agreed that those were all the terms of the contract, and that, although Nuttall never said so, Kapiloff assumed that this agreement would last "forever." Id. at 313-14. This clearly fails to establish any of the three elements of an agency agreement under Maryland law. Moreover, the plaintiffs' opposition is devoid of any substantive discussion or evidence that (1) Berlyn **[*740]** had the right to control Press Network; (2) that Press Network agreed to act primarily for Berlyn's benefit; or (3) that Press Network had the authority to alter Berlyn's legal relations. [9]

[57]** In sum, the plaintiffs have failed to identify the elements of an agency contract, either through express agreement or implied through conduct. Under settled law, ***HN26***[] the party who would bear the burden of proof on an issue at trial bears the similar burden of producing admissible evidence on that issue at the summary judgment stage. *Celotex Corp., 477 U.S. at 322*. The plaintiffs have failed to meet this burden, and the defendants therefore are entitled to judgment as to count VI of the amended complaint.

Finally, even if plaintiffs could establish a case for breach of contract based on Press Network's conduct upon Gazette's entry into Prince George's County, that cause of action would be time -- barred. ***HN27***[] Under Maryland law, a cause of action for breach of contract must be filed within three years from the date that the cause

[9] Even if there were some evidence of any of these elements somewhere in the substantial record generated during discovery, it is the plaintiffs' affirmative burden to identify admissible evidence that warrants denial of a motion for summary judgment. *Celotex Corp., 477 U.S. at 322*.

of action accrues. MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (1998). A breach of contract claim accrues when the contract is breached or anticipatorily breached. The Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc., 139 Md. App. 277, 297, 775 A.2d 458 (2001) (citing Singer Co., Link Simulation Sys. Div. v. Balt. Gas & Elec. Co., 79 Md. App. 461, 473, 558 A.2d 419 (1989); **[**58]** DeGroft v. Lancaster Silo Co., 72 Md. App. 154, 171, 527 A.2d 1316 (1987); Yingling v. Phillips, 65 Md. App. 451, 460, 501 A.2d 87 (1985)). In this case, the plaintiffs allege an agency contract, including, presumably, exclusivity of representation in Prince George's County. If such a contract existed, it would have been breached, at the latest, in the fall of 1997, when Gazette expanded into Prince George's County and Press Network began to facilitate the placing of ads in the Prince George's Gazette. Plaintiffs' cause of action for breach of contract is therefore time -- barred, as the plaintiffs did not file a complaint until February 28, 2001.

For these several reasons, the defendants are entitled to judgment as a matter of law on the plaintiffs breach of contract claim.

H. Counts VII and VIII: Tortious Interference with Contract and with Business Relations

The plaintiffs argue that the Post and Gazette interfered with whatever contractual relationship existed between Press Network and Berlyn. ***HN28***[] To prove tortious interference with contract in Maryland, the plaintiffs must prove "1) the existence of a contract between the plaintiff and a third **[**59]** party; 2) defendant's knowledge of that contract; 3) defendant's intentional interference with that contract; and 4) resulting damages to the plaintiff." Cogan, 843 F. Supp. at 1021 (citing Fowler v. Printers II, Inc., 89 Md. App. 448, 466, 598 A.2d 794 (1991)). Even if a plaintiff can establish these elements, "a competitor who induces a breach of [an at -- will contract] to serve his own competitive purpose does not interfere improperly unless the competitor employs wrongful means or creates a restraint of trade." Fowler, 89 Md. App. at 468.

As discussed above, the plaintiffs have failed to establish the existence of an agency contract between Press Network and Berlyn. To the extent that there was *any* **[*741]** contract between those parties, there is no evidence in the record showing that the agreement was anything other than terminable at will. Moreover, the plaintiffs have failed to show that Gazette's conduct in this case was inconsistent with its competitive purposes, and the discussion above illustrates that there was no independently wrongful conduct or a restraint on trade. The defendants, therefore, are entitled to judgment on this **[**60]** issue.

The plaintiffs also assert the broader tort of interference with economic advantage, stating that "Post and Gazette have tortiously interfered with Berlyn's economic relationship with Press Network, and all three defendants have discouraged and interfered with attempts by Berlyn to deal directly with advertisers, disparaged the *Sentinel's* quality to prospective customers, and tortiously weakened Berlyn's ability to sell advertising space to prospective customers." Am. Compl. 52. The plaintiffs' claims here fail for several reasons.

HN29[] To prove a claim of tortious interference with a prospective economic relationship, the plaintiffs must show (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants; and (4) actual damage and loss resulting. Alexander &# 38; Alexander, Inc. v. B. Dixon Evander &# 38; Assocs., Inc., 336 Md. 635, 652, 650 A.2d 260 (1994). The tort requires conduct "that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business **[**61]** relationships." Id. at 657. "Wrongful or unlawful acts include common law torts and' violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" Id. (quoting K & K Management, Inc. v. Lee, 316 Md. 137, 166, 557 A.2d 965 (1989) (quoting PROSSER, LAW OF TORTS, § 130, 952-953 (4th ed. 1971)).

The plaintiffs simply have failed to establish that each of these elements exists. In opposition to summary judgment, the plaintiffs essentially reassert their allegations of predatory conduct by the Post and Gazette, and identify several discounts that Gazette gave to Sentinel's advertisers. The plaintiffs fail to offer evidence to prove that these acts were calculated specifically to cause damage to the plaintiffs, or that they were done with unlawful purpose or without justifiable cause. As discussed in the antitrust context, the plaintiffs have failed to show that these acts were not pursuant to defendants' lawful business purposes. The plaintiffs cannot base tort liability simply on the ground that the Post or Gazette caused them incidental damage **[**62]** by attracting away certain advertisers. In short, the plaintiffs' general allegations of wrongdoing fail to satisfy the specific elements of a cause of action for tortious interference, and, for the above reasons, the defendants are entitled to judgment as a matter of law.

I. Count IX: Violations of the Maryland Antitrust Act

The final count of the amended complaint asserts that the defendants are liable for numerous violations of the Maryland Antitrust Act, on the same grounds as their numerous federal antitrust claims. All of the plaintiffs' arguments for state law liability must be dismissed, for the same reasons their federal claims failed. The Maryland Antitrust Act substantially mirrors its federal counterparts, and the plaintiffs' failure to establish a case under federal law warrants dismissal under state law for the many reasons discussed above. See *Natural Design, Inc., 302 Md. at 53-56*. This includes the plaintiffs' **[*742]** claim of price discrimination under *MD. CODE ANN., COM. LAW II, 11-204 (a) (3)*. ***HN30***[] That statute is in *pari materia* with the Robinson -- Patman Act's prohibition of price discrimination, *15 U.S.C. § 13* **[**63]** *(a)*. To establish liability under the Robinson -- Patman Act, as is the case with the other antitrust claims involved in this case, the plaintiffs bear the burden of proving a relevant market within which the consequences of the defendants' anticompetitive acts can be measured. *Brooke Group. Ltd., 509 U.S. at 222*. The plaintiffs cannot prove a relevant market on the evidence now before the Court, and, for that reason, the plaintiffs' state law price discrimination claim fails as a matter of law.

IV. CONCLUSION

For the reason stated above, by separate order, the Court will GRANT the defendants' motion for summary judgment and enter judgment in their favor. That order will also DENY AS MOOT the plaintiffs' motion for preliminary injunctive relief.

Date: August 16, 2002

Frederic N.Smalkin

Chief U.S. District Judge

ORDER AND JUDGMENT

For the reasons stated in the Memorandum Opinion issued on this day, it is this 16th day of August, 2002, ORDERED AND ADJUDGED:

1. That the defendants' motion for summary judgment BE, and it hereby IS, GRANTED;

2. That the plaintiffs' motion for preliminary injunctive relief BE, and it hereby IS, DENIED AS MOOT;

3. That **[**64]** judgment BE, and it hereby IS, ENTERED in favor of the defendants and against the plaintiffs;

4. That each party bear its own costs;

5. That this case BE, and it hereby IS, CLOSED; and

6. That the Clerk of the Court mail copies of this Order and Judgment and Memorandum Opinion to counsel.

Frederic N. Smalkin

Chief U.S. District Judge

Flamingo Indus. v. United States Postal Serv.

United States Court of Appeals for the Ninth Circuit

June 13, 2002, Argued and Submitted, San Francisco, California ; August 23, 2002, Filed

No. 01-15963

Reporter

302 F.3d 985 *; 2002 U.S. App. LEXIS 17524 **; 2002-2 Trade Cas. (CCH) P73,782; 2002 Cal. Daily Op. Service 7723; 2002 Daily Journal DAR 9698

FLAMINGO INDUSTRIES (USA) LTD. AND ARTHUR WAH, Plaintiffs-Appellants, v. UNITED STATES POSTAL SERVICE, an entity created pursuant to the Postal Reorganization Act, Defendant-Appellee.

Subsequent History: US Supreme Court certiorari granted by *United States Postal Serv. v. Flamingo Indus. (USA), 155 L. Ed. 2d 1104, 123 S. Ct. 2215, 2003 U.S. LEXIS 4072 (U.S., 2003)*

Motion granted by *United States Postal Serv. v. Flamingo Indus. (USA) Ltd., 156 L. Ed. 2d 682, 124 S. Ct. 16, 2003 U.S. LEXIS 5240 (U.S., 2003)*

Reversed by Postal Serv. v. Flamingo Indus. (usa), *2004 U.S. LEXIS 1625 (U.S., Feb. 25, 2004)*

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-00-02484-MMC. Maxine M. Chesney, District Judge, Presiding.

Disposition: Affirmed in part, reversed in part and remanded.

Core Terms

district court, immunity, Procurement, sovereign immunity, anti trust law, sue-and-be-sued, mail, instrumentality, antitrust claim, federal law, sovereign, sacks, venue, private corporation, preempted, covenant, cases, federal government, tort claim, sovereignty, enterprise, regulation, decisions, argues, subject matter jurisdiction, asserted claim, federal agency, Sherman Act, antitrust, contracts

LexisNexis® Headnotes

Governments > Federal Government > US Postal Service

HN1[] **Federal Government, US Postal Service**

The Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, provides that the Postal Service shall have the power to sue and be sued in its official name. *39 U.S.C.S. § 401(1)*.

Governments > Federal Government > Claims By & Against

HN2[] Federal Government, Claims By & Against

The United States Supreme Court has applied a two-step inquiry in analyzing whether a federal instrumentality enjoys immunity from a particular substantive area of law. Under this analysis, the first inquiry is whether there has been a waiver of sovereign immunity. If there has been, the second inquiry is whether the source of substantive law upon which the claimant relies provides an avenue for relief.

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Governments > Federal Government > US Congress

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

HN3[] Fair Housing Rights, Fair Housing Act

When Congress establishes an agency, it authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. To overcome this presumption it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Education Law > Libraries > General Overview

Governments > Federal Government > US Postal Service

Civil Procedure > Remedies > Judgment Interest > General Overview

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Governments > Federal Government > Claims By & Against

HN4[] Judgment Interest, Prejudgment Interest

Title VII of the Civil Rights Act of 1964 allows for actions against the federal government, *42 U.S.C.S. § 2000e-16*, but it does not contain a provision allowing for prejudgment interest against the government.

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

HN5[] Federal Government, Claims By & Against

Under the "no-interest rule," absent express consent by Congress, the United States is immune from interest awards. However, the no-interest rule is inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise. In creating the Postal Service, Congress cast off the cloak of sovereignty, and therefore, the no-interest rule does not apply to it.

Governments > Federal Government > Claims By & Against

HN6[] **Federal Government, Claims By & Against**

Sue-and-be-sued waivers are to be "liberally" construed, notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign.

Civil Rights Law > Protection of Rights > Implied Causes of Action

Governments > Federal Government > Claims By & Against

Governments > Federal Government > Employees & Officials

HN7[] **Protection of Rights, Implied Causes of Action**

Bivens actions cannot be filed against federal agencies, only against federal officers.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

HN8[] **Causes of Action, Restraints of Trade**

The general liberal-construction rule of sue-and-be sued waivers can be overcome only if the Postal Service makes a clear showing that the type of suit filed against it is not consistent with the statutory or constitutional scheme, an implied restriction is necessary to avoid grave interference with the performance of a governmental function, or Congress plainly intended to use "sue and be sued" in a narrow sense.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Governments > Federal Government > Claims By & Against

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

HN9[] **US Department of Justice Actions, Civil Actions**

The Sherman Act only allows "persons" to bring civil suits and the United States did not meet the definition of a "person" under the Act.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > Claims By & Against

HN10[] Antitrust & Trade Law, Sherman Act

Federal instrumentalities are excluded from the meaning of the word "person" in federal antitrust laws. Notably, Congress did not place the United States or its instrumentalities under the governance of the Sherman Act.

Governments > Federal Government > US Postal Service

HN11[] Federal Government, US Postal Service

The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation. Because the Postal Service is an entity with the status of a private commercial enterprise, it fits within the common meaning of the word "person," just as does any other private corporation. *15 U.S.C.S. § 7*.

Governments > Federal Government > US Postal Service

HN12[] Federal Government, US Postal Service

The Postal Service is a "person" that can be sued under the Lanham Act.

Governments > Courts > Judicial Precedent

Governments > Federal Government > US Postal Service

HN13[] Courts, Judicial Precedent

Where federal ***antitrust law*** defines "person" as including any private corporation, *15 U.S.C.S. § 7*, and United States Supreme Court precedent establishes that the Postal Service is to be treated as a private corporation, the postal service is a "person" that can be sued under federal ***antitrust law***.

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

HN14[] Federal Government, Claims By & Against

Although the Postal Service does not enjoy status-based immunity to federal antitrust claims does not prevent the Postal Service from asserting conduct-based immunity if the action of the Postal Service being challenged was taken at the command of Congress.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Governments > Courts > Courts of Claims

Administrative Law > Sovereign Immunity

HN15[] Agency Adjudication, Alternative Dispute Resolution

See *28 U.S.C.S. § 1491(b)(1)*.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Governments > Courts > Courts of Claims

Administrative Law > Sovereign Immunity

HN16[] Agency Adjudication, Alternative Dispute Resolution

The termination of jurisdiction under the Administrative Dispute Resolution Act of 1996 shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000. Pub. L. 104-320, § 12(d),(e).

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Governments > Courts > Courts of Claims

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

HN17[] Agency Adjudication, Alternative Dispute Resolution

The Administrative Dispute Resolution Act of 1996, *28 U.S.C.S. § 1491(b)(1)*, applies to the Postal Service. The Postal Service can be sued under *§ 1491(b)(1)* because although Title 28 of the United States Code does not define "federal agency," it does define "agency" in a manner that covers the Postal Service.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Governments > Courts > Courts of Claims

Administrative Law > Sovereign Immunity

Governments > Federal Government > US Postal Service

HN18[] Agency Adjudication, Alternative Dispute Resolution

28 U.S.C.S. § 1491(b)(4) incorporates by reference the Administrative Procedures Act (APA) review standards into cases under *28 U.S.C.S. § 1491(b)(1)*; *28 U.S.C.S. § 1491(b)(4)* does not create APA liability.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Governments > Federal Government > Claims By & Against

Administrative Law > Sovereign Immunity

Governments > Courts > Courts of Claims

Governments > Federal Government > US Postal Service

HN19[] **Agency Adjudication, Alternative Dispute Resolution**

28 U.S.C.S. § 1491(b)(1) provides for district court jurisdiction over any claim by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

Administrative Law > Sovereign Immunity

Governments > Federal Government > US Postal Service

Torts > Procedural Matters > Commencement & Prosecution > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Torts > ... > Liability > Claim Presentation > General Overview

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN20[] **Administrative Law, Sovereign Immunity**

The Federal Tort Claims Act (FTCA) applies to the Postal Service, *39 U.S.C.S. § 409(c)*. Under the FTCA, a claim has to be administratively exhausted for a federal court to have subject matter jurisdiction. *28 U.S.C.S. § 2675(a)*.

Administrative Law > Sovereign Immunity

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Governments > Federal Government > US Postal Service

Torts > ... > Liability > Federal Tort Claims Act > General Overview

HN21[] **Administrative Law, Sovereign Immunity**

Where in determining that a claim was unexhausted under the Federal Tort Claims Act, the district court considered a declaration submitted by the moving party and took note of the non-moving party's failure to proffer contrary evidence, the federal appellate court will treat the district court's dismissal of the claim as a grant of summary judgment, which the federal appellate courts review de novo.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Governments > Federal Government > US Postal Service

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN22[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

39 U.S.C.S. § 409(a) provides that the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. The plain language of this statute grants United States district courts original jurisdiction over lawsuits by or against the Postal Service, as other circuits have held.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Governments > Federal Government > US Postal Service

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN23[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

39 U.S.C.S. § 409(a) grants the district courts original but not exclusive jurisdiction over actions by or against the United States Postal Service.

Constitutional Law > Supremacy Clause > General Overview

HN24[] **Constitutional Law, Supremacy Clause**

Pursuant to conflict preemption, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Constitutional Law > Supremacy Clause > General Overview

Governments > Federal Government > US Postal Service

Administrative Law > Sovereign Immunity

Governments > Courts > Courts of Claims

HN25[] **Agency Adjudication, Alternative Dispute Resolution**

The Postal Service is expressly authorized by *39 U.S.C.S. § 401(3)* to determine the character and necessity of its expenditures. And, although *28 U.S.C.S. § 1491(b)(1)* allows for challenges to Postal Service procurement decisions, *28 U.S.C.S. § 1491(b)(4)* provides that such decisions may only be invalidated by a federal court applying the deferential Administrative Procedures Act standard of review codified at *5 U.S.C.S. § 706*. Allowing the requirements of *Cal Bus. & Prof. Code § 17200* to control the Postal Service's procurement decisions would impinge upon the Postal Service's right to control the character and necessity of its purchases free from state constraint, and would negate the deferential standard Congress has created for federal court review of such decisions.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Governments > Federal Government > US Postal Service

HN26[] **Involuntary Dismissals, Failure to State Claims**

42 U.S.C.S. § 1983 does not allow for a suit based upon actions taken under color of federal law.

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN27[] **Venue, Corporations**

See *15 U.S.C.S. § 22*.

Counsel: George P. Eshoo, Redwood City, California, for the plaintiffs-appellants.

Patricia J. Kenny, Assistant United States Attorney, San Francisco, California, for the defendant-appellee.

Judges: Before: Donald P. Lay, * David R. Thompson, and Richard C. Tallman, Circuit Judges. Opinion by Judge Thompson.

Opinion by: David R. Thompson

Opinion

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

[*988] THOMPSON, Circuit Judge.

Plaintiffs Flamingo Industries and its owner Arthur Wah (collectively "Flamingo") brought suit in the Northern District of California against the United States Postal Service. Flamingo asserted a number of federal and state law claims stemming from the Postal Service's termination of Flamingo's contract to produce U.S. Mail sacks. The district court dismissed the suit for lack of jurisdiction and improper venue, and did not reach the merits of any of the claims. Flamingo appeals.

According to the allegations of Flamingo's complaint, which we **[**2]** take as true for purposes of this appeal, the Postal Service terminated Flamingo's contract because it wanted to use cheaper mail sacks manufactured in Mexico, sacks that fail to meet safety and quality regulations. To disguise this scheme, the Postal Service adopted outdated requirements for mail sacks that could not be met by the modern machines used by Flamingo and other domestic manufactures, creating a pretext for canceling the domestic mail sack contracts. Once those contracts were canceled, the Service declared a fake emergency in the supply of mail sacks that allowed it to award future contracts to foreign manufactures on a no-bid basis. The Service sought to hide the false nature of this emergency by failing to follow regulations requiring documentation of any emergency.

Based on this alleged conduct, Flamingo asserted five federal antitrust claims, alleging that the Postal Service, in collusion with Mexican mail sack manufacturers, sought to suppress competition and create a monopoly in mail sack production in violation of federal antitrust laws. Flamingo also asserted claims alleging that the Postal Service violated the Postal Service Procurement Manual, the implied covenant **[**3]** of good faith and fair dealing, *California Business and Professions Code § 17200*, and *42 U.S.C. § 1983*.

The district court did not reach the merits of any of these claims. It dismissed the federal antitrust claims on the ground that the Postal Service was protected by sovereign immunity from antitrust liability. It determined that the claim for breach of the implied covenant of good faith and fair dealing was a tort claim, and dismissed it for lack of exhaustion under the Federal Tort Claims Act. The court dismissed the remaining claims on the ground that venue did not lie in the Northern District of California.

We have jurisdiction under *28 U.S.C. § 1291*. We affirm in part, reverse in part, and remand for further proceedings. We conclude that: (1) Flamingo may pursue claims against the Postal Service for alleged violations of federal antitrust laws because Congress has withdrawn the cloak of sovereign immunity from the Postal **[*989]** Service and given it the status of a private corporation; (2) the district court had jurisdiction over Flamingo's Procurement Manual claim pursuant to *28 U.S.C. § 1491(b)*; (3) the court **[**4]** properly dismissed Flamingo's breach of implied covenant claim for failure to exhaust under the Federal Tort Claims Act; (4) although the district court had original jurisdiction over Flamingo's claim asserted under *California Business & Professions Code § 1700*, that claim was properly dismissed because it is preempted by federal law; (5) Flamingo's *42 U.S.C. § 1983* claim fails to state a claim upon which relief can be granted; and (6) venue for the Postal Service Procurement Manual claim was properly laid in the Northern District of California.

I

THE FEDERAL ***ANTITRUST LAW*** CLAIMS

[1] Flamingo argues the district court erred in holding that sovereign immunity bars its suit against the Postal Service under federal antitrust laws. [1] Flamingo contends the Postal Service lost its sovereign status ***HN1***[] pursuant to the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended in Title 39 of the United States Code), which provides in relevant part that "The Postal Service shall have the . . . power[] to sue and be sued in its official name." *39 U.S.C. § 401(1)*. We agree.

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[1] We do not distinguish between the various sections of the federal antitrust laws relied upon by Flamingo in its complaint -- *15 U.S.C. §§ 1*, *13*, *13a*, *14*, *45* -- because all of these sections are subject to the same analysis as to the sovereign immunity issue presented.

[5]** **[2]** In *FDIC v. Meyer, 510 U.S. 471, 484, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)*, ***HN2***[] the Supreme Court applied a two-step inquiry in analyzing whether a federal instrumentality enjoys immunity from a particular substantive area of law. Under this analysis, "the first inquiry is whether there has been a waiver of sovereign immunity." *Id*. If there has been, "the second inquiry . . . [is] whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id*.

A

[3] Following *Meyer*, we first consider whether *39 U.S.C. § 401(1)* operates as a waiver of the Postal Service's sovereign immunity. More precisely, our inquiry is whether the sue-and-be-sued language of that section waives sovereign immunity as to the plaintiffs' antitrust claims.

The Supreme Court established the breadth of the Postal Service's sovereign immunity waiver in *Franchise Tax Board v. United States Postal Service, 467 U.S. 512, 81 L. Ed. 2d 446, 104 S. Ct. 2549 (1984)*. There, the issue was whether the Postal Service had to comply with a state tax board's liens on Postal Service employees' salaries. **[**6]** The Court began its analysis by recognizing that the general presumption is that a sue-and be-sued clause should be liberally construed: "***HN3***[] When Congress establishes . . . an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id. at 517* (quoting *FHA v. Burr, 309 U.S. 242, 245 (1940))*. To overcome this presumption "it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in **[*990]** a narrow sense." *467 U.S. at 517-18* (quoting *Burr, 309 U.S. at 245*).

[4] The Postal Service could not overcome the presumption. In doing away with the Post Office Department and creating the Postal Service in the Postal Reorganization Act, Congress had "indicated that it wished the Postal Service to be **[**7]** run more like a business than had its predecessor . . . ." *467 U.S. at 519-20*. Congress had "'launched [the Postal Service] into the commercial world'; hence under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the Service's liability is the same as that of any other business." *467 U.S. at 520* (brackets in original).

The Court reaffirmed the breadth of the Postal Service's waiver in *Loeffler v. Frank, 486 U.S. 549, 100 L. Ed. 2d 549, 108 S. Ct. 1965 (1988)*. There, a mail carrier had successfully maintained a Title VII action against the Postal Service and was seeking prejudgment interest on his award of damages. *Id. at 552*. ***HN4***[] Title VII allowed for actions against the federal government, *see 42 U.S.C. § 2000e-16*, but it did not contain a provision allowing for prejudgment interest against the government. Indeed, just two years earlier, in *Library of Congress v. Shaw, 478 U.S. 310, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986)*, the Supreme Court had held that sovereign immunity barred the payment of interest on an award under Title VII against the Library **[**8]** of Congress. The Court in *Loeffler*, however, distinguished *Shaw* because, unlike the Library of Congress, the Postal Service's sovereign immunity had been waived. *Loeffler, 486 U.S. at 554-56, 565*.

The Court stressed the difference between a sovereign instrumentality, such as the Library of Congress, and a nonsovereign sue-and-be-sued instrumentality, such as the Postal Service. The Court stated that in *Shaw*, "the starting point for our analysis was ***HN5***[] the 'no-interest rule,' which is to the effect that, absent express consent by Congress, the United States is immune from interest awards . . . . The dispositive question was . . . whether Title VII contained an express waiver of the Library of Congress' immunity from interest." *Loeffler, 486 U.S. at 565* (citation omitted). It did not. However, "'the no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.' " *Id*. (quoting *Shaw, 478 U.S. at 317 n.5*). "In creating the Postal Service, Congress [cast off the cloak of sovereignty], and therefore, the no-interest rule does not **[**9]** apply to it." *Id*.

In 1994, the Court returned to the sue-and-be-sued issue in *Meyer, 510 U.S. 471, 127 L. Ed. 2d 308, 114 S. Ct. 996*. There, the plaintiff prevailed at trial in a *Bivens* [2] action against the Federal Savings and Loan Insurance Corporation (FSLIC), which was a federal sue-and-be-sued instrumentality. After the FDIC, the successor in interest to the FSLIC, appealed unsuccessfully, the Supreme Court granted certiorari. *Id. at 473-75* . In rejecting the FDIC's argument that the FSLIC enjoyed sovereign immunity, the Court reiterated that ***HN6***[] "sue-and-be-sued waivers are to be 'liberally' construed . . . notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id. at 480* (citation omitted). Further, the fact that *Bivens* actions were not generally available against private corporations was not controlling. "We [have] looked to the liability of a private enterprise as a floor below which [a sue-and-be-sued] agency's liability **[*991]** could not fall," not a ceiling that may not be exceeded. *Id. at 482-83* (emphasis omitted). Thus, the waiver of **[**10]** the FSLIC's immunity included federal constitutional torts. *Id. at 483*. The Court went on to hold, however, that ***HN7***[] *Bivens* actions could not be filed against federal agencies, only against federal officers. *Id. at 484-86* .

[5] Relying on *Franchise Tax Board, Loeffler*, and *Meyer*, Flamingo argues that the Postal Service's waiver of immunity reaches federal antitrust actions. We agree. In *Franchise Tax Board*, the Court held that ***HN8***[] the general liberal-construction rule can be overcome only if the Postal Service makes a clear showing that the type of suit filed against it is not consistent with the statutory or constitutional scheme, an implied restriction is necessary to avoid "grave interference with the performance of a governmental function," or Congress **[**11]** plainly intended to use "sue and be sued" in a narrow sense. *Franchise Tax Bd., 467 U.S. at 517-18* (quoting *Burr, 309 U.S. at 245*); *accord* *Loeffler, 486 U.S. at 554-55* . Here, the Postal Service does not "attempt to make the 'clear' showing of congressional purpose necessary to overcome the presumption that immunity [from federal antitrust actions] has been waived." *Meyer, 510 U.S. at 481*. Further, it is doubtful the Postal Service could make that showing: As was the case in *Loeffler*, "since Congress expressly included several narrow and specific limitations on the operation of the [Postal Service's] sue-and-be-sued clause, *see* *39 U.S.C. § 409*, none of which is applicable here, the natural inference is that it did not intend other limitations to be implied." *Loeffler, 486 U.S. at 557* (footnote omitted).

B

[6] Having determined that Congress has waived the Postal Service's immunity, we turn to the second inquiry, "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer, 510 U.S. at 484*. The **[**12]** source of substantive law upon which Flamingo relies is federal ***antitrust law***. The Postal Service argues that a federal antitrust claim may not be pursued against it because it is not a "person" within the meaning of that law. We disagree. Although a federal sovereign is not a "person," the Postal Service is not a sovereign.

The rule that the federal government and its instrumentalities are not "persons" for federal ***antitrust law*** purposes dates back to *United States v. Cooper Corp., 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)*. In *Cooper*, the federal government attempted to bring a civil suit under the Sherman Act. The Court rejected the suit, holding that ***HN9***[] the Sherman Act only allowed "persons" to bring civil suits and the United States did not meet the definition of a "person" under the Act. *Id. at 604, 614*. The Court explained that, "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Id. at 604*. Although "there is no hard and fast rule of exclusion" of the sovereign from the word "person," *id. at 604-05*, the **[**13]** Court was concerned because the Sherman Act used the word "person" to describe both who could bring suit and who could be sued. The Court wanted to avoid interpreting "person" in a manner in which the United States could be sued. *Id. at 606*. Hence, the Court reasoned that "the more natural inference . . . is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations." *Id*.

Later circuit court decisions extended *Cooper* to exclude ***HN10***[] federal instrumentalities from the meaning of the word "person" in federal antitrust laws. In the seminal case **[*992]** of *Sea-Land Service, Inc. v. Alaska Railroad,*

[2] *Bivens v. Six Unknown Named Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)* (recognizing an implied cause of action against federal officials who violate the Constitution).

212 U.S. App. D.C. 197, 659 F.2d 243, 244 (D.C. Cir. 1981), then-Judge Ginsburg wrote for the court in holding that "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act." The *Sea-Land Service* opinion relied on *Cooper*, and on Congress's decision after *Cooper* to amend some of the federal antitrust laws to allow the United States to bring civil actions for single, but not treble, damages. 659 F.2d at 245-46 **[**14]** . This, the court reasoned, represented a Congressional intent to leave the word "persons" as the *Cooper* Court had defined it. Id. at 246.

In Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288-89 (9th Cir. 1985), we applied *Sea-Land Service* and held that federal instrumentalities are immune from antitrust liability. Because the defendant government of Guam was "an instrumentality of the federal government," we held "there is no reason why Guam should enjoy less immunity than the federal government itself." Id. at 1289 (citing Jet Courier Servs., Inc. v. Fed. Reserve Bank of Atlanta, 713 F.2d 1221, 1228 (6th Cir. 1983), and Sea-Land Serv., 659 F.2d at 246-47).

Cooper, Sea-Land Service, and *Sakamoto* remain valid precedent, but they do not control our decision today. These holdings require (or assume) that the federal instrumentality at issue enjoys federal sovereignty. As the Second Circuit recently explained: "While the *Sea-Land* court's holding that the Sherman Act does not expose federal agencies to legal or equitable liability for alleged antitrust violations . . . is **[**15]** uncontroversial, such immunity was founded on the sovereign immunity of the United States." Name. Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 580-81 (2d Cir. 2000)(citation omitted). Here, the Postal Service does not enjoy federal sovereignty.

[7] ***HN11***[] The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation. *See* Franchise Tax Board, 467 U.S. at 520 ("We must presume that the Service's liability is the same as that of any other business."); *accord* Loeffler, 486 U.S. at 556 ("Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' ") (quoting Shaw, 478 U.S. at 317 n.5.); *see also* Meyer, 510 U.S. at 482 (the Court has "looked to the liability of a private enterprise as a floor below which the [sue-and-be-sued] agency's liability could not fall."). Because the Postal Service is an entity with the status of a private commercial enterprise, it fits within the common meaning of the **[**16]** word "person," just as does any other private corporation. *See* 15 U.S.C. § 7 ("The word 'person,' or 'persons,' wherever used in [Title 15 of the United States Code] shall be deemed to include corporations . . . ."); *see also* Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 782, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000) ("The presumption with regard to corporations is just the opposite of the one governing [sovereigns]: they are presumptively covered by the term 'person' . . . .") (citing 1 U.S.C. § 1) (emphasis omitted).

We find support for our conclusion in Global Mail Ltd. v. United States Postal Service, 142 F.3d 208, 216-17 (4th Cir. 1998). There, the Fourth Circuit held that ***HN12***[] the Postal Service was a "person" that could be sued under the Lanham Act. [3] The court explained:

> **[*993]** The Lanham Act itself contains no waiver of sovereign immunity for the federal government, and . . . the Act's definition of 'person' as an 'organization capable of being sued' falls short of the standard of explicitness required for such a waiver. But those agencies whose immunity has already been waived, and are capable of suing **[**17]** and being sued, fall squarely within the plain language of the Lanham Act's definition of 'juristic persons.' . . . [A] governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'

[3] Since *Global Mail* was decided, the Lanham Act was amended to expressly cover the United States and its instrumentalities as "persons." *See* Pub. L. No. 106-43, §§ 4(c), 6(b), 113 Stat. 219, 220 (1999) (codified at 15 U.S.C. § 1127).

Id. at 216; [4] *accord* *Fed. Express Corp. v. United States Postal Serv., 151 F.3d 536, 544-46 (6th Cir. 1998)*; *United States v. Q Int'l Courier, Inc., 131 F.3d 770, 775 (8th Cir. 1997)*. This reasoning applies equally here, ***HN13***[] where federal ***antitrust law*** defines "person" as including any private corporation, *see* *15 U.S.C. § 7*, and where Supreme Court precedent establishes that the Postal Service is to be treated as a private corporation. *See* *Loeffler, 486 U.S. at 556*.

[18]** The Postal Service cites several cases involving sue-and-be-sued instrumentalities where such entities were held exempt from federal antitrust laws. *See* *Jet Courier Servs., 713 F.2d at 1228-29*; *E.W. Wiggins Airways, Inc. v. Mass. Port Auth., 362 F.2d 52, 56 (1st Cir. 1966)*; *Webster City Coal Corp. v. Tenn. Valley Auth., 476 F. Supp. 529, 531-32 (W.D. Ky. 1979)*. These cases predate the Supreme Court's decisions in *Franchise Tax Board, Loeffler*, and *Meyer* and are not persuasive authority in light of the Court's recent sue-and-be-sued jurisprudence.

[8] We hold that the Postal Service can be sued under federal antitrust laws because Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation. However, we add one significant caveat. Two types of immunity from federal antitrust laws exist. Our discussion has focused solely on the first kind of immunity -- "status-based" immunity, *see* *Name. Space, 202 F.3d at 581* -- because the parties only raise that type of immunity. A second type of immunity -- "conduct-based" **[**19]** immunity -- can apply when an entity does not enjoy status-based immunity, but acts at the direction of a federal sovereign. *See* *id. at 581-82* (holding that a nonsovereign contractor enjoyed immunity from ***antitrust law*** where it was exercising a Congressionally-mandated monopoly). Accordingly, our holding that ***HN14***[] the Postal Service does not enjoy status-based immunity does not prevent the Service from asserting conduct-based immunity if the action of the Postal Service being challenged was taken at the command of Congress. *See generally* *Air Courier Conf. v. Am. Postal Workers Union, 498 U.S. 517, 519, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991)* (recognizing that Congress has conferred a legal monopoly on the Postal Service over mail delivery in and from the United States).

[*994] II

THE PROCUREMENT MANUAL CLAIM

The Postal Service argues that the district court lacked jurisdiction over Flamingo's claim that it violated the Postal Service Procurement Manual because Flamingo lacks standing to assert the claim. The parties' briefs devote much energy to an inconsistent series of cases from the 1970's to the 1990's discussing this issue. We need not attempt to reconcile **[**20]** these cases; they are irrelevant.

In 1996, Congress amended *28 U.S.C. § 1491*, part of the codification of the Tucker Act, by enacting the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870 (1996). ***HN15***[] The relevant portion of the ADRA, as codified, reads:

> Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

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[4] The Postal Service points out that *Global Mail* holds that Lanham Act claims, which are federal tort claims, may be brought against the Postal Service. According to the Postal Service, this is contrary to the law of this circuit under *Pereira v. United States Postal Serv., 964 F.2d 873 (9th Cir. 1992)*. In *Pereira*, we held that the Postal Service is immune from suit for federal torts because the sue-and-be-sued clause is limited by the Federal Tort Claims Act (FTCA). *Id. at 876-77*. However, subsequent to *Pereira*, the Supreme Court held that the FTCA does not limit a sue-and-be-sued waiver as to federal tort claims because the FTCA only applies to state tort claims. *Meyer, 510 U.S. at 476-79* . This overruled *Pereira*.

28 U.S.C. § 1491(b)(1). A sunset provision in the ADRA terminated district court jurisdiction under § 1491(b)(1) on January 1, 2001; however, a savings provision states that **HN16**[] the termination **[**21]** of jurisdiction "shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000." ADRA, Pub. L. 104-320, § 12(d)-(e). Flamingo is within this savings clause because it filed its action on July 11, 2000. This being so, the questions presented are whether § 1491(b)(1) applies to the Postal Service, and if so, whether Flamingo has standing to assert the Procurement Manual claim. At our request, the parties addressed these questions at oral argument.

Having considered the parties' arguments, we hold that **HN17**[] § 1491(b)(1) applies to the Postal Service. In *Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1080-83 (Fed. Cir. 2001)*, the Federal Circuit held that the Postal Service could be sued under § 1491(b)(1). The court explained that, although Title 28 of the United States Code does not define "federal agency," it does define "agency" in a manner that covers the Postal Service. *Emery Worldwide Airlines, 264 F.3d at 1080-81* (citing 28 U.S.C. § 451 and 39 U.S.C. § 201). We agree with the reasoning of *Emery* **[**22]** *Worldwide Airlines*, and follow its holding. [5]

We also hold that Flamingo has standing under § 1491(b)(1) to assert its Procurement Manual claim. **HN19**[] Section 1491(b)(1) provides for district court jurisdiction **[**23]** over any claim by an "interested party objecting to a solicitation by a Federal agency for bids or proposals for a **[*995]** proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." Flamingo alleges that the Postal Service violated its Procurement Manual by maintaining contracts with Mexican suppliers of mail sacks that violated the Manual while unfairly canceling a procurement contract with Flamingo. Flamingo also alleges that the Postal Service violated the Manual by falsely declaring an emergency in the supply of mail sacks and failing to document this emergency so as to be able to award no-bid contracts to Mexican suppliers. Flamingo has standing under 28 U.S.C. § 1491(b)(1).

III

THE IMPLIED COVENANT CLAIM

The district court held that it lacked jurisdiction over Flamingo's claim for an alleged violation of the implied covenant of good faith and fair dealing because that claim was an unexhausted tort claim barred under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 . **HN20**[] The FTCA applies to the Postal **[**24]** Service, *see* 39 U.S.C. § 409(c), and Flamingo has never disputed that the claim is a tort claim covered by the FTCA. Under the FTCA, the claim had to be administratively exhausted for the court to have subject matter jurisdiction. *Jerves v. United States, 966 F.2d 517, 518-19 (9th Cir. 1992)*; *see* 28 U.S.C. § 2675(a).

HN21[] In determining that the claim was unexhausted, the district court considered a declaration submitted by the Postal Service and took note of Flamingo's failure to proffer contrary evidence. We therefore treat the court's dismissal of the claim as a grant of summary judgment, which we review de novo. *Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)* (en banc).

The declaration submitted to the district court by the Postal Service demonstrated that Flamingo had not met the exhaustion requirement of the FTCA. Flamingo failed to present any evidence contradicting this declaration. We affirm the district court's dismissal of the claim.

IV

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[5] 28 U.S.C. § 1491(b)(4) imports Administrative Procedures Act (APA) standards of review into procurement cases under 28 U.S.C. § 1491(b)(1). 39 U.S.C. § 410(a) exempts the Postal Service from most of the APA. In *Emery Worldwide Airlines*, the court noted the possibility that 28 U.S.C. § 1491(b)(4) and 39 U.S.C. § 410(a) are in conflict, although the court avoided deciding the issue. *See* *Emery Worldwide Airlines, 264 F.3d at 1084-85* . We do not see a conflict. **HN18**[] 28 U.S.C. § 1491(b)(4) incorporates by reference the APA review standards into cases under 28 U.S.C. § 1491(b)(1); 28 U.S.C. § 1491(b)(4) does not create APA liability.

THE *CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200* CLAIM

The Postal Service argues that the district court lacked supplemental jurisdiction over **[**25]** the *California Business & Professions Code § 17200* claim and, alternatively, that the claim is preempted by federal law. We do not reach the issue of *supplemental* jurisdiction because we hold that the district court properly exercised *original* jurisdiction over this claim under *39 U.S.C. § 409(a)*. Nonetheless, the claim was properly dismissed because it is preempted by federal law.

A

We first consider the district court's jurisdiction. Subject to certain inapplicable exceptions, ***HN22***[] *39 U.S.C. § 409(a)* provides that "the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." The plain language of this statute grants United States district courts original jurisdiction over lawsuits by or against the Postal Service, as other circuits have held. *E.g. Licata v. United States Postal Serv., 33 F.3d 259, 260-62 (3d Cir. 1994)*; *Cont'l Cablevision of St. Paul, Inc. v. United States Postal Serv., 945 F.2d 1434, 1437-41 (8th Cir. 1991)*; *Am. Postal Workers Union v. United States Postal Serv., 265 U.S. App. D.C. 146, 830 F.2d 294, 312 n.33 (D.C. Cir. 1987)*. **[**26]** **[*996]**

We would stop our discussion here, except for the need to clarify an arguable inconsistency in our cases interpreting *39 U.S.C. § 409(a)*. In *Janakes v. United States Postal Service, 768 F.2d 1091, 1093 (9th Cir. 1985)*, we quoted and adopted the Seventh Circuit's holding in *Peoples Gas, Light & Coke Co. v. United States Postal Service, 658 F.2d 1182, 1189 (7th Cir. 1981)*, that *§ 409(a)* "does not confer subject matter jurisdiction for actions in which the [Postal] Service is a party, but requires a 'substantive legal framework' of federal law to confer federal subject matter jurisdiction." According to *Peoples Gas* and *Janakes*, *§ 409(a)* "merely removes the barriers of sovereign immunity." *Id*. Later, without citing *Janakes*, we held in *Wright v. United States Postal Service, 29 F.3d 1426, 1430 (9th Cir. 1994)*, that " ***HN23***[] *39 U.S.C. § 409(a)* . . . grants the district courts original but not exclusive jurisdiction over actions by or against the USPS." *See also* *Silver v. United States Postal Serv., 951 F.2d 1033, 1035 & n.1 (9th Cir. 1991)* (per curiam) (citing without **[**27]** discussion *§ 409(a)* as a basis for jurisdiction).

A careful reading of our cases reveals that no true inconsistency exists because *Janakes* is distinguishable. In *Janakes*, the issue we decided was whether *§ 409(a)* created a substantive right to bring suit. *See* *Janakes, 768 F.2d at 1093*. We held it did not. *Id*. Although some language in *Janakes* suggests that *§ 409(a)* does not confer subject matter jurisdiction, that language is dicta. Indeed, the Seventh Circuit, which in *Peoples Gas* created the decision that prompted our *Janakes* language, later adopted a reading of *Peoples Gas* consistent with the reading we now apply to *Janakes. See* *Powers v. United States Postal Serv., 671 F.2d 1041, 1042 (7th Cir. 1982)*. We are satisfied that our reading, following *Wright*, is correct. The plain language of *§ 409(a)* states that the district courts "shall have original jurisdiction" -- the same words used to grant jurisdiction elsewhere in the United States Code. *E.g*. *28 U.S.C. §§ 1331*, *1332*.

We hold that the district court correctly exercised original subject matter jurisdiction under *39 U.S.C. § 409(a)* **[**28]** over Flamingo's claim asserted under *California Business & Professions Code § 17200*.

B

The district court's dismissal of the *California Business & Professions Code § 17200* claim was proper, however, because that claim is preempted by federal law. The district court did not reach this issue, but we may affirm on any ground supported by the record. *See* *Laboa v. Calderon, 224 F.3d 972, 981 n.7 (9th Cir. 2000)*.

Preemption comes in several forms. Here we are concerned with ***HN24***[] conflict preemption, by which "state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' . . . , or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983)* (quoting

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), and Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). **[**29]**

The state law at issue, California Business & Professions Code § 17200, is a notoriously broad statute. It applies to, among other things, "any unlawful, unfair or fraudulent business act or practice." Here, Flamingo is using the section to challenge procurement decisions made by the Postal Service involving the Postal **[*997]** Service's requirements for mail bags. This use of section 17200 conflicts with federal law.

HN25[] The Postal Service is expressly authorized by 39 U.S.C. § 401(3) to determine the character and necessity of its expenditures. And, although 28 U.S.C. § 1491(b)(1) allows for challenges to Postal Service procurement decisions, 28 U.S.C. § 1491(b)(4) provides that such decisions may only be invalidated by a federal court applying the deferential APA standard of review codified at 5 U.S.C. § 706 (for example, if the procurement decision is arbitrary and capricious). Allowing the requirements of California Business & Professions Code § 17200 to control the Postal Service's procurement decisions would impinge upon the Service's right to control the character and necessity of its purchases **[**30]** free from state constraint, and would negate the deferential standard Congress has created for federal court review of such decisions. *Cf.* United States v. City of Pittsburg, Cal., 661 F.2d 783, 785-86 (9th Cir. 1981) (holding that a local ordinance requiring letter carriers to obtain consent before crossing lawns was preempted by a Postal Service regulation allowing mail carriers to cross lawns unless the owner objects because of the clear conflict between the two provisions). Flamingo's claim asserted under California Business & Professions Code § 17200 is preempted by federal law.

V

THE § 1983 CLAIM

The Postal Service argues that we should dismiss Flamingo's 42 U.S.C. § 1983 claim for failure to state a claim upon which relief can be granted. We agree. The Postal Service acts under federal law, and **HN26**[] § 1983 does not allow for a suit based upon actions taken under color of federal law. Billings v. United States, 57 F.3d 797, 801 (9th Cir. 1995). Exercising our authority to affirm on any ground supported by the record, we dismiss with prejudice the § 1983 claim.

VI

VENUE

The district court, after dismissing the federal **[**31]** antitrust claims and the breach of implied covenant claim, dismissed the Procurement Manual, California Business and Professions Code § 17200, and 42 U.S.C. § 1983 claims for improper venue. It held that 15 U.S.C. § 22 did not support venue for these claims once the antitrust claims were dismissed.

HN27[] Section 22 states:

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

15 U.S.C. § 22 (emphasis added).

We have held earlier in this opinion that the district court erred in dismissing the antitrust claims on the ground of sovereign immunity. We now hold that under 15 U.S.C. § 22, venue for the antitrust claims was proper in the Northern District of California because the Postal Service may be found in, and transacts business in, that district. *See id*.

Because venue is proper in the **[**32]** Northern District of California for the antitrust claims, and because the Procurement Manual, *§ 17200*, and *§ 1983* claims arise out of the same common nucleus of facts, venue in the Northern District was proper for these claims as well. *See* *Beattie v. United States, 244 U.S. App. D.C. 70, 756 F.2d 91, 100-104 (D.C. Cir. 1984)*, *overruled on other grounds in* *Smith v. United States, 507 U.S. 197, 122 L. Ed. 2d 548, 113* ***[*998]*** *S. Ct. 1178(1993)*; *Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1286, 1290 (W.D. Wash. 1994)*. However, for alternative reasons previously discussed, we have affirmed the dismissal of the *§ 17200* and *§ 1983* claims. We now reverse the district court's dismissal of the Procurement Manual claim for improper venue.

VII

CONCLUSION

We reverse the district court's dismissal of Flamingo's antitrust claims and Procurement Manual claim. We affirm the district court's dismissal of Flamingo's claim for breach of the implied covenant of good faith and fair dealing, and its dismissal of the claims asserted under *California Business & Professions Code § 17200* and *42 U.S.C. § 1983*. The parties shall each bear **[**33]** their respective costs for this appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

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Haynes Trane Serv. Agency, Inc. v. Am. Std., Inc.

United States Court of Appeals for the Tenth Circuit

August 27, 2002, Filed

Nos. 00-1171, 00-1206, 00-1207

Reporter
51 Fed. Appx. 786 *; 2002 U.S. App. LEXIS 17919 **; 49 U.C.C. Rep. Serv. 2d (Callaghan) 65

HAYNES TRANE SERVICE AGENCY, INC. and FREDERICK M. HAYNES, Plaintiffs-Appellees - Cross-Appellants, v. AMERICAN STANDARD, INC., d/b/a The Trane Company, Defendant-Appellant - Cross-Appellee.

Notice: [1]** RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Motion granted by, Request denied by *Haynes Trane Serv. Agency, Inc. v. Am. Std., Inc., 2006 U.S. Dist. LEXIS 31943 (D. Colo., May 12, 2006)*

Prior History: (D. Colorado). (D.C. No. 95-M-1700).

Disposition: Affirmed in part, vacated in part, reversed in part, and remanded.

Core Terms

termination, district court, counterclaim, franchise agreement, sales, distributorship, claim for breach, damages, affirmative defense, fiduciary duty, products, notice, unjust enrichment, accounting, claimback, parties, argues, breached, courts, implied covenant, fair dealing, implied duty, antitrust, terminable at will, equitable, vacate, summary judgment, anti trust law, jury's verdict, without cause

LexisNexis® Headnotes

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[ ] **Standards of Review, De Novo Review**

A district court's ruling on an issue of law is subject to de novo review. A ruling on a motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50* is also subject to de novo review.

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

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN2[] **Standards of Review, De Novo Review**

A district court's interpretations of state law and decisions as to the ambiguity of a contract are subject to de novo review.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

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

HN3[] **Standards of Review, Clearly Erroneous Review**

A district court's decision that a cause of action has been waived is reviewed under two standards: factual conclusions are reviewed for clear error, and the application of law to those facts is reviewed de novo.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN4[] **Standards of Performance, Discharge & Termination**

Under Wisconsin law, contracts effective for an indeterminate period are terminable without cause unless the contract expressly provides otherwise.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN5[] **Standards of Performance, Discharge & Termination**

Under Wisconsin law, service contracts may be terminated at will unless the agreement specifies otherwise.

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN6[] **Termination, Good Cause**

Under Wisconsin law, a franchise agreement is terminable at will when it does not specify whether good cause is required for termination.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Contracts Law > Breach > General Overview

HN7[] **Types of Contracts, Covenants**

Wisconsin recognizes the implied covenants of good faith, fair dealing, and cooperation. However, Wisconsin courts hold that conduct authorized by a contract cannot be a breach of the implied covenants.

Contracts Law > Contract Modifications > General Overview

HN8[] **Contracts Law, Contract Modifications**

Whether a contract has been modified is a question of fact. It is universally accepted that, unless a contract is one required by law to be in writing, the contract can be modified orally although it provides that it can be modified only in writing.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Contracts Law > Statute of Frauds > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Statute of Frauds

HN9[] **Distributorships & Franchises, Causes of Action**

Violation of the statute of frauds is an affirmative defense that must be raised in the trial court or be deemed waived. *Fed. R. Civ. P. 8(c)*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Real Property Law > Financing > Secondary Financing > Lien Priorities

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN10[] **Defenses, Demurrers & Objections, Waiver & Preservation of Defenses**

The parol evidence rule only bars evidence of prior or contemporaneous promises that contradict the written terms of an integrated contract.

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN11[] **Termination, Good Cause**

Under the doctrine of equitable estoppel, a franchisor can be estopped from denying that a sales franchise agreement had been modified to require good cause for termination if the franchisor engaged in action or inaction which induced detrimental reliance by the franchisee.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Breach > General Overview

HN12[] **Affirmative Defenses, Fraud & Misrepresentation**

Fraud is a claim that sounds in tort; and fraud independent of a contract is not a proper affirmative defense to a claim that a contract was breached.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Breach of Contract

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Breach > General Overview

HN13[] **Breach, Material Breach**

Fraud that is a prior material breach of a contract may be a viable affirmative defense to a breach of contract claim.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN14[] **Jury Trials, Jury Instructions**

A court cannot let a verdict stand where juror confusion is evident, and the appellate court must reverse the judgment with respect to those verdicts.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Remedies > Damages > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN15[] **Standards of Review, Plain Error**

The appellate court has discretion to review the submission of a party's damages claim to the jury for plain error.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Commercial Law (UCC) > General Provisions (Article 1)

HN16[] **Distributorships & Franchises, Franchise Relationships**

A distributorship agreement can be subject to the Uniform Commercial Code.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

HN17[] **Types of Contracts, Covenants**

Under Texas law, an implied covenant cannot contradict the express terms of a contract.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN18[] **Business Torts, Fraud & Misrepresentation**

Direct evidence of fraudulent transactions is not required under Colorado law. Fraud may be inferred from circumstantial evidence.

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN19[] **Procedural Matters, Rulings on Evidence**

Admission of evidence is within the sound discretion of the trial court.

Evidence > Admissibility > Conduct Evidence > Habit & Routine Practices

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN20[] Conduct Evidence, Habit & Routine Practices

If evidence is admissible under any of the Federal Rules of Evidence, the appellate court may affirm the admission.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN21[] Pleadings, Counterclaims

Fed. R. Civ. P. 8 permits a party to state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Contracts Law > Remedies > Equitable Relief > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN22[] Remedies, Equitable Relief

Both Texas and Colorado courts allow plaintiffs to pursue claims for both fraud and unjust enrichment.

Contracts Law > Remedies > Equitable Relief > General Overview

HN23[] Remedies, Equitable Relief

Both Colorado and Texas courts recognize that claims for unjust enrichment are equitable.

Civil Procedure > Remedies > Equitable Accountings > General Overview

HN24[] Remedies, Equitable Accountings

An equitable claim for an accounting is not cognizable where an adequate remedy exists at law. However, an accounting may yet be appropriate where the accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fiduciary Duties

Governments > Fiduciaries

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN25[] **Causes of Action, Fiduciary Duties**

Colorado courts recognize a cause of action for breach of fiduciary duty.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN26[] **Contract Interpretation, Fiduciary Responsibilities**

Under the test that Colorado courts generally apply when determining whether there has been a breach of fiduciary duty, fiduciary duties may arise when parties are engaged in a fiduciary, or confidential, relationship. A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a duty may arise when one party is in a superior position relative to the other party. But an unequal relationship does not automatically create a fiduciary duty. In order to be liable, the superior party must assume a duty to act in the dependent party's best interest. A fiduciary relationship can arise out of a relationship of blood, business, friendship, or association.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN27[] **Private Actions, Remedies**

To survive summary judgment, a plaintiff must demonstrate an "antitrust injury," which is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The purpose of this requirement is to ensure that courts connect the alleged injury to the purposes of the antitrust laws. Compensation for that injury must be consistent with the purposes of ***antitrust law*** generally and with the rationale for condemning the particular defendant. The point is to prevent an award of damages for losses stemming from continued or increased competition rather than diminished competition, a result that otherwise would be inimical to the antitrust laws.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN28[] **Private Actions, Remedies**

A dealer terminated for its refusal to abide by a vertical minimum price fixing agreement suffers antitrust injury.

Counsel: For HAYNES TRANE SERVICE AGENCY, INC., FREDERICK M. HAYNES, Plaintiff-Counter - Defendant - Appellees (00-1171): Charles B. Hecht, Michelle W. Stern, John Lawrence Hamil, Lisa Perfrement, Hamil Professional Corporation, Denver, CO.

For AMERICAN STANDARD INC., Defendant-Counter - Claimaint - Appellant (00-1171): Andrew M. Low, Dale R. Harris, Meredith A. Munro, Geoffrey H. Simon, John Allen Francis, Davis, Graham & Stubbs, Denver, CO. Donald B. Ayer, Kathleen M. Laubenstein, Lawrence D. Rosenberg, Jones, Day, Reavis & Pogue, Washington, DC.

For HAYNES TRANE SERVICE AGENCY, INC., Plaintiff-Counter - Defendant (00-1206): Charles B. Hecht, Michelle W. Stern, John Lawrence Hamil, Christina Miller, Lisa Perfrement, Hamil Professional Corporation, Denver, CO.

For FREDERICK M. HAYNES, Plaintiff-Counter-Defendant - Appellant (00-1206): Charles B. Hecht, Michelle W. Stern, John Lawrence Hamil, Christina Miller, Lisa Perfrement, Hamil Professional Corporation, Denver, **[**2]** CO.

For AMERICAN STANDARD INC., Defendant-Counter-Claimaint - Appellee (00-1206): Andrew M. Low, Dale R. Harris, Meredith A. Munro, Geoffrey H. Simon, John Allen Francis, Davis, Graham & Stubbs, Denver, CO. Donald B. Ayer, Kathleen M. Laubenstein, Lawrence D. Rosenberg, Jones, Day, Reavis & Pogue, Washington, DC.

For HAYNES TRANE SERVICE AGENCY, INC., Plaintiff-Counter-Defendant - Appellant (00-1207): Charles B. Hecht, Michelle W. Stern, John Lawrence Hamil, Christina Miller, Lisa Perfrement, Hamil Professional Corporation, Denver, CO.

For FREDERICK M. HAYNES, Plaintiff-Counter-Defendant (00-1207): Charles B. Hecht, Michelle W. Stern, John Lawrence Hamil, Christina Miller, Lisa Perfrement, Hamil Professional Corporation, Denver, CO.

For AMERICAN STANDARD INC., Defendant-Counter-Claimaint - Appellee (00-1207): Andrew M. Low, Dale R. Harris, Meredith A. Munro, Geoffrey H. Simon, John Allen Francis, Davis, Graham & Stubbs, Denver, CO. Donald B. Ayer, Kathleen M. Laubenstein, Lawrence D. Rosenberg, Jones, Day, Reavis & Pogue, Washington, DC.

Judges: Before MURPHY and BALDOCK, Circuit Judges, and VANBEBBER, Senior District Judge. [**] **[**3]**

Opinion by: G. Thomas Van Bebber

Opinion

[*788] ORDER AND JUDGMENT [*]

This action arose out of the termination of two separate contracts: a sales franchise **[*789]** agreement between a manufacturer of heating and air conditioning equipment, American Standard, Inc., d/b/a/ The Trane Company ("Trane"), and Frederick Haynes ("Haynes"); and a distributorship agreement between Trane and Haynes's family-owned business, Haynes Trane Service Agency, Inc. ("HTSA").

In 1968, Haynes entered into a sales franchise agreement with Trane. Under that contract, Haynes became a sales agent for Trane's large commercial systems. The contract was for an indeterminate period and stated that it could "be terminated by either party upon 30 days **[**4]** notice to the other." Haynes also formed HTSA, largely in order to fulfill his responsibilities under his sales franchise agreement with Trane. HTSA's employees solicited orders for Trane commercial systems and performed start-up and warranty services. HTSA also serviced and repaired Trane products and those of other manufacturers.

In 1990, Trane and HTSA entered into a distributorship agreement, whereby HTSA became a wholesale distributor of Trane's "unitary products," which are light commercial and residential products. The distributorship agreement did not include Trane's large commercial systems, for which Haynes continued to hold his sales franchise agreement. HTSA's distributorship agreement was for a term of one year, and it did not contain a renewal option. However, Trane and HTSA entered into new distributorship agreements every year through 1995. Each

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[**] The Honorable G. Thomas Van Bebber, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

[*] This order and judgment is not binding precedent, except under the doctrines of law or the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

distributorship agreement was terminable "by either party, with or without cause, upon 90 days written notice." Under Trane's distributorship agreements, including those with HTSA, distributors bought unitary products from Trane at a set price and resold them at a profit. At times, market forces might require a distributor **[**5]** to resell a unitary product at an unusually low price. When this occurred, a distributor could complete a "claimback form" and submit it to Trane for a rebate, which would be credited to the distributor through Trane's "claimback program."

Early in 1995, Trane began auditing HTSA's claimback forms. Trane concluded that there was evidence of fraud by HTSA. Trane decided to terminate both Haynes's sales franchise agreement and HTSA's distributorship agreement. The sales franchise agreement was terminated, effective in thirty days (July 8, 1995); the distributorship agreement was terminated, effective immediately.

Haynes and HTSA filed this action against Trane, advancing claims for breach of both contracts, breach of implied covenants, breach of fiduciary duty, and violation of federal antitrust laws, as well as other claims which are not the subject of this appeal. Trane asserted counterclaims of fraud, unjust enrichment, and for an accounting, along with other counterclaims which are not the subject of this appeal.

Trane filed motions for summary judgment regarding most of Haynes's and HTSA's claims. In an order dated October 2, 1998, the district court entered summary judgment **[**6]** in favor of Trane on the antitrust claims. At a pretrial conference held February 5, 1999, the court announced that Trane's counterclaims for unjust enrichment and an accounting would not be tried to a jury; the court would decide those claims following a jury trial on the remaining claims. At a pretrial conference held September 17, 1999, the court dismissed Haynes's and HTSA's claims for breach of fiduciary duty. It also dismissed HTSA's claim for breach of the **[*790]** implied duty of good faith and fair dealing. No reasons for the dismissals were stated on the record.

The remaining claims were tried to a jury. The district court submitted three claims to the jury: (1) Haynes's claim for breach of the implied covenants of good faith, fair dealing, and cooperation under his sales franchise agreement; (2) HTSA's claim for breach of the distributorship agreement; and (3) Trane's counterclaim for fraud against HTSA. [1]

[7]** At the close of Haynes's and HTSA's evidence, the district court entered judgment against Haynes on his claim for breach of the sales franchise agreement, pursuant to *Fed. R. Civ. P. 50(a)*. The jury, in answers to special questions, found that Trane had violated the implied covenants of good faith, fair dealing, and cooperation under the sales franchise agreement and awarded Haynes $ 8.1 million in damages. The jury also found that Trane had breached its distributorship agreement with HTSA and awarded HTSA $ 9.9 million in damages.

The jury found in Trane's favor on its fraud counterclaim, but damages were not determined. However, the district court ruled, *sua sponte* at a post-trial hearing, that there was not sufficient evidence to support the jury's verdict for Trane. The court then entered judgment pursuant to *Fed. R. Civ. P. 50(a)* for HTSA on the fraud counterclaim. At the same hearing, the court dismissed Trane's counterclaims for unjust enrichment and an accounting.

Trane filed three post-trial motions: (1) a motion to amend the judgment on all of its counterclaims, requesting both reinstatement of the verdict on its fraud counterclaim and a trial to determine the amount **[**8]** of damages due Trane because of HTSA's fraud; (2) a motion for judgment in Trane's favor on Plaintiffs' claims as a matter of law, pursuant to *Fed. R. Civ. P. 50(b)*; and (3) an alternative motion for a new trial. The district court denied all three motions. In the order denying Trane's motion to amend the judgment on its counterclaims, the court stated that Trane had waived its counterclaims for unjust enrichment and an accounting by choosing to proceed with its fraud counterclaim.

On appeal, Trane asks us to: (1) vacate the verdict for Haynes on his claim for breach of the implied covenants of good faith, fair dealing, and cooperation under his sales franchise agreement; (2) vacate the verdict for HTSA on its

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[1] At the close of Trane's evidence, the district court entered judgment against Trane on several counterclaims which are not at issue in this appeal.

claim for breach of its distributorship agreement; (3) reverse the judgment for HTSA on Trane's fraud counterclaim; and (4) reverse the dismissal of Trane's counterclaims for unjust enrichment and an accounting.

Haynes separately cross-appeals for reversal of the dismissal of his claim for breach of contract, should we vacate the verdict on his claim for breach of the implied covenants. HTSA separately cross-appeals for reversal of the dismissal of its claim for breach of **[**9]** the implied duty of good faith and fair dealing. HTSA also separately cross-appeals the district court's jury instructions on fraud, and an evidentiary decision regarding Trane's fraud counterclaim.

Finally, Haynes and HTSA both cross-appeal for reversal of the district court's dismissal of their claims for breach of fiduciary duty and antitrust violations, and they appeal the district court's refusal to award prejudgment interest on their judgments. We exercise jurisdiction pursuant **[*791]** to *28 U.S.C. § 1291*. We affirm in part, vacate in part, reverse in part, and remand for a new trial.

STANDARDS OF REVIEW

HN1[] A district court's ruling on an issue of law is subject to *de novo* review. *Moncrief v. Williston Basin Interstate Pipeline Co., 174 F.3d 1150, 1163-64 (10th Cir. 1999)*. A ruling on a motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50* is also subject to *de novo* review. *Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1241 (10th Cir. 1999)*. Likewise, ***HN2***[] a district court's interpretations of state law and decisions as to the ambiguity of a contract are subject to *de novo* review. *Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 727 (10th Cir. 1991)*; **[**10]** *City of Wichita v. S.W. Bell Tel. Co., 24 F.3d 1282, 1287 (10th Cir. 1994)*. ***HN3***[] A district court's decision that a cause of action has been waived is reviewed under two standards: factual conclusions are reviewed for clear error, and the application of law to those facts is reviewed *de novo*. *Fed. Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170, 173 (10th Cir. 1992)*.

I. TERMINATION OF HAYNES'S SALES FRANCHISE AGREEMENT

The parties stipulated that the issues concerning termination of the sales franchise agreement are governed by Wisconsin law. Before submitting the case to the jury, the district court determined that the sales franchise agreement was terminable without cause by either party on thirty days notice. The court then concluded that Trane did not breach the agreement, because it provided Haynes with thirty days notice of its termination of the agreement. Having made that determination, the district court then permitted the jury to decide whether Trane breached implied covenants of good faith, fair dealing, and cooperation in terminating the sales franchise agreement without cause.

Trane appeals the jury's verdict that it **[**11]** breached the implied covenants under the sales franchise agreement. Haynes conditionally cross-appeals the court's decision that Trane did not breach the sales franchise agreement, asking us to review that decision only if we vacate the jury's verdict on the implied covenants claim. We affirm the district court's decision that Trane did not breach the terms of the sales franchise agreement as it was written. We reverse the court's decision to submit to the jury Haynes's claim for breach of implied covenants, and we remand for further proceedings on the issues of modification of the agreement and the applicability of equitable estoppel.

A. Haynes's Claim for Breach of the Sales Franchise Agreement.

The district court correctly concluded that, ***HN4***[] under Wisconsin law, contracts effective for an indeterminate period are terminable without cause unless the contract expressly provides otherwise. See *Cal. Wine Ass'n v. Wis. Liquor Co., 20 Wis. 2d 110, 121 N.W.2d 308, 316-18 (Wis. 1963)*; Regal Ware, Inc. v. TSCO Corp., *229 Wis. 2d 734, 1999 Wisc. App. LEXIS 721, 600 N.W.2d 54, 1999 WL 415370*, at *4 (Wis. Ct. App. June 23, 1999) ("Because none of the prior agreements . . . contained termination **[**12]** dates, the agreements were terminable at will."); *Rakowski Distrib., Inc. v. Marigold Foods, Inc., 193 F.3d 504, 508 (7th Cir. 1999)* (citation omitted) ("In Wisconsin as in other states, service contracts may be terminable at will unless the agreement specifies otherwise or unless some specific statute changes that background rule.").

Haynes urges us to create an exception to this rule for franchise agreements. In support of his argument, **[*792]** Haynes offers examples of cases from other jurisdictions that have required cause for the termination of franchise agreements when the agreements are silent. It appears, however, that Wisconsin courts have not adopted such an exception for franchise agreements. In light of California Wine Ass'n, Regal Ware, Inc., and Rakowski Distributing, Inc., we do not believe that, given the opportunity, Wisconsin courts would adopt such an exception.

In California Wine Ass'n, the Wisconsin Supreme Court considered whether an implied exclusive distributorship agreement with no termination provisions could be terminated only after reasonable notice. *121 N.W.2d at 316*. The parties to the agreement had a relationship which **[**13]** spanned more than 14 years. *Id. at 312-13*. The court appeared to assume that the agreement was terminable at will and merely held that reasonable notice was required before termination. *Id. at 317* ("The exclusive distribution contracts were implied from the conduct of the parties and could be terminated at will provided there was reasonable notice.").

In Regal Ware, Inc., an unpublished opinion by the Wisconsin Court of Appeals, the court considered a series of agreements with no termination provisions. *1999 Wisc. App. LEXIS 721, 1999 WL 415370*, at *1, *4. The parties entered into the agreements over a period of about ten years. *1999 Wisc. App. LEXIS 721*, [WL] at *1-2. The court stated that "because none of the . . . agreements . . . contained termination dates, the agreements were terminable at will." Id. As in California Wine Ass'n, the court's focus was not on whether the contract was terminable at will, but whether the notice given before termination was reasonable. *1999 Wisc. App. LEXIS 721*, [WL] at *4-6.

In Rakowski Distributing, Inc., the Seventh Circuit briefly addressed whether, under Wisconsin law, a service contract without termination provisions was terminable at will. *193 F.3d at 508*. We again **[**14]** note that at-will termination was not a central issue in the case. However, the decision remains instructive. The plaintiff was a small, family-owned trucking company that had done hauling and distribution for Marigold Foods for some ten years. *Id. at 505*. The plaintiff devoted about seventy-five percent of its labor force to hauling for Marigold, bought trailers especially suited to Marigold's products, and installed a lift gate on one of its trailers so that it could service one of Marigold's customers without a loading dock. *Id. at 505-06*. Marigold Foods terminated the hauling contract somewhat unexpectedly. Despite the relationship between the parties and the hardship inflicted on the plaintiff, the Seventh Circuit noted that, ***HN5***[] under Wisconsin law, "service contracts may be terminated at will unless the agreement specifies otherwise . . . ." *Id. at 508*.

While the agreements that were the subjects of these cases were not sales franchise agreements, the relationships involved were similar to the relationship between Haynes and Trane. In each case, the court appeared to assume that the contract, because it was for an indeterminate **[**15]** period of time and had no express provision to the contrary, was terminable at will. We find these cases persuasive, and we determine that, ***HN6***[] under Wisconsin law, a franchise agreement is terminable at will when it does not specify whether good cause is required for termination. [2] Consequently, **[*793]** we affirm the district court's decision that the sales franchise agreement, on its face, was terminable at will with thirty days notice, which was given.

B. Haynes's Claim for Breach of Implied Covenants.

HN7[] Wisconsin recognizes the implied covenants of good faith, fair **[**16]** dealing, and cooperation. *In re Chayka's Estate, 47 Wis. 2d 102, 176 N.W.2d 561, 564 n.7 (Wis. 1970)*. However, Wisconsin courts have held that conduct authorized by a contract cannot be a breach of the implied covenants. See *Wausau Med. Ctr. v. Asplund,*

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[2] Haynes also urges us to apply the principles of the Wisconsin Fair Dealership Law ("WFDL") to import a good cause requirement into the sales franchise agreement. The WFDL is inapplicable, because it applies only to "dealers" operating within the state of Wisconsin. *Wis. Stat. Ann. § 135.02(2)*. Haynes did not operate his franchise in Wisconsin. We decline to impose the obligations of the WFDL on parties to an agreement not covered by the WFDL.

182 Wis. 2d 274, 514 N.W.2d 34, 43 (Wis. Ct. App. 1994) ("[Defendant] could not have breached the implied covenant of good faith by terminating his contract because the contract contemplated that he could do so at any time, as long as he gave sixty days' notice, which he did."); Super Valu Stores, Inc. v. D- Mart Food Stores, Inc., 146 Wis. 2d 568, 431 N.W.2d 721, 726 (Wis. Ct. App. 1988); see also Smith v. Rainsoft Water Conditioning Co., 848 F. Supp. 1413, 1417 (E.D. Wis. 1994).

Having decided that, as a matter of law, the sales franchise agreement was terminable at will, the district court should not have allowed the jury to decide whether Trane breached the implied covenants in terminating the sales franchise agreement as written, without cause. [3] We find the submission of that claim to be in error, and we vacate the jury's verdict on that claim.

[17]** Nevertheless, Haynes argues that the district court's decision to submit the implied covenants claim to the jury was not erroneous, because the sales franchise agreement was modified to include a good cause requirement for termination. We first note that there was no written modification of the sales franchise agreement. However, evidence was admitted at trial from which a jury might have found that the sales franchise agreement was otherwise modified to include a good cause requirement. Haynes testified that Trane officials, at franchisee meetings, communicated Trane's policy of only terminating franchise agreements for cause. Trane official Don O'Keefe testified that he interpreted franchise agreements to require cause for termination, and that he had never terminated a franchise agreement without cause. Trane official James Schultz testified that he was not aware of any time when a franchise agreement was terminated except for cause.

Although it was requested to do so, the district court did not submit to the jury the question of whether the contract had been modified. ***HN8***[] Whether a contract has been modified is a question of fact. Akrosil Div. of Int'l Paper Co. v. Ritrama Duramark, Inc., 847 F. Supp. 623, 628 (E.D. Wis. 1994). **[**18]** Moreover, the Wisconsin Supreme Court has held, "It is universally accepted that, unless a contract is one required by law to be in writing, the contract can be modified orally although it provides that it can be modified only in writing." S&M Rotogravure Serv., Inc. v. Baer, 77 Wis. 2d 454, 252 N.W.2d 913, 920 (Wis. 1977).

[*794] In response, Trane argues on appeal that any modification of Haynes's sales franchise agreement had to be in writing, because any oral modification of the contract to include a good cause requirement would violate the statute of frauds. We cannot locate in the record where Trane preserved this argument for appeal. ***HN9***[] Violation of the statute of frauds is an affirmative defense that must be raised in the trial court or be deemed waived. Fed. R. Civ. P. 8(c); Radio Corp. of Am. v. Radio Station KYFM, Inc., 424 F.2d 14, 17 (10th Cir. 1970). We conclude that Trane waived any statute of frauds defense as to modification of the sales franchise agreement.

Trane further argues on appeal that the parol evidence rule bars any attempt by Haynes to import a good cause requirement into the agreement. Trane's argument is misplaced. ***HN10***[] The parol evidence **[**19]** rule only bars evidence of prior or contemporaneous promises that contradict the written terms of an integrated contract. Fed. Deposit Ins. Corp. v. First Mortgage Investors, 76 Wis. 2d 151, 250 N.W.2d 362, 367 (Wis. 1977) (citations omitted). The district court properly admitted evidence to support modification which was not evidence of prior or contemporaneous promises.

We conclude that the district court committed reversible error when it refused to submit to the jury the question of whether the sales franchise agreement was modified to include a good cause requirement. We further conclude that the jury should have been requested to make factual determinations which would control the application of an equitable estoppel theory. Special questions or interrogatories should have been submitted and answered. [4] ***HN11***[

[3] Haynes alleged that Trane breached the implied covenants in both performance of the contract and termination of the contract. After reviewing the jury instructions, we conclude that the district court instructed the jury to find whether Trane breached the implied covenants only with regard to termination of the contract. We also note that Haynes's expert witness only testified about damages resulting from termination of the contract.

] Under the doctrine of equitable estoppel, Trane could be estopped from denying that the sales franchise agreement had been modified to require good cause for termination if Trane engaged in action or inaction which induced detrimental reliance by Haynes. See *Gabriel v. Gabriel, 57 Wis. 2d 424, 204 N.W.2d 494, 497 (Wis. 1973)*. Haynes testified **[**20]** that Trane officials stated in franchisee meetings that Trane's policy was to only terminate franchise holders for cause. Such evidence is sufficient to create an issue of fact for the jury as to whether Trane should be equitably estopped from denying that the agreement had been modified to require good cause for termination.

II. TERMINATION OF HTSA'S DISTRIBUTORSHIP AGREEMENT

A. HTSA's Claim for Breach of Contract.

The jury found that Trane breached the distributorship agreement with HTSA and awarded HTSA $ 9.9 million in damages. The claim should not have been submitted to the jury because HTSA failed to offer any relevant proof of damages. We vacate the jury's damages award as we explain more fully below.

The parties stipulate that Texas law applies to HTSA's **[**21]** breach of contract claim. HTSA alleged that Trane's termination without notice was a breach of the express terms of the distributorship agreement, and the jury found that Trane breached the agreement. Trane asserted an affirmative defense of fraud to HTSA's claim of breach. The affirmative defense was necessarily rejected by the jury when it found for HTSA on the breach issue. But the jury also found that HTSA defrauded Trane by filing false claimback forms, and **[*795]** returned a verdict for Trane on its counterclaim for fraud.

The trial court gave the following jury instruction regarding HTSA's breach of contract claim and Trane's affirmative defense of fraud to that claim:

> For [HTSA] to recover from Trane on its claim of breach of the distributor agreement, you must find that, one, Trane failed to terminate the contract in accordance with its terms and, two, [HTSA] has suffered resulting damages.
>
> If you find that [HTSA] has proven both of these elements by a preponderance of the evidence, then you must find for [HTSA], unless you also find that Trane has proven its affirmative defense to this claim by a preponderance of the evidence. Trane's affirmative defense to this claim **[**22]** is that [HTSA's] conduct was fraudulent.
> If you find that Trane's affirmative defense has been proven by a preponderance of the evidence, then your verdict on this claim must be in favor of Trane. On the other hand, if you find that Trane failed to terminate the contract in accordance with its terms, and that Trane has not proven its affirmative defense by a preponderance of the evidence, then you must find in favor of [HTSA].
> . . . .
>
> For Trane to prove its affirmative defense of fraud *and recover from [HTSA] on its counterclaim for fraud* by following a pattern or practice of falsifying documents submitted in support of claims for payment under the claimback program . . ., you must find that Trane has proven all of the following by a preponderance of the evidence . . . .

(App. 3969, 3641) (emphasis added).

By giving this instruction, the district court in effect instructed the jury that Trane must prove the same elements to win on its affirmative defense of fraud as it must prove to win on its counterclaim of fraud. Despite this instruction,

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[4] Haynes submitted a requested jury instruction on equitable estoppel (Haynes Supp. App. 639) and also argued that his equitable estoppel claim should be submitted to the jury in opposition to Trane's *Rule 50(a)* motion (App. 3458-59).

the jury found *against* Trane on its affirmative defense and *for* Trane on its counterclaim. Such findings are **[**23]** incompatible under the instruction given.

HTSA argues that the verdicts were not inconsistent, because fraud is not an affirmative defense to a breach of contract claim. HTSA also argues that once the district court granted HTSA's *Rule 50* motion with respect to Trane's fraud counterclaim, there was no fraud verdict to be inconsistent with HTSA's breach of contract verdict.

We agree that the district court erred when it permitted Trane's fraud claim to be considered as an affirmative defense to HTSA's breach of contract claim. ***HN12***[] Fraud is a claim that sounds in tort; and fraud independent of a contract is not a proper affirmative defense to a claim that a contract was breached. See *Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923, 928 (N.D. Cal. 1970)* ("No case could be found, and no commentator has suggested, that a tort committed by one party to a contract against the other, independent of the contract itself, is a defense to a breach of contract action by the tortfeasor.").

HN13[] Fraud that is a prior material breach of a contract may be a viable affirmative defense to a breach of contract claim. *Hampton v. Minton, 785 S.W.2d 854, 857-58 (Tex. App. 1990)*. **[**24]** But in this case the district court had already ruled that HTSA's alleged fraud was not a prior breach of the distributorship agreement. Trane failed to appeal that ruling, thus rendering it the law of the case.

The district court should not have instructed the jury that fraud was an affirmative **[*796]** defense to HTSA's breach of contract claim. But, whether or not the instruction was valid, the jury obviously was confused by it and reached inconsistent and incompatible verdicts. The district court should have ordered a new trial. ***HN14***[] A court cannot let a verdict stand where juror confusion is evident, and we must reverse the judgment with respect to those verdicts. *Jarvis v. Commercial Union Assur. Cos., 823 F.2d 392, 395-96 (10th Cir. 1987)* (citations omitted); *Global Van Lines, Inc. v. Nebeker, 541 F.2d 865, 868 (10th Cir. 1976)* (citations omitted).

Our decision does not entitle HTSA to retry its claim for breach of the distributorship agreement. The district court should have dismissed HTSA's claim when Trane moved for judgment as a matter of law at the close of HTSA's evidence. (App. 2645-46). Judgment as a matter of law was appropriate under *Fed. R. Civ. P. 50(a)*, **[**25]** because HTSA failed to provide evidence of damages resulting from Trane's breach of the distributorship agreement.

HTSA claimed that Trane's termination without notice breached the agreement. The agreement provided that it could be terminated "(a) by either party, with or without cause, upon 90 days written notice; . . . ." or for other reasons not at issue here. (App. 4680-69). Under the plain language of the agreement, termination itself could not have been the breach. Trane was expressly entitled to terminate the agreement, with or without cause. Modification of the HTSA distributorship agreement was not an issue identified in the district court, nor was there any evidence offered at trial which suggested any modification. The only breach that the jury could reasonably have found was Trane's failure to give 90 days notice before terminating the agreement.

HTSA presented no evidence to support a finding of damages resulting from Trane's failure to give proper 90-day notice of termination. HTSA's damages evidence centered on damages resulting from the fact of termination. HTSA's damages expert, Jon Karraker, repeatedly stated that his calculations were based on damages **[**26]** stemming from termination of the contract. Trane argues, and we agree, that there was no evidence from which the jury could assess damages as a result of Trane's failure to give proper notice, which was the only identifiable breach of the distributorship contract.

HTSA argues on appeal that Trane did not argue the "causation issue" in its *Rule 50(a)* motion and thus did not properly preserve the issue for review. The phrase "causation issue" is inapt, but we assume that HTSA uses it to refer to the question of whether it offered evidence from which a reasonable jury could assess damages for Trane's failure to give 90 days notice of termination. The record reveals that Trane made several references to HTSA's failure to prove damages, specifically arguing that any damages caused by Trane's failure to give proper notice should be limited to those accruing within 90 days of the notice, and that HTSA did not offer such evidence. (App. 286; App. 340-43; App. 2645-50).

Even if Trane's objections were not clear from the record, ***HN15***[] this court would exercise its discretion to review the submission of HTSA's damages claim to the jury for plain error. See *Okland Oil Co. v. Conoco Inc., 144 F.3d 1308, 1314 n.4 (10th Cir. 1998)*. **[**27]** Under the plain error standard, we would reach the same conclusion. Because HTSA failed to present evidence of any damages incurred as a result of Trane's failure to give 90 days notice, the district court should have granted Trane's *Rule 50(a)* motion. We vacate the jury's verdict awarding damages to HTSA **[*797]** for breach of the distributorship agreement.

B. HTSA's Claim for Breach of Implied Duty Under the UCC.

The parties agree that Texas law applies to HTSA's claim for breach of the implied duty of good faith and fair dealing. During a pretrial conference, the district court dismissed that claim. HTSA argues that the dismissal was improper, because Texas law recognizes the implied duty of good faith and fair dealing in contracts for the sale of goods under the Uniform Commercial Code ("UCC").

Trane denies that the UCC applies to the distributorship agreement. However, the Texas Court of Appeals recently held, in accordance with the majority rule, that ***HN16***[] a distributorship agreement could be subject to the UCC. *Cont'l Casing Corp. v. Siderca Corp., 38 S.W.3d 782, 787-88 (Tex. App. 2001)*.

Nevertheless we agree that HTSA is not entitled to present evidence that **[**28]** Trane's termination of the distributorship agreement breached the implied duty under the UCC. ***HN17***[] Under Texas law, an implied covenant cannot contradict the express terms of a contract. *Exxon Corp. v. Atl. Richfield, 678 S.W.2d 944, 947 (Tex. 1984)*. By the express terms of its agreement, Trane had a right to terminate without cause on 90 days notice. HTSA already has failed to present evidence of any damages stemming from Trane's failure to give 90 days notice before terminating the agreement, and it is not entitled to another bite at that apple.

However, the terms of the distributorship agreement do not preclude HTSA from trying its claim for breach of the implied duty based on Trane's actions prior to termination. HTSA claimed in its First Amended Complaint and in the Pretrial Order that Trane's pretermination conduct constituted a breach of the implied duty. (App. 54; App. 105). Specifically, HTSA claimed that Trane:

> repeatedly withdrew products that Plaintiffs could sell or customers to whom Plaintiffs could sell such products; forced manufacturers of non-Trane equipment to pay Trane what amounted to a royalty on sales by Trane's franchises, including Plaintiffs, **[**29]** of such manufacturers' equipment without informing Plaintiffs; imposed price minimums and maximums and other pricing policies; and imposed numerous restrictions on how Plaintiffs could conduct their business -- including restrictions on the purchase and sale of "Commercial After-Market Products" and of non-Trane products.

(App. 105). If HTSA has evidence that those pretermination actions violated the implied duty of good faith and fair dealing, HTSA is entitled to present that evidence at trial.

We reverse the district court and remand for a trial on HTSA's claim with respect to Trane's pretermination actions. If, on remand, the jury determines that the sale of goods was the dominant factor in HTSA's distributorship agreement, thus making it subject to the Texas UCC, then the jury should also determine whether Trane breached the implied duty of good faith and fair dealing required under the UCC for such agreements.

III. TRANE'S COUNTERCLAIMS

A. The Counterclaim for Fraud.

The jury found for Trane on its fraud counterclaim against HTSA, but it was not asked to assess damages. The district court announced that it would assess damages after trial. However, before **[**30]** **[*798]** doing so, the district court overturned the jury's verdict. On January 12, 2000, the district court ruled, *sua sponte*, that "under the standards of *Rule 50*, the evidence does not support the counterclaim of fraud and, therefore, I'm dismissing it." (App. 3690). [5]

As previously explained, Trane's counterclaim for fraud must be retried. The jury returned inconsistent verdicts, demonstrating that it was confused. HTSA argues that the district court properly remedied this confusion by dismissing Trane's fraud counterclaim. We disagree. We have already discussed why no action short of retrying the case would remedy the inconsistent verdicts. Moreover, we find that there was sufficient evidence to support Trane's fraud counterclaim and the district court should not have dismissed it.

The parties agree that Colorado law **[**31]** applies to Trane's fraud claim. HTSA asserts that the district court was authorized to overturn the verdict because Trane was required to provide direct evidence of false transactions and failed to do so. However, ***HN18***[] direct evidence of fraudulent transactions is not required under Colorado law. *Kopeikin v. Merchs. Mortgage & Trust Co., 679 P.2d 599, 602 (Colo. 1984)* (*en banc*) (citations omitted) ("We have held repeatedly that fraud may be inferred from circumstantial evidence."). The cases from other jurisdictions cited by HTSA for the proposition that fraud must be proved by direct evidence are inapplicable. Under Colorado law, Trane needed only to produce circumstantial evidence from which the jury could infer fraud in order for the jury to find that HTSA was liable on Trane's counterclaim.

HTSA also argues that the district court erred when it instructed the jury that it only needed to find a pattern of fraudulent conduct in order to decide in favor of Trane on its fraud counterclaim. (App. 3641-42). [6] We reject this argument. The pattern and practice defined by the district court in its instruction clearly set forth for the jury the elements of fraud, and required **[**32]** the jury to find that each of them had been proved. The evidence that Trane presented at trial was sufficient for the jury to find a pattern of fraud by HTSA in submitting its claimback forms. Denice Louder, billing administrator for HTSA's distributor products group, testified by deposition that most of the claimback forms she submitted contained intentionally false information. She also testified extensively about the creation of false documentation intended to conceal the fraudulent claims. If **[*799]** believed, the evidence showed that the submission of false claimback forms and the subsequent concealment of their falsity was routine. Furthermore, the testimony regarding HTSA's pattern of fraud was supplemented by specific examples of claimback submissions that were fraudulent. HTSA asserts that Trane should not have been permitted to adduce evidence of specific fraudulent claimback submissions, because Trane was limited to presenting evidence on 336 claimback transactions which were the subject of a statistical analysis conducted by Trane's expert, Jo Marie Dancik. None of the specific examples of fraud offered by Trane at trial were within the statistical sampling transactions.

[33]** ***HN19***[] Admission of evidence is within the sound discretion of the trial court. *Seymore v. Shawver & Sons, Inc., 111 F.3d 794, 800 (10th Cir. 1997)* (citation omitted). We do not find that Trane was limited to presenting

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[5] Because we find that the fraud counterclaim must be retried, we need not decide Trane's assertion that the court had no authority to vacate the verdict without a post-verdict motion by HTSA.

[6] The instruction, in pertinent part read:

> For Trane to . . . recover from [HTSA] on its counterclaim for fraud by following a pattern or practice of falsifying documents submitted in support of claims for payment under the claimback program . . ., you must find that Trane has proven all of the following by a preponderance of the evidence:
>
> 1. [HTSA] regularly made false representations of past or present fact.
>
> 2. The fact was material.
>
> 3. [HTSA] made the representations knowing them to be false, or [HTSA] was aware that [HTSA] did not know whether it was true or false.
>
> 4. [HTSA] made the representations with the intent that Trane act in reliance on the representations.
>
> 5. Trane relied on the representations.
>
> 6. Trane's reliance was justified; and
>
> 7. This reliance caused damage to Trane by causing it to make payments to which HTSA was not entitled.

evidence on the statistical sampling transactions. Only Dancik was limited in her testimony to discussing the transactions that she sampled. We are not persuaded that other witnesses should have been prohibited from discussing claimback transactions which were outside the statistical samples.

HTSA further argues that the district court committed reversible error when it erroneously overruled HTSA's objections, asserted under *Fed. R. Evid. 404(b)*, to introduction of the specific examples of fraudulent transactions. HTSA asserts that the specific examples of fraud were evidence of other bad acts which, under *Rule 404(b)*, could not be used to show that HTSA made false statements in the 336 claimback transactions which were the subject of the statistical sampling conducted by Dancik. HTSA's argument is inapplicable here, where the "general statements of wrongdoing" were offered, not as evidence of other bad acts, but as primary evidence of an ongoing fraudulent **[**34]** pattern or practice.

We conclude that the district court did not err when it admitted specific evidence of HTSA's allegedly fraudulent acts in order to show a pattern or practice of fraud. Furthermore, the district court did not err when it overruled HTSA's objections made under *Rule 404(b)*. [7] We find no error in the instructions that were given on the fraud counterclaim (with the exception of treating fraud as an affirmative defense to HTSA's breach of contract claim, as previously discussed), and we conclude that the verdict of the jury was supported by the record. The district court's post-trial dismissal was an impermissible re-weighing of the evidence. *Lucas v. Dover Corp., 857 F.2d 1397, 1400 (10th Cir. 1988)*.

[35]** The jury was entitled to find, under the instructions they were given, that Trane proved its fraud counterclaim. Nevertheless, we remand for retrial of the counterclaim because the verdict, under the instructions given, was inconsistent with HTSA's breach of contract verdict.

B. The Counterclaims for Unjust Enrichment and an Accounting.

After trial, the district court dismissed Trane's counterclaims for unjust **[*800]** enrichment and an accounting, holding that Trane had waived them by pursuing its fraud counterclaim. Trane argues on appeal that it was not required to make an election, but that it was entitled under *Fed. R. Civ. P. 8* to plead in the alternative. HTSA makes no response to that argument, but claims that Trane did not prove its unjust enrichment claim; or, in the alternative, that unjust enrichment is a legal claim, so that the only error the district court could have committed was its refusal to submit the claim to a jury. HTSA also argues that Trane was not entitled to the equitable remedy of an accounting because it had an adequate legal remedy. We reject HTSA's arguments as unresponsive to the issue on appeal, and we reverse the dismissal of the claims and remand **[**36]** them for consideration on the merits.

The parties use both Texas and Colorado law to support their positions. It is irrelevant which state's law applies, since the law is the same in both states.

We can find no support for the district court's conclusion that the two counterclaims were waived when Trane proceeded with its fraud counterclaim. Trane correctly points out that ***HN21***[] *Fed. R. Civ. P. 8* permits a party to "state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Furthermore, ***HN22***[] both Texas and Colorado courts have allowed plaintiffs to pursue claims for both fraud and unjust enrichment. See *Ludlow v. DeBerry, 959 S.W.2d 265, 275, 279 (Tex. App. 1998)*; *Bock v. Am. Growth Fund Sponsors, Inc., 904 P.2d 1381, 1384*, *24 Colo. Law. 2403, 19 Brief Times Rptr.*

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[7] HTSA also argues that the district court committed reversible error when it admitted evidence of fraudulent acts under *Fed. R. Evid. 406*. However, HTSA has not indicated where in the record it preserved this objection for appeal. In any event, the question is moot, because we have determined that the evidence was properly admitted under *Fed. R. Evid. 402*. ***HN20***[] "If evidence is admissible under any of the Federal Rules of Evidence, this court may affirm the admission." *United States v. Robinson, 978 F.2d 1554, 1562 (10th Cir. 1992)*.

1299, 1387 (Colo. Ct. App. 1995). We hold that the district court erred in finding that Trane waived its counterclaims for unjust enrichment and an accounting. [8]

[37]** ***HN23***[] Both Colorado and Texas courts have recognized that claims for unjust enrichment are equitable. *Salzman v. Bachrach, 996 P.2d 1263, 1265*, 29 Colo. Law. No. 5 230 (Colo. 2000) (en banc); *Bransom v. Standard Hardware, Inc., 874 S.W.2d 919, 927 (Tex. App. 1994)*. On remand, the district court should make findings as to whether or not Trane has an adequate remedy at law with respect to its counterclaim for unjust enrichment before determining whether the claim may be tried to the court.

The same determination should be made with respect to Trane's counterclaim for an accounting. ***HN24***[] An equitable claim for an accounting is not cognizable where an adequate remedy exists at law. *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962)* (citations omitted). However, an accounting may yet be appropriate where "the accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them." Id. (citation and internal quotation marks omitted). Here, Trane claims nearly 3,000 claimback submissions are at issue. The district court declined to submit the issue of damages to the jury in the first instance, **[**38]** because of the complexity of the fraud counterclaim. We conclude that this case is one where the accounts are so complicated that an equitable accounting may be warranted.

IV. PLAINTIFFS' CLAIMS FOR BREACH OF FIDUCIARY DUTY

At a pretrial conference, without explanation, the district court dismissed Haynes's and HTSA's claims for breach of fiduciary duty. Trane previously had **[*801]** moved for summary judgment on those claims, and Trane's motion was ripe for consideration at the pretrial conference. Because the district court had affidavits and other evidence before it on these claims, we assume that it considered such evidence. We therefore review the dismissal of Haynes's and HTSA's claims for breach of fiduciary duty as a grant of summary judgment pursuant to Trane's motion, and we determine that the decision was in error as to both Plaintiffs.

The parties agree that the claims for breach of fiduciary duty are governed by Colorado law. ***HN25***[] Colorado courts recognize a cause of action for breach of fiduciary duty, but they do not appear to have specifically addressed whether such a cause of action is available in the context of a franchise relationship or a distributorship relationship. **[**39]** The only Colorado case we have found or been provided addressing the existence of a fiduciary duty in a franchise relationship is *Mr. Steak, Inc. v. Belleview Steak, Inc., 38 Colo. App. 278, 555 P.2d 179 (Colo. Ct. App. 1976)*. But that case provides no guidance on whether Colorado courts would recognize such a duty.

Some courts have found no inherent fiduciary duty in a franchise or distributorship relationship. See *Marcella & Co., Inc. v. Avon Prods., Inc., 282 A.D.2d 718, 724 N.Y.S.2d 192* (N.Y. App. Div.), leave to appeal denied, *759 N.E.2d 372 (N.Y. 2001)*; *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594-96 (Tex. 1992)*; *Power Motive Corp. v. Mannesmann Demag Corp., 617 F. Supp. 1048, 1051 (D. Colo 1985)* (applying Ohio law). Other courts have held that a fiduciary duty may arise in a franchise relationship, depending on the relationship between the parties. See *Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS, 664 F. Supp. 1422, 1425 (D. Utah 1987)*; *Carter Equip. Co. v. John Deere Indus. Equip. Co., 681 F.2d 386, 390-91 (5th Cir. 1982)*. **[**40]**

In the absence of direction from Colorado courts that fiduciary duties never can arise in franchise relationships, we will apply ***HN26***[] the test that Colorado courts generally apply when determining whether there has been a breach of fiduciary duty. Fiduciary duties may arise when parties are engaged in a fiduciary, or confidential, relationship. *Moses v. Diocese of Colo., 863 P.2d 310, 321 (Colo. 1993)* (en banc). "'A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon

[8] HTSA's assertion that Trane failed to offer adequate proof of its waived counterclaims is without merit, since the substance of those claims was never before the court or the jury.

matters within the scope of the relation.'" Id. (quoting Restatement (Second) of Torts § 874 cmt. a (1979)). Such a duty may arise when one party is in a superior position relative to the other party. Id. (citations omitted); First Nat'l Bank of Meeker v. Theos, 794 P.2d 1055, 1060-61 (Colo. Ct. App. 1990). But "an unequal relationship does not automatically create a fiduciary duty. In order to be liable, the superior party must assume a duty to act in the dependent party's best interest." Moses, 863 P.2d at 322 (citations omitted). "A fiduciary relationship can arise out of a **[**41]** relationship of blood, business, friendship, or association." Id.; see also First Nat'l Bank of Meeker, 794 P.2d at 1061 (setting forth test).

Haynes testified in an affidavit concerning his long relationship with Trane, the assurances of Trane, and the trust engendered by those assurances. (Haynes Supp. App. 121-22). This evidence is sufficient to create a genuine issue of material fact as to whether Haynes and Trane were involved in a fiduciary or confidential relationship and, if so, whether Trane breached that duty. Accordingly, we reverse and remand for trial on this issue.

[*802] V. PLAINTIFFS' ANTITRUST CLAIMS

The district court granted summary judgment for Trane on antitrust claims made by both Haynes and HTSA. These claims stem from Trane's pricing policies. Plaintiffs claimed that Trane's policies regarding the mixed sales of Trane and non-Trane products constituted vertical price fixing, in violation of the Sherman Act, 15 U.S.C. § 1. Plaintiffs sought treble damages under the Clayton Act, 15 U.S.C. § 15.

Trane's Manual on Policies and Procedures No. 34 regulated the division of profits when Haynes or **[**42]** HTSA made a "mixed sale" comprised of both a Trane product and a non-Trane product. Such sales were permitted when necessary to meet a customer's requirements. Essentially, the manual prevented Plaintiffs from allocating all of the profit from such a sale to the non-Trane product. The manual specified that Haynes or HTSA could keep the first thirty percent of any mark-up over cost on a non-Trane product involved in a mixed sale. After the first thirty percent, Plaintiffs were required to split the mark-up evenly with Trane. In addition, the mark-up of the non-Trane products had to be directly proportional to the mark-up of the Trane products, based on the lowest price at which Trane would sell its products. Haynes and HTSA contend that the provisions of the manual violate federal ***antitrust law***, because they effectively mandate minimum prices for Trane products and maximum prices for non-Trane products.

HN27[] To survive summary judgment, a plaintiff must demonstrate an "antitrust injury," which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of **[**43]** the violation or of anticompetitive acts made possible by the violation." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). The purpose of this requirement is to ensure that "courts connect the alleged injury to the purposes of the antitrust laws. Compensation for that injury must be consistent with the purposes of ***antitrust law*** generally and with the rationale for condemning the particular defendant." 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 362a (Revised ed. 1995). "The point is to prevent an award of damages for losses stemming from continued or increased competition rather than diminished competition -- a result that otherwise would be 'inimical' to the antitrust laws." Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394, 1400 (D. Colo 1995) (citations and internal quotation marks omitted).

The district court held that Haynes and HTSA failed to show antitrust injury because they did not present evidence of an injury to competition or the relevant market. In so holding, the district court stated that "'the injury of the type the antitrust laws were intended to prevent' **[**44]** is an injury to competition or an injury to the relevant market." (App. 96-7). The court then explained Plaintiffs' lack of evidence regarding injury to competition.

Plaintiffs argue on appeal that they are not required to show an anticompetitive effect, because anticompetitive effect is an element of antitrust liability, rather than an antitrust injury. Plaintiffs disagree with the district court's definition of the "injury of the type the antitrust laws are intended to prevent." They claim that the relevant injury is not injury to competition, but rather the "crippling [of] the freedom of traders . . . thereby restraining their ability to sell in accordance with their own judgment." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213, *95 L. Ed. 219, 71* ***[*803]*** *S. Ct. 259 (1951)*, overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*.

Haynes and HTSA argue that, because the policies manual interfered with their ability to sell in accordance with their own judgment, they suffered antitrust injury. We disagree. Their definition is too broad. It could be used to find **[**45]** antitrust injury in a situation where pricing regulation resulted in increased competition. In such a case, the alleged injury certainly would not "reflect the anticompetitive effect" of the regulation. *Brunswick Corp., 429 U.S. at 489*.

Plaintiffs had to show that their alleged injuries reflect the anticompetitive effect of the alleged violation. Implicit in that requirement is the condition that they must first show an actual anticompetitive effect. Plaintiffs offered no evidence that showed an anticompetitive effect, and therefore, showed no antitrust injury.

The result is consistent with the way in which we have analyzed antitrust injury in the past. In *Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, 754-55 (10th Cir. 1999)*, we held that the plaintiff adequately alleged antitrust injury after finding that the defendants' actions resulted in a reduction of competition from two competitors in the market to one monopolist. Here, Haynes and HTSA made no attempt to show that the policies manual resulted in reduced competition. Rather, they merely offered evidence to suggest that the policies of the manual resulted in a reduction of their **[**46]** profits. We note, as did the district court, that the manual only affected the allocation of internal profits; customers saw no increase or decrease in prices because of its implementation. Moreover, there is no indication that Plaintiffs were foreclosed from competing in the market as a result of the policies. Cf. *Pace Elec., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 145 (3d Cir. 2000)* ***HN28***[] ("[A] dealer terminated for its refusal to abide by a vertical minimum price fixing agreement suffers antitrust injury."). We affirm the district court's grant of summary judgment to Trane on Plaintiffs' antitrust claims.

CONCLUSION

For the reasons stated above, we AFFIRM in part, VACATE in part, REVERSE in part, and REMAND.

Specifically, we affirm the district court's dismissal of Haynes's claim for breach of the sales franchise agreement as it was written, we reverse and vacate the jury's verdict for Haynes on his claim for breach of implied covenants under the agreement as written, and we remand for further proceedings consistent with this opinion on the issues of modification of the agreement and equitable estoppel.

We reverse the jury's verdict for HTSA as **[**47]** to damages for breach of the express terms of the distributorship agreement with respect to termination. We remand for trial on HTSA's claim for breach of the implied duty with respect to Trane's pretermination actions.

We reverse the district court's decision to overturn the jury's verdict for Trane on its fraud counterclaim and remand for a new trial on the counterclaim. We reverse the district court's dismissal of Trane's counterclaims for unjust enrichment and an accounting, and we remand for consideration of those counterclaims, consistent with this opinion.

We reverse the grant of summary judgment on Haynes's and HTSA's claims for breach of fiduciary duty and remand for trial. We affirm the district court's grant of summary judgment on Haynes's and **[*804]** HTSA's antitrust claims. Haynes's and HTSA's requests for prejudgment interest have been rendered moot by this opinion.

Entered for the Court

G. Thomas VanBebber

Senior District Judge

Pfau v. Reliant Energy, Inc. (In re Reliant Sec. Litig.)

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

August 27, 2002, Decided

CIVIL ACTION NO. 02-1810 (CONSOLIDATED), CIVIL ACTION NO. 02-1837, CIVIL ACTION NO. 02-1920, CIVIL ACTION NO. 02-2264, CIVIL ACTION NO. 02-2292

Reporter
2002 U.S. Dist. LEXIS 27777 *

IN RE RELIANT SECURITIES LITIGATION; PETER PFAU, Plaintiff, v. RELIANT ENERGY, INC., R. STEVE LETBETTER, and STEPHEN W. NAEVE, and MARY P. RICCIARDELLO, Defendants. ROBERT GLENN, III and JOHN PAGE, Plaintiffs, v. RELIANT RESOURCES, INC., R. STEVE LETBETTER, STEPHEN W. NAEVE, and MARY P. RICCIARDELLO, Defendants. MILTON FERGUSON, Plaintiff, v. RELIANT ENERGY, INC., R. STEVE LETBETTER, STEPHEN W. NAEVE, and MARY P. RICCIARDELLO, Defendants. SCOTT SCHROEN, Plaintiff, v. RELIANT ENERGY, INC., R. STEVE LETBETTER, STEPHEN W. NAEVE, and MARY P. RICCIARDELLO, Defendants.

Subsequent History: Motion granted by, Motion granted by, in part, Claim dismissed by *In re Reliant Sec. Litig., 2004 U.S. Dist. LEXIS 27951 (S.D. Tex., Jan. 16, 2004)*

Core Terms

law firm, lead counsel, lead plaintiff, appointment, consolidated, co-lead, class action, securities fraud, cases, prosecuting, incapable, defenses, liaison

LexisNexis® Headnotes

Education Law > Faculty & Staff > Misconduct & Performance > Dishonesty

Pensions & Benefits Law > Governmental Employees > Teacher Pensions

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Pensions & Benefits Law > Governmental Employees > Police Pensions

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN1[] **Misconduct & Performance, Dishonesty**

To serve as a representative party in a securities fraud class action, a plaintiff must file a sworn certification stating certain matters specified by statute. *15 U.S.C.S. § 78u-4(a)(2)(A)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN2[] **Prerequisites for Class Action, Adequacy of Representation**

With regard to appointment of lead plaintiff in a securities fraud class action suit, the "most adequate plaintiff" is the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members. *15 U.S.C.S. § 78u-4(a)(3)(B)(i)*. *Section 78u-4* creates a rebuttable presumption that the most adequate plaintiff is the person or group of persons that (1) filed the complaint or made a motion to serve as lead plaintiff; (2) in the court's determination, has the largest financial interest in the relief sought by the class, and (3) otherwise meets the requirements of *Fed. R. Civ. P. 23*. *15 U.S.C.S. § 78u-4(a)(3)(B)(iii)(I)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > Appeals > En Banc Determinations

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN3[] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23 imposes four requirements on parties seeking to sue in behalf of a class: numerosity, commonality, typicality, and adequacy of representation. *Fed. R. Civ. P. 23(a)*. Typicality and adequacy are directly relevant to the selection of a lead plaintiff in a securities fraud class action. Thus, the "most adequate plaintiff" must (1) have claims or defenses that are typical of the claims or defenses of the class, and (2) fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. The Private Securities Litigation Reform Act (PSLRA), *15 U.S.C.S. § 78u-4*, raises the standard adequacy threshold by requiring that securities class actions be managed by active, able class representatives who are informed and can demonstrate that they are directing the litigation. The "lead plaintiff" provisions of the PSLRA direct courts to appoint, as lead plaintiff, the most sophisticated investor available and willing so to serve in a putative securities class action.

Antitrust & Trade Law > Sherman Act > Defenses

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

Antitrust & Trade Law > Clayton Act > Defenses

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN4[] **Sherman Act, Defenses**

With regard to appointment of lead plaintiff in a securities fraud class action suit, a member of the purported plaintiff class may rebut the presumption that a particular plaintiff or group of plaintiffs is the "most adequate plaintiff" upon proof that the presumptively "most adequate plaintiff" (1) will not fairly and adequately protect the interests of the class, or (2) is subject to unique defenses that render that plaintiff incapable of adequately representing the class. *15 U.S.C.S. § 78u-4(a)(3)(B)(iii)(II)*.

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN5[] **Class Attorneys, Appointments**

With regard to appointment of lead plaintiff in a securities fraud class action suit, large institutional investors tend to be sophisticated investors capable of controlling attorneys in securities fraud litigation, and the Private Securities Litigation Reform Act of 1995, by emphasizing financial stake, expresses a preference for appointing such investors.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Counsel

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN6[] **Counsel, Right to Counsel**

With regard to appointment of lead plaintiff in a securities fraud class action suit, once a plaintiff or group of plaintiffs is selected as the "most adequate plaintiff," the most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class. *15 U.S.C.S. § 78u-4(a)(3)(B)(v)*. The right to select and retain counsel is not absolute. The district court has the power and the duty to supervise lead counsel selection.

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

HN7[] Class Attorneys, Appointments

Although appointment of multiple law firms as lead counsel in certain circumstances may be beneficial to the litigation of a class action, appointment of co-counsel more commonly will create needless complications, administratively and otherwise, substantial multiplicity of effort, and materially increased litigation costs and expenses. Thus, district courts have declined to appoint co-lead counsel in securities fraud class actions absent a showing that co-counsel will better protect the interests of the plaintiff class.

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Costs & Attorney Fees

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Counsel

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

Securities Law > ... > Remedies > Damages > Costs & Attorney Fees

HN8[] Securities Litigation Reform & Standards, Costs & Attorney Fees

With regard to appointment of lead counsel in a securities fraud class action, consistent with the Private Securities Litigation Reform Act (PSLRA), *15 U.S.C.S. § 78u-4*, a lead plaintiff should act reasonably to minimize the incurrence of needless attorneys' fees and expenses in prosecuting their case.

Counsel: [*1] For Individually Fern Lerner and on Behalf of all others similarly Situated, Plaintiff: Thomas E Bilek, Houston, TX.

For Louisiana School Employees' Retirement System, Louisiana Municipal Police Employees' Retirement System, Plaintiffs: Alan Schulman, David R Stickney, Niki L O'Neel, Bernstein Litowitz et al, San Diego, CA; Jacks C Nickens, Nickens Keeton et al, Houston, TX; Michael J Pucillo, Wendy Hope Zoberman, Berman Devalerio et al, West Palm Beach, FL; Peter A Pease, Berman DeValerio & Pease, Boston, MA.

For Boca Raton Police & Firefighters Retirement System, Plaintiff: Alan Schulman, David R Stickney, Niki L O'Neel, Bernstein Litowitz et al, San Diego, CA; Jacks C Nickens, Nickens Keeton et al, Houston, TX; Michael J Pucillo, Wendy Hope Zoberman, Jay W Eng, Berman Devalerio et al, West Palm Beach, FL; Peter A Pease, Berman DeValerio & Pease, Boston, MA.

For Individually Eugene Wilm and on behalf of all others similarly situated, Ariel Holdings LLC, individually and on behalf of itself and all others similarly situated, Individually Mitchell Hirth and on behalf of all others similarly situated, Individually John Kainrath and on behalf of all others similarly situated, **[*2]** James K Lindsay, on behalf of himself and all others similarly situated, Consol Plaintiffs: Thomas E Bilek, Houston, TX.

For David Vaughn, Consol Plaintiff: Paul F Bennett, Gold Bennett et al, San Francisco, CA; Thomas W Sankey, Godwin Gruber LLP, Houston, TX.

For Raymond Bergman On behalf of himself and all others similarly situated, Scott Schroen on behalf of himself and all others, Consol Plaintiffs: John G Emerson, Jr, Emerson Poynter LLP, Houston, TX.

For individually Fraizer Investments, individually and on behalf of all others similarly situated, Consol Plaintiff: Roger Farrell Claxton, Claxton & Hill PLLC, Dallas, TX.

For Mark Kaysen, individually and on behalf of all others similarly situated, Consol Plaintiff: Kenneth S Marks Susman Godfrey LLP, Houston, TX.

For Peter Pfau, on behalf of himself and all others similarly situated, Milton Ferguson, on behalf of himself and all others similarly situated, John Page, on behalf of themselves and all others similarly situated, Robert Glenn, III, Consol Plaintiffs: Amanda Frances Bell, Puls Taylor et al, Fort Worth, TX.

For Individually Carolyn Williams and on behalf of all others similarly situated, **[*3]** Consol Plaintiff: Charles Cary Patterson, Nix Patterson et al, Daingerfeld, TX; George L McWilliams, Patton Haltom et al, Texarkana, TX.

For Reliant Resources Inc, Defendant: James Edward Maloney, Maria Wyckoff Boyce, Baker & Botts, Houston, TX; Lawrence H Hunt, Jr, R Rene Pengra, Sidley Austin et al, Chicago, IL.

For R Steve Letbetter, Steven W Naeve, Mary P Ricciardello, Defendants: James Edward Maloney, Maria Wyckoff Boyce, Baker & Botts, Houston, TX; Lawrence H Hunt, Jr, Sidley Austin et al, Chicago, IL.

For Reliant Energy Inc, Consol Defendant: James Edward Maloney, Maria Wyckoff Boyce, Baker & Botts, Houston, TX; Lawrence H Hunt, Jr, Sidley Austin et al, Chicago, IL.

For Deloitte & Touche LLP, Consol Defendant: Eric J R Nichols, Beck Redden & Secrest, Houston, TX; Michael P Carroll, Davis Polk et al, New York, NY.

For Goldman Sachs & Co, Credit Suisse First Boston Corporation, ABN Amro Rothschild LLC, Banc of America Securities LLC, Deutsche Banc Alex Brown Inc, Merrill Lynch Pierce Fenner & Smith Inc, UBS Warburg LLC, Consol Defendants: Charles G King, III, King & Pennington LLP, Houston, TX; Dimitry Joffe, Paul Vizcarrondo, Jr, Wachtell Lipton et al, **[*4]** New York, NY;

For CenterPoint Energy Inc, successor in interest to Reliant Energy, Consol Defendant: James Edward Maloney, Baker & Botts, Houston, TX.

For Joe Bob Perkins, Consol Defendant: Dixie L Johnson, Fried Frank Harris Shriver, Washington, DC; Howard W Goldstein, Washington, DC; Kevin J Harnisch, Fried Frnk et al, Washington, DC; Thomas C Godbold, Fulbright & Jaworski, Houston, TX.

For Ardsley Partners, Societe Generale Asset Management International Ltd, Movants: Andrew L Barroway, Schiffrin and Barroway LLP, Bala Cynwyd, PA; John G Emerson, Jr, Emerson Poynter LLP, Houston, TX.

For Louisiana Retirement Funds consisting of the Louisiana School Employees' Retirement System, Louisiana Municipal Police Employees Retirement System, Movants: Alan Schulman, Bernstein Litowitz et al, San Diego, CA; Jacks C Nickens, Nickens Keeton et al, Houston, TX; Peter A Pease, Berman DeValerio & Pease, Boston, MA.

For Wan-Cheng Chiu, Gary H Gutchess, Individually and on behalf of Gary H Gutchess IRA, Movants: Steven G Schulman, Milberg Weiss et al, New York, NY; Thomas E Bilek, Houston, TX.

For Archdiocese of Milwaukee, Supporting Fund Inc, Movant: David R Scott, **[*5]** Scott & Scott, Colchester, CT; Neil Rothstein, Scott & Scott LLD, Colchester, CT; Theodore C Anderson, Kilgore & Kilgore PLLC, Dallas, TX.

Judges: EWING WERLEIN, JR., UNITED STATES DISTRICT JUDGE. Vanessa D. Gilmore, Judge. Nancy F. Atlas, Judge.

Opinion by: EWING WERLEIN, JR.

Opinion

MEMORANDUM AND ORDER

Pending are the Motion of the Boca Raton Police & Firefighters Retirement System and the Louisiana Retirement Funds for the Appointment as Lead Plaintiff and Approval of Their Selection of Co-Lead and Liaison Counsel (Document No. 12), [1] and Defendants' Motion to Consolidate Related Cases (Document No. 22). No opposition *has* been filed in response to these motions, and in accordance with Local Rule 7.4, the motions are deemed unopposed.

I. Consolidation

Defendants move to consolidate Civil Cause No. H-02-1837, *Pfau* **[*6]** *v. Reliant Energy*, Inc., Civil Cause No. H-02-1920, *Glenn v. Reliant Resources, Inc.*, Civil Cause No. H-02-2264, *Ferguson v. Reliant Energy, Inc.*, and Civil Cause No. H-02-2292, *Schroen v. Reliant Energy, Inc.*, into this consolidated action, Civil Cause No. H-02-1810, *In re Reliant Securities Litigation.* By Order entered August 1, 2002, numerous cases involving common questions of law and fact to those raised by Plaintiffs Pfau, Glenn, Page, Ferguson, and Schroen were consolidated into this action. The aforementioned Plaintiffs have filed no opposition to consolidation of their claims. Accordingly, Defendants' motion will be granted.

II. Lead Plaintiff

Boca Raton Police & Firefighters Retirement System and the Louisiana Retirement Funds, which consists of the Louisiana School Employees' Retirement System (LSERS) and the Louisiana Municipal Police Employees' Retirement System (MPERS), (collectively, the "Retirement Systems") seek to serve as lead plaintiff in this securities fraud class action. As a preliminary matter, ***HN1***[] to serve as a representative party in a securities fraud class action, a plaintiff must file a sworn certification stating certain matters specified **[*7]** by statute. *See 15 U.S.C. § 78u-4(a) (2) (A)*. Each of the Retirement Systems has filed a certification in compliance with this statute.

An Order of Consolidation in Civil Action No. H-02-1810 was entered August 1, 2002, and the additional four above-captioned cases are consolidated under the same cause number by this Order. "As soon as practicable" after ruling on pending motions to consolidate, "the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions." Id. at *§ 78u-4(a)(3)(B)(ii)*. ***HN2***[] The "most adequate plaintiff" is the "member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." Id. at *§ 78u-4(a)(3)(B)(i)*. *Section 78u-4* creates a rebuttable presumption that the most adequate plaintiff is the person or group of persons that (1) filed the complaint or made a motion to serve as lead plaintiff; (2) in the court's determination, has the largest financial interest in the relief sought by the class, and (3) otherwise meets the requirements of *Fed. R. Civ. P. 23*. Id. at *§* ***[*8]*** *78u-4(a)(3)(B)(iii)(I)*.

HN3[] *Rule 23* imposes four requirements on parties seeking to sue in behalf of a class: numerosity, commonality, typicality, and adequacy of representation. *See fed. R. CIV. P. 23(a)*. Typicality and adequacy are directly relevant to the selection of a lead plaintiff in a securities fraud class action. *See In re Enron Corp. Sec. Litig., 206 F.R.D. 427, 441 (S.D. Tex. 2002)*. Thus, the "most adequate plaintiff" must (1) have claims or defenses that are typical of the claims or defenses of the class, and (2) fairly and adequately protect the interests of the class. *See FED. R. CIV. P. 23(a)*. "The PSLRA raises the standard adequacy threshold" by requiring that "securities class actions be managed by active, able class representatives who are informed and can demonstrate that they are directing the litigation." *Berger v. Compaq Computer Corp., 257 F.3d 475, 483 (5th Cir. 2001)* (quotation omitted). The "lead plaintiff" provisions of the PSLRA "direct courts to appoint, as lead plaintiff, the most sophisticated

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[1] Various other potential class members also filed motions for appointment as lead plaintiff and for approval of lead counsel. These motions have been withdrawn. *See* Document No. 24.

investor available and willing so to serve in a putative securities class action. **[*9]** " *Berger v. Compaq Computer Corp., 279 F.3d 313, 313 (5th Cir. 2002)* (denying rehearing en banc).

HN4[] A member of the purported plaintiff class may rebut the presumption that a particular plaintiff or group of plaintiffs is the "most adequate plaintiff" upon proof that the presumptively "most adequate plaintiff" (1) will not fairly and adequately protect the interests of the class, or (2) is subject to unique defenses that render that plaintiff incapable of adequately representing the class. *15 U.S.C. § 78u-4(a) (3) (B) (iii) (II)*.

The Retirement Systems, as the only plaintiff or plaintiff group seeking appointment as lead plaintiff, have produced evidence that they collectively suffered over $ 1 million in financial losses. There is no indication of record that the Retirement Systems have claims and defenses that are not typical of the claims and defenses of the proposed class, nor is there any indication that the Retirement Systems will not fairly and adequately represent the interests of the proposed class. ***HN5***[] Large institutional investors such as the Retirement Systems tend to be sophisticated investors capable of controlling attorneys in securities **[*10]** fraud litigation, and the Private Securities Litigation Reform Act of 1995, by emphasizing financial stake, expresses a preference for appointing such investors. *See, e.g.*, *Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129, 1135 (C.D. Cal. 1999)*; *Gluck v. CellStar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997)*. Because the Retirement Systems, the only plaintiff or plaintiff group seeking appointment as lead plaintiff, are the presumptive most adequate plaintiff, their unopposed motion for appointment as lead plaintiff will be granted.

III. Lead Counsel

HN6[] Once a plaintiff or group of plaintiffs is selected as the "most adequate plaintiff," the most adequate plaintiff "shall, subject to the approval of the court, select and retain counsel to represent the class." Id. at *§ 78u-4(a)(3)(B)(v)*. The right to select and retain counsel is not absolute. *In re Cendant Corp. Litig., 264 F.3d 201, 273 (3d Cir. 2001)*. The district court has the power and the duty to supervise lead counsel selection. *See* id.

Rather surprisingly, the Retirement Systems seek to appoint as lead counsel three separate law firms: Bernstein Litowitz **[*11]** Berger & Grossmann L.L.P., Berman DeValerio Pease Tabacco Burt & Pucillo, and Schiffrin & Barroway, L.L.P., plus a fourth law firm as local liaison counsel: Nickens, Lawless & Flack, L.L.P. ***HN7***[] Although appointment of multiple law firms as lead counsel in certain circumstances may be beneficial to the litigation of a class action, appointment of co-counsel more commonly will create needless complications, administratively and otherwise, substantial multiplicity of effort, and materially increased litigation costs and expenses. *See* *In re Milestone Scientific Sec. Litig., 187 F.R.D. 165, 176-80 (D.N.J. 1999)*. Thus, district courts have declined to appoint co-lead counsel in securities fraud class actions absent a showing that co-counsel will better protect the interests of the plaintiff class. *See* *Bell v. Ascendant Solutions, Inc., 2002 U.S. Dist. LEXIS 6850, 2002 WL 638571, *6 (N.D. Tex. 2002)*; *In re Orbital Sciences Corp. Secs. Litig., 188 F.R.D. 237, 240 (E.D. Va. 1999)*; *Milestone, 187 F.R.D. at 176, 181*.

The Retirement Systems have made no showing that the controversy in this case requires the retention of three separate law **[*12]** firms as lead counsel, nor have they made any effort to explain why any one of the law firms suggested is incapable of serving as sole lead counsel for the class in association with local liaison counsel. To the contrary, Retirement Systems have not demonstrated any identifiable shortcomings on the part of any of these law firms that require the addition of a second law firm, much less even a third law firm, as co-lead counsel. According to the biographies and resumes submitted, the Court is advised as follows:

BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO

> Berman DeValerio Pease Tabacco Burt & Pucillo is one of the nation's leading law firms devoted to representing the victims of securities fraud and ***antitrust law*** violations. The Firm concentrates its practice on complex litigation throughout the United States.
>
> With offices in Boston, San Francisco and West Palm Beach, the Firm consists of 34 attorneys focusing almost exclusively on prosecuting class actions. The Firm has prosecuted hundreds of class actions on behalf of

> defrauded individuals and institutions, chiefly victims of securities fraud, consumer fraud and ***antitrust law*** violations. The firm has recovered **[*13]** over $ 1 billion dollars for clients and achieved significant changes in corporate governance.

The Berman DeValerio law firm claims to have been lead counsel, sole lead counsel, or co-lead counsel in numerous cases, and has offered no explanation as to why it is incapable of acting as sole lead counsel in this particular case or why it would require the assistance of another law firm as co-lead counsel.

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

> Bernstein Litowitz Berger & Grossman LLP, a firm of 32 attorneys in three offices located in New York, California and New Jersey, prosecutes class and private actions, nationwide, on behalf of individual and institutional clients. The firm's litigation practice concentrates in the area of securities class actions in federal and state courts; corporate governance litigation, including claims for breach of fiduciary duty and proxy violations; antitrust; prosecuting violations of federal and state anti-discrimination laws and vindication of employee rights; consumer and toxic/mass tort actions. We also handle, on behalf of major institutional clients and lenders, more general complex commercial litigation involving allegations **[*14]** of breach of contract, accountants' liability, breach of fiduciary duty, fraud and negligence.
>
> * * *
>
> Since its founding in 1983, Bernstein Litowitz Berger & Grossmann LLP has litigated some of the most complex cases in history. For example, the firm was lead counsel in the celebrated In re *Washington Public Power Supply System Litigation*, which, after seven years of litigation and three months of jury trial, resulted in the then largest securities fraud settlement ever. Equally important, Bernstein Litowitz Berger & Grossman LLP has successfully advanced novel and socially beneficial principles by developing important new law in the areas in which we litigate.

The Bernstein Litowitz law firm claims to have been lead counsel, sole lead counsel, or co-lead counsel in numerous cases, and has offered no explanation as to why it is incapable of acting as sole lead counsel in this particular case or why it would require the assistance of another law firm as co-lead counsel.

SCHIFFRIN & BARROWAY LLP

> Schiffrin & Barroway, LLP, located just outside of Philadelphia, has specialized in complex class action litigation for over fifteen years, representing individual **[*15]** and institutional stockholders and consumers in class action litigation pending in state and federal courts throughout the United States. During the firm's successful history, Schiffrin & Barroway has recovered hundreds of millions of dollars for defrauded stockholders and aggrieved consumers. The firm, which has developed a nationwide reputation for excellence, is led by its senior partners, Richard S. Schiffrin and Andrew L. Barroway, with assistance from partners, Marc A. Topaz, David Kessler and Krishna B. Narine and numerous experienced associates and staff able to manage all aspects of complex class action litigation.

The Schiffrin & Barroway law firm claims to have been lead counsel, sole lead counsel, or co-lead counsel in numerous cases, and has offered no explanation as to why it is incapable of acting as sole lead counsel in this particular case or why it would require the assistance of another law firm as co-lead counsel.

All other motions for appointment of lead plaintiff and accompanying motions for approval of lead counsel have been withdrawn. Given the submissions that have been made, the Court is of the opinion that the appointment of more than one lead law **[*16]** firm in this particular case is not necessary for the effective representation of the proposed class; that at least one if not all three of the law firms that have been proposed for co-lead counsel would appear to be capable of acting more efficiently as sole lead counsel; that there are other law firms capable of serving as sole lead counsel if none of the three above described firms is selected or will do so; and that, ***HN8***[] consistent with the PSLRA, Lead Plaintiff should act reasonably to minimize the incurrence of needless attorneys' fees and expenses in prosecuting their case. The motion and stipulation to appoint three different law firms all as co-lead counsel will therefore not be approved.

IV. Order

For the foregoing reasons, it is

ORDERED that Defendants' Motion to Consolidate Related Cases (Document No. 22) is GRANTED, and Civil Cause No. H-02-1837, *Pfau v. Reliant Energy, Inc.*, Civil Cause No. H-02-1920, *Glenn v. Reliant Resources, Inc.*, Civil Cause No. H-02-2264, *Ferguson v. Reliant Energy, Inc.*, and Civil Cause No. H-02-2292, *Schroen v. Reliant Energy, Inc.*, are hereby consolidated into Civil Action No. H-02-1810, In *re Reliant Securities Litigation.* **[*17]** It is further

ORDERED that the Motion of the Boca Raton Police & Firefighters Retirement System and the Louisiana Retirement Funds for the Appointment as Lead Plaintiff (Document No. 12-2) is GRANTED, and the Boca Raton Police & Firefighters Retirement System, the Louisiana School Employees' Retirement System, and the Louisiana Municipal Police Employees' Retirement System, are appointed as the lead plaintiff group in this case. It is further

ORDERED that the Motion of the Boca Raton Police & Firefighters Retirement System and the Louisiana Retirement Funds for Approval of Their Selection of Co-Lead and Liaison Counsel (Document No. 12-3), is DENIED. Principals of Lead Plaintiff Boca Raton Police & Firefighters Retirement System and the Louisiana Retirement Funds shall confer with one another, shall act with the kind of sophistication that the Court expects the lead plaintiff group to demonstrate in selecting and controlling attorneys and in managing the litigation and, within twenty-one (21) days after the entry of this Order shall move for approval of one law firm and a particular member of that law firm to serve as lead counsel. Lead Plaintiff if it wishes may also move for **[*18]** approval of a local liaison counsel.

The Clerk will enter this Order and provide a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 27th day of August, 2002.

EWING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE

In re Warfarin Sodium Antitrust Litig.

United States District Court for the District of Delaware

August 30, 2002, Decided

MDL No. 98-1232-SLR

Reporter

212 F.R.D. 231 *; 2002 U.S. Dist. LEXIS 16375 **; 2002-2 Trade Cas. (CCH) P73,791

In re WARFARIN SODIUM ANTITRUST LITIGATION; This document relates to: All Actions.

Subsequent History: *Affirmed by In re Warfarin Sodium Antitrust Litig., 2004 U.S. App. LEXIS 25180 (3d Cir. Del., Dec. 8, 2004)*

Prior History: *In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 2000 U.S. App. LEXIS 11973 (3d Cir. Del., 2000)*

Disposition: **[**1]** Class certification was granted. Settlement approval was granted. The court awarded attorneys' fees in the amount of 22.5% and expenses in the amount of $ 832,382.84. All motions to intervene were denied.

Core Terms

settlement, consumers, class member, notice, generic, warfarin, class action, sodium, damages, plaintiffs', settlement fund, DuPont, objectors, discovery, class certification, negotiations, claimants, Pharmaceutical, parties, predominance, deceptive, proposed settlement, anti trust law, consumer fraud, nationwide class, expenses, factors, cases, estimate, consumer protection

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN1[] **Remedies, Injunctions**

A claim for injunctive relief under § 16 of the Clayton Act, *15 U.S.C.S. § 26*, to prevent violations of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, meets the "federal question" requirement for subject matter jurisdiction.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN2[] **Justiciability, Case & Controversy Requirements**

A court may assert supplemental jurisdiction over a plaintiff's state law claims under *28 U.S.C.S. § 1367* where all of the claims flow from a common nucleus of operative fact and are part of the same case or controversy under U.S. Const. art. III.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] **Class Actions, Class Members**

A court may obtain personal jurisdiction over absentee class members by providing proper notice of the impending class action to class members and by providing absentees with the opportunity to be heard and to exclude themselves from the class. This process satisfies due process requirements.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN4[] Justiciability, Standing

So long as class representatives have constitutional standing to raise a particular issue before a court, no further constitutional standing requirements exist for the remainder of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN5[] Class Actions, Certification of Classes

To be certified, a class must satisfy the four threshold requirements of *Fed. R. Civ. P. 23(a)*: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. In addition, the parties seeking certification must show the action is maintainable under *Fed. R. Civ. P. 23(b)(1)*, *(2)*, or *(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

HN6[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23(b)(3) allows for so-called "opt-out" class actions for damages.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN7[] Class Actions, Certification of Classes

Under *Fed. R. Civ. P. 23(b)(3)*, two additional requirements must be met for a class to be certified: (a) common questions must predominate over any questions affecting only individual members; and (b) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. The court must take a "close look" at the predominance and superiority criteria, including the following pertinent factors: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN8[] Class Actions, Prerequisites for Class Action

Class certification requirements must be met even in the settlement context, except that the court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN9[] Class Actions, Judicial Discretion

A court does not inquire into the merits of a lawsuit while determining whether it may be maintained as a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN10[] Class Actions, Certification of Classes

To be certified, a class must be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] Prerequisites for Class Action, Commonality

Commonality requires that class members share a single common issue. Predominance requires that common issues predominate over issues affecting only individuals. *Fed. R. Civ. P. 23(b)(3)*. The Third Circuit requires that the commonality and predominance requirements be analyzed together, because the predominance requirement, which is far more demanding, incorporates the commonality requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12[] Class Actions, Prerequisites for Class Action

The *Fed. R. Civ. P. 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Contracts Law > Statute of Frauds > Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Contracts Law > Statute of Frauds > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN13[] **Choice of Law, Significant Relationships**

The Delaware Consumer Fraud statute, *Del. Code Ann. tit. 6, § 2511 et seq.*, protects non-residents as well as residents from unfair or deceptive merchandising practices conducted in part or wholly within the State. Hence, class members from other states can assert Delaware law, so long as the members' own state consumer fraud statutes do not have material conflicts with the Delaware statute and Delaware has significant contacts with the asserted claims of these plaintiffs.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Sherman Act, Claims**

To prove a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, plaintiffs must demonstrate that defendant possesses monopoly power and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence of a superior product, business acumen, or historic accident.

Contracts Law > Statute of Frauds > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN15[] **Contracts Law, Statute of Frauds**

To prove a violation of the Delaware Consumer Fraud statute, plaintiffs need only show that defendant committed fraud or misrepresentation in connection with its sale of a product; no proof of individual reliance on the fraud or misrepresentation is required. *Del. Code Ann. tit. 6, § 2513*.

Contracts Law > Statute of Frauds > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN16[] **Contracts Law, Statute of Frauds**

Where state consumer fraud statutes do not require proof of reliance, a plaintiff need only establish a causal link between the deceptive conduct at issue and his or her injury, and this individual issue of causation does not necessarily defeat predominance of the common issues about defendant's course of conduct.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Prerequisites for Class Action, Predominance**

The need for individual damages calculations does not defeat predominance and class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN18[] **Class Actions, Prerequisites for Class Action**

So far as differences between state laws impact only on case management, these differences are irrelevant to certification of a settlement class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Prerequisites for Class Action, Typicality**

The claims or defenses of the named class representatives must be typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals. Typicality lies where there is a strong similarity of legal theories or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the defendant.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN20[] **Class Actions, Prerequisites for Class Action**

Differences in the amount of damages suffered between class representatives and class members does not render the named plaintiffs' claims atypical.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Attorneys > General Overview

HN21[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a) requires that the representative parties will fairly and adequately represent the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. First, the adequacy of representation inquiry tests the qualifications of the counsel to represent the class. Second, it serves to uncover conflicts of interest between named parties and the class they seek to represent.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN22[] **Class Actions, Prerequisites for Class Action**

The existence of separate consumer and third-party payors counsel provides adequate structural protections to assure that differently situated plaintiffs negotiate for their own unique interests.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN23[] **Prerequisites for Class Action, Numerosity**

The superiority requirement asks a court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication. The factors set out in *Fed. R. Civ. P. 23(b)(3)* help the court assess whether a class action is superior to other available methods of adjudication. In the case of consumers, the class members here have little interest in individually controlling the prosecution or defense of separate actions, *Fed. R. Civ. P. 23(b)(3)(A)*, because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit. A class action facilitates spreading of litigation costs among numerous litigants and encourages private attorney general enforcement of statutes.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > Statute of Frauds > General Overview

HN24[] Federal & State Interrelationships, Choice of Law

Where the defendant's headquarters are located in Delaware and the alleged deceptive acts originated in Delaware, it is proper to apply the Delaware consumer fraud statute to a nationwide class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN25[] Class Actions, Certification of Classes

A class can be certified even where some individual, absentee class members may later prove not to be injured, in particular where causation can be shown by generalized damage to all and individual damage determinations can be left to the damages phase of litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN26[] Class Actions, Compromise & Settlement

Before certifying a class or approving a class settlement, a court must direct that notice of the proposed settlement be disseminated to class members. *Fed. R. Civ. P. 23(c)(2)*, *23(e)*. To alert class members to their right to "opt out" of a *Fed. R. Civ. P. 23(b)(3)* class, *Fed. R. Civ. P. 23(c)(2)* instructs the court to direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN27[] Class Actions, Prerequisites for Class Action

The settlement notice requirement is found in *Fed. R. Civ. P. 23(e)*, which specifies that no class action may be dismissed or compromised without court approval, preceded by notice to class members.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Governments > Courts > Clerks of Court

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

HN28[] **Settlements, Settlement Agreements**

A settlement notice must contain a clear, accurate description of the key terms of the settlement and tell class members where they can examine or secure a copy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN29[] **Class Actions, Prerequisites for Class Action**

Class members are not expected to rely upon a settlement notices as a complete source of settlement information.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Governments > Fiduciaries

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN30[] **Class Members, Absent Members**

Fed. R. Civ. P. 23(e) provides that a class action shall not be dismissed or compromised without the approval of the court, thereby protecting unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise. There is a need for heightened scrutiny where a case is settled before the class has been formally certified. The court's duty is to protect absent class members by assuring the settlement represents adequate compensation for the release of the class claims, a duty which some courts have described as a fiduciary responsibility.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Indorsements, Negotiations & Transfers > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN31[] **Settlements, Settlement Agreements**

An initial presumption of fairness for a settlement is established if the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN32[] **Class Actions, Compromise & Settlement**

To determine whether a settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*, the United States Court of Appeals for the Third Circuit applies the nine-factor Girsh test.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN33[] **Class Actions, Compromise & Settlement**

To determine whether a settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*, the complexity, expense and likely duration of litigation factor captures the probable costs, in both time and money, of continued litigation. Settlement is particularly favored in a complex class.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN34[] **Class Actions, Compromise & Settlement**

To determine whether a settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*, the class factor attempts to gauge whether members of the class support the settlement, although the court needs to be careful not to infer too much from a small number of objectors to a sophisticated settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Attorneys > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN35[] **Class Actions, Compromise & Settlement**

To determine whether a settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*, the stage of proceedings and amount of discovery completed factor evaluates whether counsel had an adequate appreciation of the merits of the case before negotiating. To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Attorneys > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN36[] **Class Actions, Compromise & Settlement**

To determine whether a settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*, the risks of establishing liability factor considers the potential rewards or risks if class counsel decided to litigate rather than settle.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN37[] **Class Actions, Compromise & Settlement**

To determine whether a settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*, the risks of establishing damages inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time. In particular the court looks at the potential damage award if the case were taken to trial against the benefits of immediate settlement. Damages would likely be established at trial through a battle of experts, with each side presenting its figures to the jury and with no guarantee whom the jury would believe.

Civil Procedure > ... > Class Actions > Certification of Classes > Decertification

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN38[] Certification of Classes, Decertification

Fed. R. Civ. P. 23(a) allows a district court to decertify or modify a class at any time during the litigation if it proves to be unmanageable.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN39[] Class Actions, Compromise & Settlement

To determine whether a settlement is fair, reasonable, and adequate under Fed. R. Civ. P. 23(e), the ability to withstand greater judgment factor considers whether the defendants could withstand a judgment for an amount significantly greater than a settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN40[] Class Actions, Compromise & Settlement

To determine whether a settlement is fair, reasonable, and adequate under Fed. R. Civ. P. 23(e), the range of reasonableness of settlement in light of best possible recovery and all attendant risks of litigation factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement. These damages estimates should generate a range of reasonableness within which a district court approving or rejecting a settlement will not be set aside. The court must keep in mind that settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Contracts Law > Statute of Frauds > General Overview

HN41[] Settlements, Settlement Agreements

The standard for evaluating settlement involves a comparison of the settlement amount with the estimated single damages, not treble damages.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN42[] Settlements, Settlement Agreements

A settlement is by nature a compromise between the maximum possible recovery and the inherent risks of litigation. The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN43[] **Class Actions, Compromise & Settlement**

In the context of a settlement, dollar amounts are judged not in comparison with possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN44[] **Class Actions, Compromise & Settlement**

A thorough judicial review of fee applications is required in all class action settlements. In determining the fee award in a common-fund class action, the Third Circuit follows the percentage-of-the-recovery method. Several nonexclusive factors are considered in determining the appropriate percentage fee: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. The factors need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN45[] **Class Actions, Compromise & Settlement**

The single clearest factor reflecting the quality of class counsels' services to the class are the results obtained.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN46[] **Remedies, Costs & Attorney Fees**

A court determines a reasonable award to the class counsel in the aggregate, and the counsel then determine how to allocate the award among themselves.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN47[] **Class Attorneys, Fees**

Many courts, including several in the United States Court of Appeals for the Third Circuit, have considered 25% to be the benchmark figure for attorney fee awards in class action lawsuits, with adjustments up or down for significant case-specific factors.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Legal Ethics > Client Relations > Attorney Fees > Excessive Fees

HN48[] **Attorney Fees & Expenses, Reasonable Fees**

The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the attorney's experience. When performing the lodestar analysis as a cross check on the fee award, the court may find it sufficient to review time summaries, rather than the actual billing records.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN49[] **Attorney Fees & Expenses, Reasonable Fees**

Multipliers in the range of one to four are frequently awarded in common fund cases.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Parties > Intervention > Motions to Intervene

HN50[] **Class Actions, Judicial Discretion**

Objecting class members are eligible to appeal from any final order entered by the court.

Counsel: Pamela Tikellis, Esquire and Robert J. Kriner, Jr., Esquire of Chimicles & Tikellis LLP, Wilmington, Delaware, Counsel for Plaintiff. Of Counsel: Bernard Perksy, Esquire, Barbara J. Hart, Esquire, and Vaishali Shetty, Esquire of Goodkind Labaton Rudoff & Sucharow LLP, New York, New York; Marvin A. Miller, Esquire, Patrick E. Cafferty, Esquire, and Jennifer W. Sprengel, Esquire of Miller Faucher and Cafferty LLP, Chicago, Illinois; Susan Salvetti, Esquire of Zwerling, Schachter & Zwerling, LLP, New York, New York; Stephen Lowey, Esquire, Richard W. Cohen, Esquire, and Geoffrey M. Horn, Esquire of Lowey Dannenberg Bemporad & Selinger, P.C., White Plains, New York; and Joseph Arshawsky, Esquire of Provost Umphrey L.L.P and Youngdahl Sadin, P.C., Albuquerque, New Mexico.

Donald J. Wolfe, Jr., Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, Counsel for Defendant. Of Counsel: Adam L. Hoeflich, Esquire of Bartlit Beck Herman Palenchar & Scott, Chicago, Illinois; and George D. Ruttinger of Crowell & Moring LLP, Washington, D.C.

John B. Scott, Esquire and Andrew W. Yung, Esquire of Scott Yung LLP, Dallas, Texas, Counsel for Objector **[**2]** Health Care Service Corporation. W. Scott Simmer, Esquire and Thomas J. Poulin, Esquire of Porter, Wright, Morris & Arthur, LLP, Washington, DC, Counsel for Objector Trigon Blue Cross Blue Shield et al. R. Stephen Griffis, Esquire, Charles M. Thompson, Esquire, Kearney Dee Hutsler, Esquire, Birmingham, Alabama, Counsel for Objector Jean Bradley et al. Edward W. Cochran, Esquire, Shaker Heights, Ohio, Counsel for Objector Shirley Bruce. J. Arnold Fitzgerald, Esquire, Dayton, Tennessee, Counsel for Objector Mary L. Cleusman et al. Paul D. Wexler, Esquire of Bragar Wexler Eagler & Morgenstern, LLP, New York, New York, Counsel for Objector Seymour Eagel. Paul S. Rothstein, Esquire, Gainesville, Florida, Counsel for Objector Alexander Galperin. Jean Marie Hansen, Esquire and David W. Wright, Esquire, Bloomfield Hills, Michigan, Counsel for Objector Kenard C. Hansen. N. Albert Bacharach, Jr., Esquire, Gainesville, Florida, Counsel for Objectors Willie Hutchinson, Jr. and Vincent Palazzola. Robert W. Bishop, Esquire of Bishop & Assoc., PSC, Louisville, Kentucky, Counsel for Objector Garey L. McCarty. Frank H. Tomlinson, Esquire of Pritchard McCall & Jones, LLC, Birmingham, Alabama, Counsel **[**3]** for Objector Madison W. O'Kelley, Jr. John J. Pentz, Esquire of The Objectors Group, Sudbury, Massachusetts, Counsel for Objector Alan Shapiro.

Judges: Sue L. Robinson, United States District Judge.

Opinion by: Sue L. Robinson

Opinion

[*236] Dated: August 30, 2002

Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On March 30, 2001, consumers and third-party payors ("TPPs") who paid all or part of the purchase price of Coumadin(R) warfarin sodium [1] filed a consolidated class action complaint alleging, individually and on behalf of all others similarly situated, that defendant DuPont Pharmaceuticals Company [2] ("DuPont") caused them to overpay for Coumadin as a result of defendant's anticompetitive behavior and dissemination of false and misleading information about Coumadin and its generic competitor. (D.I. 163) Plaintiffs alleged violations of federal and state

[1] Coumadin(R) is the brand name for the prescription drug warfarin sodium, as manufactured and marketed by defendant. Warfarin sodium is prescribed for the prevention and treatment of blood clotting disorders. (D.I. 163 at P1)

[2] Formerly known as DuPont Merck Pharmaceutical Company (a partnership between E.I. duPont de Nemours & Company and Merck & Company).

antitrust statutes, the Delaware Consumer Fraud Act (*6 Del. C. § 2513*), and the consumer fraud and deceptive acts and practices statutes of the fifty states and the District of Columbia. Plaintiffs also claimed tortious inference with contract on behalf of the TPPs and unjust enrichment on behalf of the entire **[**4]** class.

In the motions at bar, plaintiffs seek the court's final approval of a proposed class action settlement agreement (D.I. 233) and seek an award of attorneys' fees and expenses (D.I. 235). For the reasons that follow, the court shall grant plaintiffs' motion for final approval of the settlement and award attorneys' fees in the amount of 22.5% of the Settlement Fund and expenses in the amount of $ 832,382.84.

II. BACKGROUND

A. Litigation History

The proposed settlement resolves related class actions in both federal and state courts. The course of this litigation is relevant to determining the fairness of the settlement and the **[**5]** reasonable attorneys' fees and expenses, thus a brief history is set forth below.

[*237] 1. Federal Court Actions

In December 1997, two consumer class actions, *Kusnerik v. DuPont Merck Pharmaceutical Company*, C.A. No. 97-659-SLR, and *Altman v. DuPont Merck Pharmaceutical Company*, C.A. No. 97-670-SLR, were filed in this court. The actions sought treble damages and injunctive relief under federal ***antitrust law*** on behalf of a nationwide class of indirect purchasers of Coumadin. By a February 9, 1998 order, the court consolidated the *Kusnerik* and *Altman* actions under the caption *In re Warfarin Sodium Antitrust Litigation*, C.A. No. 97-659-SLR. (D.I. 237 at P6)

In January 1998, another consumer class action was filed in the Southern District of Florida, *Tischler v. DuPont Merck Pharmaceutical Company*, C.A. No. 1:98-178. Plaintiffs in *Tischler* sought damages and injunctive relief under federal ***antitrust law***, the Florida Deceptive and Unfair Trade Practices Act, and other state consumer protection laws. (*Id.* at P11) A fourth consumer class action, *Steckel v. DuPont Merck Pharmaceutical Company*, C.A. NO. 98-697, was filed in the Western District of Pennsylvania **[**6]** in April 1998. The *Steckel* plaintiffs alleged violations of federal ***antitrust law*** and sought damages and injunctive relief. (*Id.* at P14)

Pursuant to a motion filed by counsel in the *Kusnerik/Altman* action, the Panel on Multi-District Litigation (the "MDL panel") transferred the *Tischler* and *Steckel* actions to this court in June 1998 for coordination of pretrial proceedings under MDL No. 98-1232-SLR. (*Id.* at P17)

Even prior to the MDL order, plaintiffs' counsel had engaged in negotiations with defendant to reach agreement on confidentiality orders, discovery, and scheduling. (*Id.* at PP9, 16, 19) Eventually the court entered a scheduling order for completion of fact and expert discovery, and plaintiffs' counsel began preparing discovery requests. (*Id.* at P24) In response to discovery requests in various related federal and state actions, defendant produced approximately 447 boxes of documents, which were made available to all plaintiffs' counsel at a document depository that defendant established and maintained in Maryland. (*Id.* at P26) Plaintiffs' counsel in the federal and state actions informally coordinated their efforts in reviewing and analyzing **[**7]** the voluminous documents produced by defendant. (*Id.*)

During this time, plaintiffs also worked extensively with an expert in preparation for filing a motion for class certification. (*Id.* at P27) Before plaintiffs filed the motion, their expert terminated his work with them because he had moved to a consulting firm that was then representing defendant in the matter. (*Id.*) Plaintiffs filed a motion to disqualify the consulting firm.

In October 1998, plaintiffs filed a joint motion for class certification to certify a nationwide class of Coumadin indirect purchasers and to appoint class counsel. (*Id.* at P28)

In December 1998, the court granted defendant's motion to dismiss the *Kusnerik*, *Altman*, *Tischler*, and *Steckel* actions. (D.I. 98) Plaintiffs appealed the portion of the court's judgment which had dismissed their claim for injunctive relief under the federal antitrust laws. (D.I. 237 at P29) On May 30, 2000, the Third Circuit reversed and remanded the court's decision with respect to injunctive relief, finding the consumer plaintiffs had standing under federal ***antitrust law***. *In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395 (3d Cir. 2000)*. **[**8]**

Following remand of the *Kusnerik*, *Altman*, *Tischler*, and *Steckel* actions, several additional class actions were filed in this court and other federal courts by TPP plaintiffs and by a state medicaid agency. In *United Wisconsin Services, Inc. v. DuPont Pharmaceutical Company*, C.A. No. 00-979-SLR, plaintiffs asserted claims based on federal ***antitrust law*** and state deceptive acts and practices and consumer protection laws on behalf of a nationwide class of TPPs. (D.I. 237 at P34) A separate action was filed in this court in December 2000 on behalf of a nationwide class of TPPs alleging violations of federal and state antitrust laws as well as state consumer protection laws. *Arkansas Carpenters' Health & Welfare Fund et al. v. DuPont Pharmaceutical Company*, C.A. No. 00-1035-SLR. (*Id.* at P35)

In July 2000, a class action was filed in the Middle District of Louisiana on behalf of a **[*238]** nationwide class of TPPs. *Louisiana Health Svcs. and Indemnity Company v. DuPont Pharmaceuticals, Inc.*, C.A. No. 00CV538C-Z. The action alleged unlawful and anticompetitive acts by defendant in violation of, among other things, the Clayton Act, the Robinson-Patman Act, and the **[**9]** Lanham Act. The action was transferred to this court as a tag-along action pursuant to the earlier MDL order. (D.I. 237 at P36)

The Alabama Medicaid Agency and the State of Louisiana, through its Department of Health and Hospitals, filed a complaint against defendant in the Southern District of Alabama, Southern Division, in May 2000. *Alabama Medicaid Agency et al. v. DuPont Pharmaceutical, Inc. et al.,* C.A. No. 00-0420-BH-L. Plaintiffs alleged violations of federal antitrust laws and the state fraudulent misrepresentation statute. The case was also transferred to this court as a tag-along action to the MDL order. (*Id.* at P37)

After numerous discussions among consumer and TPP counsel and, subsequently, defendant's counsel, the parties negotiated and drafted a proposed pre-trial case management order that would establish a formal plaintiffs' Executive Committee, establish procedures for conducting settlement discussions, and specify how and when to file a consolidated class action complaint. (D.I. 237 at P40) On February 22, 2001, this court entered the case management order and consolidated the *Tischler*, *Steckel*, *Arkansas Carpenters*, and *United Wisconsin* actions **[**10]** with the previously consolidated *Kusnerik* and *Altman* actions. [3] (D.I. 159) The *Louisiana Blue Cross* action was added after its transfer to this court. (Civ. No. 01-124, D.I. 7) A consolidated class action complaint was filed on March 30, 2001. (D.I. 163)

As specified by the case management order, plaintiffs' counsel formed an Executive Committee consisting of the following members: Goodkind Labaton Rudoff & Sucharow LLP (co-chair for all plaintiffs); Miller Faucher and Cafferty LLP (co-chair for all plaintiffs); Zwerling, Schachter & Zwerling, LLP (consumer counsel); Lowey Dannenberg Bemporad & Selinger, P.C. (TPP counsel); and Youngdahl & Sadin, P.C. (TPP counsel). (D.I. 159 at 7) The co-chairs of the Executive Committee were assigned primary responsibility for, among other things, motions, discovery, negotiations with defendant, and acting as spokespersons at pretrial conferences. (*Id.* **[**11]** at 7-8) While the co-chairs had primary responsibility for negotiations, any settlement discussions had to be attended by at least one of the co-chairs, one consumer representative, and one TPP representative; no settlement offer could be made or accepted without the prior consent of all the consumer and TPP representatives on the committee. (*Id.* at 8)

2. State Litigation

Certain plaintiffs' counsel pursued related class actions in various state courts:

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[3] The *Alabama Medicaid* case continued to be coordinated, but not consolidated, with the other cases.

. *Shirley Ricks Freeman, Walter R. Goldstein and Andrew D. Baugus v. DuPont Merck Pharmaceutical Company*, CV-98-58, Circuit Court of Lauderdale County, Alabama ("Baugus action")

. *Wilkinson v. E.I. duPont de Nemours & Co., Merck & Co., DuPont Merck Pharmaceutical Co.*, C.A. No. 3:98-440, Chancery Court of the State of Tennessee, 20th District, Davidson County ("Wilkinson action")

. *Newman v. DuPont Merck Pharmaceutical Company*, No. 788358, California Superior Court, Orange County ("Newman action")

. *Brahm v. E.I. duPont de Nemours & Co., Merck & Co., and the DuPont Merck Pharmaceutical Co.*, No. 719668, California Superior Court, San Diego County ("Brahm action").

Ambler v. DuPont **[**12]** *Merck Pharmaceutical Co.*, No. BC189002, California Superior Court, Los Angeles County ("Ambler action").

Kruse v. DuPont Merck Pharmaceutical Company, No. 97 CH 15799, Illinois Circuit Court, Cook County ("Kruse action").

[*239] *Dean Health Plan, Inc. v. DuPont Merck Pharmaceutical Co.*, Case No. 00CV2357, State of Wisconsin, Dane County ("Dean Health Plan action").

Krausman v. DuPont Pharmaceuticals Company, Index No. 49030/00, New York State Supreme Court, New York County ("Krausman action")

The state actions that are still pending, specifically, the *Kruse*, *Newman*, *Wilkinson*, *Krausman*, and *Dean Health Plan* actions, are included in the proposed settlement.

In the *Kruse* action, filed in December 1997, plaintiff sued on behalf of a nationwide Coumadin consumer class, alleging violations of the Illinois Consumer Fraud Act and similar statutes in other states. (D.I. 237 at P43) After surviving motions to remove the case to federal court and motions to dismiss, the case eventually proceeded to discovery and class certification. Plaintiff's counsel served and responded to document requests and interrogatories and engaged **[**13]** in extensive review of documents produced by defendant. Plaintiff's and defendant's counsel deposed several witnesses, including expert witnesses for each side. After briefing and a hearing on plaintiff's motion for class certification, in June 2000 the court certified a nationwide class of Coumadin indirect purchasers, appointed plaintiff Kruse as class representative, and designated the firms of Goodkind Labaton Rudoff & Sucharow LLP and Miller Faucher and Cafferty LLP as class counsel. After certification of the consumer class, several TPPs sought to intervene on behalf of a class of TPPs. Before the motions to intervene could be resolved, defendant successfully applied to the Illinois Supreme Court for a stay in the proceedings pending the disposition of another Illinois Supreme Court case involving potentially dispositive issues relating to the Illinois Consumer Fraud Statute. (*Id.* at PP43-69)

The *Newman* action in California state court was filed in December 1997 as a multistate class action under state antitrust and consumer protection laws. In the trial court, plaintiffs successfully defended against defendant's motion to strike the complaint as a so-called "SLAPP suit" **[**14]** [4] and against a motion to dismiss. Plaintiffs' counsel conducted and defended several depositions, conducted written discovery, and participated in document discovery at the document depository in Maryland. Subsequently, defendant appealed the SLAPP suit decision to the California Supreme Court; eventually the trial court decision was vacated and the issue was remanded to the trial court for further consideration. (*Id.* at PP70-83) Defendant also sought stay or dismissal of the *Newman* action on the basis of a settlement in another statewide antitrust class action which defendant claimed estopped the *Newman* action. After a hearing, the motion was denied. An appeal is currently stayed. (*Id.* at PP97-99)

The *Ambler* plaintiffs filed a multistate class action in April 1998 alleging violations of state antitrust and consumer protection laws, as well as common law claims for fraud and deceit, negligent misrepresentation, and negligence.

[4] "SLAPP" is a Strategic Lawsuit Against Public Participation.

[15]** (*Id.* at PP84-85) The *Brahm* plaintiffs brought a similar class action on behalf of consumers in 13 jurisdictions, including California. (*Id.* at PP87-89) The *Brahm* and *Ambler* plaintiffs jointly petitioned the Judicial Council of the State of California to coordinate the *Brahm*, *Ambler*, and *Newman* actions, and the petition was granted after a hearing on the petition. (*Id.* at PP86, 91-96) Defendant filed a motion to strike the *Brahm* complaint as a SLAPP suit and, after briefing and argument, the complaint was dismissed. (*Id.* at PP88-89)

In Alabama, the *Bauqus* plaintiffs filed a class action in February 1998 on behalf of Alabama consumers of Coumadin, pursuant to Alabama antitrust statutes. Plaintiffs pursued document discovery and spent many months reviewing voluminous documents in Alabama and the document depository established by defendant in Maryland. Defendant filed a motion for summary judgment alleging its acts fell outside the reach of Alabama antitrust statutes, which were wholly limited to intrastate commerce. The court granted defendant's motion, and the Supreme Court of Alabama affirmed the decision on appeal. (*Id.* at PP100-108)

[16] [*240]** In April 1998, the *Wilkinson* plaintiffs filed a class action suit in Tennessee state court alleging violation of the Tennessee Consumer Protection Act and similar consumer protection statutes in 45 other states. Defendant removed the action to federal court and sought its transfer to the District of Delaware, but the Tennessee district court remanded it back to the state. Defendant subsequently filed a motion a dismiss, which was denied with the exception of one count that was dismissed. Plaintiffs filed a motion for class certification and, after extensive discovery and oral argument before the court, the motion was denied. Plaintiffs have since filed an amended complaint alleging violations of the antitrust laws of sixteen jurisdictions as well as the Tennessee Consumer Protection Act. (*Id.* at PP109-116) In a related action in the District of Columbia, the target of a document and deposition subpoena served by the *Wilkinson* plaintiffs filed a motion for a protective order, seeking to quash or modify the deposition subpoena. The court denied the motion, and the movant there has appealed. (*Id.* at PP117-119)

In Wisconsin in August 2000, the Dean Health Plan health **[**17]** maintenance organization filed a class action on behalf of consumers or entities who had purchased Coumadin not for resale, alleging violation of Wisconsin antitrust statutes. (*Id.* at PP120-122) Finally, in December 2000, the *Krausman* plaintiffs filed a class action on behalf of consumer purchasers of Coumadin under the New York antitrust and consumer protection statutes. (*Id.* at PP123-125)

B. Consolidated Complaint

A consolidated class action complaint was filed in this court on March 30, 2001 by consumer [5] and TPP [6] **[**19]** plaintiffs on behalf of all similarly situated United States consumers who purchased Coumadin at supracompetitive prices and all similarly situated United States TPPs who paid for the fulfillment of their members' or insureds' prescriptions for Coumadin at supracompetitive prices beginning on July 28, 1997. (D.I. 163 at PP2) Plaintiffs sought an injunction and other equitable relief pursuant to Section 16 of the Clayton Act, *15 U.S.C. § 26*, to enjoin and prevent defendant's violation of the federal antitrust laws, particularly *Section 2* of the Sherman Act, *15 U.S.C.*

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[5] The named consumer plaintiffs are John Kusnerik, a resident of New Jersey; Sara Altman, a resident of New York; Samuel Gordon Tischler, a resident of Florida; and Marie A. Steckel, a resident of Pennsylvania. (D.I. 163 at P16) Each claims to have purchased Coumadin during the class period at supracompetitive prices.

[6] The named TPP plaintiffs are Arkansas Carpenters' Health & Welfare Fund, a trust fund and employee benefit plan with its principal place of business in North Little Rock, Arkansas; Operating Engineers Local 312 Health & Welfare Fund, a trust fund and employee benefit plan with its principal place of business in Birmingham, Alabama; United Food and Commercial Workers Union and Employers Midwest Health Benefits Fund, a trust fund and employee benefit plan with its principal place of business in Park Ridge, Illinois; United Wisconsin Services, Inc., a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin that provides managed health cares services to more than 1.9 million people in 49 states through its various subsidiaries and affiliates; and Louisiana Health Services and Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana, a Louisiana corporation with its principal place of business in Baton Rouge, Louisiana that provides health and medical services and supplies to more than 750,000 people.

§ 2. (*Id.* at P3) On behalf of all **[**18]** TPPs, [7] plaintiffs sought treble damages pursuant to Section 4 of the Clayton Act, *15 U.S.C. § 15*. (*Id.* at P4) Plaintiffs also alleged violations of the Delaware Consumer Fraud Act, *6 Del. C. § 2513*; the consumer fraud and deceptive acts and practices statutes of the fifty states and the District of Columbia; and the antitrust statutes [8] **[*241]** of the "Indirect Purchaser" states. (*Id.* at PP5-7) In addition, plaintiffs alleged tortious interference with TPPs' contracts or agreements with health benefit plan members and pharmacies relating to the substitution of generic warfarin sodium and alleged unjust enrichment under the laws of all fifty states and the District of Columbia. (*Id.* at PP8-9)

[20]** In the complaint, plaintiffs accused defendant of disseminating false and misleading information to consumers, TPPs, and others about generic versions of warfarin sodium. Defendant allegedly disseminated information claiming generic warfarin sodium was not bioequivalent or therapeutically equivalent to Coumadin, thus creating a climate of fear that discouraged the use of generic warfarin sodium and caused millions of prescriptions to be filled with Coumadin that could and would have been filled with less expensive generic warfarin sodium. (*Id.* at P11)

Plaintiffs made the following factual allegations in the complaint. Warfarin sodium is a prescription oral anticoagulant medication sold in tablet form that is taken by more than 2 million Americans to treat blood clotting disorders. Until July 1997, defendant's brand name version of warfarin sodium, Coumadin, was the only warfarin sodium tablet available. (*Id.* at P29) Although defendant lost its patent protection for Coumadin in 1962, it was able to continue monopolizing the market for warfarin sodium and, between 1987 and 1997, raised the price of Coumadin by more than 400 percent. (*Id.* at PP32-33) In 1998 and 1999, defendant's **[**21]** annual sales of Coumadin were approximately $ 550 million and $ 464 million respectively. (*Id.* at P28)

In March 1997, the FDA approved Barr's generic warfarin sodium product, concluding that the generic warfarin sodium was bioequivalent and, therefore, therapeutically equivalent to Coumadin. [9] (*Id.* at P43) Barr introduced its generic warfarin sodium product to the market on July 26, 1997 at prices substantially lower than Coumadin. (*Id.* at P49)

[22]** Defendant allegedly published false and misleading statements concerning the bioequivalence, therapeutic efficacy, and safety of generic warfarin sodium to help it maintain its monopoly position in the face of generic competition. The purpose of these statements was to deter doctors, pharmacists, TPPs, and consumers from switching to the generic drug despite the FDA's findings that the generic was bioequivalent and therapeutically equivalent to Coumadin. (*Id.* at P40)

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[7] Plaintiffs were barred from seeking treble damages on behalf of consumer plaintiffs due to this court's earlier dismissal of consumer damage claims under the federal antitrust laws. (D.I. 98)

[8] *Arizona Revised Statutes §§ 44-1401, et seq.*; *California Business and Professions Code §§ 17200 et seq.*; District of Columbia Antitrust Act of 1980, *D.C. Code §§ 28-4502, et seq.*; Chapter 401, Part II, Florida Statutes; *Kansas Statutes Annotated §§ 50-101, et seq.*; Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110-310, *et seq.*; *Louisiana Revised Statutes §§ 51:137, et seq.*; Maine Revised Statutes Annotated, *10 M.R.S.A. §§ 1101, et seq.*; Massachusetts Ann. Laws, Ch. 93A, *et seq.*; Michigan Antitrust Reform Act, *MCL §§ 445.771, et seq.*; Minnesota Antitrust Act of 1961, *Minn. Stat. §§ 325D.49, et seq.*; New Jersey Stat. Ann., *N.J.S.A. §§ 56:9-1, et seq.*; *N.M. Stat. Ann. §§ 57-1-1, et seq.*; *New York General Business Law §§ 340, et seq.*; *North Carolina Gen. Stat. §§ 75-1, et seq.*; *North Dakota Cent. Code §§ 51-08.1-01, et seq.*; *South Dakota Codified Laws Ann. §§ 37-1-1, et seq.*; *Tenn. Code Ann. §§ 47-25-101, et seq.*; West Virginia Code, *W. Va. Code §§ 47-18-1, et seq.*; *Wisconsin Stat. §§ 133.01, et seq.*

[9] Generic drug manufacturers can obtain approval from the FDA to market generic drugs by submitting detailed information proving that the generic version is equivalent to the previously approved brand name version. Bioequivalence is demonstrated by showing that the generic drug delivers to the body the same amount of active ingredient at the same rate and extent as its brand name counterpart. Once bioequivalence is established and the FDA approves the manufacturing controls and labeling of the generic substitute, the FDA grants approval for release of the generic drug to the market and assigns an "AB" rating. (*Id.* at P34-35)

As a specific example, in the days and months before and after introduction of Barr's generic warfarin sodium, defendant repeatedly claimed in press releases and promotional brochures targeted at doctors that additional blood tests and monitoring had to be done when interchanging Coumadin with a generic substitute. (*Id.* 49-51, 54) This warning was repeated directly to patients who called an "800" telephone number in response to full-page newspaper advertisements (*id.* at P52) and in a facsimile addressed to 45,000 pharmacists in October 1997 (*id.* at P57). Plaintiffs also alleged that a press release issued within days after Barr's generic was introduced implied that the cheaper generic substitute sacrificed **[**23]** patient safety to focus on cost. (*Id.* at P50)

On August 26, 1997, the FDA sent a letter to defendant warning that certain statements made by defendant with regard to Coumadin and generic warfarin sodium were false and/or misleading under the Federal Food, Drug, and Cosmetic Act and FDA regulations. (*Id.*, Ex. 1) The FDA objected to a **[*242]** slide presentation that "stated or suggested generic drug products, such as warfarin, that have been shown to be bioequivalent to a reference drug (Coumadin) and approved as such by FDA may not be therapeutically equivalent." (*Id.*) It also found statements made in a March 1997 press release and in several promotional brochures - claiming that additional blood testing and monitoring were required if a patient was switched to another warfarin sodium product - were misleading. (*Id.*) The FDA cautioned that these statements, based on previously approved Coumadin product labeling, applied to other, non-bioequivalent warfarin products (such as warfarin potassium) no longer available in the marketplace. To use these statements in reference to bioequivalent and therapeutically equivalent products was misleading. In a follow-up letter on January 5, 1998, the **[**24]** FDA reaffirmed its position and indicated the "seriousness with which we regard DuPont's false and misleading promotion of Coumadin." (*Id.*, Ex. 2) The FDA also commented that the offending activities had continued after the August 1997 FDA letter.

Defendant also allegedly revised its promotional and educational "CoumaCare" initiative following the launch of Barr's generic substitute. The revised program included false and misleading assertions and innuendoes about problems that patients could have as a result of slight variations in drug dosage and encouraged doctors and pharmacists to minimize risk by not substituting generics for branded drugs. (*Id.* at P41)

Plaintiffs further alleged that, through financial and other incentives, defendant induced large pharmacy and drugstore chains to dispense Coumadin rather than its less expensive generic substitute. (*Id.* at P62) Another allegation was that defendant misrepresented generic warfarin sodium as it engaged in a wide-ranging campaign to persuade state agencies and legislatures to restrict the sale and substitution of generic warfarin. (*Id.* at P59-60)

Finally, plaintiffs cited a DuPont press release about supposedly **[**25]** "spontaneous and unsolicited" reports of adverse drug reactions associated with patients who had switched from Coumadin to the generic equivalent. (*Id.* at P64) Defendant later admitted that it had solicited many of these reports. Plaintiffs asserted that the adverse events were similar to adverse events reported to the FDA about Coumadin itself, and thus it was misleading for defendant to imply a causal link between switching to a generic and the adverse events. (*Id.* at PP65)

As evidence that defendant's misrepresentations had their desired effect, plaintiffs cited the weak market penetration of generic warfarin sodium. Generally, about 40-70% of prescriptions for drugs available from multiple sources are filled with less expensive generics within one year of generic availability. (*Id.* at P70) However, more than 75% of prescriptions for sodium warfarin were still filled with Coumadin a year after Barr introduced its generic version, and DuPont continued to maintain a 67% market share up until the date the complaint was filed. (*Id.*) Plaintiffs also asserted that some pharmacies, including some large chains, refused to substitute the generic for Coumadin out of a mistaken **[**26]** belief that generic warfarin sodium was not equivalent to Coumadin. (*Id.* at P58) The reports of adverse events disseminated by defendant caused at least one physician's group to instruct their patients to take only brand name Coumadin. (*Id.* at P67)

Plaintiffs alleged this unlawful conduct "arose, was directed and emanated from Delaware" to the detriment of class members throughout the United States. (*Id.* at P96)

C. Settlement Negotiations and Stipulation of Settlement and Compromise

Settlement negotiations in the federal actions began in March 2000 and continued through the next year. (D.I. 237 at PP133, 135) In the course of negotiations, plaintiffs consulted with an economic expert to prepare a damages analysis. (*Id.* at P134) Plaintiffs' damages analysis "sharply conflicted" with that of the defense. (*Id.* at P135) Nevertheless, after TPPs got involved in negotiations, an oral agreement in principle to the basic terms of a settlement was reached on April 19, 2001 and a memorandum of understanding was executed by all parties on May 14, **[*243]** 2001. (*Id.* at P136) After spending a substantial amount of time negotiating and finalizing the formal, detailed terms **[**27]** of the settlement, the parties entered into a Stipulation of Settlement and Compromise on July 26, 2001. (*Id.* at P137)

The proposed settlement provides for defendant to pay $ 44.5 million to settle the claims of the following class to be certified for settlement purposes only:

> All consumers and Third Party Payors in the United States who purchased and/or paid all or part of the purchase price of Coumadin dispensed pursuant to prescriptions in the United States during the period March 1, 1997 through and including August 1, 2001 ("Class Period"). Excluded from the Class are Defendant and any of its officers and directors, and any governmental entity. "Third Party Payor" shall mean any non-governmental entity that is (i) a party to a contract, issuer of a policy, or sponsor of a plan, which contract, policy or plan provides prescription drug coverage to natural persons, and is also (ii) at risk, pursuant to such contract, policy or plan, to provide prescription drug benefits, or to pay or reimburse all or part of the cost of prescription drugs dispensed to natural persons covered by such contract, policy, or plan.

(*Id.* at P5) Upon final approval of the settlement, **[**28]** all pending actions against defendant arising from its alleged unlawful marketing and sale of Coumadin (both federal MDL proceedings and related state actions) would be dismissed. Defendant has already paid $ 44.5 million into an escrow account which is earning interest for the benefit of the class. (*Id.*)

Under the allocation and distribution plan negotiated between the consumer counsel representative and the TPP counsel representatives on the Executive Committee, the Net Settlement Fund [10] will be distributed to class members who have filed a Proof of Claim on or before April 30, 2002. (*Id.* at P138) The "recognized loss" for each class member will be total payments made for Coumadin (less the amounts received for reimbursements, discounts or rebates) multiplied by 15%. Eighteen percent of the Net Settlement Fund is to be set aside as a "Preferential Fund" out of which the recognized losses of consumers will be paid. If the total recognized losses of consumers are not fully satisfied out of the Preferential Fund, the unsatisfied amounts will be paid from the remainder of the Net Settlement Fund on a pro-rata basis with TPP claimants. If the recognized losses of consumers **[**29]** are fully satisfied from the Preferential Fund and money remains in that fund, the unexpended portion will be added to the Net Settlement Fund for payment of the recognized losses of TPPs. (D.I. 237 at P139)

As a condition of the settlement, plaintiffs and class members agree to release any legal, equitable, or administrative claims against defendant "that relate to the marketing, promotion or sale of Coumadin during the Class Period that were or could have been asserted" in the instant Coumadin litigation. (D.I. 172 at 7, 20-22) "To the extent permitted by applicable law," the class members also waive and release any "provisions, rights and benefits conferred by § 1542 of the California Civil Code [or other similar state or common law]," which states that **[**30]** a general release does not extend to claims which the creditor does not know or suspect to exist at the time the release is executed, if the knowledge would have "materially affected his settlement with the debtor." (*Id.* at 21-22) Excluded from the released claims are any claims for physical or bodily injury or defective products arising from the use or purchase of Coumadin; any claims that Coumadin is not safe or effective; and any breach of contract claims between defendant and TPPs that are unrelated to the current false and/or misleading information claims. (*Id.* at 8)

The stipulation of settlement is also conditioned on final approval of the settlement by the court without material modification. (*Id.* at 19)

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[10] The Net Settlement Fund will be calculated as follows: $ 44.5 million plus interest, less court-awarded attorneys' fees, costs and expenses, less costs of notice to class members, less costs of administering the fund, and less taxes. (D.I. 172 at 6)

[*244] D. Preliminary Approval

On August 1, 2001, the court granted preliminary approval of the settlement and conditionally certified the settlement class. (D.I. 177) The order approved the plan for providing notice to the class members about the settlement terms and required class members to exclude themselves from the class ("opt out") by December 17, 2001. The court also required any class members who wished to object to the proposed settlement, but had chosen **[**31]** not to opt-out, to file a written statement of objection by December 17, 2001. Class members who wanted to file a claim were given until April 30, 2002 to file the appropriate Proof of Claim. A settlement hearing ("fairness hearing") was scheduled for January 23, 2002.

The court approved the Proof of Claim forms for consumers and TPPs on August 17, 2001. (D.I. 181)

E. Notice to Class and Response

Plaintiffs contracted with a nationally recognized settlement administrator, Complete Claim Solutions, Inc. ("CCS"), to prepare and implement a notice program. (D.I. 237 at P142) After the court approved the program, CCS published notice targeted at both consumer and TPP class members; set up a call center to receive telephone inquiries; prepared, printed, and distributed notice packets for consumers and TPPs who responded to the notice; and designed and developed a website for class members to review and access information about the settlement. (D.I. 237, Ex. C) Summary notice of the proposed settlement was published over a period of three months beginning in August 2001 in selected publications throughout the country, including *USA Today*, *USA Weekend*, and *Parade* magazine; **[**32]** newspapers in the top twelve United States markets for adults over the age of 50; and widely circulated magazines such as *Modern Maturity* and *Readers Digest*. (D.I. 237 at P145; Ex. C at P5, Young Affidavit) The publications have a combined circulation of approximately 115 million people. The notice was also published in *National Underwriter* and *Benefits and Compensation Solutions*. (D.I. 237 at P145)

The summary notice informed class members that a settlement on behalf of the class had been proposed and included the following information:

. Case caption;

. Settlement amount of $ 44.5 million plus interest;

. Date, time, and place for fairness hearing;

. Class description;

. Nature of litigation claims, i.e., that defendant had disseminated false and misleading information regarding the bioequivalence of Coumadin and other warfarin sodium products and had induced pharmaceutical distributors to favor Coumadin over other warfarin sodium products;

. Address and telephone number from which class members could obtain more detailed information about the settlement and their rights to participate in or object to the settlement;

. Deadline for receipt of Proof of Claim;

[33]** . Website address;

. Notice that class members who did not ask to be exluded would be bound by the final order and judgment entered by the court; and

. Deadline for exclusion from the final order and judgment, i.e., opt-out deadline.

(*Id.*, Ex. C at P5, Young Affidavit)

Separate notice packets were developed for consumers and TPPs. (*Id.*, Ex. C at P2) The notice packets included a full written notice of the proposed settlement, a Notice of Exclusion form, and a consumer or TPP Proof of Claim form. (*Id.*) CCS sent the TPP notice packet to 12,707 potential TPPs using first class mail. (*Id.*, Ex. C at PP3-4) Additional notice packets were mailed to consumer and TPP class members as requests were received by the claims administrator.

In addition to the same information provided in the summary notice, the full notice of the settlement included:

. Description of the litigation and the claims and defenses raised by the parties;

. Terms of the proposed settlement, including how to review a copy of the complete **[*245]** Stipulation of Settlement and Compromise;

. Description of the allocation and distribution plan;

. Explanation of the right to opt out of the class, how to **[**34]** file a Notice of Exclusion, and the consequences of opting out;

. Identification of counsel appointed as co-chairs of the Executive Committee;

. Scope of claims release and dismissal of litigation;

. Description of fairness hearing and how to participate;

. Procedure for submitting written and/or oral objections to settlement; and

. Counsels' plan to apply for attorneys' fees of no more than 25% of the settlement fund and reimbursement of expenses, all to be paid out of the settlement fund. (*Id.*)

Claimants who chose to exclude themselves from the settlement were required to send a Notice of Exclusion to the settlement administrator by December 17, 2001. On the exclusion form, claimants had to provide identification information and the amount paid for Coumadin during the class period and had to certify that the information provided was true. (*Id.*)

To make a claim, consumers were required to submit a Proof of Claim identifying their name, address, date they began using Coumadin (by year), and the amount paid for Coumadin during the class period (with any reimbursements from insurance deducted), along with proof of their most recent purchase of Coumadin during the class **[**35]** period. The claimants also had to certify that the information provided was true and correct. (*Id.*)

The TPPs were required to submit a Proof of Claim identifying the TPP or agent making the claim and the total amount paid for Coumadin during the class period. (*Id.*) TPP claimants also were required to certify that the amount claimed was true and accurate and based upon actual records maintained by or otherwise available to the claimants and to agree to furnish additional documentary backup upon request of the settlement administrator. (*Id.*)

The website developed by CCS provided class members access to the full notice of settlement, the Stipulation of Settlement and Compromise, and proof of claim forms. (*Id.*, Ex. C at P7)

By January 2, 2002, the settlement administrator had received over 89,000 telephone inquiries. (*Id.*, Ex. C at P6) In addition, more than 41,803 "visits" were made to the settlement website and 15,127 forms viewed and/or downloaded. (*Id.*, Ex. C at P7) An additional 7,273 requests for printed notice packets were received via e-mail. (*Id.*) Through June 3, 2002, the administrator had mailed claim forms to 90,926 potential consumer class members, **[**36]** and received and processed 48,305 consumer claims and 1,055 TPP claims. (D.I. 281 at P3; Ex. B) A total of 136 consumers and ten TPPs opted out of the proposed settlement by the December 17, 2001 deadline. (D.I. 237 at P146)

F. Objections

Thirteen objections to the settlement were filed by the December 17, 2001 deadline, including eleven from individual consumers or consumer groups [11] **[**37]** and two from TPPs. [12] The objections can generally be categorized into the following subject areas:

. Amount of settlement

. Conflicts of interest between consumers and TPPs

. Allocation of settlement proceeds

. Settlement class certification

. Sufficiency of notice

. Scope of release

[*246] . Amount of attorneys' fees and costs

The substance of the objections is summarized and addressed as appropriate within the individual discussions of class certification, notice, settlement fairness, and attorneys' fees and expenses.

In addition to objections to the settlement, several objectors filed motions to intervene in the litigation itself. [13]

G. Fairness Hearing

The fairness hearing was held January 23, 2002. Oral argument was presented by plaintiffs' counsel and by counsel representing objectors HCSC, Bradley, Bruce, Cleusman, Eagel, Galperin, Hansen, Hutchinson, McCarty, Nipper, O'Kelley, Palazzola, and Shapiro. (D.I. 267) No evidence was presented.

III. JURISDICTION

The court has subject matter jurisdiction over this action pursuant to *28 U.S.C. §§ 1331* and *1337*, providing for exclusive federal district **[**38]** court jurisdiction over "federal question" claims. ***HN1***[] Plaintiffs' claims for injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26*, to prevent violations of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, meet the "federal question" requirement.

HN2[] The court asserts supplemental jurisdiction over plaintiffs' state law claims under *28 U.S.C. § 1367*. All of the claims flow from a common nucleus of operative fact and are part of the same case or controversy under Article III of the United States Constitution. [14] *See* *In re The Prudential Ins. Co. of American Sales Practices Litigation, 148 F.3d 283, 300-303 (3d Cir. 1998)*.

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[11] Consumer objections were filed by: Jean Bradley et al. (D.I. 214); Shirley Bruce (D.I. 210); Mary L. Cleusman et al. ("Tennessee objectors") (D.I. 218); Julious M. Davis (D.I. 191); Seymour Eagel (D.I. 194); Alexander Galperin (D.I. 216); Kenard C. Hansen (D.I. 245); Willie Hutchinson, Jr. and Vincent Palazzola (D.I. 202); Garey L. McCarty (D.I. 198); Ramona Nipper (D.I. 252); Madison W. O'Kelley, Jr. (D.I. 205); J.G. Rodgers (D.I. 259, Ex. 13; not filed directly with the court); Alan Shapiro (D.I. 186).

[12] TPP objections were filed by: Trigon Blue Cross Blue Shield et al. ("Blue Cross Health Plans") (D.I. 196); Health Care Service Corporation ("HCSC") (D.I. 207).

[13] Objectors HCSC (D.I. 254), Bradley et al. (D.I. 212), Cleusman et al. (D.I. 218), and McCarty (D.I. 200) filed motions to intervene.

[14] Plaintiffs also claim diversity jurisdiction. However, plaintiffs do not allege that either the individual class representatives or the individual members of the class sustained the minimum amount of damages required for the court to assert diversity jurisdiction. *See* *In re The Prudential, 148 F.3d at 303 (3d Cir. 1998)*.

[39]** ***HN3***[] The court also finds that it obtained personal jurisdiction over absentee class members by providing proper notice of the impending class action to class members and by providing absentees with the opportunity to be heard and to exclude themselves from the class. This process satisfies due process requirements. *In re Prudential, 148 F.3d at 306* (citing *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985))*. Reasonable notice was provided to the consumer class members through the mass media and to TPP class members through individual mailings. The notice informed class members that they could either opt out of the settlement or submit objections in writing and/or orally at the fairness hearing.

Finally, the court finds that the named parties individually meet the requirements of Article III standing. Each named party sufficiently alleges injury in fact - overpayment for warfarin sodium - as a result of defendant's alleged product misrepresentations and monopolistic activities and has a valid "case or controversy" with respect to defendant. (Consol. Compl. PP70, 72) ***HN4***[] So long as the class representatives have **[**40]** constitutional standing to raise a particular issue before the court, no further constitutional standing requirements exist for the remainder of the class. *See* *In re Prudential, 148 F.3d 283 at 306-7*.

IV. CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT

Plaintiffs seek certification of the following class for settlement purposes:

> All consumers and Third Party Payors in the United States who purchased and/or paid all or part of the purchase price of Coumadin dispensed pursuant to prescriptions in the United States during the period March 1, 1997 through and including August 1, 2001 ("Class Period"). Excluded from the Class are Defendant and any of its officers and directors, and any governmental entity. "Third Party Payor" shall mean any nongovernmental entity that is (i) a party to a contract, issuer of a policy, or sponsor of a plan, which contract, policy or plan provides prescription drug coverage **[*247]** to natural persons, and is also (ii) at risk, pursuant to such contract, policy, or plan, to provide prescription drug benefits, or to pay or reimburse all or part of the cost of prescription drugs dispensed to natural persons covered by such contract, policy, **[**41]** or plan.

(D.I. 233)

HN5[] To be certified, a class must satisfy the four threshold requirements of *Rule 23(a) of the Federal Rules of Civil Procedure*: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)*. In addition, the parties seeking certification must show the action is maintainable under *Rule 23(b) (1)*, *(2)*, or *(3)*. *Id. at 614*. ***HN6***[] *Rule 23(b) (3)*, the category at issue in this case, allows for so-called "opt-out" class actions for damages. *Id. at 614-5*. ***HN7***[] Under *Rule 23(b) (3)*, two additional requirements must be met for a class to be certified: (a) common questions must predominate over any questions affecting only individual members; and (b) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. *Id. at 615*. The court must take a "close look" at the predominance and superiority criteria, including the following pertinent factors:

> (A) the interest of members of the class in individually controlling the prosecution **[**42]** or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id. at 615-6 (quoting *Fed. R. Civ. P. 23(b) (3)*). The Supreme Court has noted that the dominant purpose behind certifying *Rule 23(b) (3)* cases is to vindicate the rights of people who individually would be without the strength to bring their opponents into court; it overcomes the problem of small recoveries, which do not provide enough incentive for individual actions to be prosecuted. *Id. at 617*.

HN8[] Class certification requirements must be met even in the settlement context, except that the court "need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Id. at 620*.

HN9[] The court does not inquire into the merits of a lawsuit while determining whether it may be maintained as a class action. *See* *Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*. **[**43]**

A. Numerosity

HN10[] To be certified, the class must be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a) (1)*. This class potentially includes 2 million or more members, thus it easily satisfies the numerosity requirement.

B. Commonality and Predominance

HN11[] Commonality requires that class members share a single common issue. *See* *Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Predominance requires that common issues **predominate** over issues affecting only individuals. *Fed. R. Civ. P. 23(b) (3)*. The Third Circuit requires that the commonality and predominance requirements be analyzed together, because the predominance requirement, which is "far more demanding," incorporates the commonality requirement. *In re LifeUSA Holding, Inc., 242 F.3d 136, 144 (3d Cir. 2001)*.

HN12[] "The *Rule 23(b) (3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623*. The Supreme Court has opined that "predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the **[**44]** antitrust laws." *Id. at 625*.

The court finds that in the case at bar common questions of fact and law predominate over any questions affecting only individual **[*248]** members. Common questions of fact and law alleged by plaintiffs include:

. Whether defendant monopolized and attempted to monopolize the United States market for warfarin sodium;

. Whether defendant caused plaintiffs and the class to overpay for Coumadin by disseminating false and/or deceptive information to TPPs, patients, doctors, and pharmacists concerning the use, quality, and effectiveness of bioequivalent generic warfarin sodium;

. Whether and to what extent the conduct of defendant caused injury to plaintiffs and the class and, if so, the appropriate measure of damages;

. Whether defendant's misrepresentations concerning generic warfarin sodium have violated, and continue to violate, the Delaware Consumer Fraud Act; [15]

. Whether plaintiffs and members of the class are entitled to declaratory and/or injunctive relief;

. Whether defendant was unjustly enriched as a result of its actions.

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[15] *HN13*[] The Delaware Consumer Fraud statute, *6 Del. C. §§ 2511 et seq.*, protects non-residents as well as residents from unfair or deceptive merchandising practices conducted "in part or wholly within" the State. *See* *Lony v. E.I. du Pont de Nemours and Company, Inc., 821 F. Supp. 956, 961 (D. Del. 1993)* (finding standing for citizen of Germany where the alleged misrepresentation commenced in Delaware). Hence, class members from other states can assert Delaware law in this case, so long as the members' own state consumer fraud statutes do not have material conflicts with the Delaware statute and Delaware has significant contacts with the asserted claims of these plaintiffs. *See* *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-823, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*. Plaintiffs have alleged here that defendant's deceptive conduct "arose, was directed and emanated from Delaware," which is enough to invoke the Delaware statute on behalf of the class. (D.I. 163 at P96)

[45]** This case is clearly focused on the allegedly deceptive conduct of defendant and the effect that conduct had on market penetration by the generic substitute and the prices paid for warfarin sodium; it is not focused on the conduct of individual class members. *See* *In re Flat Glass Antitrust Litigation, 191 F.R.D. 472, 483-4 (W.D. Pa. 1999)* (noting predominance test is met in antitrust case because "consideration of the conspiracy issue would, of necessity, focus on defendants' conduct, not the individual conduct of the putative class members."). Plaintiffs' claims arise from an alleged broad-based communications campaign to deceive consumers, TPPs, physicians, and regulatory bodies into believing a generic version of warfarin sodium could not be directly substituted for Coumadin, thereby discouraging consumers from switching to lower priced generic warfarin sodium and allowing defendant to charge supracompetitive prices for Coumadin. The claims do not rely on the conduct or reliance of individual consumers or TPPs. Rather, they depend on proof that defendant made misrepresentations about Coumadin and generic warfarin sodium that allowed it to maintain its monopoly **[**46]** in the warfarin sodium market, discourage switching to lower-cost generic warfarin sodium, and charge supracompetitive prices for Coumadin. Proof of liability thus depends on evidence common to the class. [16]

[47]** Several other courts have recently certified nationwide or multi-state classes under federal and state laws in actions alleging overpayment for prescription drugs. [17] **[**48]** The case **[*249]** at bar also bears similarities to *In re Prudential, 148 F.3d 283 (3d Cir. 1998)*, in which the Third Circuit affirmed a class certification and settlement in a nationwide class action brought pursuant to federal and state securities fraud statutes. [18]

The fact that plaintiffs alleged purely economic harm from a common cause (overpayment for warfarin sodium that resulted from defendant's deceptive communications) further supports certification of the class. These allegations present none of the individual proof problems and divergent interests that have arisen in some other class actions. [19] *See* *In re Prudential, 148 F.3d 283 at 315* (noting "the complexity of a case alleging physical injury as a result of asbestos exposure [*Amchem*] differs greatly from a case alleging economic injury as a result of deceptive sales practices").

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[16] ***HN14***[] To prove a violation of *Section 2* of the Sherman Act, plaintiffs must demonstrate that defendant possesses monopoly power in the warfarin sodium market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence of a superior product, business acumen, or historic accident. *See* *United States v. Grinnell Corp., 384 U.S. 563, 570-1, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. ***HN15***[] To prove a violation of the Delaware Consumer Fraud statute, plaintiffs need only show that defendant committed fraud or misrepresentation in connection with its sale of Coumadin; no proof of individual reliance on the fraud or misrepresentation is required. *See* Delaware Consumer Fraud Statute, *6 Del. C. § 2513*; *S&R Assocs. v. Shell Oil Co., 725 A.2d 431, 440 (Del. Super. Ct. 1998)*.

[17] The Northern District of Illinois certified separate nationwide consumer and TPP classes in a class action brought under federal ***antitrust law*** and the consumer fraud statutes of two states. *In re Synthroid Marketing Litigation, 188 F.R.D. 295 (N.D. Ill. 1999)* (consumer class certification); *In re Synthroid Marketing Litigation, 188 F.R.D. 287 (N.D. Ill. 1999)* (TPP class certification). The court in the District of Columbia recently approved various settlements of prescription drug antitrust litigation that included two multi-state consumer classes and two multi-state TPP classes. *In re Lorazepam & Clorazepate Antitrust Litigation, 205 F.R.D. 369, 2002 U.S. Dist. LEXIS 5677, 2002-1 Trade Cas. (CCH) P73649*, Nos. MDL 1290 (TFH) and 99 MS276 (TFH), 2002 WL 246664 (D.D.C. Feb. 1, 2002). A Michigan court certified a class of indirect prescription drug purchasers that included both consumers and TPPs in an action brought pursuant to state antitrust statutes. *In re Cardizem CD Antitrust Litigation, 200 F.R.D. 326 (E.D. Mich. 2001)*.

[18] The defendant in *In re Prudential* allegedly engaged in a common, nationwide scheme to defraud customers through standardized, deceptive sales presentations. *148 F.3d 283 at 314*. The Third Circuit affirmed the district court's determination that common issues predominated over individual issues, and rejected an objector's contention that predominance was defeated because the claims were subject to the laws of fifty states. *148 F.3d 283 at 315*.

[19] *See, e.g.*, *Georgine v. Amchem Products, Inc., 83 F.3d 610, 630 (3d Cir. 1996)*, *aff'd*, *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)* (reversing a certification in a personal injury class action because of "the multiplicity of individualized factual and legal issues, magnified by choice of law considerations," and because some class members would develop their injuries sometime in the future and other members were presently injured)

[49]** The case at bar can also be distinguished from cases where liability depends on specific deceptive communications made to individual class members and members' reliance on those communications. *See* *In re LifeUSA Holding, Inc., 242 F.3d at 144-6* (reversing a class certification in part because plaintiffs' claims of deceptive insurance sales practices arose from individual and nonstandardized presentations by numerous independent agents, rather than uniform, scripted presentations). Here, the alleged deception involved a broad-based, national campaign conducted by and directed from corporate headquarters, and individual reliance on the misrepresentations is irrelevant to liability. ***HN16***[] Where state consumer fraud statutes do not require proof of reliance, as is the case here, plaintiff "need only establish a causal link between the [deceptive] conduct at issue and his or her injury," and this individual issue of causation does not necessarily defeat predominance of the common issues about defendant's course of conduct. *Mulligan v. Choice Mortgage Corp. USA, 1998 U.S. Dist. LEXIS 13248*, No. 96-596- B, 1998 WL 544431, at *11-*12 (D.N.H. Aug. 11, 1998) (finding common issue of whether **[**50]** defendant's practices were unfair or deceptive in violation of state consumer fraud statute predominated despite need for individual proof of causation, where no proof of individual reliance was required by the statute); *see also* , *Hill v. Gateway 2000, Inc. 1996 U.S. Dist. LEXIS 16581*, No. 96 C 4086, *1996 WL 650631*, *6 (N.D. Ill. Nov. 7, 1996) (certifying class under Illinois and South Dakota consumer fraud statutes because no showing of reliance required, but denying certification of UCC claims because reliance was a necessary requirement).

The court also concludes that ***HN17***[] the need for individual damages calculations does not defeat predominance and class certification. *See* *Baby Neal, 43 F.3d at 57* (finding that individual damage determinations did not undermine commonality finding); *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977)* (recognizing that the necessity for calculation of damages on an individual basis does not preclude class certification where common issues determining liability predominate); *In re Prudential Ins. Co. of America, 962 F. Supp. 450, 517 (D.N.J. 1997)* ("Individual damages issues do not defeat an otherwise valid **[**51]** class certification.").

One objector argues that claims under various state consumer fraud and antitrust laws **[*250]** defeat predominance because of variations in the state laws. (D.I. 194, Eagel Objection) However, the Third Circuit has recognized that these issues can be minimized by grouping state statutes and common law that share common elements of liability or common defenses, particularly where the lawsuits do not involve personal injuries. *See* *In re Prudential, 148 F.3d 283 at 315*; *In re School Asbestos Litigation, 789 F.2d 996, 1010* (3d cir. 1986). This court also notes that, ***HN18***[] so far as differences between state laws impact only on case management, these differences are irrelevant to certification of a settlement class. *See* *Amchem, 521 U.S. at 620* ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

Based on the above, the court finds that common questions of fact and law predominate over any questions affecting only individual members.

C. Typicality

[52]** ***HN19***[] The claims or defenses of the named class representatives must be "typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. "The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Prudential, 148 F.3d 283 at 311*. "Typicality lies where there is a strong similarity of legal theories [] or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the defendant. . . ." *In re the Prudential, 962 F. Supp. at 518* (internal citation omitted).

Here, the claims of the representative plaintiffs arise from the same course of conduct that gave rise to the claims of the other class members and are based on the same general legal theories. Plaintiffs allege that defendant misled consumers, TPPs and others regarding the bioequivalence of generic warfarin sodium to Coumadin, which resulted in economic harm to plaintiffs through overpayment for warfarin sodium. The most obvious differences between class members is that some are consumers **[**53]** of Coumadin and some are TPPs. However, the named class representatives include both consumers and TPPs, so each type of class member is represented by one or more named plaintiffs. Two of the named consumer plaintiffs reside in "indirect purchaser" states (New Jersey and

Florida), so potentially divergent interests on damages are also represented by named plaintiffs, though courts have found that ***HN20***[] differences in the amount of damages suffered between class representatives and class members does not render the named plaintiffs' claims atypical. *See* *In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 510 (S.D.N.Y. 1996)*.

Based on the above, the court finds the claims of the named plaintiffs are typical of the claims of the class.

D. Adequate Representation

HN21[] *Rule 23(a)* also requires that "the representative parties will fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "First, the adequacy of representation inquiry 'tests the qualifications of the counsel to represent the class.' Second, it 'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" *In re Prudential, 148 F.3d 283 at 313* **[**54]** (internal citations omitted).

The class counsel at bar are well qualified and experienced class action attorneys who have been involved in similar drug litigation around the country. Counsel vigorously pursued this litigation in this court and in several state courts over a period of more than three years, conducting extensive document discovery and numerous depositions before engaging in settlement negotiations. Any potential conflicts between consumers and TPPs were adequately represented by separate counsel for consumers and TPPs. ***HN22***[] The existence of separate consumer and TPP counsel provides adequate "structural protections to assure that differently situated plaintiffs negotiate for their own unique interests." *Georgine, 83 F.3d at 631* (finding inadequate representation of disparate **[*251]** groups of plaintiffs where no such structural protections existed).

As noted in the typicality discussion, named parties include both consumers and TPPs, and named consumers include two from "indirect purchaser" states. The named plaintiffs share a strong interest in establishing liability of defendant, seeking the same type of damages (compensation for overpayment) for the same type **[**55]** of injury (overpayment for warfarin sodium). The court finds that any alleged conflict goes to how the settlement fund should be allocated. (D.I. 214, Bradley Objection) While some courts in similar cases have certified consumers and TPPs as separate classes or subclasses, there does not appear to be any compelling reason to require separate classes or subclasses here in the context of settlement. Instead, the court will address allocation of the settlement fund between consumers and TPPs in its discussion of settlement fairness.

Based on the above discussion, the court finds the named plaintiffs will fairly and adequately represent the interests of the class.

E. Superiority

HN23[] "The superiority requirement asks the court 'to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.'" *In re Prudential, 148 F.3d 283 at 316*. The factors set out in *Rule 23(b)(3)* help the court assess whether a class action is superior to other available methods of adjudication. In the case of consumers, the class members here have little interest in "individually controlling the prosecution or defense of **[**56]** separate actions," *Fed. R. Civ. P. 23(b)(3)(A)*, because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit. A class action facilitates spreading of litigation costs among numerous litigants and encourages private attorney general enforcement of statutes. *See* *In re General Motors, 55 F.3d 768 at 784*. This is less true for the TPP members of the class, some of whom have significant individual claims. However, the TPPs had the option to opt-out of the settlement if they believed it was worth it to them to pursue litigation separately. Plaintiffs assert there are potentially thousands of TPPs who have claims, so this large number of potential TPP plaintiffs - added to the 2 million consumers - strongly suggests the use of the class action device as the most efficient way to resolve the asserted claims.

In addition, a relatively small number of individual lawsuits were pending against defendant in this matter, indicating a lack of interest in individual prosecution of claims. *See* *In re Prudential, 148 F.3d 283 at 316*; see also *Fed. R.*

Civ. P. 23(b)(3)(C). Furthermore, the presence of defendant's place of business in Delaware **[**57]** and the initial filing of several separate class action lawsuits in Delaware make it a desirable forum in which to concentrate the litigation, a conclusion already reached by the Multi-District Litigation Panel that consolidated several pending federal lawsuits here. *See* *In re Prudential, 148 F.3d 283 at 316*; see also *Fed. R. Civ. P. 23(b)(3)(D)*.

In sum, the court finds that the class action device is clearly superior in terms of fairness and efficiency to other available methods of litigation.

F. Objections to Settlement Class Certification

Several class members object to certifying a single, nationwide class because some members may be eligible for treble damages or punitive damages under their state antitrust or consumer fraud statutes, and Tennessee and Kansas members may be eligible for "full consideration" damages, thereby destroying commonality. (D.I. 218, Tennessee Objectors) These differences, however, go to damages calculations and thus do not destroy commonality or predominance, though they may be considered by the court in assessing the fairness of the settlement.

The court is also unpersuaded by one class member's objection to applying Delaware state **[**58]** law to class members from other states. (D.I. 194, Eagel Objection) ***HN24***[] Where the defendant's headquarters are located in Delaware and the alleged deceptive acts originated in Delaware, it is proper to apply the Delaware consumer fraud statute to a nationwide class. *See* *In re Cordis Corp. Pacemaker Product* ***[*252]*** *Liability Litigation*, No. C-3-86-543, *1992 U.S. Dist. LEXIS 22612*, at *49 (S.D. Ohio Dec. 23, 1992) (noting that it is proper under Supreme Court precedent to apply a particular state's laws in a nationwide class action if the defendant's headquarters are in that state and many of the acts upon which liability is predicated took place there).

Finally, objectors assert that consumers who pay a fixed co-pay [20] for their prescription drugs cannot be included in the certified class because they have suffered no damages. (D.I. 245, Hansen; D.I. 205, O'Kelley; D.I. 210, Bruce; D.I. 198, McCarty; D.I. 216, Galperin) The court concludes, however, that fixed co-pay consumers need not be excluded from the settlement class, because they still have claims for injunctive and other equitable relief. In addition, ***HN25***[] a class can be certified even where some individual, absentee class **[**59]** members may later prove not to be injured, in particular where causation can be shown by generalized damage to all and individual damage determinations can be left to the damages phase of litigation. *See* *In re NASDAO Market-Makers Antitrust Litigation, 169 F.R.D. 493, 523 (S.D.N.Y. 1996)* ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class."). The fairness of including fixed co-pay consumers in the settlement fund distribution is addressed in the discussion of settlement fairness.

[60]** In conclusion, the court finds the objections raised to class certification unpersuasive, finds the proposed class meets the requirements of *Rule 23*, and certifies the class for settlement purposes.

V. NOTICE

HN26[] Before certifying a class or approving a class settlement, the court must direct that notice of the proposed settlement be disseminated to class members. *Fed. R. Civ. P. 23(c)(2)* & *23(e)*. "To alert class members to their right to 'opt out' of a (b)(3) class, [*Rule 23(c)(2)*] instructs the court to 'direct to the members of the class the best

[20] A "fixed co-pay" as it is used here means the insured pays the same co-pay amount for prescription drugs regardless of whether they are name-brand or generic. Plaintiffs assert that most insureds who have co-pays pay a higher co-pay for name-brand prescription drugs than for generic drugs. Another type of co-pay is a "percentage co-pay," in which the insured pays a percentage of the drug's cost.

notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *Amchem, 521 U.S. at 617* (quoting *Fed. R. Civ. P. 23(c)(2)*).

HN27[] The settlement notice requirement is found in *Rule 23(e)*, which specifies that "no class action may be 'dismissed or compromised without [court] approval,' preceded by notice to class members." *Id.* (quoting *Fed. R. Civ. P. 23(e)*).

As described in detail earlier, plaintiffs executed a court-approved plan to provide notice to class members that began immediately after preliminary approval of the settlement. The **[**61]** notice was designed to meet the requirements of both *Rule 23(c)* and *Rule 23(e)* and follow the procedures recommended by the *Manual for Complex Litigation* ("MCL"), 3d ed., § 30.21. The parties provided individual notice to class members who could be identified through reasonable effort by assembling a mailing list of over 12,000 potential TPP class members and sending individual notice packets to all TPPs on the list by first class mail. This was supplemented by publication of a summary notice in industry-specific journals as well as general interest newspapers and magazines. Although individual notice was not reasonable or even possible to consumers, given the large number of potential consumer class members, the best notice practicable under the circumstances was given by publishing the summary notice in newspapers and magazines which were likely to be read by potential class members and which had a combined circulation of 115 million people. The summary notice provided potential class members with an address and toll-free telephone number from which they could obtain the full notice and claims packet, as well as the website address at which they could view or download the information **[**62]** themselves.

[*253] The summary and full notice properly informed potential class members of their right to be excluded from the class, indicated that the judgment would bind all class members who did not request exclusion, and informed members who did not request exclusion that they could enter an appearance through counsel. *See* *Fed. R. Civ. P. 23(c)(2)*. In addition, the notice informed class members (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information was available from the court files; and (4) that any class members could appear and be heard at the fairness hearing. *See In re Prudential Ins. Co. of America, 962 F. Supp. 450, 527 (D.N.J. 1997)* (citing 2 H. Newberg, *Newberg on Class Actions* § 8.32 at 8-103). In sum, the notice contained all the information recommended by other courts and by the *Manual for Complex Litigation*. *See In re Prudential, 962 F. Supp. at 496*; .

MCL 3d § 30.212 Notice was also timely in that class counsel initiated publication of the summary notice within several weeks of receiving the court's approval and well in advance of the opt-out deadline and the **[**63]** fairness hearing, giving potential class members a fair opportunity to obtain the full notice, submit a Notice of Exclusion, or file objections to the settlement. To avoid duplication of mailing and distribution expenses, the notice packets also included Proof of Claim forms and specified the date by which claims had to be received. *See MCL* 3d § 30.212.

While the notice itself did not include the full text of the proposed settlement due to its length, the notice summarized the key terms of the settlement and informed class members that they could review the Stipulation of Settlement by contacting the clerk of court. *See id.* ("***HN28***[] The notice must contain a clear, accurate description of the key terms [of the settlement] and tell class members where they can examine or secure a copy.") The Stipulation was also available for viewing at the Coumadin settlement website.

The court is unpersuaded by several objectors' challenges to the adequacy of the notice. (See D.I. 205, O'Kelley Obj.; D.I. 210, Bruce Obj.; D.I. 202, Hutchinson, Jr. Obj.; D.I. 198, McCarty Obj.) Class members were informed of the nature of the litigation and the claims and defense offered by the parties as well **[**64]** as the terms of the settlement and distribution plan. They were then given the opportunity to opt out of the settlement and pursue their own litigation. The notice did not need to include details such as how much each class member might receive from the settlement (a speculative amount at that stage), the confidential "opt-out" threshold beyond which defendant reserved the right to withdraw from the settlement (irrelevant to members' opt-out decision), the estimated number of class members and total damages they might claim (available from complaint), or boilerplate release language (available in Stipulation of Settlement). The purpose of the notice was to advise class members of the general terms of the settlement and their rights, not to speculate on potential distributions, provide details of the litigation, or discuss all the factors considered in approving the settlement. Furthermore, ***HN29***[] "class members are not expected to rely upon the notices as a complete source of settlement information." *Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975)*.

Based on the above, the court finds the notice satisfied the requirements of both *Rule 23(c)(2)* **[**65]** and *Rule 23(e)* and complied with the standards suggested by the *MCL* and other courts. It provided potential class members with "the information necessary to make an informed and intelligent decision whether to participate in the class and whether to object to the Proposed Settlement." *In re Prudential, 962 F. Supp. at 526*.

VI. FAIRNESS OF SETTLEMENT

A. Role of Court and Presumption of Fairness

HN30[] *Federal Rule of Civil Procedure 23(e)* provides that "[a] class action shall not be dismissed or compromised without the approval of the court. . .," thereby protecting "unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims **[*254]** by a compromise." *Amchem, 521 U.S. at 623*. The Third Circuit has expressed a need for heightened scrutiny where a case is settled before the class has been formally certified. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 805 (3d Cir. 1995)*. The court's duty is to protect absent class members by assuring **[**66]** the settlement represents adequate compensation for the release of the class claims, a duty which some courts have described as a "fiduciary responsibility." *Id.*

Nevertheless, the Third Circuit also has held that there is an overriding public interest in settling and quieting litigation, particularly in class actions. *See Id. at 784* ("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *In re School Asbestos Litig., 921 F.2d 1330 at 1333* (Third Circuit's policy is to encourage settlement of complex litigation "that otherwise could linger for years").

HN31[] An initial "presumption of fairness for the settlement is established if the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Cendant Corp. Litigation, 264 F.3d 201, 232 n.18 (3d Cir. 2001)* (citing *In re General Motors, 55 F.3d 768 at 785)*.

In the case at bar, class counsel **[**67]** submitted affidavits showing the settlement resulted from intensive, arm's length negotiations between counsel for plaintiffs and defendant, in which both consumer counsel and TPP counsel fully participated. The proposed settlement came after more than three years of litigation and discovery, including review of hundreds of thousands of documents produced by defendant, numerous depositions, and consultation with experts. Counsel also declare their experience in this type of complex class action litigation, including involvement in a similar prescription drug overcharge class action for which the district court recently approved settlement. *See In re Lorazepam, supra.* Finally, only a small fraction of the class objected to the settlement, as discussed more fully below. Accordingly, the court approaches the fairness determination with a presumption that the settlement is fair.

B. *Girsh* Factors

HN32[] To determine whether the settlement is fair, reasonable, and adequate under *Rule 23(e)*, the Third Circuit applies the nine-factor test set forth in *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*. *See also In re Cendant, 264 F.3d at 231*.

1. [68] Complexity, Expense and Likely Duration of Litigation**

HN33[] "This factor captures 'the probable costs, in both time and money, of continued litigation.'" *In re Cendant, 264 F.3d at 233*. Settlement is particularly favored in a complex class action such as this. Although significant discovery has already taken place, to continue this litigation through trial would require additional discovery, extensive pretrial motions addressing complex factual and legal questions, and a complicated, lengthy trial. The costs would significantly increase the substantial costs already incurred. In addition, any judgment would likely be the subject of posttrial motions and appeals, further prolonging the litigation and reducing the value of any recovery to the class.

In sum, this factor strongly supports settlement.

2. Class Reaction

HN34[] "This factor attempts to gauge whether members of the class support the settlement," although the court needs to be careful not to infer too much from a small number of objectors to a sophisticated settlement. *In re Prudential, 148 F.3d 283 at 318*. After an extensive nationwide notice program, very few class members filed objections to **[**69]** the proposed settlement: eleven from consumers or consumer groups and two from TPPs. In addition, only 136 consumers and ten TPPs opted-out of the settlement class. The court finds the low number of objections from TPPs particularly significant, because these are sophisticated businesses **[*255]** with, in some cases, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate. Consequently, the court finds this factor weighs in favor of settlement.

3. Stage of Proceedings and Amount of Discovery Completed

HN35[] This factor evaluates whether counsel had an adequate appreciation of the merits of the case before negotiating. *In re Cendant, 264 F.3d at 235*. "To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *In re Prudential, 148 F.3d 283 at 319*.

As described in detail earlier, class counsel pursued this litigation for over three years on several fronts before negotiating this settlement. Consumer plaintiffs filed four separate actions in federal court which were eventually coordinated in **[**70]** this court by the Multi-District Litigation Panel. Consumer counsel also engaged in substantial discovery and coordinated these efforts with other plaintiffs' counsel in related state and federal actions. Several TPPs filed separate lawsuits in federal court and worked together with the consumer plaintiffs to consolidate their actions and reach settlement with defendant. In parallel with the federal actions, plaintiffs' counsel pursued actions in several state courts, including Illinois, California, Tennessee, New York, Alabama, and Wisconsin, on behalf of consumers and TPPs.

In the course of these various federal and state actions, voluminous documents were reviewed and numerous depositions taken and motions filed. In addition, an expert was engaged in at least one of the state actions, and experts were consulted by both consumers and TPPs in conjunction with settlement negotiations. The settlement resulted from over a year of intense, arm's length negotiations between consumer counsel, TPP counsel, and defendant's counsel.

Based on the above, the court finds that counsel had an adequate appreciation of the merits of the case before negotiating and, thus, the proposed settlement **[**71]** is the product of informed negotiations. As a result, this factor strongly favors approval of the settlement at this stage of the litigation.

4. Risks of Establishing Liability

HN36[] This factor considers the potential rewards or risks if class counsel decided to litigate rather than settle. *In re Cendant, 264 F.3d at 237*. The history of litigation in federal and state courts shows the risks of establishing liability in this case, both through procedural barriers to instituting and maintaining a nationwide class action and through barriers to proving liability.

Plaintiffs advanced several theories of liability under federal and state antitrust laws, state consumer protection laws, and state common law. Defendant successfully barred consumer plaintiffs' standing, as indirect purchasers, to recover damages under the federal antitrust laws. Getting nationwide class certification under state law also presented difficulties, with one state denying class certification under the "indirect purchaser" state antitrust laws. Nevertheless, one state court has certified a nationwide consumer class under state consumer protection law and was set to consider intervention by TPPs.

[72]** If the case at bar were to proceed to trial, defendant could be expected to challenge class certification, and a class certified now could be decertified at any time later in the litigation. The defendant could also challenge the standing of TPPs and raise several other substantial defenses, including the Noerr-Pennington doctrine and *First Amendment* defenses to protect its activities lobbying state pharmaceutical boards and providing information to pharmacists, doctors, and the public.

Based on the detailed allegations in the complaint, plaintiffs have strong evidence that defendant conducted a deceptive communications campaign to convince consumers, physicians, TPPs, and others that generic warfarin sodium could not be directly substituted for Coumadin. The FDA is on record warning defendant about its communications and calling them false and misleading. Nevertheless, to prove their antitrust and consumer fraud claims, plaintiffs would **[*256]** also have to show these activities caused harm to consumers and TPPs. In this regard, the learned intermediary doctrine presents a barrier to proving that any deceptive representations made by defendant were the proximate cause of plaintiffs' injuries. **[**73]** *See*, *e.g.*, *Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315, 321 (5th Cir. 2002)*. Under the theory, a learned intermediary such as the prescribing doctor, pharmacist, or state pharmaceutical board could be deemed to have made the critical choice about whether Coumadin or the generic was available to the consumer.

The court concludes that, on balance, this factor favors settlement, despite low risk in establishing that defendant's activities were deceptive, because of the difficulty of obtaining class certification, the strong defenses that defendant could raise to liability, and the difficulties in proving causation.

5. Risks of Establishing Damages

HN37[] "Like the fourth factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *In re Cendant, 264 F.3d at 238* (citation omitted). In particular the court looks at the potential damage award if the case were taken to trial against the benefits of immediate settlement. *In re Prudential, 148 F.3d 283 at 319*.

Damages would likely be established at trial through "a 'battle of experts,' with each side presenting **[**74]** its figures to the jury and with no guarantee whom the jury would believe." *In re Cendant, 264 F.3d at 239*. In an affidavit, plaintiffs' damages expert, Dr. Gary L. French, [21] **[**75]** discusses the various challenges defendant has made to his damages model and how that would affect defendant's liability. (D.I. 238) For example, defendant contends that the price differential between Coumadin and generic warfarin sodium is much less than 25%; that those consumers who maintain loyalty to Coumadin would not have been injured, because defendant increased the price of Coumadin even with generic competition (relying on brand loyal customers continuing to buy Coumadin, even at higher prices); that Narrow Therapeutic Index drugs [22] such as Coumadin resist generic penetration, thus

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[21] Dr. French states that he is a Senior Vice President of Nathan Associates Inc., an economic and management consulting firm that provides economic research and analysis to public and private clients in the United States and abroad. He holds masters and doctoral degrees in economics and has experience analyzing economic and financial issues in antitrust and other complex litigation. (D.I. 238 at PP1-3)

increasing the number of consumers who would not have switched to the generic; and that its allegedly deceptive conduct ended less than one year after the start of the damage period, thus reducing damages. (*Id.* at P11)

The court finds that this factor strongly favors settlement at this time.

6. Risks of Maintaining Class Action Status Through Trial

HN38[] *Rule 23(a)* allows a district court to decertify or modify a class at any time during the litigation if it proves to be unmanageable. *In re Prudential, 148 F.3d 283 at 321*. The risk of decertification appears to be significant in the case at bar because of the potential difficulty of managing a nationwide class action under multiple state laws and the possibility that Delaware law could not be applied to every consumer in the nation. Other courts, including the Third Circuit, have raised concerns about maintaining nationwide class actions under multiple state laws such as this. *See In re LifeUSA Holding, Inc., 242 F.3d at 147*; *Georgine, 83 F.3d at 630*; *Tylka v. Gerber Products, Co., 178 F.R.D. 493, 498 (N.D. Ill. 1998)* **[**76]** (application of 50 states' consumer fraud statutes would be unmanageable). Even if the class were maintained through the liability portion of a trial, it is likely that the class would need to be divided into subclasses for the damages portion of a trial to manage potential conflicts between consumers and TPPs and among various consumer groups.

[*257] For these reasons, this factor strongly favors settlement.

7. Ability to Withstand Greater Judgment

HN39[] This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *In re Cendant, 264 F.3d at 240*.

There is no evidence of record about defendant's ability to pay or whether this factored into the settlement negotiations. The court finds this factor neither favors nor disfavors settlement in this matter.

8. & 9. Range of Reasonableness of Settlement in Light of Best Possible Recovery and All Attendant Risks of Litigation

HN40[] The eighth and ninth *Girsh* factors ask "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *In re Prudential, 148 F.3d 283 at 322*. **[**77]** The Third Circuit has counseled that "in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re General Motors, 55 F.3d 768 at 806* (citing *Manual for Complex Litigation 2d* § 30.44). These damages estimates should generate a range of reasonableness within which a district court approving or rejecting a settlement will not be set aside. *Id.* The court must keep in mind that "settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.*

Plaintiffs' expert, Dr. French, estimated the maximum recoverable damages in this case to be approximately $ 133.8 million. [23] (D.I. 238 at P10) This estimate assumed several things: there are 1.8 million Coumadin users in the United States; defendant's market share would have fallen from 100% in July 1997 to 50% in September 1999 and thereafter, absent its illegal conduct; generic warfarin sodium cost 25% less than Coumadin; [24] and generic

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[22] According to the French affidavit, a Narrow Therapeutic Index drug is one in which the tolerance to the drug is so narrow that too small a dose can be useless and too large a dose can be dangerous to the patient's health. (D.I. 238 at 5 n.4)

[23] This includes $ 105.63 million in damages to Coumadin customers who would have switched to the generic, and $ 28.14 million to those who would have continued using Coumadin, based on 2.5% supracompetitive pricing for Coumadin (D.I. 238 at P10)

competition would have made defendant charge 2.5% less **[**78]** for Coumadin. (*Id.* at P9) Because defendant would have vigorously challenged the basis for plaintiffs' damages figure at trial, Dr. French also estimated that recoverable damages could be as low as $ 7.1 million. (*Id.* at P20)

Dr. French based his estimates on pricing and industry data extracted from documents produced during discovery and on information from industry sources. (D.I. 237 at P148; D.I. 280 at 7-15) After reviewing the expert report and supporting materials, **[**79]** the court concludes that Dr. French's estimate of the range of possible damages if the case were to go to trial is reasonable.

One objector argues that the damages estimate is too low because it limits the potential generic penetration rate (absent defendant's unlawful conduct) to 50%, rather than the 90% market penetration typical for generic drugs. (D.I. 207, HCSC Obj.) However, Dr. French explained that he chose the 50% penetration level because warfarin sodium is a Narrow Therapeutic Index ("NTI") drug, and NTI drugs tend to have much lower generic penetration rates than non-NTI drugs. (D.I. 238 at P14; D.I. 280 at 9-10)

Some class members also contend that the damages estimate should have taken into account the potential for treble damages under antitrust or consumer fraud statutes. Recovery of such damages is purely speculative, however, and need not be taken into account when calculating the reasonable range of recovery. *See* *Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 2002 U.S. Dist. LEXIS 5677, 2002 WL 246664*, at *4 n.12 ("***HN41***[] The standard for evaluating settlement involves a comparison of the settlement amount with the estimated single **[*258]** damages," not treble damages.) (citing *In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979)* **[**80]** and *City of Detroit v. Grinnell Corp., 495 F.2d 448, 458 (2d Cir. 1974))*.

To the extent that objectors argue the settlement is not high enough because it does not allow 100% recovery of claimants' losses, the court finds these objections without merit. (D.I. 207, HCSC Obj.; D.I. 214, Bradley Obj.; D.I. 218, Tennessee Obj.) ***HN42***[] A settlement is by nature a compromise between the maximum possible recovery and the inherent risks of litigation. "The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 8931, 2001-1 Trade Cas. (CCH) P72,862, 2000 WL 1737867*, at *2 (D.D.C. Mar. 31, 2000) (internal citation omitted). The court also notes that all class members had the opportunity to opt out of the settlement and preserve their right to independently seek full recovery of their alleged damages, if they believed they could achieve better results.

The settlement amount of $ 44.5 million represents more than 33% of the maximum possible recovery, a very reasonable settlement when compared with recovery percentages in other class actions. *See* *In re Cendant, 264 F.3d at 241* **[**81]** (approving settlement for 36% recovery and noting that typical recoveries in securities class actions range from 1.6% to 14%). Even a small percentage of the maximum possible recovery can be a reasonable settlement. ***HN43***[] "Dollar amounts are judged not in comparison with possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Union Carbide Sec. Lit., 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989)*. When all the risks of litigation and defendant's alternate damages calculations are also taken into consideration, the $ 44.5 million settlement amount appears to be quite reasonable.

Accordingly, the court finds the final two *Girsh* factors, together with the other *Girsh* factors, strongly support approval of the settlement.

C. Allocation and Distribution Plan

Several class members object to the fairness of the settlement allocation plan and the inclusion of TPPs and fixed co-pay consumers in the distribution.

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[24] Dr. French also assumed that Coumadin cost each user an average of $ 23.15 per month (total sales price, including amounts paid by consumers and by TPPs). He calculated this figure by dividing $ 500 million annual Coumadin sales equally among 1.8 million Coumadin users. (D.I. 280 at 11-12)

The court observes that some of these objections arise from a misunderstanding of the settlement, with some objectors believing consumers could only recover from 18% of the settlement **[**82]** fund. (D.I. 186, Shapiro Obj.; D.I. 210, Bruce Obj.; D.I. 216, Galperin Obj.) In fact, the settlement actually prefers consumers over TPPs in that consumers get preferential access to 18% of the net settlement fund, and then share in the remaining 82% on a *pro rata* basis with the TPP claimants. Because of this preference fund, consumer claimants will receive a higher percentage of their recognized losses than will the TPPs. [25] This preference is fair for several reasons. First, consumer counsel initiated this litigation and expended much of the time and expense related to the case. Second, consumer claimants are drawn mostly from an elderly population that warrants special protection in relation to the large, sophisticated insurance companies who will be making claims as TPPs, and who can more easily bear the losses. Third, individual consumer claims are expected to be quite small in relation to the claims of TPPs, making consumers much less likely to file a claim. The consumer preference provides an incentive to encourage more consumer claims and helps prevent TPPs from collecting an unfair share of the total settlement fund.

[83]** On the other hand, it would be unfair to allow consumers to collect a disproportionate share of the settlement fund. Class counsel asserted during oral argument that, during the class period, the TPPs paid for 67% of Coumadin costs, while consumers paid for 27%, so TPPs actually bear the greater share of damages. (D.I. 267 at 62) A settlement for consumers only, if it could be achieved, would be expected to be much smaller, as the **[*259]** TPP claims against defendant would still exist.

One objector asserts that the TPPs lack standing to assert any claims under the antitrust laws, so should receive a much smaller share or none of the settlement fund. (D.I. 186, Shapiro Obj., citing *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999))*. [26] **[**85]** While TPP standing was never formally challenged in the case at bar, the Third Circuit has already held that the consumer class members in this case have antitrust standing for injunctive relief. *In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395, 402 (3d Cir. 2000)*. The TPPs are arguably in the same position as consumers in that they allegedly paid supracompetitive prices **[**84]** for Coumadin or unnecessarily paid for Coumadin instead of lower-priced generic warfarin sodium. The TPPs here, as much as the consumers, could be considered "the target of DuPont's antitrust violation," in that they were the end parties absorbing the overcharges for the drugs. *In re Warfarin, 214 F.3d at 401*. In contrast, the *Steamfitters* TPPs only suffered injury (paying for treatment of smoking-related illnesses) after physical injuries were suffered by their insureds and, thus, the TPPs' harm was derivative of the consumers' harm. Even if the TPPs do not have standing to assert direct claims, they would have subrogation claims against consumer class members, [27] as Objector Shapiro acknowledged at the fairness hearing. (D.I. 267 at 12) Inclusion of the TPPs apparently facilitated settlement, because defendant had an interest in binding all parties who had potential claims against it. (D.I. 280 at 1) If TPPs or a subclass of consumers had been excluded from the settlement, this would have left defendant vulnerable to future lawsuits or class actions.

Similar objections have been raised to including fixed co-pay consumers in the distribution of the settlement fund. (D.I. 198, McCarty Obj.; D.I. 205, O'Kelley Obj.; D.I. 210, Bruce Obj.; D.I. 216, Galperin Obj.) As discussed earlier, some class members argue that fixed co-pay consumers have not suffered any damages, because they pay the same for warfarin sodium regardless of whether it is brand name Coumadin or the generic version. These consumers should therefore be excluded from the settlement distribution. While the argument has merit, ultimately the court finds that excluding the fixed co-pay consumers at this point in the litigation cannot be justified. The fixed

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[25] Supplemental submissions by plaintiffs show consumer claimants are likely to receive 100% of their claims, based on the number of claims received by the April 30, 2002 deadline. (D.I. 280 at 5; D.I. 281 at P5)

[26] Objector also cites *In re Rezulin Products Liability Litigation, 171 F. Supp. 2d 299 (S.D.N.Y. 2001)*, for the proposition that TPPs cannot collect damages for payments made on behalf of insureds. The case at bar can be distinguished from *Rezulin*, however, in that plaintiffs here allege economic injury due only to price overcharges, whereas the crux of the *Rezulin* claims was the marketing of a defective pharmaceutical product that caused physical injury or threat of physical injury to consumers.

[27] *See* *In re Synthroid, 264 F.3d 712 at 717* (approving settlement including class of TPPs and noting that if TPPs had not been included in distribution they could have "held back and sued [consumers] in subrogation.").

co-pay consumers arguably have claims for injunctive or other equitable relief, if not damages, and thus can expect some compensation for releasing their claims against defendant. If fixed co-pay **[**86]** consumers were excluded altogether from the settlement, they could sue defendant for damages by invoking the "collateral source" doctrine, [28] thus continuing to expose defendant to lawsuits. Moreover, to exclude fixed co-pay consumers now would require sending additional notice and a new, more complicated claim form to the consumers who have already filed claims. (D.I. 280 at 5-6) A new opportunity to opt-out of the settlement would also have to be provided. This would further delay distribution to the rest of the class and result in additional administrative costs. All these factors, plus the knowledge that all consumers who have actually filed claims are likely to recover 100% of their recognized losses, persuade the court that fixed co-pay consumers should be allowed to share in the distribution of the settlement fund.

[87] [*260]** Finally, several class members question the basis for the 15% "recognized loss" calculation imposed on claims and the use of the same "loss" figure for all claimants. (D.I. 186, Shapiro Obj.; D.I. 207, HCSC Obj.; D.I. 210, Bruce Obj.; D.I. 216, Galperin Obj.; D.I. 218, Tenn. Obj.) After reviewing plaintiffs' explanation for the 15% figure, the court accepts it as a reasonable estimate of the loss each claimant has suffered due to defendant's alleged unlawful conduct. (D.I. 280 at 15-17) Dr. French made a reasonable analysis of available data to arrive at a 25% average retail price difference between Coumadin and generic warfarin sodium and to estimate 2.5% supracompetitive pricing for Coumadin. (*Id.* at 10-11, 12-15) The plaintiffs were justified in blending the 25% that would have flowed to users who switched to generic warfarin sodium with the 2.5% overcharges owed to users who remained loyal to brand name Coumadin, because determining which claimants fit into which category would have been difficult or even impossible. Also, according to defendant, the 25% price difference used by Dr. French was too high and the actual difference was closer to 17% (D.I. 238 at P17), a figure **[**88]** very close to the 15% "recognized loss" settled on by consumer and TPP class representatives.

Plaintiffs were also reasonable in applying the 15% loss figure to claimants from all states. It is purely speculative that claimants from indirect purchaser states could anticipate a greater recovery than claimants from other states; all claimants sought damages through consumer protection statutes, some of which also provide for punitive or treble damages. Any claim for recovery of full consideration in Tennessee or Kansas (the states that allegedly would allow recovery of the full purchase price, not just the overcharge) is also speculative since the application of this rule in the context of interstate competition is uncertain. (*See* D.I. 234 at 57-58)

Based on the above, the court finds the 15% recognized loss to be a reasonable and equitable figure with which to calculate distributions to all claimants.

The court also recognizes that the plan of allocation was agreed to by both consumer and TPP class representatives only after extensive, arm's length negotiations. (D.I. 241 at P6; D.I. 240 at P22) This further supports the fairness of the overall allocation and distribution of **[**89]** the settlement fund.

D. Other Objections to Settlement

The Tennessee Objectors complain that the release of claims in the Stipulation of Settlement is too broad. (D.I. 218) The court is unpersuaded by this argument, because the release language clearly limits it to the subject matter of this litigation, that is, to claims about "the marketing, promotion and sale of Coumadin during the Class Period that were or could have been asserted" in the current litigation. (D.I. 172 at 7, 20-22)

To the extent that class members objected to the procedure by which objections could be raised, the court finds that objectors were given a full and fair opportunity to object to the settlement through written submissions and to appear and present argument at the fairness hearing, at which time the objectors could respond to the information

[28] At least one court has applied the collateral source rule to allow a consumer class to pursue the full overcharge for brand name prescription drugs in an antitrust case, even though insurance companies paid all or some of the overcharge. *See Goda v. Abbott Laboratories*, No. 01445-96, 1997 WL 156541 (D.C. Super. Ct. Feb. 3, 1997).

or arguments presented by class counsel in support of the settlement approval. The fact that a number of detailed objections were filed by the appropriate deadline shows that adequate notice and information was available to class members and potential objectors.

In conclusion, after considering all objections to the settlement, the court finds that none of **[**90]** the objections raised either in writing or orally at the fairness hearing bars approval of the settlement agreement.

VII. ATTORNEYS' FEES AND EXPENSES

Class counsel requests that the court award an aggregate attorneys' fee in the amount of twenty-five percent (25%) of the settlement fund, plus an award of litigation costs and expenses in the amount of $ 832,382.84. [29] All awards are to be paid out of the settlement fund before any distributions to the claimants.

[*261] A. Fee Analysis

HN44[] "[A] thorough judicial review of fee applications is required in all class action settlements." *In re General Motors, 55 F.3d 768 at 819*. In determining the fee award in a common-fund class action, the Third Circuit follows the percentage-of-the-recovery method. *See* *In re Cendant Corporation PRIDES Litigation, 243 F.3d 722, 734 (3d Cir. 2001)*; **[**91]** *In re Prudential, 148 F.3d 283 at 333-334*. Several nonexclusive factors are considered in determining the appropriate percentage fee: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)*. "The factors . . . need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Id.*

1. Complexity of the Litigation, Size of the Settlement, and Performance of Counsel

The court need not reiterate the complex legal and factual issues and procedural difficulties of this nationwide class action and related state cases. The litigation has already progressed for over three years on multiple fronts through motions, appeals, discovery, consolidation, **[**92]** and lengthy settlement negotiations. In addition, the litigation was entirely initiated and pursued by class plaintiffs, not as a tagalong to a government enforcement action.

As a result of their efforts, the attorneys obtained a substantial cash settlement of $ 44.5 million on behalf of the class, and approximately two million consumers and potentially thousands of TPPs are eligible to make claims. The class counsel are well-qualified to litigate this type of complex class action, and they showed their effectiveness in the case at bar through the favorable cash settlement they were able to obtain. *See* *Cullen v. Whitman Medical Corp., 197 F.R.D. 136, 149 (E.D. Pa. 2000)* ("***HN45***[] The single clearest factor reflecting the quality of class counsels' services to the class are the results obtained."). The court notes, however, that though the settlement is reasonable and adequate, it contained no guarantee of 100% compensation for class members who made claims, even with the 18% preference fund set aside for consumer claimants only.

The court finds that class counsel faced considerable contingent risk in pursuing this litigation. Counsel committed substantial time and resources **[**93]** to this litigation on a purely contingent basis, expending over 23,000 hours of work and spending $ 832,382.84 (not including hours and expenses incurred after the fee petition was submitted) without compensation and without any guarantee of receiving compensation. A reasonable percentage award must

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[29] The original request was for $ 835,882.84, but the reported expenses were subsequently reduced by $ 3500 when detailed expense records were submitted to the court. (See D.I. 256)

compensate the contingent risks borne by counsel so as to ensure that "competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Manual for Complex Litigation 3d*, § 24.121, at 191. Class counsel also submitted evidence that the typical range of contingency fee agreements negotiated by health insurance companies with their attorneys ranges from 20% to 30% of the gross recovery, though the court does not put too much weight on this factor. (D.I. 242); *see* *In re Prudential Ins. Co. Am. Sales Practice Litig., 106 F. Supp. 2d 721, 731 (D.N.J. 2000)* ("the fee percentage that likely would have been negotiated between private parties" is one factor that courts consider in setting percentage fee award).

Balanced against the favorable results for class members were several substantial objections to the settlement, particularly to the makeup **[**94]** of the class and the fairness of the settlement allocation and distribution. Class counsel could have minimized these objections in the first instance by more skillfully defining the class and by providing the court with more complete documentation and analysis supporting approval of the class and the **[*262]** settlement. [30]

Moreover, a thorough review of the supplemented record of expenses also reveals the degree of duplication of effort made by the twenty-seven different law firms involved in this litigation. The court recognizes that counsel at some point worked to coordinate the various state and federal cases, pursuing consolidation of cases where possible and coordinating document discovery and depositions in an effort to conduct the litigation efficiently. Nevertheless, there has been no effort on the part of the lawyers to explain why certain work was necessary and not **[**95]** duplicative. [31]

The court finds unpersuasive the objections lodged to the attorneys' fees themselves. ***HN46***[] The court determines a reasonable award to the class counsel in the aggregate, and the counsel then determine how to allocate the award among themselves. *See* *Spicer v. Chicago Bd. Options Exch., 844 F. Supp. 1226, 1256 (N.D. Ill. 1993)* ("Ideally, allocation of the fee award is a private matter to be handled among class counsel.") (citing Newberg, *Attorney Fee Awards* § 2.16 (1986)). Counsel asserts that there is no pre-existing agreement as to the distribution of the fee award, but that the shared understanding is that it will be based on lodestar amounts as well as other factors. **[**96]** (D.I. 236 at 19; D.I. 264 at 5) This is a private matter for the attorneys to resolve. Contrary to some objectors' concerns, there is no reason to believe that TPP and consumer counsel will collect fees in proportion to the amount of recovery for their respective clients - the settlement fund is not even allocated between TPP and consumers in such a way that would make such an attorneys' fee division possible. The court also rejects an argument that the fee should be set by auction. *See* *In re Cendant, 264 F.3d at 284 n.56* (endorsing application of *Gunter* factors to determine reasonable fee even where lead counsel is selected by auction).

2. Fee Awards in Other Cases

HN47[] Many courts, including several in the Third Circuit, have considered 25% to be the "benchmark" figure for attorney fee awards in class action lawsuits, with adjustments up or down for significant case-specific factors. *See, e.g., Manual for Complex Litigation 3d*, § 24.121 at 189; *Lazy Oil Co., 95 F. Supp. 2d 290 at 341*; *Seidman v. American Mobile Systems, 965 F. Supp. 612, 622 n. 7 (E.D. Pa. 1997)*; *Pozzi v. Smith, 952 F. Supp. 218, 225 (E.D. Pa. 1997)*. **[**97]** *Lazy Oil* found a 20-27% range of fees in cases that settled for $ 20-30 million, and noted that the percentage of the award decreases as the size of the settlement fund increases to avoid a windfall to the attorneys. *Lazy Oil Co., 95 F. Supp. 2d 290 at 322, 342* (awarding 28% of $ 18.9 million settlement fund). A New York court found that awards range from 20-30% with a benchmark of 25% for class action settlements up to $ 50 million. *In re NASDAO Market Makers Antitrust Litigation, 187 F.R.D. 465, 486 (S.D.N.Y. 1998)*. Another court found that as recoveries increased from $ 50 million, the range of attorney's fees decreased, with fees falling in a 13-20% range

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[30] The court ordered supplementation of the record and further responses by all parties in interest to make up for this deficiency. (D.I. 273)

[31] The court is not inclined to order yet another supplemented record, and while the court is not questioning whether the expenses were actually incurred, the court has no way of divining whether the time and effort reflected in the consolidated expense record submitted was significantly related to the result.

for $ 51-75 million recoveries and a 6-10% range (or lower) for "megafund" recoveries of $ 75-200 million. *In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 350-1 (N.D. Ga. 1993)*. A Minnesota court awarded 22.5% of $ 50 million recovery after eight years of litigation and extensive discovery and other proceedings, equivalent to a 2.5 lodestar multiplier. *In re Workers' Compensation Ins. Antitrust Litig., 771 F. Supp. 284 (D. Minn. 1991)*. [32]

[98] 3. Reasonable Fee**

Based on the factors discussed above, the court finds that a 22.5% percentage-of-recovery **[*263]** award is a reasonable attorneys' fee. The complexity of the case, the relatively advanced stage of litigation, the substantial cash settlement, the large number of hours expended by plaintiffs' attorneys on a contingent basis, and the fees awarded in other class actions all support a substantial fee award. Nevertheless, the duplication of effort among the twenty-seven law firms involved in this litigation and the initially inadequate submissions to the court in support of settlement approval warrant a modest reduction from the 25% benchmark fee award.

4. Lodestar Cross-check

The Third Circuit suggests that the district court cross-check the percentage award against the "lodestar" award to help ensure the reasonableness of the fee. *Gunter, 223 F.3d at 195 n.1*. ***HN48***[] The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the attorney's experience. *Id.* When performing **[**99]** the lodestar analysis as a cross check on the fee award, the court may find it sufficient to review time summaries, rather than the actual billing records. *Id. at 200* (citing *In re Prudential, 148 F.3d 283 at 332 n. 107*). Counsel in the case at bar submitted affidavits from each of the twenty-seven law firms involved in the litigation detailing the number of hours and hourly billing rate for each lawyer, paralegal, or law clerk who worked on the case. (D.I. 239, Ex. B) Each affidavit verified that an unenhanced, customary billing rate was used. Based on a review of these affidavits, the court finds that the submitted hours and hourly rates are reasonable, with the hourly rates appropriately varying based on position and experience.

When the aggregate lodestar (i.e., $ 7.54 million) is compared to the attorneys' fee award of 22.5% of the settlement fund (i.e., $ 10.01 million), the fee constitutes a lodestar multiplier of 1.33, well under the multiplier cap of 3 recently suggested in *In re Cendant Corp. PRIDES Litig., 243 F.3d 722 at 742*. The Third Circuit has also recognized that ***HN49***[] multipliers in the range of one to four are frequently awarded in common **[**100]** fund cases. *In re Prudential, 148 F.3d 283 at 341*. A modest enhancement of the lodestar amount is appropriate in this case for some of the same reasons supporting the 22.5% percentage-of-recovery fee - the risk of nonpayment and the complexity and duration of the litigation. *See id. at 340*. The court finds that the calculated lodestar fee supports the reasonableness of a 22.5% percentage-of-recovery fee award in this case.

B. Litigation Costs and Expenses Analysis

Class counsel also seek an award of litigation costs and expenses in the amount of $ 832,382.84 to be paid out of the gross settlement fund before distribution to claimants. After a thorough review of the detailed expense records submitted by class counsel (D.I. 257), the court finds that an award of $ 832,382.84 in expenses is fair and reasonable.

C. Administration Costs

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[32] Contrary to one objector's suggestion, the case at bar is not a "megafund" case that warrants significant downward departure from the typical 20-30% fee range. *See, e.g.*, ***In re Prudential, 962 F. Supp. 450 at 585***.

The settlement administrator affirms that $ 2,058,294.60 in settlement administration costs had been incurred through May 31, 2002, including $ 1,531,106 for publication of notice to the class. (D.I. 281 at P6) The administrator estimates that an additional $ 137,875 in costs will be incurred to complete administration **[**101]** of the settlement. (*Id.*) The Stipulation of Settlement provides that all administration costs be paid out of the settlement fund. The court finds that the administration costs incurred to date are fair and reasonable. If the additional costs exceed $ 137,875 by more than 10%, the administrator shall submit an explanation for the additional requirements to the court for approval.

VIII. Motions to Intervene

Objectors HCSC (D.I. 254), Bradley et al. (D.I. 212), Cleusman et al. (D.I. 218), and McCarty (D.I. 200) filed motions to intervene. The movants' primary motivation in filing these motions to intervene is to preserve their rights to object to the settlement and appeal settlement approval. Intervention for these purposes is unnecessary in **[*264]** the Third Circuit. ***HN50***[] Objecting class members are eligible to appeal from any final order entered by the court. *See* *Carlough v. Amchem Prods., 5 F.3d 707, 710 (3d Cir. 1993)*. In addition, the court provided every class member who did not opt out with the opportunity to present argument or evidence of the unfairness of the settlement in writing and/or orally at the fairness hearing. This comported with Third Circuit law **[**102]** that "an objector . . . is entitled to an opportunity to develop a record in support of his contentions by means of cross examination and argument to the court." *Greenfield v. Villager Industries, Inc.*, 483, F.2d 824, 833 (3d Cir. 1973).

Based on the above, the court finds no reason to allow intervention under *Fed. R. Civ. P. 24(a)(2)* or *(b)(2)*. The moving objectors were adequately represented in this litigation by the named plaintiffs, and intervention at this stage of the litigation would serve no purpose except to potentially delay implementation of the settlement agreement. Thus, all motions to intervene shall be denied.

IX. CONCLUSION

After reviewing the submissions of the parties, the objections, and the record evidence, the court finds the proposed class meets the requirements of *Rule 23* and therefore certifies the proposed class for purposes of settlement. The court also finds the stipulated settlement is fair, reasonable, and adequate and grants approval under *Rule 23(e)*. The court awards attorneys' fees in the amount of 22.5% and expenses in the amount of $ 832,382.84. Finally, all motions to intervene shall be denied. An appropriate order shall issue.

[103] ORDER**

At Wilmington, this 30th day of August, 2002, consistent with the opinion issued this same day;

IT IS ORDERED that:

1. Plaintiffs' motion for final approval of a proposed class action settlement agreement (D.I. 233) is granted. The following class is certified for purposes of settlement:

> All consumers and Third Party Payors in the United States who purchased and/or paid all or part of the purchase price of Coumadin dispensed pursuant to prescriptions in the United States during the period March 1, 1997 through and including August 1, 2001 ("Class Period"). Excluded from the Class are Defendant and any of its officers and directors, and any governmental entity. "Third Party Payor" shall mean any non-governmental entity that is (i) a party to a contract, issuer of a policy, or sponsor of a plan, which contract, policy or plan provides prescription drug coverage to natural persons, and is also (ii) at risk, pursuant to such contract, policy or plan, to provide prescription drug benefits, or to pay or reimburse all or part of the cost of prescription drugs dispensed to natural persons covered by such contract, policy, or plan.

The parties are hereby directed **[**104]** to implement and consummate the Stipulation of Settlement (D.I. 172) according to its terms and provisions. The parties are authorized to agree to and adopt such amendments and modifications to the Stipulation as (i) shall be consistent in all material respects with this final order and (ii) do not limit the rights of the class members.

2. The terms of the Stipulation, including all exhibits thereto, and of this final order and judgment, shall forever be binding on, and shall have res judicata and claim preclusive effect in, all pending and future lawsuits maintained by or on behalf of, plaintiffs and all other class members, as well as their heirs, executors, administrators, successors, and assigns.

3. Without affecting the finality of this order and judgment, the court retains continuing and exclusive jurisdiction over all matters relating to the administration, consummation, enforcement, and interpretation of the Stipulation and this order and judgment, to protect and effectuate this final order and judgment, and for any other necessary purpose.

4. Plaintiffs' motion for an award of attorneys' fees and expenses (D.I. 235) is granted, with attorneys' fees awarded in the amount **[**105]** of 22.5% of the settlement fund and expenses **[*265]** in the amount of $ 832,382.84 to be paid to the Co-Chairs of the Executive Committee out of the settlement fund in accordance with the terms of the Stipulation of Settlement, together with interest thereon from the date of entry of this Final Order and Judgment to the date of payment out of the Settlement Fund at the rate earned by the Settlement Fund during such period. Co-Chairs of the Executive Committee shall allocate and distribute such awards among plaintiffs' counsel.

5. Objectors' HCSC (D.I. 254), Bradley et al. (D.I. 212), Cleusman et al. (D.I. 218), and McCarty (D.I. 200) motions to intervene are denied.

6. Objector Shapiro's motion to strike document (D.I. 261) and motion to require lead counsel to disclose fee arrangements (D.I. 262) are denied.

7. Objector Hansen's motions for enlargement of time to file objection (D.I. 246, D.I. 247) are denied.

8. This action is hereby dismissed, on the merits, with prejudice, against the plaintiffs and all other class members.

Sue L. Robinson

United States District Judge

Avery Dennison Corp. v. Four Pillars Enter. Co.

United States Court of Appeals for the Sixth Circuit

September 3, 2002, Filed

Nos. 00-4020, 00-4128, 00-4233

Reporter
45 Fed. Appx. 479 *; 2002 U.S. App. LEXIS 18370 **; 60 Fed. R. Evid. Serv. (Callaghan) 353

AVERY DENNISON CORPORATION, Plaintiff-Appellee, v. FOUR PILLARS ENTERPRISE CO. and P. Y. YOUNG, Defendants-Appellants.

Notice: [1]** CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: On Appeal from the United States District Court for the Northern District of Ohio. 97-02282. Nugent. 07-10-00, 08-30-00, 09-18-00.

Disposition: District court's refusal to grant defendants summary judgment, a new trial, an amendment of the verdict, or remittitur affirmed.

Core Terms

damages, misappropriation, district court, formulas, reliability, trade secret, argues, products, jury verdict, manufacturing, scientific, state-law, remittitur, adhesive, misappropriation of trade secrets, calculation, conversion, modified, copies, expert testimony, specifications, savings, secrets, sever, civil conspiracy, confidential, estimation, profits, royalty, costs

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN1[] **Standards of Review, Abuse of Discretion**

Federal appellate courts review a district court's ruling on the admissibility of expert testimony for an abuse of discretion.

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN2[] **Admissibility, Scientific Evidence**

Fed. R. Evid. 702 states: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Examination > Judicial Interrogation

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN3[] **Expert Witnesses, Daubert Standard**

A court examines expert witness testimony, under *Fed. R. Evid. 702*, for reliability and relevance. Under the Daubert standard, judges are to serve a gatekeeper function with respect to such expert testimony. Daubert sets forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by Daubert are (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The list is not exclusive: courts have found, for example, that experts pass Daubert screening if they are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation. The Daubert analysis has been extended to non-scientific expert testimony.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN4[] **Expert Witnesses, Daubert Standard**

Pursuant to Daubert analysis, the focus must be solely on principles and methodology, not on the conclusions they generate. However, the two are not unrelated. A court may question the validity of an expert's testimony when he uses accepted methods to achieve highly anomalous results. *Fed. R. Evid. 702*, advisory notes. For this reason, *Fed. R. Evid. 702* explicitly states that the court must review whether or not the methods are reliably applied to the facts of the case. Although the court should confirm that the factual underpinnings of the expert's opinion were sound, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > ... > Testimony > Lay Witnesses > General Overview

Evidence > ... > Lay Witnesses > Opinion Testimony > Nonspecialized Knowledge

HN5[] Testimony, Expert Witnesses

Fed. R. Evid. 701 was amended in 2000 to prohibit lay opinion testimony that was based on scientific, technical or other specialized knowledge within the scope of *Fed. R. Evid. 702*. *Fed. R. Evid. 701* (2001). The amendment was to eliminate the risk that the reliability requirements set forth in *Rule 702* will be evaded through the simple expedient of proffering an expert in lay witness clothing. *Fed. R. Evid. 701*, advisory notes.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6[] Expert Witnesses, Daubert Standard

Although a court is required to act as a gatekeeper, and should protect the jury from scientifically unsound testimony, there is no requirement that a judge hold a formal Daubert hearing. The judge must simply keep watch over the proceedings, and, with the aid of objections from council, eliminate methodologically unsound or irrelevant expert testimony.

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Damages > General Overview

Trade Secrets Law > ... > Remedies > Damages > Compensatory Damages

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

HN7[] Federal Versus State Law, *Antitrust Law*

Damages in trade secrets cases are difficult to calculate, because the offending company has mixed the profits and savings from increased quality and quantity of products, as well as savings from reduced research costs of research and production, with its own natural profits. When the misappropriated trade secret is used to field competing products, the best measure of damages is the plaintiff's lost profits or the defendant's illicit gains.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Damages > Royalties

Trade Secrets Law > ... > Remedies > Damages > General Overview

HN8[] Trade Secrets & Unfair Competition, Trade Secrets

The Uniform Trade Secrets Act, as enacted by Ohio, reads: Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant in a civil action is entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty that is equitable under the circumstances considering the loss to the complainant, the benefit to the misappropriator, or both, for a misappropriator's unauthorized disclosure of a trade secret. *Ohio Rev. Code Ann. § 1333.63(A)* (1994).

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN9[] **Trade Secrets & Unfair Competition, Trade Secrets**

Ohio Rev. Code Ann. § 1333.68 instructs courts to construe the provisions of Ohio's Uniform Trade Secrets Act to effectuate their general purpose to make uniform the law with respect to their subject among states enacting them.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Damages > General Overview

HN10[] **Trade Secrets & Unfair Competition, Trade Secrets**

Where a trade secret has not been destroyed and where the plaintiff is unable to prove specific injury, courts measure the value of the secret to the defendant. If the benefit to the defendant in terms of direct profits is not ascertainable, damages may be awarded based on the value to the defendant of the secret at the time of misappropriation, the value derived from savings because of increased productivity, or the value derived from savings in research costs. An increase in productivity a proper basis for damages for misappropriation of trade secrets.

Torts > Business Torts > General Overview

Trade Secrets Law > ... > Remedies > Damages > Royalties

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Damages > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

HN11[] **Torts, Business Torts**

In a claim for misappropriation of trade secrets, a reasonable royalty may not be used as a damages method where no evidence of commercial use was established. However, the concept of commercial use is not limited to the fielding of directly competing products.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN12[] **Trade Secrets & Unfair Competition, Trade Secrets**

Courts seeking to establish a reasonable royalty measure the value of the secret to the defendant at the time that it was misappropriated, regardless of the commercial success of the enterprise.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Civil Actions > Evidence

HN13[] **Trade Secrets & Unfair Competition, Trade Secrets**

The fact that a defendant may have altered a trade secret does not insulate it from liability.

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

Civil Procedure > Trials > Separate Trials

HN14[] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellant's argument, that trials should have been severed because of undue prejudice to the appellant, which was not presented to the district court, was not properly preserved for appeal.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN15[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The Racketeering Influence and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961* provides that: Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

HN16[] **Relief From Judgments, Additur & Remittitur**

Courts faced with apparent incongruities in a jury verdict construe the jury's decision to form a whole that expresses a coherent and reasonable view of the case.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

HN17[] **Standards of Review, Abuse of Discretion**

Federal appellate courts review a district court's denial of remittitur for abuse of discretion. A jury verdict is properly reduced when, viewing all of the evidence in the light most favorable to the plaintiff, the court finds that the verdict is clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the judicial conscience of the court.

Civil Procedure > Remedies > Damages > Punitive Damages

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

HN18[] **Damages, Punitive Damages**

Under Ohio law, punitive damages may be awarded in a trade secret case if the plaintiff establishes that the defendant acted with malice. Malice does not require, however, an intent to injure. The element of malice can be established by proof of conscious, deliberate, or intentional wrongdoing, or by showing that the defendant had a conscious disregard for the rights of other persons.

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

HN19[] **Damages, Punitive Damages**

Upon a motion for remittitur, a non-movant is not required to put on testimony regarding the movant's ability to pay; if the movant wishes remittitur, it is incumbent upon the movant to provide the numbers.

Counsel: For Avery Dennison Corporation, Plaintiff - Appellee (00-4020, 00-4128, 00-4233): James D. Robenalt, Jeffrey M. Clarke, Thompson Hine, Cleveland, OH.

For Avery Dennison Corporation, Plaintiff - Appellee (00-4020, 00-4128, 00-4233): John B. Quinn, Dominic Surprenant, Quinn, Emanuel, Urquhart & Oliver, Los Angeles, CA.

For Avery Dennison Corporation, Plaintiff - Appellee (00-4128, 00-4233): Robert F. Ware, Thompson Hine, Cleveland, OH.

For Four Pillars Enterprise Company, Ltd, Defendant - Appellant (00-4020, 00-4128, 00-4233): Bernard J. Casey, Nancy Luque, Eric A. Dubelier, Jacqueline **[**2]** E. Bennett, Reed, Smith, Shaw & McClay, Washington, DC.

For P. Y. Young, Defendant - Appellant (00-4020, 00-4128, 00-4233): Eric A. Dubelier, Jacqueline E. Bennett, Reed, Smith, Shaw & McClay, Washington, DC.

For Four Pillars Enterprise Company, Ltd, P. Y. Young, Defendants - Appellants (00-4233): Robert D. Anderle, Porter, Wright, Morris & Arthur, Cleveland, OH.

For P. Y. Young, Defendant - Appellant (00-4233): Bernard J. Casey, Nancy Luque, Reed, Smith, Shaw & McClay, Washington, DC.

Judges: BEFORE: RYAN and BOGGS, Circuit Judges; and HAYNES, District Judge. *

Opinion

[*481] PER CURIAM. Four Pillars (FP) appeals the jury verdict and the district court's denial of judgment as a matter of law and *remittitur* in this combined RICO and state law action for misappropriation of trade secrets, unjust enrichment, civil conspiracy, unfair competition, and conversion brought by Avery Dennison Corporation. FP argues that the district court abused its discretion by failing to screen the methodologies and factual foundations of Avery's witnesses **[**3]** for scientific acceptability. FP also asserts that the judge abused his discretion **[*482]** by not severing the trial of co-conspirator Tenhong Lee from the FP trial. Finally, FP alleges that the jury award of both state-law and RICO damages was improperly duplicative, that the judge incorrectly determined that the jury meant to impose damages separately for misappropriation and for other state law claims, that the jury verdict was excessive, and that the judge erred in failing to grant a *remittitur* of damages.

Because the "facts" that FP believes the district court should have reviewed for scientific veracity are rather the underlying questions of liability in the case, we affirm the decision of the district court to allow the expert witness testimony. We also affirm the district court's refusal to sever the trial, because defendants did not join the motion to sever when it was originally made. Finally, we affirm the jury verdict as correctly calculated, and affirm the district court's decision to refuse *remittitur,* because the jury verdict was not based on mistake or so excessive as to shock the conscience.

II

Avery Dennison is the world leader in the creation of pressure-sensitive **[**4]** adhesive labels; the company invests considerable time and effort in researching new adhesive products. In 1996, Avery discovered that FP, a Taiwanese competitor, was paying Avery scientist Dr. Tenhong Lee to provide FP with Avery adhesive formulas, manufacturing techniques, product specifications, and other fruits of Avery's research.

Avery contacted the FBI. The FBI confronted Lee after they videotaped him stealing confidential Avery documents. Lee confessed to stealing Avery formulas and other confidential information for eight years, and passing them on to FP.

On September 4, 1997, the FBI arranged and videotaped a meeting between Lee, P.Y. Young, Chairman of FP, and Sally Yang, an FP manager. The videotape showed Young accepting Avery confidential materials, removing Avery's confidential markings from the materials, and discussing how Four Pillars could use the information, and what sorts of thefts Lee should make next. Young and FP were convicted of conspiracy and attempt to violate the Economic Espionage Act, *18 U.S.C. § 1832(a)(4)*,*(5)*.

Avery then brought suit against Lee and FP for (1) violation of the Racketeer Influenced and Corrupt Organization **[**5]** Act (RICO), *18 U.S.C. §§ 1962(c)* and *1964(c)*; (2) conspiracy to violate RICO; (3) conspiracy; (4) misappropriation of trade secrets; (5) unfair competition; (6) conversion; and (7) unjust enrichment. Avery also sued Lee for fraud. Avery settled with Lee before trial. The settlement was partial: Lee conceded liability, and Avery agreed to limit the damages for which Lee could be held accountable to $ 160,000. Lee also agreed, as part of the settlement, to testify on Avery's behalf as to the nature and extent of the conspiracy.

At trial, Avery produced expert and lay testimony in support of its claim that FP used Avery manufacturing procedures (compounding specifications) and formulas in making and modifying adhesive products, and in

* The Honorable William J. Haynes, United States District Judge for the Middle District of Tennessee, sitting by designation.

overhauling its research and manufacturing methods. FP did not produce exact copies of Avery products, nor did it bring directly competing products to market; rather, as Young stated on the FBI videotape, "as a research institute, we do not need to copy the thing. We can modify it." In all, FP misappropriated 71 formulas and matching manufacturing instructions for Avery products. FP made multiple copies of these formulas, and attempted **[**6]** to reproduce the formulas. FP **[*483]** successfully copied Avery's S-246 flagship label adhesive, and modified it. Five copies of the compounding specification for S-246 and four copies of an S-246 laboratory notebook page were in FP's files. FP also received research memoranda concerning upcoming products and Avery's newly developed "high speed release" manufacturing techniques. Lee gave FP two Avery research reports, multiple copies of which were found in FP's files. Lee stressed to FP that the reports were/ "extremely confidential" and were the "fruit of painstaking work of Avery Research Center over a period of several years." FP obtained copies of a confidential Avery report on 5-roll coating; FP purchased a 5-roll coater and used it to create new products.

FP also obtained and used Avery's specifications for the paper used in its adhesive labels. FP introduced new thermal label products after Lee provided it with thermal label paper specifications and supplier information. Lee also provided FP with Avery's test methods. FP removed references to Avery, and distributed the methods for use in its R&D laboratory.

Based on their opinions that FP had misappropriated Avery secrets, Avery's **[**7]** witnesses proposed several theories for the calculation of damages to which FP objected. John Neels, an Avery damages witness, presented three theories of recovery: defendant's profits, defendant's avoided costs, and reasonable royalty.

The jury returned a verdict in Avery's favor. The verdict included $ 10 million on Avery's RICO claims; $ 10 million on the misappropriation claim; $ 10 million on the civil conspiracy and conversion claims; $ 25 million in punitive damages; $ 5 million against Young personally; and $ 160,000 against Lee. The district court tripled the RICO award under *18 U.S.C. § 1964(c)*. The total jury verdict was for $ 81,358,110, including attorneys' fees and costs. FP then appealed the matter to this court.

A. *Daubert* and Expert Testimony

HN1[] We review a district court's ruling on the admissibility of expert testimony for an abuse of discretion. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)*. ***HN2***[] *Rule 702 of the Federal Rules of Evidence* states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to **[**8]** determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

HN3[] A court examines expert witness testimony, under *Rule 702*, for reliability and relevance. In *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, the Supreme Court held that judges are to serve a gatekeeper function with respect to such expert testimony. *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. *Fed. R. Evid. 702* (advisory notes). "The specific factors explicated by the *Daubert* court are (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the **[**9]** existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community." *Ibid.* The list is not exclusive: **[*484]** courts have found, for example, that experts pass *Daubert* screening if they are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation …." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)*. In *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)*, the Supreme Court extended the *Daubert* analysis to non-scientific expert testimony.

HN4[] *Daubert* held that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." Daubert, 509 U.S. at 595. However, the two are not unrelated. A court may question the validity of an expert's testimony when he uses accepted methods to achieve highly anomalous results. Fed. R. Evid. 702 (advisory notes). For this reason, Rule 702 explicitly states that the court must review whether or not the methods are reliably applied to the **[**10]** facts of the case. Our precedent indicates that the court should confirm that "the factual underpinnings of the expert's opinion were sound." Greenwell v. Boatwright, 184 F.3d 492, 498 (6th Cir. 1999). However, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Daubert, 509 U.S. at 596.

Federal Rule of Evidence 701 governs the testimony of lay witnesses. At the time of trial, the Rule read:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

After the trial, **HN5**[] Rule 701 was amended in 2000 to prohibit lay opinion testimony that was "based on scientific, technical or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701 (2001). The amendment was to "eliminate the risk that the reliability requirements set **[**11]** forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 (advisory notes).

HN6[] Although a court is required to act as a gatekeeper, and should protect the jury from scientifically unsound testimony, there is no requirement that a judge hold a formal *Daubert* hearing. Greenwell v. Boatwright, 184 F.3d 492 (6th Cir. 1999). The judge must simply keep watch over the proceedings, and, with the aid of objections from council, eliminate methodologically unsound or irrelevant expert testimony.

1. Lay Testimony: Decoding Avery Formulas

At trial, Avery presented testimony by one of its employees, Norman Conti. Conti's testimony consisted, in large part, of explaining the code used by Avery to protect its formulas. Essentially, two documents were needed in order to use an Avery formula. The ingredients list was kept separate from the formulas, so that a person stealing a formula would know the chemical amounts, but not the ingredients, to use in creation of the product. Conti explained how to read the code, and also testified as to whether handwritten notations on the formula pages indicated **[**12]** that someone at FP had tried to decode or modify the formulas. Conti also testified as to the cost of developing a new adhesive, based on his work on some of the adhesives that had been stolen. Conti was offered as a lay witness under the old Rule 701. The district court permitted Conti to **[*485]** testify about the attempts of FP to decode and modify the Avery formulas, and the cost of development of Avery formulas based on "things he knows from his experience and work."

FP argues that the court should have excluded Conti's testimony under *Daubert* even though Conti was properly admitted to testify as a lay witness under the then-governing Rule 701. It is an open question whether, prior to the amendment of Rule 701, such sophisticated lay testimony even fell under Rule 702's requirement that a court act as the arbiter of scientific reliability and relevance. However, we need not answer that question to decide this case. Assuming that *Daubert* applies, we find no reason that the district court should have excluded Conti's testimony on the grounds that it lacked either reliability or relevance.

FP offers no challenge at all to the reliability or the relevance of Conti's statements, rather, **[**13]** it chooses to challenge his conclusions. FP argues that Conti's estimation of the cost of creation of an Avery product should have been excluded under *Daubert.* Because the cost of the product was estimated rather than "proven," they argue, Conti's estimation was insufficiently reliable to meet the *Daubert* standard. This is not a valid basis for contesting Conti's testimony. Greenwell, 184 F.3d at 497-98 ("[Plaintiffs] challenge the inferences made by the expert and the jury from [expert] evidence. The testimony cannot be excluded on those grounds."). Conti testified that he relied on his personal knowledge, review of project plans, salary information, and interviews of Avery employees with experience in adhesive development. The estimate was not groundless. FP had and took the opportunity to cross-examine Conti extensively on the weaknesses of his testimony at trial; under *Daubert,* that is the proper way to challenge expert witness testimony that is weak, rather than methodologically unsound or irrelevant. [Daubert, 509 U.S. at 596].

We find Conti's testimony both relevant and reliable. Conti's testimony was directly relevant to the **[**14]** central question of the case: whether FP was able to make use of the stolen technology. Further, there is no serious challenge to the reliability of Conti's methodology. He was intimately familiar with the Avery code system, and his explanation of the code system helped the jurors to understand a key portion of the physical evidence before them. His product cost estimates were not based on speculation, but on personal experience developing Avery products. Because Conti's testimony was both reliable and relevant, we find no abuse of discretion in the district court's judgment that such testimony should be allowed to go before the jury.

2. Damages Calculations for Misappropration of Trade Secrets.

HN7[] Damages in trade secrets cases are difficult to calculate, because the offending company has mixed the profits and savings from increased quality and quantity of products, as well as savings from reduced research costs of research and production, with its own natural profits. *See* Michael A. Rosenhouse, *Proper Measure and Elements of Damages for Misappropriation of Trade Secrets,* 11 A.L.R. 4th 12 (1982). When the misappropriated trade secret is used to field **[**15]** competing products, the best measure of damages is the plaintiff's lost profits or the defendant's illicit gains. However, where the misappropriated secrets were not directly used to field competing products, but were used, for example, to save research and manufacturing resources, plaintiffs have used a number of different methods of calculation to determine damages.

[*486] ***HN8***[] The Uniform Trade Secrets Act, as enacted by Ohio, reads:

> Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant in a civil action is entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty that is equitable under the circumstances considering the loss to the complainant, the benefit to the misappropriator, or both, for a misappropriator's unauthorized **[**16]** disclosure of a trade secret.

O.R.C. 1333.63(A) (West 1994). Scant Ohio caselaw interprets this section. However, ***HN9***[] *O.R.C. 1333.68* instructs us to construe the provisions of the Act "to effectuate their general purpose to make uniform the law with respect to their subject among states enacting them." We therefore draw on the law of other jurisdictions as well to aid us in construing the Ohio statute.

HN10[] Where a trade secret has not been destroyed and where the plaintiff is unable to prove specific injury, courts measure the value of the secret to the defendant. *See, e.g., University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 535-36 (5th Cir. 1974)*. If the benefit to the defendant in terms of direct profits is not ascertainable, damages may be awarded based on the value to the defendant of the secret at the time of misappropriation, the value derived from savings because of increased productivity, or the value derived from savings in research costs. *Ibid.* (increase in productivity a proper basis for damages for misappropriation of trade secrets); *Reinforced Molding Corp. v. General Electric Co., 592 F. Supp. 1083 (W.D. Pa. 1984)* **[**17]** (same).

In this case, FP did not use the stolen trade secrets to bring directly competing products to market. Rather, FP used the Avery secrets to create a panoply of new products, save significantly on time and resources devoted to research, and streamline their manufacturing processes. Avery's theories of damages therefore concentrated on the benefits that FP derived from the use of the secrets. John Neels, an economist and Avery's damages expert, presented three theories of damages: reasonable royalty, defendant's profits, and defendant's avoided costs. [1]

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[1] Neels also discussed a damages theory, termed "loss of control," that sought to recapture damages sustained by Avery as a result of the fact that Avery no longer controlled the formulas and technologies. The idea is simple -- Avery is diminished

[18]** FP moved *in limine* to exclude Neels's testimony, based on its reading of *Daubert.* The court considered Neels's testimony in light of *Daubert,* and determined that Neels's methods of damage calculation were relevant and reliable enough to go before the jury. FP argues here that Neels's testimony was inadmissible as scientifically unreliable, under *Daubert,* because his calculations proceeded from **[*487]** several assumptions: that FP misappropriated trade secrets from Avery, that FP used and modified such technology, and that the use of the stolen Avery technology saved FP money. Although a *Daubert* challenge may certainly include arguments that the expert theory is invalid because it has no basis in fact, we do not conclude that the district court abused its discretion by determining that Neels's theories were sufficiently factually supported. The "facts" challenged by FP here are not scientific facts to be evaluated under *Daubert,* but are rather the central questions of liability in the case, which were properly presented to the jury.

Finally, FP points out that ***HN11***[] a reasonable royalty may not be used as a damages method where no evidence of commercial use was established. **[**19]** FP's definition of commercial use is unduly restrictive. The concept of commercial use is not limited to the fielding of directly competing products. *See, e.g.,* *University Computing, 504 F.2d at 536-37* (damages based on benefit to the defendant proper, on a "reasonable royalty" theory, when the defendant never successfully brought the product to market). Rather, ***HN12***[] courts seeking to establish a reasonable royalty measure the value of the secret to the defendant at the time that it was misappropriated, regardless of the commercial success of the enterprise. *Ibid.* Here, FP did not directly copy Avery's products; rather, it modified Avery formulas, and used Avery's manufacturing specifications to cut their own research time and streamline its manufacturing processes. Avery was not required to produce evidence of direct product copying. *See, e.g.,* *Pioneer Hi-Bred Int'l v. Holden Found. Seeds, Inc., 35 F.3d 1226, 1239 (8th Cir. 1994)* ("***HN13***[] The fact that [a defendant] may have altered [a trade] secret does not insulate it from liability."). Avery presented relevant and admissible evidence showing that FP valued, deciphered, modified, and used Avery trade **[**20]** secrets; it was not required to do more. [2] We therefore conclude that the district court's decision to allow the testimony was within its discretion.

[21]** 3. Severance

Lee, Young, and FP were all defendants in the trial. Lee concluded a settlement agreement with Avery pursuant to which he testified to the nature and extent of the theft of Avery's trade secrets by the conspirators. On appeal, FP asserts that the district court should have severed the trial, because Lee's testimony prejudiced the jury against FP. As a preliminary matter, FP's arguments on this issue are not properly before us: the original motion for severance was made by Lee, because he believed he was insufficiently prepared for trial. ***HN14***[] FP's argument, that the trials should have been severed because of undue prejudice to FP, was not presented to the district court; the issue was therefore not preserved for appeal. *Thurman v. **[*488]** Yellow Freight Sys., Inc., 97 F.3d 833, 835 (6th Cir. 1996)*.

Further, Lee has not appealed. Even were we to determine that he was not properly a party below, we would not dismiss claims against a party who has decided not to appeal. Finally, because there would be no reason to exclude Lee's testimony in a separate trial, the dismissal of Lee as a party would have had no impact on the testimony offered against Four Pillars.

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because FP can pass Avery secrets and technologies on to even more competitors. Neels did not place a specific monetary amount on this loss. FP argues that this brief discussion of "loss of control" allowed the jury to engage in open ended speculation as to the amount of damages. The theory was not pursued, however, except to the extent that Neels's reasonable royalty calculation took into account the open-ended nature of the hypothetical license agreement in determining a $ 73 million amount.

[2] In relation to this argument, FP alleges that Avery did not state with specificity which trade secrets were misappropriated, or tie them to any FP products. They base this claim on the district court's statement that it was impossible to determine which items were found to be trade secrets. This is a misquotation of the record. The court denied Avery's Application for Injunctive Relief, filed after trial. In so doing, the court stated: "It is certain from the Jury's Answers to Interrogatories and the General Verdict that Four Pillars or P.Y. Young made use of trade secrets, but it is uncertain which items specifically were found to be trade secrets." In denying injunctive relief, therefore, the court merely admitted that it was unable to determine which trade secrets the jury had relied on in making their findings, not that Avery had made an insufficient showing of FP's use of stolen Avery technologies.

[22]** 4. RICO and State-Law Damages.

FP appeals the denial of its motion to amend the judgment, based on the argument that Avery could not recover for both RICO and state-law claims. The district court held that Avery was entitled to recover for both types of claims.

The question is not settled in this circuit. FP argues that the district court erred by imposing damages for both the RICO violation and for state-law misappropriation. The jury found FP liable both for RICO violations and for various state law claims. FP argues that recovery for both RICO and state-law violations is an "impermissible double recovery." FP cites several unpublished cases for the proposition that RICO damages and state-law damages may not be recovered for the same alleged conduct. *See, e.g., AIG Aviation, Inc. v. Boorom Aircraft, Inc., 142 F.3d 431, 1998 U.S. App. LEXIS 2143 (6th Cir. 1998)* (unpublished) ("We note that there is no reason for the jury or the district court to fear a double recovery. Just as these are alternative claims, the damages are alternative as well; AIG will recover the larger of either the state-law damages **[**23]** or the RICO damages.").

However, as the district court noted, because the claims in *AIG were* alternative, the question of whether or not non-alternative claims could yield two damage awards based on the same conduct was not presented to the *AIG* panel. Noting the unpublished nature of the *AIG* decision, the district court instead adopted as its guide the Ninth Circuit's opinion in *Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1130 (9th Cir. 1997)*. *Neibel* stated: "we cannot ignore the text of ***HN15***[] RICO itself, which states: 'Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.'" *Neibel, 108 F.3d at 1130*.

We agree with *Neibel* and the district court. Congress intended RICO to impose stringent civil penalties on organized illegal activity, above and beyond state-law remedies already available. There is no barrier to applying RICO as written; we therefore adopt the reasoning of *Neibel* and do so.

5. Calculation of State-law Claims

FP alleges that the district court erred in interpreting **[**24]** the jury verdict to impose $ 10 million for misappropriation of trade secrets, and a separate $ 10 million for civil conspiracy, conversion, and other state-law claims. The jury's responses to interrogatories were recorded on a verdict form. FP argues that the headings for two of the claims categories are confusing: the first interrogatory asks what damages to be allocated for misappropriation of trade secrets; the later interrogatory asks what damages should be ascribed to misappropriation of trade secrets along with conversion and civil conspiracy.

HN16[] Courts faced with apparent incongruities in a jury verdict construe the jury's decision to form a whole that expresses a coherent and reasonable view of the case. *Morales v. American Honda **[*489]** Motor Co., 151 F.3d 500, 509 (6th Cir. 1998)*. FP argues that the jury imposed $ 10 million for misappropriation of trade secrets, and then recorded that same $ 10 million under a heading entitled "Civil Conspiracy and/ or Misappropriation and/ or Unfair Competition and/ or Conversion." FP essentially treats the later damages line as a sum of the previous headings.

Avery argues that the jury meant to award two $ 10 million awards, the **[**25]** first for misappropriation, and the second for the other state law claims. Avery's position draws support from the verdict form: the jury found FP specifically liable on the conspiracy, conversion, and unfair competition claims. On each previous, unmixed count (RICO and misappropriation), the jury had found FP liable for $ 10 million. There was no other place in the interrogatories to record a damages amount for conversion and civil conspiracy.

We note that neither party objected to the verdict form beforehand, despite the obvious strangeness of a form that contained no independent damages line for several causes of action, and included misappropriation in two headers. The district court's determination that the jury intended to award $ 10 million for the other state law counts was reasonable, and gave effect to each part of the jury's verdict.

6. Remittitur

HN17[] We review the district court's denial of *remittitur* for abuse of discretion. *Gregory v. Shelby County, 220 F.3d 433, 443 (6th Cir. 2000)*. FP argues that the district court abused its discretion in failing to reduce the jury verdict amount. A jury verdict is properly reduced when, viewing all of **[**26]** the evidence in the light most favorable to the plaintiff, the court finds that the verdict is "clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the judicial conscience of the court." *Gregory, 220 F.3d at 443*.

HN18[] Under Ohio law, punitive damages may be awarded in a trade secret case if the plaintiff establishes that the defendant acted with malice. *Pyromatics v. Petruziello, 7 Ohio App. 3d 131, 7 Ohio B. 165, 454 N.E.2d 588 (1983)*. Malice does not require, however, an intent to injure. *Malone v. Courtyard by Marriott Ltd. Partnership, 74 Ohio St. 3d 440, 659 N.E.2d 1242 (Ohio 1996)*. The element of malice can be established by proof of conscious, deliberate, or intentional wrongdoing, or by showing that the defendant had a conscious disregard for the rights of other persons. *Malone, 659 N.E.2d at 1247-48*.

FP makes two related arguments. First, FP points out that the jury found that FP did not act with intent to injure Avery's business. FP incorrectly asserts that this precludes a finding by the jury that FP acted with malice. As noted above, intent to injure is not a requirement of malice under Ohio law. **[**27]** Second, FP argues that the verdict is excessive in light of the evidence. The jury had before it evidence that FP conspired with Lee to steal many millions of dollars worth of research and development, manufacturing techniques, product specifications, formulas, and even information about suppliers. The jury was presented with detailed testimony regarding Avery's costs of research, and the degree to which Avery technologies were converted and used by FP. Given the longstanding and organized nature of the misappropriation, the jury was justified in its damages award.

Finally, FP asserts that *remittitur* was required, because the punitive damages award was almost double the net worth of Four Pillars. FP argues that the only evidence at trial of FP's ability to pay was Avery testimony estimating the net worth **[*490]** of FP at $ 13-15 million. *HN19*[] However, Avery is not required to put on testimony regarding FP's ability to pay; if FP wishes *remittitur,* it is incumbent upon it to provide the numbers. *See, e.g., Kemezy v. Peters, 79 F.3d 33, 36 (7th Cir. 1996)* ("It ill becomes defendants to argue that plaintiffs must introduce evidence of the defendant's wealth.").

The jury **[**28]** verdict was supported by the evidence, and was commensurate with the acts for which the jury found FP liable. The verdict neither shocked the conscience, nor was the product of mistake. The district court did not, therefore, abuse its discretion in refusing *remittitur.*

III

For the above reasons, we AFFIRM the district court's refusal to grant defendants summary judgment, a new trial, an amendment of the verdict, or *remittitur.*

End of Document

Mendoza v. Zirkle Fruit Co.

United States Court of Appeals for the Ninth Circuit

June 7, 2002, Argued and Submitted, Seattle, Washington ; September 3, 2002, Filed

No. 01-35276

Reporter
301 F.3d 1163 *; 2002 U.S. App. LEXIS 18044 **; 2002 Cal. Daily Op. Service 8040; 2002 Daily Journal DAR 10079

OLIVIA MENDOZA, individually and on behalf of all others similarly situated; JUANA MENDIOLA, individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. ZIRKLE FRUIT CO., a Washington corporation; MATSON FRUIT COMPANY, a Washington corporation; SELECTIVE EMPLOYMENT AGENCY, INC., a Washington corporation, Defendants-Appellees.

Subsequent History: Class certification granted by, in part, Class certification denied by, in part *Mendoza v. Zirkle Fruit Co., 2004 U.S. Dist. LEXIS 13027 (E.D. Wash., July 12, 2004)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Washington. D.C. No. CV-00-03024-FLVS. Fred L. Van Sickle, District Judge, Presiding.

Mendoza v. Zirkle Fruit Co., 2000 U.S. Dist. LEXIS 21126 (E.D. Wash., Sept. 27, 2000)

Disposition: Reversed and remanded.

Core Terms

district court, growers, wages, employees, supplemental jurisdiction, hiring, fruit, allegations, causation, labor market, undocumented, parties, pendent, depressed, factors, milk, conspiracy, antitrust, subject matter jurisdiction, illegal immigrant, intervening, comprise, orchards, damages, courts, speculative, documented, passed-on, laborers, packing

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Involuntary Dismissals, Failure to State Claims**

For purposes of appellate review, facts which are derived from a complaint must be taken to be true where a case was dismissed on the pleadings for lack of jurisdiction and failure to state a claim.

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] **Standards of Review, De Novo Review**

Where a district court dismisses a case on the pleadings, an appellate court reviews the decision de novo, and the appellate court may affirm the dismissal only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

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

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Civil Procedure > Appeals > Motions on Appeal

HN3[] **Motions to Dismiss, Failure to State Claim**

In the context of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, at the pleading stage, general factual allegations of injury resulting from a defendant's conduct may suffice, for on a motion to dismiss an appellate court presumes that general allegations embrace those specific facts that are necessary to support the claim.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Criminal Law & Procedure > ... > Miscellaneous Offenses > Harboring & Transporting Illegal Aliens > Elements

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Miscellaneous Offenses > Harboring & Transporting Illegal Aliens > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] **Involuntary Dismissals, Failure to State Claims**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, prohibits engaging in a pattern of "racketeering activity," defined as violating certain laws; as such, a predicate illegal act must be alleged. *18 U.S.C.S. §§ 1962(c)* and *1961(1)(F)*.

Civil Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

HN5[] **Justiciability, Standing**

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962* may sue therefor in any appropriate United States district court for civil damages. *18 U.S.C.S. § 1964(c)*. This statute is quite similar to the antitrust statute granting standing to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, *15 U.S.C.S. § 15(a)*, and consequently the two have been interpreted in tandem.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of a civil case under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, potential plaintiffs who have suffered "passed-on" injury - that is, injury derived from a third party's direct injury - lack statutory standing.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of a civil case under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, the Ninth Circuit focuses on three nonexhaustive factors in considering causation, that is whether the injury is "too remote" to allow recovery: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The fact that the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through civil RICO lawsuits. *18 U.S.C.S. § 1961(1)(F)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of a civil case under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, different standards govern proof of the fact and proof of the amount of damages.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Federal Government > Claims By & Against

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Federal Government > Employees & Officials

HN10[] **Justiciability, Standing**

Because a party is invoking federal jurisdiction, the party must establish the irreducible constitutional minimum of standing in addition to meeting any statutory standing requirements. This minimum or threshold consists of three factors: (1) injury in fact: an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) causation: the injury must be fairly traceable to the defendant's challenged action; and (3) redressability: it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN11[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The controlling constitutional standard for supplement jurisdiction remains that articulated in Gibbs: the claims must form but one constitutional "case" and derive from a common nucleus of operative fact.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Parties

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN12[] Supplemental Jurisdiction, Pendent Parties

Finley imposes two requirements for supplemental jurisdiction: (1) the claims must be part of the same constitutional "case;" and (2) the jurisdiction must be expressly authorized by statute. *28 U.S.C.S. § 1367* supercedes this second Finley requirement.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Constitutional Law > The Judiciary > Congressional Limits

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN13[] Subject Matter Jurisdiction, Supplemental Jurisdiction

28 U.S.C.S. § 1367 functions as a general grant of jurisdiction. U.S. Const. art. III permits supplemental jurisdiction if the federal and state law claims derive from a common nucleus of operative fact and comprise but one constitutional case.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Constitutional Law > The Judiciary > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN14[] Jurisdictional Sources, Constitutional Sources

Federal courts are courts of limited jurisdiction. *U.S. Const. art. III, § 2*. The Gibbs standard defines the minimum constitutional constraints, offering both Congress and the district courts flexibility to shape each case in a way that is efficient for the courts, fair to the parties, and respectful of state sovereignty.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN15[] **Jurisdiction, Jurisdictional Sources**

Assuming that claims meet the Gibbs standard, a district court has the power to exercise supplemental jurisdiction. The decision to exercise that jurisdiction remains discretionary with the district court.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Courts > Judicial Comity

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN16[] **Jurisdiction, Jurisdictional Sources**

District courts may decline to exercise jurisdiction over supplemental state law claims in the interest of judicial economy, convenience, fairness, and comity.

Counsel: Steve W. Berman & Andrew M. Volk, Hagens Berman LLP, Seattle, Washington, and Howard W. Foster, Johnson & Bell, Ltd., Chicago, Illinois, for the appellants.

Irwin Schwartz, Law Offices of Irwin Schwartz, Seattle, Washington, Sheryl Gordon McCloud, Law Offices of Sheryl Gordon McCloud, Seattle, Washington, Walter G. Meyer, Meyer, Fluegge & Tenney, P. S., Yakima, Washington, Terry Schmalz, Halverson & Applegate, P. S., Yakima, Washington, for appellees Zirkle Fruit Co. and Matson Fruit Co.

J. Jay Carroll, Brendan Victor Monahan, Velikanje, Moore & Shore, P. S., Yakima, Washington, for appellee Selective Employment Agency, Inc.

Judges: Before: Melvin Brunetti, Stephen S. Trott, and M. Margaret McKeown, Circuit Judges. Opinion by Judge McKeown.

Opinion by: M. Margaret McKeown

Opinion

[*1166] McKEOWN, Circuit Judge:

This case arises from claims that two agricultural companies leveraged the hiring of undocumented immigrants in order to depress the wages of their legally documented employees. We are called upon to decide two significant **[**2]** issues. First, we must determine whether, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961-1968*, legally documented agricultural workers have standing to sue their employers, whom they allege depressed their salaries by conspiring to hire undocumented workers at below market wages. Second, we must consider the constitutionality of supplemental subject matter jurisdiction involving a party over whom there is no independent basis for federal court jurisdiction. The district court resolved both questions in favor of the defendants and dismissed this lawsuit on the pleadings. We reverse.

BACKGROUND

Olivia Mendoza, Juana Mendiola, and the purported class ("employees") are agricultural laborers for Zirkle Fruit Company and Matson Fruit Company ("growers"), which operate fruit orchards and packing houses in Eastern

Washington, the heart of Washington's fruit industry. According to the complaint, [1] the employees are "persons legally authorized to be employed in the United States." They worked for the growers "at wages that are substantially depressed because of the Illegal Immigrant Hiring Scheme." Pursuant to the scheme, **[**3]** Zirkle and Matson "knowingly hire workers of illegal status because the illegal workers are willing to accept wages that are significantly lower than wages would be in a labor market comprised solely of legally authorized workers." They do so "for the purpose of depressing employee wages below the levels they would otherwise be required to pay if they were unable to hire substantial numbers of illegal immigrants who, due to their economic situation and fear of asserting their rights due to their illegal status, can be easily exploited and who are therefore willing to work for depressed wages." The complaint provides substantial background and detail about the scope of the challenged scheme:

> Eastern Washington is the heart of Washington's famed apple and fruit industry. This area …is uniquely suited for growing fruit ….
> In Washington state there are more than 15,000 fruit packers and 30,000 orchard pickers of fruit. Many operations require unskilled, low-wage laborers for harvesting and packing and other related tasks requiring manual labor. While the industry now generates over $ 1 billion, many of these workers live in poverty.
>
> Defendants Matson and Zirkle operate fruit **[**4]** orchards and packing houses. Matson and Zirkle are motivated to keep labor costs as low as possible and, due to a variety of complex social and economic factors, the industry's demand for low-skilled workers has attracted many workers of Mexican citizenship. Many of these Mexican nationals are illegal immigrants who have been smuggled into the U.S. and/or harbored in the U.S. by relatives, friends, and the employers. Matson and Zirkle …knowingly hire workers of illegal status because illegal workers are willing to accept wages that are significantly lower **[*1167]** than wages would be in a labor market comprised solely of legally authorized workers.

The Immigration and Naturalization Service has conducted investigations finding that as much as half the growers' workforce is employed illegally, and the growers have been targeted for "raids and other law enforcement procedures."

[5]** According to the complaint, the scheme is facilitated by Selective Employment Agency, Inc., a separate company that employs the workers and then "loans" them to the growers. "Defendants Matson and Zirkle use Selective Employment as a 'front company' for the purpose of perpetrating this scheme with the hope that each will be thus shielded from charges that they violated federal law." Although Selective Employment was named only as an association-in-fact enterprise, not as a defendant, in the federal RICO claim, the complaint alleged a state conspiracy claim that did name Selective Employment as a defendant.

The district court dismissed the complaint pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. [2] **[**6]** Although the district court held that the employees pled a direct injury because there was no intervening third party from whom their injury was derived, the court dismissed the complaint on grounds that the damages were too speculative and difficult to ascertain. [3]

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[1] ***HN1***[] These facts, which are derived from the complaint, must be taken to be true because the case was dismissed on the pleadings for lack of jurisdiction and failure to state a claim. *United States v. One 1997 Mercedes E420*, *175 F.3d 1129, 1131 n. 1 (9th Cir. 1999)*.

[2] The complaint also alleged a mail fraud RICO predicate in sending forms falsely verifying employment eligibility to the government. In a ruling that has not been appealed, the district court held that the mail fraud scheme did not provide an adequate RICO predicate act because the employees were not the party defrauded.

[3] The district court "remanded" the remaining state law claims against the growers. As the parties acknowledge, dismissal, not remand, was called for because this suit was originally brought in federal court. *See* *28 U.S.C. § 1447*.

The employees moved for reconsideration, proffering a proposed amended complaint that alleged a conspiracy broader than the named growers and included more specific causation allegations. The amended complaint states that the growers and unnamed conspirators "comprise a large percentage of the fruit orchards and packing houses in the area, and therefore affect wages throughout the labor market for apple pickers and fruit packers, [such that] competition with respect to wages is stifled and suppressed." The proffered complaint also adds six paragraphs explaining how the scheme injures the workers. Nonetheless, the district court denied the motion, clarifying that it was not dismissing merely for difficulty of proof, but for lack of concrete injury and proximate causation.

In addition, the district court, quite reluctantly, granted Selective **[**7]** Employment's motion to dismiss pursuant to *Rule 12(b)(1)*. The district court determined that it was bound by *Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977)*, *cert. granted*, *434 U.S. 814 (1977), 54 L. Ed. 2d 70, 98 S. Ct. 50 cert. dismissed*, *435 U.S. 982 (1978), 56 L. Ed. 2d 76, 98 S. Ct. 1635* which it characterized as holding pendent-party jurisdiction unconstitutional.

DISCUSSION

We note at the outset that ***HN2***[] the district court dismissed this case on the pleadings. Consequently, our review is de novo, and we may affirm the dismissal "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002)* (quoting *Hishon v. King & Spalding,* ***[*1168]*** *467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984))*. ***HN3***[] In the RICO context, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *NOW v. Scheidler, 510 U.S. 249, 256, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)* **[**8]** (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992))*.

The district court offered two bases for dismissal on the pleadings: RICO standing and supplemental jurisdiction. We discuss those issues below, but first we address one proffered alternative ground for affirming the dismissal for failure to state a claim, an argument that need not detain us long. ***HN4***[] RICO prohibits engaging in a pattern of "racketeering activity," defined as violating certain laws; as such, a predicate illegal act must be alleged. *18 U.S.C. §§ 1962(c)*, *1961(1)(F)*. The district court held that the "Illegal Immigrant Hiring Scheme" as pleaded involved a predicate RICO act, knowingly hiring undocumented workers in violation of Immigration and Naturalization Act § 274, *8 U.S.C. § 1324*. We are unpersuaded by the growers' argument that the district court erred in this respect. Their argument rests on a hypertechnical reading of the complaint inconsistent with the generous notice pleading standard. *See* *Swierkiewicz, 122 S. Ct. at 999*. The complaint alleges that the defendants had knowledge of **[**9]** illegal harboring "and/or" smuggling. Even if knowledge of smuggling were required by the statute, an issue about which we express no opinion, the complaint easily contains this allegation. We affirm the district court's analysis and reasoning on this issue, and turn to standing and supplemental jurisdiction.

I. STANDING

A. STATUTORY STANDING

We turn first to the statutory standing requirements particular to RICO. ***HN5***[] Under RICO, "any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court" for civil damages. *18 U.S.C. § 1964(c)*. This statute is quite similar to the antitrust statute granting standing to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," *15 U.S.C. § 15(a)*, and consequently the two have been interpreted in tandem. *Holmes v. Sec. Inv. Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. The employees allege an injury to their property in the form of lost wages. [4] The key task is to determine **[**10]** whether this injury was "by reason of" the growers' alleged violations, a requirement the Supreme Court has interpreted to encompass proximate as well as factual causation.

In a series of cases beginning in the antitrust context and later extended to **[**11]** RICO, the Supreme Court clarified that ***HN6***[] potential plaintiffs who have suffered **[*1169]** "passed-on" injury - that is, injury derived from a third party's direct injury - lack statutory standing. *Ill. Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*; *Assoc. Gen'l Contractors v. Calif. State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*; *Holmes, 503 U.S. at 268*. *Illinois Brick* held that government consumers could not sue on a theory that high prices were passed on to them as a result of the defendants' illegal price-fixing scheme. *431 U.S. at 736*. Similarly, in *Associated General Contractors*, unions lacked standing to sue a contractors' association for an illegal conspiracy to use nonunion subcontractors because such a conspiracy would directly victimize the union subcontractors, not the unions. *459 U.S. at 520-21*. *Holmes* extended the requirement to RICO; nonpurchasing customers, forced to cover costs when brokers became insolvent as a result of an illegal stock manipulation scheme, could not sue for this derivative harm. *503 U.S. at 268*. **[**12]**

HN7[] In this circuit, we focus on three nonexhaustive factors in considering causation, that is whether the injury is "too remote" to allow recovery:

> (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 701 (9th Cir.) (quoting *Oregon Laborers - Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 (9th Cir. 1999))*, *cert. denied*, *534 U.S. 891, 151 L. Ed. 2d 147, 122 S. Ct. 207 (2001)* ("Wash. Pub. Hosp."). At this stage of the proceedings, we cannot say that there is "no set of facts that could be proved," to satisfy these requirements. *Swierkiewicz, 122 S. Ct. at 998*.

Our analysis is guided by two key cases, both decided after the district court's original opinion. *See Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)*; **[**13]** *Commercial Cleaning Servs. v. Colin Serv. Sys., Inc., 271 F.3d 374, 378 (2d Cir. 2001)*.

The relationships among the parties in this case bear a striking resemblance to those in *Knevelbaard Dairies*, an antitrust case in which we recently held that the plaintiffs had standing. There, milk producers sued defendant cheese producers, who illegally fixed the price of cheese, which in turn set the price of milk artificially low. *232 F.3d at 989*. Applying classic antitrust standing principles, we looked "to the chain of causation between [plaintiff's] injury and the alleged restraint in the market." *Id. at 989* (quoting *Am. Ad Mgmt. Inc. v. General Tel. Co., 190 F.3d 1051, 1058 (9th Cir. 1999))*. We concluded that the milk producers' injury was sufficiently direct. Their allegations that they would "receive[]less for milk than they otherwise would have received in the absence of the defendants' unlawful conduct" were "disputed claims of causation and injury [that] cannot be decided on a *Rule 12(b)(6)* motion." *232 F.3d at 989*. The employees here, like the milk producers in *Knevelbaard Dairies*, claim a direct market **[**14]** injury as a result of the alleged illegal hiring scheme (or in the case of *Knevelbaard Dairies*, as a result of the price fixing in the cheese market). In fact, the causation allegations here are more direct than *Knevelbaard Dairies*, as the

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[4] The growers suggest that the employees would have to show a "property right" in the lost wages, by showing that they were promised or contracted for higher wages. This argument is misplaced in the context of RICO. This case does not implicate procedural due process; rather, what is required is precisely what the employees allege here: a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes. *18 U.S.C. §§ 1962(c)*, *1961(1)*; *Dumas v. Major League Baseball Prop., 104 F. Supp. 2d 1220, 1222 (S.D. Cal. 2000)*, *aff'd sub nom.* *Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 2002 U.S. App. LEXIS 16689* at *9, No. 00-56251 (9th Cir. Aug. 20, 2002) (holding no "injury to property" under RICO).

employees allege a direct impact on the labor market, not the more attenuated claim of **[*1170]** an impact on the cheese market, which in turn affected the milk prices.

The Second Circuit, the only circuit to have considered allegations of illegal immigrant hiring based on the same predicate act as that at issue here, held that the plaintiffs had standing to sue under RICO. In *Commercial Cleaning*, a competitor alleged that the defendant janitorial service underbid it by relying on laborers that the defendant knew to be undocumented. *271 F.3d at 378*. The injury was not derivative of an injury to a third party because "the theory of Commercial's claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals." *Id. at 384*. Similarly here, the employees allege that the illegal hiring scheme was divined in order to depress the normal labor market.

Turning to the first factor, **[**15]** taking the allegations in the complaint as true, we are unable to discern a more direct victim of the illegal conduct. The documented employees here do not complain of a passed-on harm. They allege that the scheme had the purpose and direct result of depressing the wages paid to them by the growers. Thus, as the district court correctly determined, "plaintiffs have stated a claim that they are the direct victims of the illegal hiring scheme."

As in *Knevelbaard Dairies* and *Commercial Cleaning*, the scheme aims to gain an illegal commercial advantage - here, disproportionate bargaining power in employment contracts - in the growers' dealings with the employees. Neither the government nor the undocumented workers are an intervening third party in this scheme, despite the growers' arguments to the contrary. The claims here thus differ fundamentally from passed-on injury cases. *See* *Imagineering Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1312 (9th Cir. 1992)* (holding that minority-and women-owned subcontractors could not sue general contractors under RICO for an illegal scheme to evade federally required quotas because the direct harm was to competitor general contractors **[**16]** who complied with the quotas); *Oregon Laborers*, 185 F.3d at 963-67 (holding that health care trust funds could not sue tobacco companies under RICO because their injury derived from the smokers' injury); *Wash. Pub. Hosp., 241 F.3d at 703* (same for health care providers). In contrast to these other cases, the alleged scheme here was intended to give the growers a contract advantage at the expense of the documented workers, a direct rather than a pass-through injury.

We also note that the undocumented workers cannot "be counted on to bring suit for the law's vindication." *Holmes, 503 U.S. at 273*; *cf.* *Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137, 152 L. Ed. 2d 271, 122 S. Ct. 1275 (2002)* (holding that undocumented workers are not entitled to backpay wrongfully withheld in a labor dispute). Although not dispositive, *see* *Oregon Laborers, 185 F.3d 957*, we heed the Supreme Court's example and consider this factor in our analysis. As the district court noted, ***HN8***[] the fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration **[**17]** laws through lawsuits like this one. *18 U.S.C. § 1961(1)(F)*.

The second concern to which we direct our attention is the speculative measure of harm. The district court noted that "intervening factors …could have interfered with the plaintiffs receiving higher pay absent the defendants' hiring of undocumented workers. These intervening factors include the wage paid by other orchards in the area, the skill and qualifications of each plaintiff, the profitability of the defendants' businesses without the undocumented workers, and the general **[*1171]** availability of documented workers in the area." In other words, the district court dismissed the complaint based on the conclusion that factors other than the scheme coupled with the growers' power in the relevant labor market *could* account for the plaintiffs' depressed wages. The difficulty with this reasoning is that the employees allege that the growers singularly have the ability to define wages in this labor market, akin to monopsony or oligopsony power. *See* Phillip Areeda, et al., ***Antitrust Law*** P P 574, 1431 (1995). They further allege that it is the illegal scheme that has caused their injury. The proposed **[**18]** amended complaint lays to rest any remaining doubt about attributing the alleged harm to the scheme, by spelling out a broad conspiracy causing direct harm to the workers. For example, it makes clear that the scheme involves fruit growers that "comprise a large percentage of the fruit orchards and packing houses in the area, and therefore affect wages throughout the labor market."

The district court's analysis focused primarily on cause-in-fact, not proximate cause, and it is inappropriate at this stage to substitute speculation for the complaint's allegations of causation. As we explained in *Knevelbaard Dairies* when we rejected the claim that milk prices might have been lower due to independent factors instead of the cheese price fixing: "Whether experts will be able to measure the difference between the allegedly restrained price for milk and the price that would have prevailed but for the antitrust violation remains to be seen; in deciding a *Rule 12(b)(6)* motion we are dealing only with the complaint's allegations, which in this instance do not make the claim speculative." *232 F.3d at 991*.

Similarly here, the workers must be allowed to make their case through presentation **[**19]** of evidence, including experts who will testify about the labor market, the geographic market, and the effects of the illegal scheme. Questions regarding the relevant labor market and the growers' power within that market are exceedingly complex and best addressed by economic experts and other evidence at a later stage in the proceedings. For now, it is sufficient that the employees have alleged market power - they must not be put to the test to prove this allegation at the pleading stage. *See* *Scheidler, 510 U.S. at 256*; *In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395, 398 (3d Cir. 2000)* (reversing dismissal based on lack of antitrust standing because "the District Court considered facts gleaned from counsel's argument and from its own experience, factors not contemplated by the dictates of *Rule 12(b)(6)*").

Finally, it is important to distinguish between uncertainty in the fact of damage and in the amount of damage. *Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976)* (***HN9***[] "Different standards govern proof of the fact and proof of the amount of damages."). That wages would be lower if, as alleged, the growers **[**20]** relied on a workforce consisting largely of undocumented workers, is a claim at least plausible enough to survive a motion to dismiss, whatever difficulty might arise in establishing how much lower the wages would be. *Cf.* *Oregon Laborers, 185 F.3d at 964* (holding medical costs resulting from injury to smokers easily established).

Turning to the final factor, the growers do not appear to argue that there is a significant risk of multiple recovery in this case. No other potential plaintiffs emerge with clarity. Also, as the Second Circuit reasoned, even if there are other classes of potential plaintiffs who could recover for the alleged illegal hiring scheme, such lawsuits would not threaten multiple recovery of passed-on harm. *Commercial Cleaning, 271 F.3d at 383-84*. **[*1172]** This factor does not bar suit for "different classes of plaintiffs, each of which suffered a different concrete injury, proximately caused by the violation." *Id. at 384*. In sum, there is no difficulty avoiding multiple recovery here because this is not a suit for derivative or passed-on harm.

B. CONSTITUTIONAL STANDING

HN10[] Because they are invoking federal jurisdiction, **[**21]** the employees must establish "the irreducible constitutional minimum of standing" in addition to meeting the statutory standing requirements. *Lujan, 504 U.S. at 560-61*. This minimum or threshold consists of three factors: (1) injury in fact: "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *id. at 560* (citations and internal quotations omitted); (2) causation: the injury must be fairly traceable to the defendant's challenged action, *id.*; and (3) redressability: "it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision," *id. at 561* (internal quotations omitted).

Based on the complaint, the employees easily meet this test. First, they allege a concrete, actual injury in their lost wages. As discussed above, their causation allegations are sufficient at this stage. *See* *Scheidler, 510 U.S. at 256* (rejecting a constitutional causation challenge in a RICO suit where the plaintiffs alleged that a conspiracy to threaten staff and patients "has injured the business and/or property interests of the [petitioners]"). **[**22]** Finally, because the award of money damages will redress the injury of lost wages, the third element is also met.

II. SUPPLEMENTAL PARTY JURISDICTION

The employees sued Selective Employment solely under state law, precluding federal question jurisdiction, and all parties are Washington citizens, precluding diversity jurisdiction. *See* 28 U.S.C. §§ 1331 & 1332. In such a situation, absent an independent basis for federal subject matter jurisdiction, Congress has authorized the district court to exercise supplemental jurisdiction:

> The district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a). [5]

[23]** Prior to the passage of § 1367, supplemental jurisdiction was more circumscribed and the addition of a party was one factor that barred jurisdiction over additional claims brought by plaintiffs. *See generally* Denis F. McLaughlin, *The Federal Supplemental Jurisdictional Statute - A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 859-89 (1992). In 1973, the Supreme Court expressed some skepticism about "pendent party jurisdiction" - jurisdiction over plaintiffs' claims requiring the addition of parties not involved in the main lawsuit. The Court characterized this issue as a "subtle and complex question with far-reaching implications." *Moor v. County of Alameda, 411 U.S. 693, 715, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973)*. Continuing this thread, in *Aldinger v. Howard, 427 U.S. 1, 49 L. Ed. 2d 276, 96 S. Ct. 2413 (1976)*, the **[*1173]** Court held that pendent party jurisdiction was impermissible as a matter of statutory construction under the particular circumstances of the case. Finally, in *Finley v. United States, 490 U.S. 545, 549, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989)*, the Court "assumed, without deciding, **[**24]** " that pendent party jurisdiction was constitutional, but cautioned that it requires an express statutory jurisdictional grant. In 1990, Congress enacted § 1367 to provide such an express grant. Pub. L. No. 101-650 § 310.

The statutory grant of jurisdiction is, of course, limited by constitutional boundaries. Upon careful review, however, we are convinced that ***HN11***[] the controlling constitutional standard remains that articulated in *United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*: The claims must form "but one constitutional 'case' "and "derive from a common nucleus of operative fact." We therefore decline Selective Employment's invitation to impose a per se constitutional bar on supplemental jurisdiction over claims against additional parties.

A. *AYALA v. UNITED STATES*

Selective Employment relies on *Ayala v. United States, 550 F.2d 1196, 1199-1200 (9th Cir. 1979)*, where we held that federal courts were without power to exercise pendent party jurisdiction under the Federal Tort Claims Act. At that time, neither of the key Supreme Court cases, *Moor* and *Aldinger*, had resolved the question, **[**25]** nor did we have the benefit of the explicit language of *Finley*, which came ten years later. Selective Employment, however, points to language that implied that, in addition to not being authorized under any statute, pendent party jurisdiction posed constitutional difficulties. *550 F.2d at 1199, 1200 n. 8*. These statements, however, are best read as flagging the necessity for caution due to potential constitutional problems that might arise with an unduly broad exercise of pendent jurisdiction.

Significantly, *Ayala* also came before intervening decisions that clarified that *Ayala's* restrictive interpretation does not survive the 1990 passage of § 1367. We explained in *Galt G/ S v. Hapag-Lloyd AG, 60 F.3d 1370, 1374 (9th Cir. 1995)*, that ***HN12***[] *Finley* imposed two requirements for supplemental jurisdiction: (1) the claims must be "part of the same constitutional 'case' "; and (2) the jurisdiction must be expressly authorized by statute. We further observed that " 28 U.S.C. § 1367 supersedes this second *Finley* requirement. ..." *60 F.3d at 1374 n. 3*; *see also* *Yanez v. United States, 989 F.2d 323, 327 n. 3 (9th Cir. 1993)* **[**26]** (holding that court lacked jurisdiction in pre-

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[5] The statute restricts supplemental jurisdiction in certain cases where the underlying basis for federal jurisdiction is diversity. 28 U.S.C. § 1367(b). This provision is not at issue in this case, which rests on federal question jurisdiction.

1990 suit, but noting that "Congress has now explicitly authorized pendent party jurisdiction" (citing 28 U.S.C. § 1367)).

B. CONSTITUTIONALITY OF SUPPLEMENTAL JURISDICTION UNDER § 1367

Any lingering doubt that *Ayala* establishes a binding constitutional rule is put to rest by the Supreme Court's recent decision in Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 122 S. Ct. 999, 1004, 152 L. Ed. 2d 27 (2002). Holding that a tolling provision was curtailed by the Eleventh Amendment, the Court discussed the history of supplemental jurisdiction:

> In *Mine Workers v. Gibbs*, this Court held that federal courts deciding claims within their federal question subject matter jurisdiction, 28 U.S.C.§ 1331, may decide state law claims not within their subject matter jurisdiction if the federal and state law claims "derive from a common nucleus of operative fact" and comprise "but one constitutional 'case.' " ...This Court later made **[*1174]** clear that *absent authorization from Congress*, a district court could not exercise pendent jurisdiction over claims **[**27]** involving parties who were not already parties to a claim independently within the court's subject matter jurisdiction. *See* Finley v. United States, 490 U.S. 545, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989).

122 S. Ct. at 1004 (emphasis added; some citations omitted). The Court elaborated that ***HN13***[] § 1367 provided just such authorization, functioning as a "general grant of jurisdiction." Id. at 1005. As the Supreme Court explained in *Raygor*, Article III permits supplemental jurisdiction "if the federal and state law claims 'derive from a common nucleus of operative fact' and comprise 'but one constitutional case.' " 122 S. Ct. at 1004 (quoting Gibbs, 383 U.S. at 725) (some internal quotation marks omitted). Thus, any suggestion in *Ayala* that the Constitution imposes a bar on supplemental jurisdiction over additional parties independent of statutory authorization has been undermined by intervening Supreme Court authority. *See United States v. Gay, 967 F.2d 322, 327 (9th Cir. 1992)* (holding that a prior panel decision is not binding in such a situation).

Selective Employment provides no compelling rationale to **[**28]** restrict supplemental jurisdiction beyond the limitation imposed in *Gibbs*. Indeed, the district court suggested that it would hold otherwise but for the belief that its hands were tied by *Ayala*. The district court's instincts were vindicated by the Supreme Court's later ruling in *Raygor*. We acknowledge, of course, that ***HN14***[] federal courts are courts of limited jurisdiction. U.S. Const. Art. III, sec. 2; Finley, 490 U.S. at 550 (quoting *Gibbs*, Aldinger 427 U.S. at 15). The *Gibbs* standard defines the minimum constitutional constraints, offering both Congress and the district courts flexibility to shape each case in a way that is efficient for the courts, fair to the parties, and respectful of state sovereignty.

Finally, we note that none of our sister circuits has imposed a per se constitutional restriction on supplemental jurisdiction over additional parties. *See* Hinson v. Norwest Financial S. C., Inc., 239 F.3d 611, 615 (4th Cir. 2001) (holding that district court did not abuse its discretion in joining plaintiffs who asserted only state law claims); HB Gen'l Corp. v. Manchester Partners, L. P., 95 F.3d 1185, 1197-98 (3d Cir. 1996) **[**29]** (holding that nondiverse party could be joined for counterclaims); Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995) (noting that only *Gibbs* now limits pendent party jurisdiction); Palmer v. Hosp. Auth., 22 F.3d 1559, 1566-67 (11th Cir. 1994) (holding that district court had pendent party jurisdiction because claims involved the "same facts, occurrences, witnesses, and evidence").

Thus, to avoid dismissal for lack of federal subject matter jurisdiction, the employees must show that the state conspiracy claims against Selective Employment constitute part of the same constitutional case as the federal RICO claims against the growers. ***HN15***[] Assuming that the claims meet the *Gibbs* standard, the district court has the power to exercise supplemental jurisdiction. The decision to exercise that jurisdiction remains discretionary with the district court. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 172-73, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997) (holding that ***HN16***[] district courts may decline to exercise jurisdiction over supplemental state law claims in the interest of judicial economy, convenience, fairness, and comity). We therefore **[**30]** remand for the district court to determine, in the first instance, whether the application of the *Gibbs* standard permits the exercise of supplemental jurisdiction, and to exercise discretion over whether such **[*1175]** jurisdiction would be appropriate in the context of this litigation.

REVERSED and REMANDED.

Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.

United States District Court for the Southern District of New York

September 4, 2002, Decided

02 Civ. 3242 (DAB)

Reporter

224 F. Supp. 2d 657 *; 2002 U.S. Dist. LEXIS 16291 **; 2002-2 Trade Cas. (CCH) P73,792

YANKEES ENTERTAINMENT AND SPORTS NETWORK, LLC, Plaintiff, -against- CABLEVISION SYSTEMS CORPORATION and CSC HOLDINGS, INC., Defendants.

Disposition: Motion to dismiss denied in part and granted in part.

Core Terms

antitrust, programming, Network, sports, advertising, broadcast, rights, monopoly, competitor, alleges, regional, cable, anti trust law, vertical, markets, Sherman Act, subscribers, Donnelly Act, monopolization, leveraging, television, anticompetitive, integrated, team, conspiracy, monopoly power, prices, Clayton Act, argues, rival

LexisNexis® Headnotes

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

In evaluating a motion to dismiss, the court must accept plaintiff's allegations as true and must draw all inferences in plaintiff's favor. The court's task is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. Accordingly, dismissal of a complaint for failure to state a claim is warranted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Conclusory allegations which merely recite the litany of antitrust will not suffice to defeat a motion to dismiss.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

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

HN3[] **Monopolies & Monopolization, Attempts to Monopolize**

An antitrust complaint must adequately define the relevant product market, allege antitrust injury, and allege conduct in violation of antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Section 2 of the Sherman Act, found at *15 U.S.C.S. § 2*, is not primarily aimed at improper conduct which directly implicates the restraint of trade (as under *15 U.S.C.S. § 1*), but rather at the creation of a pernicious market structure by specific intent in which the concentration of power saps the salubrious influence of competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] **Monopolies & Monopolization, Attempts to Monopolize**

The act of monopolization prohibited by *15 U.S.C.S. § 2* consists of two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Attempted monopolization has three elements: (1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. As such, the Sherman Act is interpreted to condemn monopoly power only when it is accompanied by the "purpose or intent to exercise that power" in order to impede or destroy competition.

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

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

HN7[] **Market Definition, Relevant Market**

The definition of the relevant market in an antitrust case involves the specification of its dimensions, specifically, its product, geographic and time dimensions. The United States Court of Appeals for the Second Circuit has elucidated that the relevant market definition must encompass the realities of competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

In a Sherman Act case, the attempt to monopolize offense is closely tied to completed monopolization. The United States Supreme Court has approved of defining attempt to monopolize as the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN9[] **Monopolies & Monopolization, Attempts to Monopolize**

The Clayton Act, *15 U.S.C.S. §§ 12-27*, was passed to strengthen and clarify the Sherman Act and, inter alia, *§ 7*, *15 U.S.C.S. § 18*, encompasses conduct where the effect of mergers may be substantially to lessen competition or tend to create a monopoly in any line of commerce. Despite the utilization of different verbiage in the two Acts, standards of liability under the Clayton Act largely mirror those under the Sherman Act.

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

HN10[] **Private Actions, Standing**

The United States Supreme Court has identified several factors to consider in determining whether a particular plaintiff has "antitrust standing", including inter alia: (1) the causal connection between the alleged antitrust violation and the alleged harm suffered by the plaintiff; (2) whether the injury was of a type that Congress sought to redress with the antitrust laws; (3) the directness or indirectness of the connection between the asserted injury and the alleged restraint in the relevant market; (4) the existence of an identifiable class of persons other than plaintiff who were more direct victims of the antitrust violation; (5) the potential for duplicative recovery or complex apportionment of damages; and (6) the speculative nature of the damages.

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

HN11[] **Private Actions, Standing**

The United States Court of Appeals for the Second Circuit has provided a "two-prong analysis" for determining antitrust standing. Under this test, courts must first determine whether the plaintiff suffered an antitrust injury. If such injury is found, the next step is to determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws.

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

HN12[] **Private Actions, Standing**

An antitrust injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. In assessing injury, the United States Supreme Court has delineated: Conduct in violation of the ***antitrust law*** may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

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

HN13[] **Private Actions, Standing**

The antitrust injury requirement for antitrust claims underscores the fundamental tenet that the antitrust laws were enacted for the protection of competition, not competitors.

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

HN14[] **Private Actions, Standing**

The antitrust injury concept requires an antitrust plaintiff to show that its own injury coincides with the public detriment tending to result from the alleged violation.

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

HN15[] **Private Actions, Standing**

In an antitrust case, the requirement that the plaintiff's injury results from a threat to competition is invaluable in distinguishing the efficient, vertically integrated defendant properly situated outside the ambit of antitrust laws from the economic monopoly which is the target of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws do not operate to prevent a vertically integrated firm from reaping the rewards of its efficiency or to punish a company that profits from its expertise and innovativeness.

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

HN17[] **Private Actions, Standing**

The United States Supreme Court has directed that an antitrust plaintiff should be given the full benefit of its proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN18[] **Regulated Practices, Monopolies & Monopolization**

Monopoly power is defined as the power to control prices in the relevant market or to exclude competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

A rival has clear standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude competitors from the market.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

That alleged anticompetitive conduct creates a possible monopoly of "buyers" rather than "sellers" is not dispositive.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

Competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN22[] **Clayton Act, Claims**

A showing of antitrust injury is necessary but not sufficient to establish antitrust standing, and a plaintiff may indeed have suffered an antitrust injury yet not be considered the proper plaintiff to bring an antitrust action. To determine whether a plaintiff is a proper antitrust plaintiff, courts have focused on whether there are more direct victims of the alleged antitrust violations, and whether the plaintiff can effectively represent the interests of such victims. Put another way, where there exists an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement, such persons, not one who has suffered a more indirect harm from the defendant's conduct, are the proper plaintiffs to bring an antitrust action. The doctrine of antitrust standing reflects the United States Supreme Court's attempt to articulate a test for recovery of treble damages pursuant to § 4 (15 U.S.C.S. § 15) of the Clayton Act, 15 U.S.C.S. §§ 12-27, that will not encompass every conceivable harm that can be traced to alleged wrongdoing.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN23[] **Antitrust & Trade Law, Sherman Act**

It is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN24[] **Antitrust & Trade Law, Sherman Act**

The United States Court of Appeals for the Second Circuit has found that to allege a monopoly leveraging claim, the plaintiff must show that the defendant: (1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage in another distinct market; and (3) caused injury by such anticompetitive conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN25[] **Antitrust & Trade Law, Sherman Act**

Instructive on the issue of leverage claims is the following admonition: Offsetting the prevention of monopolies is the fear that many leverage claims are really complaints about the defendant's greater efficiency or aggressiveness and the willingness to turn the antitrust laws into a statute that protects firms from "unfair" but non-monopolistic practices. Thus, any monopoly leveraging claim must be limited to circumstances where (1) the "target" (B) market is properly defined; and (2) the alleged conduct threatens the B market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by large market share. If the second requirement is met, then one literally does not need a distinctive "leveraging" doctrine--an action that yields monopoly performance in the B market could be regarded as "monopolization" or "attempt to monopolize" within the literal language of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, notwithstanding that it fails to yield a monopoly market share. But courts must then take great care not to permit the second requirement to be satisfied with such alternative formulations as "unfairness," "competitive advantage," or "distorting competition" in the leveraged market.

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] **Antitrust & Trade Law, Sherman Act**

Regarding leveraging claims in an antitrust lawsuit, the gravamen of the offense is not the enlargement of the defendant's market share at the plaintiffs' expense or even the destruction of plaintiffs by unfair means. Rather, it must be monopoly market performance measured by reduced output or higher prices in the secondary market.

Antitrust & Trade Law > Clayton Act > General Overview

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN27[] **Antitrust & Trade Law, Clayton Act**

In an analysis, under *§ 7* (*15 U.S.C.S. § 18*) of the Clayton Act, *15 U.S.C.S. §§ 12-27*, of vertical mergers, the competitive significance of a vertical merger results primarily from the degree, if any, to which it may increase barriers to entry into the market or reduce competition by (1) foreclosing competitors of the purchasing firm in the merger from access to a potential source of supply, or from access on competitive terms, (2) foreclosing competitors of the selling firm from access to the market or a substantial portion of it, or (3) forcing actual or potential competitors to enter or continue in the market only on a vertically integrated basis because of advantages unrelated to economies attributable solely to integration.

Antitrust & Trade Law > Clayton Act > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN28[] **Antitrust & Trade Law, Clayton Act**

The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete.

Antitrust & Trade Law > Clayton Act > General Overview

HN29[] **Antitrust & Trade Law, Clayton Act**

In an antitrust case, the fact that entry into a market has occurred does not necessarily preclude the existence of "significant" entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN30[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A refusal to grant access to an essential facility violates the antitrust laws because of the danger that a monopolist in one market might use its market power to extend its monopoly into another.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN31[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Court of Appeals for the Second Circuit has stated that, for purposes of the essential facilities doctrine, essential facilities include: facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately. Most of the successful essential facility claims fall within these categories. In cases finding liability in other categories, however, the facility in question is more than dominant; it is effectively the only one in town.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN32[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To state a claim under the essential facility doctrine, a plaintiff must allege: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN33[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Court of Appeals for the Second Circuit has found that there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable. A defendant may ultimately be able to delineate a "legitimate business practice" which would shield the defendant from liability for conduct that otherwise would constitute denial of an essential facility.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN34[] **Jury Trials, Province of Court & Jury**

Finding that whether a facility is essential and/or what constitutes reasonable access are issues of fact that cannot be resolved on this motion to dismiss.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN35[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The direction of payment (i.e. liability attaches only where a plaintiff must pay for access to a facility not vice versa) plays no part in determining the applicability of the essential facilities doctrine, except in the determination of reasonableness of the access arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

Tax Law > Federal Taxpayer Groups > S Corporations > Distributions by S Corporations

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN36[] **Antitrust & Trade Law, Sherman Act**

Sherman Act ramifications are quite different for combinations versus individuals. While a combination may be liable for effecting a mere restraint of trade, for a single firm to be liable there generally must be either monopolization or the threat of monopolization.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN37[] Defenses, Demurrers & Objections, Motions to Strike

When sought to expunge irrelevant factual matters, a strike motion will not be granted unless those matters have no clear bearing on the issues in dispute. Accordingly, a motion to strike will be granted if the disputed matter is irrelevant under any state of facts which could be proved in support of the claims being advanced.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Evidence > Relevance > Relevant Evidence

HN38[] Defenses, Demurrers & Objections, Motions to Strike

In the absence of relevant authority to the contrary, however, the standards developed by an industry's regulatory agency (i.e. the Federal Communications Commission), while not binding or necessarily persuasive authority, may be relevant to a civil claim.

Evidence > Judicial Notice > General Overview

HN39[] Evidence, Judicial Notice

A court may take judicial notice of materials publicly filed by or with the Federal Communication Commission as giving an indication of the nature of relevant practices in and policies affecting a business.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN40[] Monopolies & Monopolization, Attempts to Monopolize

The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, proscribes that every contract, agreement, arrangement, or combination whereby a monopoly is or may be established or maintained, or whereby competition may be restrained is illegal. *N.Y. Gen. Bus. Law § 340(1)*. The Act was closely patterned after the Sherman Act and has been narrowly construed to encompass only those causes of action falling within the Sherman Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN41[] Public Enforcement, State Civil Actions

A party asserting a violation of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, must (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN42[] **Public Enforcement, State Civil Actions**

The United States Supreme Court has found that a parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other due to a presumed unity of purpose.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN43[] **Public Enforcement, State Civil Actions**

Conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*.

Counsel: [1]** ALAN B. VICKERY, PHILIPPE Z. SELENDY, MARIANNE FOGARTY, EDWARD NORMAND, HELEN M. MAHER, Boies, Schiller & Flexner LLP, New York, New York, ATTORNEYS FOR PLAINTIFF.

YVONNE S. QUINN, MICHAEL T. TOMAINO, JR., ANTONY M. CANDIDO, VINCENT P. SHERMAN, ELIZABETH M. ZITO, Sulllivan & Cromwell, New York, New York, ATTORNEYS FOR DEFENDANT.

Judges: Deborah A. Batts, United States District Judge.

Opinion by: DEBORAH A. BATTS

Opinion

[*662] DEBORAH A. BATTS, United States District Judge.

Plaintiff Yankees Entertainment and Sports Network, LLC (hereinafter "YES") brings this antitrust action pursuant to *Section 2* of the Sherman Act, *15 U.S.C. § 2*, *Section 7* of the Clayton Act, *15 U.S.C. § 18*, *Section 4* of the Clayton Act, *15 U.S.C. § 15*, as well as *Section 340* of the Donnelly Act, *N.Y. Gen. Bus. L. § 340*, for alleged monopolization of the greater New York area sports programming, broadcast rights, advertising, and distribution of multi-channel video programming markets. Defendants Cablevision Systems Corporation and CSC Holdings, Inc. (hereinafter together "Cablevision" or "Defendant") now move to dismiss pursuant to *Federal Rule of Civil Procedure **[**2]** 12(b)(6)* ten claims wholly or partially comprised in the Complaint's Counts I, II, III, IV, V, VI, and VII for failure to state a claim upon which relief can be granted. [1]

For the reasons set forth below, Defendant Cablevision's motion to dismiss is denied in part and granted in part.

I. BACKGROUND [2]

A. The Parties

[1] While the Parties appear to be in some disagreement as to the correspondence of Cablevision's ten "claims" to the "counts" enumerated in the Complaint (Def.'s Mem. Law at 12-14; Pl.'s Mem. Law at 3-4), for the purposes of clarity and simplicity, this Court will refer to the Counts alleged rather than the Claims enumerated by Defendant.

[2] **Since the instant motion is a *Rule 12(b)(6)*, the facts recited herein are drawn from the Plaintiff's Complaint.**

Defendant Cablevision and its wholly owned subsidiary CSC Holdings, **[**3]** Inc., are Delaware corporations which directly or indirectly own and operate cable television programs in various areas of New York, New Jersey, and Connecticut. (Compl. PP25,26,38.) As a cable operator which provides pay television programming within its service area, Cablevision is considered to be a multichannel video programming distributor ("MVPD"). [3] (Compl. P40.) Unlike other types of MVPDs, cable operators like Cablevision serve only those areas for which they are granted franchises by local government authorities for fixed periods of time. (Compl. P36.)

Plaintiff YES, a Delaware limited liability company, is a regional sports programming network launched on September 10, 2001 which has purchased the local broadcast rights to, among others, New York Yankees baseball games **[**4]** beginning with the 2002 baseball season. (Compl. PP2,4,24.) It has since reached agreement with more than 30 television operators and satellite direct broadcast systems (with the notable exception of Cablevision) for the distribution of its programming in the greater New York metropolitan area to approximately 5.3 million subscribers. (Compl. P4.)

According to YES, Cablevision's cable television systems are "clustered" in the New York metropolitan area (covering roughly more than 3 million households) and likely comprise the largest cluster of cable systems in the United States. **[*663]** (Compl. P38.) Specifically, Cablevision provides its customers with a subscription television service which includes television broadcast networks, news, entertainment, general programming, and national and regional sports programming. (Compl. PP 36,42.) Cablevision, subject to some regulation by local franchising authorities, decides which networks to distribute to their subscribers by paying a programming network, like YES, for the right to include a particular network in its programming options. (Compl. PP43,70-71,85.)

Moreover, Cablevision, like many MVPDs, determines the package of channels available **[**5]** to subscribers through a tiered system, whereby a subscriber can purchase the simplest "Broadcast Basic", an expanded "Family Cable", and then three tiers of "Optimum TV". (Compl. P43.) Each successive tier is more expensive and includes additional channels. (Compl. P43.) Cablevision may also sell subscriptions to "premium" programming, such as HBO, not as part of a package, but separately on a channel-by-channel basis. (Compl. PP42,85.)

In addition to its distribution of programming, Cablevision also indirectly owns a partial interest in Madison Square Garden LP ("MSG LP"), which in turn owns, inter alia, MSG Network ("MSG") and Fox SportsNet New York ("FSNY"). (Compl. P48.) MSG [4], FSNY, and now YES are the only existing regional sports networks, that is, networks focused primarily on airing live sporting events of local sports teams, in the greater New York metropolitan area. (Compl. PP7,29,35,48.) Cablevision sells MSG and FSNY to other MVPDs that want to make regional sports programming available to their subscribers as part of an expanded basic package. (Compl. P83.)

[6]** B. The Markets

YES has identified and defined four relevant markets for the purpose of the instant case: (1) local sports broadcast rights, (2) regional sports programming, (3) distribution of multi-channel video programming, and (4) advertising on regional sports networks. (Pl.'s Mem. Law at 3.) The first, the purchase and sale of local broadcast rights to local professional sports teams, concerns the sale by the owners/creators of sporting events of their rights to televise to owners of Programming Networks such as MSG and YES. (Compl. PP30,31.)

The second, the purchase and sale of programming of local professional sporting events, occurs between the aforementioned Programming Networks and various MVPDs, such as cable operators, for delivery to their subscribers. (Compl. PP27-29.)

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[3] **Other examples of MVPDs include direct broadcast satellite operators, multi-point multi-direction system operators and others who use different delivery methods for the provision of pay television programming. (Compl. P40.)**

[4] **Prior to the creation of YES, MSG owned the local broadcast rights to the New York Yankees until early October 2001, when the Yankees exercised its option to terminate its contract with MSG. (Compl. P55.)**

The third, the market of the distribution of multi-channel programming, involves the purchase and sale of pay television services between competing MVPDs and the residents and businesses in their respective service area. (Compl. PP32,33.)

Finally, the advertising on regional sports networks market refers to the buying and selling of advertising time on regional sports programming services between advertisers **[**7]** and either the Programming Network or the MVPD. (Compl. PP34,35.)

C. The Dispute Between YES and Cablevision

Since its creation in September 2001, YES has actively sought to have its network **[*664]** distributed to the largest possible audience, and YES reached agreement with more than thirty subscription television distribution systems for its broadcast as part of expanded basic cable service, the "most popular tier of subscription television services." (Compl. PP4,62.) Cablevision is the only large cable operator in the greater New York metropolitan area with which YES has not reached an agreement, making New York Yankees games unavailable to Cablevision's 3 million subscribers. (Compl. P63.)

Despite a series of negotiations dating from October 2001, YES and Cablevision have been unable to reach agreement on two major issues: the tier of service on which YES would be offered to Cablevision subscribers and the price to be paid by Cablevision to YES. [5] (Compl. PP65-73.) Specifically, YES states that Cablevision, in alleged violation of Federal Communications Commission ("FCC") regulations, stated that "it would carry YES Network only if there were cable exclusivity, and YES Network would **[**8]** be unavailable to satellite distributors." (Compl. P66.) Further, YES alleges Cablevision offered to carry YES as a "premium" channel, instead of carrying it on an expanded basis tier__"an offer deliberately constructed to ensure that the YES Network would have minimal market penetration because regional sports networks generally cannot be successfully marketed on premium channels." (Compl. P67.) YES further characterizes Cablevision's offer of providing YES with its own wholly controlled subscription channel as unprecedented and untenable, since YES is not set up to administer billing or collections. (Compl. P70.) Finally, YES claims that the per-subscriber rate proposed by Cablevision is "significantly below the economic value of the YES Network by any standard industry measure" and is designed to "drive YES Network out of business." (Compl. P90.)

[9]** In sum, YES alleges that Cablevision "is using its status as a vertically integrated multichannel video programming distributor [6] to protect its monopoly over local sports programming by refusing to grant YES Network carriage on its system on nondiscriminatory terms such as those terms and conditions available to its affiliates." (Compl. P99.) YES claims injury stemming from "having fewer viewers, less advertising at reduced fees, and the loss of revenue from subscriber fees." (Compl. P121.)

As such, on April 29, 2002, YES set forth eight Counts alleging: (1) attempted monopoly of regional sports programming market in violation of the Sherman Act; (2) attempted monopoly of local broadcast rights market in violation of the Sherman Act; (3) depriving Plaintiff access to an essential facility in violation of the Sherman Act; (4) refusal to deal to maintain monopoly of regional **[**10]** sports programming in violation of the Sherman Act; (5) illegal monopoly leveraging in violation of the Sherman Act; (6) anticompetitive horizontal integration in violation of the Clayton Act; (7) anticompetitive vertical integration in violation of the Clayton Act; and (8) anticompetitive arrangement and combination in violation of the Donnelly Act. (Compl. PP116-169.)

Cablevision now moves to dismiss on the following grounds:

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[5] **Cablevision disputes YES' following rendition of facts regarding the negotiations, which as stated here will be taken as true for the purposes of this motion to dismiss**.

[6] **"Vertical integration" refers to Cablevision's ownership of both a distribution facility and programming networks. (Compl. P157.)**

[*665] 1. YES does not have antitrust standing to pursue a claim of attempted monopolization of the alleged "local broadcast rights" market because no causation exists for YES' alleged injury and alternatively, the injury is not cognizable as an "antitrust injury".

2. YES does not have antitrust standing to pursue a claim for attempted monopolization of the alleged market for "sale of advertising time" solely on regional sports networks because no causation exists for YES' alleged injury and alternatively, the injury is not cognizable as an "antitrust injury".

3. YES has failed to plead, as required, that Cablevision has market power in Internet services in order to sustain its alleged tie-in claim and YES has no standing to attack Cablevision's **[**11]** approach to offering Internet and video programming services.

4. YES does not have antitrust standing to challenge the 1997 acquisition of Madison Square Garden.

5. YES cannot state a claim under the "essential facility" doctrine because (i) YES has access pursuant to the leased access provision of the Cable Act, *47 U.S.C. § 521, et seq.*; (ii) YES is trying to sell Cablevision a service, not gain access to a facility; and (iii) YES is seeking *better* access, not the same access. (emph. incl. in original)

6. YES' allegations regarding maintenance or expansion of a monopoly cannot state a claim under the Donnelly Act that requires, instead, a combination or conspiracy.

7. YES has no right to enforce in this Court the FCC regulations regarding programming carriage, *47 C.F.R. § 76.1301*, that it alleges Cablevision has violated.

II. DISCUSSION

It is well-settled that ***HN1***[] in evaluating a motion to dismiss, the Court must accept Plaintiff's allegations as true and must draw all inferences in Plaintiff's favor. See *Diezcabeza v. Lynch, 75 F. Supp. 2d 250, 255 (S.D.N.Y. 1999)*; *Mackey v. Property Clerk of New York City Police Dept., 26 F. Supp. 2d 585, 588 (S.D.N.Y. 1998)*. **[**12]** The Court's task "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000)*(quoting *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984)*(internal quotation marks omitted)). Accordingly, dismissal of a complaint for failure to state a claim is warranted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; see also *ICOM Holding, Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 221 (2d Cir. 2001)*.

Nevertheless, it is axiomatic that ***HN2***[] "conclusory allegations which merely recite the litany of antitrust" will not suffice. *John's Insulation, Inc. v. Siska Constr. Co., 774 F. Supp. 156, 163 (S.D.N.Y. 1991)*; see also Re-Alco Indus., Inc. f. *National Ctr. for Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)*("***HN3***[] [an antitrust complaint] must adequately…define **[**13]** the relevant product market, …allege antitrust injury, [and] … allege conduct in violation of antitrust laws.").

A. Federal ***Antitrust Law***

As delineated by the Supreme Court, the Sherman Act was enacted to **[*666]** assure customers the benefits of price competition and with the "central interest" of "protecting the economic freedom of participants in the relevant market." *Associated General Contractors of CA v. CA State Council of Carpenters, 459 U.S. 519, 538, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. Specifically, ***HN4***[] *Section 2* of the Sherman Act provides, in part, that "Every person who shall monopolize…any part of the trade or commerce among the several States…shall be deemed guilty of a felony." *15 U.S.C. § 2 (1976)*. ***HN5***[] *Section 2* is not primarily aimed at improper conduct which directly implicates the restraint of trade (as under *§ 1*), but rather at the creation of a pernicious market structure by specific intent in which the "concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*.

HN6[] The act of monopolization prohibited by 15 U.S.C. § 2 **[**14]** consists of two elements: "the possession of monopoly power in the relevant market [7] and ... the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Attempted monopolization has three elements: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 822 F. Supp. 145, 153 (S.D.N.Y.1993) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966), and Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)) [8] As such, the Sherman Act is interpreted to condemn monopoly power only when it is accompanied by the "purpose or intent to exercise that power" in order to impede or destroy competition. Berkey, 603 F.2d at 274 (quoting Griffith, 334 U.S. 100 at 107, 68 S. Ct. at 945); **[**15]** see also United States v. Aluminum Co., 148 F.2d 416, 430 (2d Cir. 1945)("The successful competitor, having been urged to compete, must not be turned upon when he wins."); 3 Phillip Areeda, Hovenkamp, & Blair, ***Antitrust Law*** P 637 (2d ed. 2002).

[16]** HN9[] The Clayton Act, 15 U.S.C. §§ 12-27 (1976), was passed to strengthen and clarify the Sherman Act and, inter alia, § 7 encompasses conduct where the effect of mergers "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." Despite the utilization of different verbiage in the two Acts, standards of liability under the Clayton Act largely mirror those under the Sherman Act. See 2 Areeda & Hovencamp, supra, § 301 at 7 ("No difference in the **[*667]** criteria for illegality or the mode of analysis follows from the difference between the 'unreasonable' formula of the Sherman Act and the 'substantial lessening of competition' formula of the Clayton Act.").

B. Antitrust Standing

HN10[] The Supreme Court has identified several factors to consider in determining whether a particular plaintiff has "antitrust standing", including inter alia: (1) the causal connection between the alleged antitrust violation and the alleged harm suffered by the plaintiff; (2) whether the injury was of a type that Congress sought to redress with the antitrust laws; (3) the directness or indirectness of the connection between the asserted injury **[**17]** and the alleged restraint in the relevant market; (4) the existence of an identifiable class of persons other than plaintiff who were more direct victims of the antitrust violation; (5) the potential for duplicative recovery or complex apportionment of damages; and (6) the speculative nature of the damages. See Associated General Contractors, 459 U.S. at 537-44 (1983).

HN11[] The Second Circuit has provided a "two-prong analysis" for determining antitrust standing. Under this test, "courts must [first] determine whether the plaintiff suffered an antitrust injury ." Balaklaw v. Lovell, 14 F.3d 793, 797 n. 9 (2d Cir.1994). If such injury is found, the next step is to "determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws." Id.

1. Antitrust Injury: Local Broadcast Rights and Advertising Markets

[7] HN7[] **The definition of the relevant market involves the specification of its dimensions, specifically, its product, geographic and time dimensions. 2 Earl W. Kintner, Federal *Antitrust Law* § 12.2 (1980). The Second Circuit has elucidated that the relevant market definition "must encompass the realities of competition." Balaklaw v. Lovell, 14 F.3d 793, 797 n. 9 (2d Cir.1994)(quoting Oksanen v. Page Memorial Hosp., 945 F.2d 696, 709 (4th Cir. 1991))(defining relevant employment market as geographically broader than Plaintiff's exclusively local definition)**

[8] HN8[] **The attempt to monopolize offense is closely tied to completed monopolization. See American Tobacco Co. v. United States, 328 U.S. 781, 785, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946) (approving jury instruction defining attempt to monopolize as "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it").**

Specifically, ***HN12***[] an antitrust injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect **[**18]** either of the violation or of anticompetitive acts made possible by the violation." Balakalow, 14 F.3d at 797, n.9 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*(finding no antitrust injury where plaintiff's claimed injury was "a result of his losing out in the competition for an exclusive [employment] contract [with Defendant], and nothing more."). In assessing injury, the Supreme Court has delineated:

> Conduct in violation of the ***antitrust law*** may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 343-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

HN13[] The antitrust injury requirement underscores the fundamental tenet that "the antitrust laws … were enacted for 'the protection **[**19]** of competition, not competitors. " *Brunswick, 429 U.S. at 488* (quoting *Brown Shoe v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*(finding no antitrust injury where the defendant had preserved competition by acquiring a number of plaintiff's bowling alley competitors that would have otherwise gone out of business); *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* ("The challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been **[*668]** harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors."); see also 2 Areeda & Hovenkamp, supra, P337 at 312 ***HN14***[] ("The antitrust injury concept thus requires the antitrust plaintiff to show that its own injury coincides with the public detriment tending to result from the alleged violation."). ***HN15***[] The requirement that the plaintiff's injury results from a threat to competition **[**20]** is invaluable in distinguishing the efficient, vertically integrated defendant properly situated outside the ambit of antitrust laws from the economic monopoly which is the target of the antitrust laws. See, e.g., *Viacom v. Time Inc., 785 F. Supp. 371, 379 (S.D.N.Y. 1992)*("It is of course axiomatic that ***HN16***[] the antitrust laws do not operate to prevent a vertically integrated firm from reaping the rewards of its efficiency or to punish a company that profits from its expertise and innovativeness.")

YES alleges that Cablevision has specifically intended to monopolize the market for sports broadcast rights in the greater New York metropolitan area and has "engaged in anticompetitive conduct" designed to "cause YES to fail." Compl. P118. The main basis for the conduct appears to consist of Cablevision's refusal to carry YES on its cable television systems: "Cablevison's anticompetitive conduct relevant to this claim includes at least its refusal to deal with YES on terms of carriage on its cable facility to preclude YES from competing with Cablevision and its MSG and FSNY networks in the broadcast rights market, and its attempt to use its monopoly in the regional sports programming **[**21]** market to monopolize the local broadcast rights market." Pl.'s Memo. Law at 11. YES alleges it is harmed by "having fewer viewers, less advertising at reduced fees and the loss of revenues from subscriber fees." Compl. P121. In other places in the Complaint, YES further alleges harms including the limitation of its ability to purchase broadcast rights and, by reducing its reach to subscribers, the rendering of YES as a "less desirable vehicle" for the distribution of programming. Compl. PP 106-08,124-5.

In the market for the sale of advertising, YES alleges it is harmed because (1) YES is made a less attractive seller in the advertising market; (2) YES is precluded from expanding its sales of advertising time; (3) YES's advertising sales revenues is lowered and (4) YES is sought to be eliminated as a competitor in the advertising market. See Compl. PP12, 34-5, 103, 108, 120, 135-36, 148-49.

Cablevision claims that YES has no standing to challenge the purported antitrust action in these markets because (1) YES is not a team owner/advertiser so increased rates do not cause YES any harm; (2) YES is a buyer of television rights in the local broadcast rights market and a seller in **[**22]** the advertising market and as such, benefits from the alleged antitrust violation; and (3) YES is not the best suited Plaintiff, as the owners of sports broadcast rights and advertisers are an "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." See Def. Mem. Law at 18-19.

YES responds that it has standing in these markets because Cablevision seeks to eliminate YES as a competitor in the markets for the acquisition of local broadcast rights and for the sale of advertising and because YES is the "only competitor of Cablevision's affiliated MSG and FSNY sports networks, the intended direct result of Cablevision's conduct is the **[*669]** suppression--and in fact elimination--of competition in the purchase of broadcast rights, enabling monopoly pricing." Pl.'s Mem. Law at 11-12 (quoting Compl. PP8-10), 30-32 (quoting Compl. PP12, 34-5, 103, 108, 120, 135-36, 148-49). Plaintiff also depends on the so-called "leverage" theory claim, an antitrust claim in which a violating defendant possesses monopoly power in one market and uses that power in support of an anticompetitive purpose in a second, competing market. **[**23]** See Pl.'s Mem. Law at 14-15.

Cablevision's arguments that YES did not suffer an antitrust injury because it is not a team owner and because it is a buyer in the market of broadcast rights are unavailing. The arguments appear to characterize the sole harm alleged by YES as a "reduction in the amount of money that team owners will be able to command for their television rights." Def.'s Mem. Law at 17. However, the harms alleged by the Complaint are broader in scope and do encompass, in addition to these alleged market distortions for sellers, harms to YES as an excluded competitor. The Complaint, read as a whole [9] **[**24]** , does allege further that Cablevision intends to shut out YES and any other potential competitors [10] in order to ensure that "Cablevision is the only entity seeking to acquire regional broadcast rights of local professional sports teams." Compl. P124. The same can be said for YES' allegations in the advertising market; specifically that by making YES less attractive to potential advertisers because of reduced subscriber access and fewer revenues, Cablevision is distorting and trying to eliminate competition in the market. Compl. PP103, 108.

Cablevision's argument appears to conflate the Complaint's purported damages with allegations necessary to constitute antitrust injury. YES does not, and indeed, cannot, claim damages based upon team owners forced to demand lower rates or advertisers forced to pay higher rates to reach their targeted market, i.e., the 3 million Cablevision subscribers that constitute almost 40% of the greater New York metropolitan area market. See Compl. P103; see, e.g. *Cargill, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484* (denying a plaintiff competitor standing to enjoin merger of two of its rivals on ground that it increased concentration among sellers because plaintiff could benefit by increasing its own prices). Rather, YES asserts that it is being driven from the markets, specifically, (1) of selling sports programming and buying broadcast rights and (2) of selling **[**25]** advertising time, by the alleged violations. It seeks damages to compensate for profits it would have earned by competing in the respective markets in the first place. See Compl. P126. [11] Irrespective of the team owners' or advertisers' injury, an excluded competitor like YES suffers a distinct injury if it is prevented from buying/selling its product. ***HN19***[] "[A] rival has clear standing to challenge the conduct of rival(s) that is illegal **[*670]** precisely because it tends to exclude competitors from the market." 2 Areeda et al., supra, P 348, at 387; Compl. P9 ("If Cablevision refuses to carry YES Network, Cablevision believes YES Network will fail and once again, Cablevision will be the only provider of local sports programming in the greater New York area, thus restoring its monopoly control of local sports programming."); see also *Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intern., 347 U.S. App. D.C. 178, 256 F.3d 799 (D.C. Cir. 2001)*(finding standing is supported where alleged injury is not derived from or measured by the

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[9] ***HN17***[] **The Supreme Court has directed that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.**

[10] ***HN18***[] **Monopoly power is defined "as the power to control prices in the relevant market or to exclude competitors." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, n. 20, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*.**

[11] **Cablevision asserts that YES' phrasing that it has suffered harm to reputation is not a cognizable antitrust injury. That may be so, but other claims in the complaint sufficiently allege that YES complains of being forced out of business and/or of being unable to compete for the purchase of broadcast rights. See Compl. PP9,10,124-26.**

injury to consumers, but measured by the loss of profits [plaintiff] would have otherwise made had it not been excluded from the market); *Yellow Pages Cost Consultants, Inc. v. GTE Directories, 951 F.2d 1158 (9th Cir. 1991)* **[**26]** (finding GTE's refusal to deal with plaintiff consultants directly injured consultants, who were found to compete with GTE for advertisers); *Sweeney v. Athens Regional Medical Center, 709 F. Supp. 1563 (M.D.Ga. 1989)*(standing found for direct competitor of defendant in suit alleging defendant conspiracy to drive her from market by limiting access to patients). For similar reasons, ***HN20***[] that this creates a possible monopoly of "buyers" rather than "sellers" is not dispositive; YES has entered into the market as the direct competitor of Cablevision affiliates (MSG Network and FSNY)for the purchase of broadcast rights. Compl. PP8-10.

In a related argument, **[**27]** Cablevision asserts that its dominance on the buyer's side can only result in an exit of a buyer and the accompanying decrease in selling prices and therefore constitutes a benefit, not detriment, to buyers such as YES. Def.'s Mem. Law at 18-19. Again, such an argument supposes that the only harms alleged in the Complaint are those on behalf of team owners and/or advertisers. Taking the facts in the Complaint as true, Cablevision's conduct was designed to ensure its status as the only buyer in town, with its control of MSG and FSNY, and its pricing for the purchase of broadcast rights and sale of advertising time can be unilaterally determined, causing price distortions. Indeed, the exclusion of competitors would ensure that no one but Cablevision would in fact benefit from those lowered broadcast rights costs or elevated advertising rates. Cf. *Brunswick, 429 U.S. at 489, n. 14, 97 S. Ct. at 698, n. 14* ***HN21***[] ("Competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened").

Accordingly, YES' allegations of injury to itself and competition which flow from Cablevision's purported exclusionary acts **[**28]** sufficiently alleges the type of injury the antitrust laws were intended to prevent in order to withstand the instant motion to dismiss. See, e.g., *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp., 294 F.3d 307, 318-19 (2d Cir. 2002)*("While the district court may find otherwise after discovery and a motion for summary judgment, it is too early to conclude on this record that the plaintiff only suffered a wholly derivative injury".).

2. Suitability of Plaintiff: Local Broadcast Rights and Advertising Markets

HN22[] A showing of antitrust injury is necessary but not sufficient to establish antitrust standing, and a plaintiff may indeed have suffered an antitrust injury yet not be considered the proper plaintiff to bring an antitrust action. See *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. To determine whether a plaintiff is a proper antitrust plaintiff, courts have focused on whether there are more direct victims of the alleged antitrust violations, and whether the plaintiff can effectively represent **[*671]** the interests of such victims. See, e.g., *Huhta v. Children's Hosp. of Philadelphia, 1994 U.S. Dist. LEXIS 7327, 1994 WL 245454* **[**29]** at *2 (E.D.Pa. May 31, 1994). Put another way, where there exists "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement," such persons, not one who has suffered a more indirect harm from the defendant's conduct, are the proper plaintiffs to bring an antitrust action. *Associated General Contractors, 459 U.S. at 542*. The doctrine of antitrust standing reflects the Supreme Court's attempt to articulate a test for recovery of treble damages pursuant to *§ 4* of the Clayton Act that will not "encompass every conceivable harm that can be traced to alleged wrongdoing." *Id. at 536*.

Cablevision's argument on this point can be summarized as follows. The main alleged antitrust violation by Cablevision is that it has "adamantly refused to carry YES Network on its cable systems, except on discriminatory and commercially unreasonable terms that it knows cannot be accepted by YES Network." Compl. P5. As such, Cablevision argues, the act of refusing to purchase and carry YES occurs only in the "regional sports programming" market. That YES' exit from this market as a competing Programming **[**30]** Service in turn has ripple effects, that is, results in weaker competition in the related "broadcast rights" market, Cablevision further argues, does not function to confer upon it automatic standing to challenge a purported monopoly in that related market. Def.'s Memo. Law at 3-6 ("Cablevision's alleged refusal to deal can harm YES only once: YES is not distributed on Cablevision's system only once and, for example, YES can go out of business only once. It does not go out of business three times_once in each of these markets.")

While Defendant's challenge has intuitive appeal, for indeed, there appears to be a dearth of cited acts other than the refusal to deal in the Complaint, there is no basis at this juncture of the case to find that a Plaintiff as a rival competitor alleging a distinct injury to competition and to itself in a defined market, lacks standing. The Second Circuit has found, in dicta, that ***HN23***[] "it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market." *Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 284 (2d Cir. 1979)*; **[**31]** see *Twin Lab v. Weider Health & Fitness, 900 F.2d 566, 570-1 (2d Cir. 1990)*(finding Berkey required "tangible harm to competition" in second market); cf. *Virgin Atlantic Airways Ltd. v. British Airways, 872 F. Supp. 52, 64 (S.D.N.Y. 1994)*(accepting leveraging claim absent an attempt to monopolize second market, provided there was an attempt to gain a competitive advantage in second market and injury amounting to "tangible harm to competition"); *International Audiotext Network, Inc. v. American Tel. & Tel. Co., 893 F. Supp. 1207 (S.D.N.Y. 1994)*("The District Courts in the Second Circuit have adhered to Berkey, with the Twin Labs gloss [i.e. requiring tangible harm to competition]"); *Viacom Intl. v. Time, 785 F. Supp. 371 (S.D.N.Y. 1992)* (accepting monopoly leveraging claim involving cable system operators who obtained anticompetitive advantage in adjacent market for cable programming).

Most recently, ***HN24***[] the Second Circuit has found that to allege a monopoly leveraging claim, the plaintiff must show that the defendant: (1) possessed monopoly power in one market; (2) used that power to gain a competitive **[**32]** advantage…in another **[*672]** distinct market; and (3) caused injury by such anticompetitive conduct. *Law Offices of Curtis Trinko v. Bell Atlantic, 294 F.3d 307, 326 (2d Cir. 2002)*. Also ***HN25***[] instructive on the issue of leverage claims is the following admonition:

> Offsetting [the prevention of monopolies] is [the] fear that many leverage claims are really complaints about the defendant's greater efficiency or aggressiveness and [the] willingness to turn the antitrust laws into a statute that protects firms from 'unfair' but non-monopolistic practices. Thus, any monopoly leveraging claim must be limited to circumstances where (1) the 'target' (B) market is properly defined; and (2) the alleged conduct threatens the B market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by large market share. If the (2) requirement is met, then one literally does not need a distinctive 'leveraging' doctrine--an action that yields monopoly performance in the B market could be regarded as 'monopolization' or 'attempt to monopolize' within the literal language of *§ 2*, notwithstanding that it fails to yield a monopoly **[**33]** market share. But courts must then take great care not to permit the (2) requirement to be satisfied with such alternative formulations as 'unfairness,' 'competitive advantage,' or 'distorting competition' in the leveraged market. ***HN26***[] The gravamen of the offense is not the enlargement of the defendant's market share at the plaintiffs' expense or even the destruction of plaintiffs by unfair means. Rather, it must be monopoly market performance measured by reduced output or higher prices in the secondary market."

3 Areeda et al., supra, § 652 at 97.

Accordingly, the focus of a court's review must be whether the Complaint alleges that the related broadcast rights and advertising (secondary) markets are faced with the requisite threats of "higher prices or reduced quality" associated with monopolies or attempted monopolies. Here, the Plaintiff has adequately alleged that Cablevision's monopoly in the regional sports programming market has been leveraged in the secondary markets of broadcast rights and advertising and caused price distortions consistent with a "tangible harm to competition". See, e.g., *Law Offices of Curtis V. Trinko, 294 F.3d at 326* (holding **[**34]** plaintiff's allegation that defendant used monopoly power in wholesale market to gain a "competitive advantage" in downstream retail market is a cognizable monopoly leveraging claim which survives a motion to dismiss); see also 3 Areeda et al., P652 at 96 (in discussing monopoly leveraging: "The plaintiff might claim that the defendant uses monopoly power in A to place rivals in B at a competitive disadvantage, perhaps by raising their costs or making their offerings less attractive.") Again, Cablevision may ultimately be able to refute these claims on summary judgment, but the Court is unable to resolve them on the instant motion.

Finally, other potential plaintiffs, that is the other teams not owned by Cablevision who are sources of programming rights and advertisers seeking to buy time on regional sports programming services, are not necessarily more efficient antitrust plaintiffs than the rivals who are alleging exclusion in the first instance. Unlike cases involving indirect purchasers, YES is a direct participant and competitor in the alleged markets affected.

Accordingly, Defendant's motions to dismiss Plaintiff's *§ 2* claims in the broadcast rights and advertising markets **[**35]** **[*673]** on the basis of standing are DENIED. [12]

[36]** 2. Antitrust Injury and Standing: Vertical Integration

For reasons similar to those discussed above, YES also has standing to claim in Count VII that Cablevision's acquisition of a "controlling interest" in Madison Square Garden, L.P., violated *§ 7* of the Clayton Act by conferring on Cablevision control over the broadcast rights licensed to MSG and FSNY and control over the New York Knicks and New York Rangers, i.e., "all locally broadcast games of all professional baseball, hockey, and basketball teams in the New York Area". Compl. P158. Cablevision's argument that YES cannot challenge a vertical integration because YES has managed to enter into the market and thereby cannot challenge entry barriers for others mischaracterizes the alleged injury.

HN27[] In a *Section 7* analysis of vertical mergers, the competitive significance of a vertical merger results primarily from the degree, if any, to which it may increase barriers to entry into the market or reduce competition by (1) foreclosing competitors of the purchasing firm in the merger from access to a potential source of supply, or from access on competitive terms, (2) foreclosing competitors of the selling firm from access to the **[**37]** market or a substantial portion of it, or (3) forcing actual or potential competitors to enter or continue in the market only on a vertically integrated basis because of advantages unrelated to economies attributable solely to integration. See *Fruehauf Corp. v. F. T. C., 603 F.2d 345, 352 (2d Cir. 1979)*; see also *Standard Oil Co. of California v. United States, 337 U.S. 293, 314, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*("The ***HN28***[] primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition, [which] 'deprive(s) . . . rivals of a fair opportunity to compete.' H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8" (footnote omitted)). YES, therefore, has standing to assert that the acquisition has deprived it of a fair opportunity to compete in a market it has already entered. See, e.g., *Rebel Oil Co. v. Atlantic Richfield, 51 F.3d 1421, 1440 (9th Cir. 1997)*("The ***HN29***[] fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. **[**38]** If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power."); *Six West Retail Acquisition, Inc. v. Sony Management Corp., 2000 U.S. Dist. LEXIS 2604, 97* cv 5499, 2000 WL 264295, at *25 (S.D.N.Y. March 9, 2000)(finding sufficient standing and antitrust injury for a *§ 7* claim where merger presented Defendants with an avenue through which they could thwart **[*674]** Plaintiff's and other exhibitors' access to movies). Accordingly, Defendant's motion to dismiss Count VII is DENIED.

C. Essential Facilities Doctrine

HN30[] A refusal to grant access to an essential facility [13] violates the antitrust laws because of the danger that a monopolist in one market might use its market power to extend its monopoly into another. See *MCI*

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[12] **While the Court has found that the allegations in the Complaint, taken as a whole, describe conduct that support standing for an antitrust claim under a number of theories, as discussed supra and infra, the Court is cognizant of Defendant's point that there is no separate Count for an attempted monopolization or monopoly leveraging of the market for the sale of advertising. For the purposes of clarity, Plaintiff, should it decide to pursue such a claim, shall file an amended complaint which explicitly sets all surviving claims pursuant to this Opinion, out in separate Counts. In amending, Plaintiff should also be cognizant of the Second Circuit's admonition in Law Offices of Curtis Trinko that monopoly leveraging claims are distinct from attempted monopolization claims, *294 F.3d at 326 n.13*, and should state its claims clearly and succinctly so that Defendant may answer them as such. In answering, Defendants should correlate its responses to Plaintiff's enumerated Counts.**

[13] ***HN31***[] **The Second Circuit has stated that essential facilities include: "'facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately.' Most of the successful essential facility claims fall within [these] categories… In cases finding liability in other categories, however, the facility in question was more than dominant; it was effectively the only**

Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.)("monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another.").

[39]** ***HN32***[] To state a claim under the essential facility doctrine, a plaintiff must allege: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Twin Labs, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990)*. Here, Count III alleges that the essential facility is the distribution system by which Cablevision delivers programming to its franchise area subscribers. See Compl. PP129-30. YES further alleges that it cannot practically or reasonably duplicate the essential facility due to significant barriers to entry (PP131-132), and that it is feasible for Cablevision to provide access to the facility to YES (PP133-34).

Cablevision's objections center around the third prong and regard what circumstances actually constitute a "denial" in the use of a facility. Specifically, Cablevision argues the essential facility doctrine does not enable YES (1) to force access when YES already has access pursuant to the leased access provisions of the Cable Act, *47 U.S.C. § 532*; **[**40]** (2) to force Cablevision to purchase products or services from YES as opposed to forcing Cablevision to permit YES to use a facility; and (3) to obtain better treatment than its competitors. Def.'s Mem. Law at 26.

The only question before the Court is whether, as a matter of law, the essential facility doctrine encompasses cases where the alleged monopoly refuses to pay a "reasonable price" to carry the challenger's service on its facility. The Supreme Court's decision in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1513 (1985)*, does not hold that a monopolist must make a facility available at a competitive rather than monopolistic price. [14] Indeed, such a ruling has great logical appeal, given that such determinations of "reasonable price" made by any court can often be Sisyphean undertakings_"nothing less than price regulation of the kind undertaken by regulatory agencies_something for which both the federal courts and the antitrust litigation process are extremely ill-suited and which is, in any event, inconsistent with antitrust's **[*675]** fundamental 'market' orientation to problems of lack of competition." Areeda et al., § 771 at 172; cf. *Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 134 n. 3 (5th Cir.1979)* **[**41]** (court should not "be called upon to weld together two business entities which have shown a propensity for disagreement, friction, and even adverse litigation").

Nevertheless, ***HN33***[] the Second Circuit in *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 179-80 (2d Cir. 1990)*, found that "there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable." Defendant may ultimately be able to delineate a "legitimate business practice" (e.g., where YES should be required to lease the distribution system [15]) which would shield defendant from liability for conduct that otherwise would constitute **[**42]** denial of an essential facility. See *MCI Communications v. American Tel. & Tel. Co., 708 F.2d*

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one in town." *Twin Labs, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990)*(quoting Areeda & Hovenkamp, P736.2 (Supp. 1998)).

[14] While the Supreme Court, unlike the Tenth Circuit, did not rely on the essential facilities doctrine, the case is concerned with a vertical integration and is often cited in lower court cases involving alleged essential facilities. See, e.g., Areeda & Hovenkamp, § 772c at 182.

[15] The Court is aware of the intent behind the leased access provisions, *47 U.S.C. § 532 (2002)* where: "Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers." S.Rep.No. 102-92, at 29 (quoting H.R.Rep.No. 98-934, at 47 (1984)). Nevertheless, the key question remains whether forcing YES to lease a system for which Cablevision pays its affiliates constitutes a competitive injury accompanied by high entry barriers such that competition in the marketplace is impaired. Absent such impairment, it could very well be that YES is simply an unintegrated rival whose injury reflects nothing more than Cablevision's ability to reduce its costs without the concomitant injury to competition. However, for the purposes of this motion, YES' allegation that Cablevision has refused to deal in terms which are reasonable in order to keep its monopolistic position from eroding is taken as true .

1081, 1133 (7th Cir. 1983). This Court, however, cannot resolve this issue on the merits at this stage of the litigation. See, e.g., Law Offices of Curtis V. Trinko, 294 F.3d at 326 **HN34**[] (finding that whether facility is essential and/or what constitutes reasonable access are "issues of fact that cannot be resolved on this motion to dismiss."). Cf. Ideal Dairy Farms v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir. 1996)(finding, on summary judgment, no denial to essential facility where defendant charged plaintiff prices significantly above market); Florida Mun. Power Agency v. Florida Power and Light Co., 81 F. Supp. 2d 1313 (M.D.Fla. 1999)(finding, on summary judgment, essential facility not violated where Defendant provided access, but not on plaintiff's desired terms).

[43]** In light of such clear precedent, Cablevision's reliance on International Audiotext v. American Telephone & Telegraph Co., 62 F.3d 69 (2d Cir. 1995) is unavailing. There, the Second Circuit found that the essential facility doctrine was not implicated because the case did not involve a facility, but a service, specifically, a phone company's "billing services". Id. at 71. That is not the case here, where there is no law to support Cablevision's allegations that its distribution network is not a facility or that the fact YES is seeking to sell its service (and thus forcing Defendant to buy) makes the claim non-cognizable under the essential facilities doctrine. [16] **[**44]** Further, **HN35**[] the direction of payment **[*676]** (i.e. liability attaches only where a plaintiff must pay for access to a facility not vice versa) plays no part in determining the applicability of the doctrine, except in the determination of reasonableness of the access arrangement. Said determination, as discussed above, cannot be made at this stage of the litigation. [17] Accordingly, Cablevision's request to dismiss Count III is DENIED.

[45]** D. Tying Claim and FCC Violations

YES alleges that Cablevision is bundling its Internet service with its video programming services at discounted prices to increase switching costs for subscribers who might consider switching to DBS (or other MVPD operators) and that Internet service, thus, is the tying [18] product. See Compl. PP14,41. Cablevision argues that YES' "tying claim" should be dismissed for lack of standing and for failure to plead a required element of the claim. Def. Mem. Law at 21-3,29. Cablevision further asserts that YES "can neither directly bring a claim to enforce these FCC regulations nor indirectly adopt these regulations as a standard to be applied in determining its antitrust claims."

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[16] **Simply re-characterizing YES' attempted access claim as an attempt to sell a service cannot result in a dismissal where YES' allegations meet the threshold requirements under the essential facilities doctrine and YES is entitled to all facts construed in its favor at this juncture. That is not to say, however, that the record at summary judgment would not permit this Court to find the essential facilities doctrine unavailable because the distribution system cannot be fairly characterized as a "facility" or where the mode of access offered by Cablevision is not so patently unreasonable by industry standards to constitute a "denial."**

[17] **Defendant relies on Paladin Assocs., Inc. v. Montana Power Co., 97 F. Supp. 2d 1013, 1038 (D.Mont. 2000) for the proposition that the essential facilities doctrine is unavailable to a plaintiff seeking "preferential treatment" over its competitors. Paladin, however, found simply, after discovery was conducted, that plaintiff failed to sustain a "denial to facility" claim since it was engaged in an active contract with defendant, though on terms not to its liking. Id. at 1038. Those facts are clearly not mirrored here, where plaintiff alleges a denial associated with Cablevision's status as a vertically integrated monopolist in the cable distribution market. Further, Paladin is of limited value because it involved a combination in restraint of trade, not single firm conduct. As such, HN36[] Sherman Act ramifications are quite different for combinations versus individuals. See Copperweld, 467 U.S. 752 at 767-69, 774-77, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (while a combination may be liable for effecting a mere restraint of trade, for a single firm to be liable there generally must be either monopolization or the threat of monopolization).**

[18] **Proof of a tying arrangement generally requires evidence that the supplier's sale of the tying product is conditioned upon the unwilling purchase of the tied product from the supplier or an unwilling promise not to purchase the tied product from any other supplier. See, e.g., Jefferson Parish, 466 U.S. 2 at 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 ("The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."); Wells Real Estate, 850 F.2d 803 at 814 ("Tying arrangements involve the use of leverage over the market for one product ... to coerce purchases of a second product....").**

Def. Mem. Law at 30. YES responds that YES is not bringing a "tying claim," or a claim to enforce FCC regulations (Pl.'s Mem. Law at 33) and accordingly, it appears that the only issue for the Court to decide at this juncture is whether to strike any allegation of tying or FCC violations from the Complaint as irrelevant. YES treats Cablevision's motion as a motion to strike pursuant to *Fed. R. Civ. P. 12(f)* and argues a determination of relevance at this stage would be **[**46]** premature. Cablevision treats the allegations as "abandoned claims" and argues they should be stricken under *Fed.R.Evid. 404(b)* as impermissible character evidence.

HN37[] When sought to expunge irrelevant **[**47]** factual matters, a strike motion will not be granted unless those matters have no clear bearing on the issues in dispute. *Reiter's Beer Distributors, Inc. v. Schmidt Brewing Co., 657 F. Supp. 136, 143 (E.D.N.Y. 1987)*. Accordingly, a motion to **[*677]** strike will be granted if the disputed matter "is irrelevant under any state of facts which could be proved in support of the claims being advanced." Id.

While the Court is skeptical that bald allegations of tying in another product/geographic market would have any relevance to the issues here (including Defendant's intent), it is a question better left to more advanced stages of this lawsuit. Indeed, the only Second Circuit case cited by Defendant was a determination made at trial, where the Court had the benefit of a developed record in order to analyze whether the proffered evidence was improper "character" evidence or evidence which properly went to intent or pattern. See *United States Football League v. National Football League, 842 F.2d 1335, 1371 (2d Cir. 1988)* (assessing relevance of prior antitrust judgments at trial) [19] .

[48]** The Plaintiff capitulates that the alleged FCC violations do not comprise an independent cause of action, but merely informs the standard of competitive conduct. Pl.'s Mem. Law at 34. There is no allegation in the Complaint that the FCC has determined that any violation has occurred. The Court is also aware that the FCC standards are not amendments to the existing federal antitrust laws. ***HN38***[] In the absence of relevant authority to the contrary, however, the standards developed by this industry's regulatory agency (i.e. the FCC), while not binding or necessarily persuasive authority, may be relevant. See, e.g., *Int'l Audiotext Network, Inc., 893 F. Supp. at 1212* (noting ***HN39***[] court may take judicial notice of materials publicly filed by or with the Federal Communication Commission as "giving an indication of the nature of relevant practices in and policies affecting the…business.")(citing *Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991))*.

Accordingly, Defendant's motions to strike are DENIED at this time.

E. Donnelly Act

HN40[] The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, proscribes that "every contract, agreement, arrangement or combination **[**49]** whereby a monopoly…is or may be established or maintained, or whereby competition…may be restrained" is illegal. *N.Y. Gen. Bus. Law § 340(1)*. The Act was closely patterned after the Sherman Act and has been narrowly construed to encompass only those causes of action falling within the Sherman Act. See *State v. Mobil Oil Corp., 38 N.Y.2d 460, 381 N.Y.S.2d 426, 427, 344 N.E.2d 357 (1976)*(concluding that price discrimination claim falls outside the ambit of the Sherman Act and therefore, the Donnelly Act); see also *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton, 997 F. Supp. 340 (E.D.N.Y. 1998)*(finding Donnelly Act is modeled after the Sherman Antitrust Act and is generally **[*678]** interpreted in accordance with federal precedent). ***HN41***[] A party asserting a violation of the Donnelly Act must (1) identify the relevant product market, (2) describe the nature and

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[19] **Comparisons of the instant matter to the other cases cited by Defendant are misplaced. 3 Penny Theater Corp. v. Plitt Theatres, Inc., 1985 WL 5138, at *1 (N.D.Ill. November 25, 1985), struck almost 30-year-old antitrust convictions, where the Plaintiff admitted it was relevant to the claims only to establish defendants' 'corporate character'. *Tivoli Realty v. Paramount Pictures, 80 F. Supp. 800, 804 (D.C.Del. 1948)*, struck a paragraph in the Complaint alleging the violation of another judicial decree as immaterial, but denied the striking request as to paragraphs which "furnished background material as to the nature, extent and character of the alleged conspiracy." In re Potash, 1994 WL 1108312 at *6 (D.Minn. 1994) found that any potential relevance of the allegations of decades-old previous misconduct was substantially outweighed by their likelihood for prejudice. Further, the Potash Court declined to strike a description of conduct which was in close proximity to the Plaintiff's claims and "provided a setting for the events which, the Plaintiffs contend, spawned the conduct that they assert as unlawful." *Id. at *7*.**

effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities. *Great Atlantic & Pacific Tea Co., Inc., 997 F. Supp. at 352*. **[**50]**

Cablevision argues that the Donnelly Act cannot be implicated, absent allegations of conduct between one or more actors (hence, the "arrangement" and "combination"), and as such, cannot apply to YES' allegations of single firm, vertical conduct. Def.'s Mem. Law at 29-30; Reply at 14-15. YES responds that the Act is broad enough to prohibit "vertical restraints" and that, regardless, YES alleges a "combination and arrangement between Cablevision and its affiliate MSG LP…as well as supporting acts that seek to restrain competition…" Pl.'s Mem. Law at 28-30.

HN42[] The Supreme Court has found that a parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other due to a presumed unity of purpose. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. The central issue is whether an alleged conspiracy between Cablevision and its affiliated MSG LP (which owns MSG and FSNY sports networks) constitutes a "combination and arrangement" sufficient to fall under the Donnelly Act. [20] While YES devotes much of the Complaint to alleging that Cablevision is a vertically integrated entity which utilizes **[**51]** its subsidiaries (i.e. CSC Holdings) and its controlling interest in its affiliates as a single force to eject YES from several related markets [21] **[**52]** , here, Cablevision argues that they are indeed separate entities: "With less than 47% ownership of MSG and FSNY, [Cablevision] does not have sufficient ownership to fall either under Copperweld or outside the scope of New York's Donnelly Act." Pl.'s Mem. Law at 30. YES cannot have it both ways. [22] Indeed, the Copperweld inquiry is more substantively about determining whether there existed control and a so-called "unity of purpose" rather than the establishment of any magic number percentage of ownership. See generally *Copperweld at 767-778*.

More importantly, ***HN43***[] conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act. *Sands v. Ticketmaster-New York, Inc., 207 A.D.2d 687, 616 N.Y.S.2d 362, 364* (1st Dep't 1994). Plaintiff alleges no facts to suggest that Cablevision's refusal to carry YES on reasonable, nondiscriminatory terms (Compl. P167-168) or "control" of the Knicks and Rangers (Compl. PP8,48, 162), was the product of a conspiracy or reciprocal arrangement, as opposed to a unilateral act by Cablevision that may have inured to the benefit of FSNY and MSG. *Great Atlantic & Pacific Tea Co., Inc., 997 F. Supp. at 352* (finding plaintiff's **[*679]** conclusory allegation regarding conspiracy insufficient to state a claim).

Plaintiffs relies on *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 525 N.Y.S.2d 816, 819, 520 N.E.2d 535 (N.Y. 1988)* for the proposition that "vertical restraints on trade if demonstrated **[**53]** to be unreasonable" clearly fall under the Donnelly Act. Pl.'s Mem. Law at 28. Anheuser-Busch, however, is a case involving purportedly illegal agreements to eliminate intrabrand competition, made between two separate economic entities, beer brewers and designated wholesalers in a given territory, "not to sell the brewer's products outside that territory or to anyone inside the territory who would resell the products elsewhere." *525 N.Y.S.2d at 818*. As such, these agreements, which operated to restrain trade vertically, clearly fell under the Donnelly Act. Anheuser-Busch, however, has no application here where the allegations relate to a network of subsidiaries and affiliates created by one vertically integrated corporation. Further, reliance on People v. Schwartz is also misplaced, where the state court did not need to decide the issue of Copperweld's applicability "because the indictment charges conspiracy with two people…and this second person has no relationship with defendant or his corporation." People v. Schwartz, Index No. 1557/86, 1986 WL 55321 (N.Y.Sup.Ct. Oct. 17, 1986).

Accordingly, Defendant's motion to dismiss the Donnelly Act claim **[**54]** (Count VIII) is GRANTED.

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[20] **YES' vague and conclusory allegation of coercion as to some "national non-networked advertising cooperative" is a wholly insufficient basis for a Donnelly Act claim.**

[21] **YES alleges: "Cablevision has owned a majority interest in FSNY for many years; in 1995, after several years of effort, Cablevision acquired a 50% interest in MSG, and acquired a controlling interest in 1997" Compl. P7.**

[22] **Notably, YES did not bring a claim of federal antitrust conspiracy under *§ 1* of the Sherman Act, *15 U.S.C. § 1*.**

III. CONCLUSION

For the reasons stated above, the Court denies Defendant's motion to dismiss with the exception of Defendant's motion as to Count VIII, the Donnelly Act claim, which is granted.

Plaintiff shall file an amended complaint in accordance with this Opinion (see n.12 supra) by September 24, 2002. Defendant shall respond by October 14, 2002.

SO ORDERED.

Dated: New York, New York

September 4, 2002

Deborah A. Batts

United States District Judge

Winoff Indus. v. Stone Container Corp. (In re Linerboard Antitrust Litig.)

United States Court of Appeals for the Third Circuit

July 19, 2002, Argued ; September 5, 2002, Filed

No. 01-4535

Reporter

305 F.3d 145 *; 2002 U.S. App. LEXIS 18296 **; 2002-2 Trade Cas. (CCH) P73,790; 53 Fed. R. Serv. 3d (Callaghan) 999

IN RE: LINERBOARD ANTITRUST LITIGATION (MDL No. 1261); WINOFF INDUSTRIES, INC. v. STONE CONTAINER CORPORATION; JEFFERSON SMURFIT CORP.; SMURFIT-STONE CONTAINER CORP.; INTERNATIONAL PAPER CO.; GEORGIA PACIFIC CORP.; WEYERHAEUSER PAPER CO.; TEMPLE-INLAND INC. *; GAYLORD CONTAINER CORP. *; UNION CAMP CORP.; SIMPSON TACOMA KRAFT CO.; TENNECO, INC.; TENNECO PACKAGING; PACKAGING CORPORATION OF AMERICA (D.C. Civil No. 98-cv-05055); GENERAL REFRACTORIES COMPANY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED v. STONE CONTAINER CORPORATION (D.C. Civil No. 99-cv-01341); Stone Container Corporation, Jefferson Smurfit Corp., Smurfit-Stone Container Corp., International Paper Co., Georgia Pacific Corp., Weyerhaeuser Paper Co., Temple-Inland, Inc. *, Gaylord Container Corp. *, Union Camp Corp., Tenneco, Inc., Tenneco Packaging and Packaging Corporation of America, Appellants

Subsequent History: [1]** As Amended September 19, 2002.

US Supreme Court certiorari denied by *Gaylord Container Corp. v. Garrett Paper, Inc., 155 L. Ed. 2d 666, 123 S. Ct. 1786, 2003 U.S. LEXIS 2960 (U.S., 2003)*

Motion granted by, Settled by, Judgment entered by *In re Linerboard Antitrust Litig., 2003 U.S. Dist. LEXIS 14825 (E.D. Pa., Aug. 26, 2003)*

Prior History: Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Nos. MDL No. 1261, 98-cv-05055 & 99-cv-01341). District Judge: Honorable Jan E. DuBois.

In re Linerboard Antitrust Litig., 203 F.R.D. 197, 2001 U.S. Dist. LEXIS 13862 (E.D. Pa., 2001)

Disposition: Affirmed.

Core Terms

prices, linerboard, corrugated, district court, manufacturers, fraudulent concealment, predominate, class certification, conspiracy, boxes, increased price, questions, class member, containerboard, plaintiffs', purchasers, sheets, allegations, containers, antitrust, putative class, inventory, class action, similarities, concealment, price-fixed, statute of limitations, member of the class, cause of action, individualized

LexisNexis® Headnotes

* (Amended per Clerk's Order dated 2/5/02)

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Standards of Review, Abuse of Discretion**

The appellate court reviews a district court's grant of class certification under an abuse of discretion standard. Regarding the standard of review applicable to class action decisions, the appellate court must decide whether the *Fed. R. Civ. P. 23(a)* prerequisites have been met, whether the district court correctly identified the issues involved and which are common, and whether it properly identified the comparative fairness and efficiency criteria. If the district court's analysis on these points is correct, then, it is fair to say that the appellate court will ordinarily defer to its exercise of discretion embodied in the findings on predominance and superiority.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN2[] **Remedies, Damages**

Under the "Bogosian short-cut," if a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. The burden of proving the fact of damage under *§ 4* of the Clayton Act, codified at *15 U.S.C.S. § 15*, is satisfied by proof of some damage flowing from the unlawful conspiracy. Under these circumstances, proof on a common basis would be appropriate. Even if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price, it might be possible to designate subclasses to conform with these variations.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] **Private Actions, Remedies**

The court does not require plaintiffs to have selected a particular econometric model for demonstrating impact (or proving damages) at the class certification stage.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

The judicial process distinguishes discrete functions in the appellate decisional process: (1) finding or choosing (or creating) the law where the dispute is over the choice of the controlling legal precept; (2) if there is no dispute as to its selection, a disagreement over its interpretation; and (3) where there is agreement on the precept and its interpretation, the sole question is the application of the law to the facts, which is described as application of the abstract grounds of decision to the facts of the particular case.

Governments > Courts > Judicial Precedent

HN5[] **Courts, Judicial Precedent**

The process of justifying a court's decision always requires application of a legal precept to a particular factual situation. The application may be purely mechanical, as it is in most cases. If the facts are similar to those in an earlier case announcing a rule of law, the doctrine of precedent becomes operative. Where there is no quarrel over the choice and interpretation of the legal precept, the root controversy usually is traced to a value judgment of whether there is sufficient similarity between the fact situations under comparison. The scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar. The finding of similarity or difference is the key step in the legal process. To predict a court's actions in a precept-application controversy, therefore, requires a prediction of what facts in the compared cases a given court, at a given time, will deem either material or insignificant. The facts considered material are "adjudicative facts," described as facts relevant in deciding whether a given general proposition is or is not applicable to a particular situation.

Governments > Courts > Judicial Precedent

HN6[] **Courts, Judicial Precedent**

For a party to prevail on an argument based upon a prior case, the party must demonstrate that the facts in the prior case are substantially similar to the facts in the case at bar, what logicians call inductive reasoning by analogy, or reasoning from one particular case to another. To draw an analogy between two entities is to indicate one or more respects in which they are similar and thus argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because of the similarities in the two sets. Because a successful analogy is drawn by demonstrating the resemblances or similarities in the facts, the degree of similarity is always the crucial element. You may not conclude that only a partial resemblance between two entities is equal to a substantial or exact correspondence.

Governments > Courts > Judicial Precedent

HN7[] Courts, Judicial Precedent

In the context of the doctrine of precedent, logicians teach that one must always appraise an analogical argument very carefully. Several criteria may be used: (1) the acceptability of the analogy will vary proportionally with the number of circumstances that have been analyzed; (2) the acceptability will depend upon the number of positive resemblances (similarities) and negative resemblances (dissimilarities); or (3) the acceptability will be influenced by the relevance of the purported analogies.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Antitrust & Trade Law, Clayton Act

Clayton Act lawsuits by persons who are not direct purchasers from the defendant antitrust violator are banned.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN9[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

An agreement on output also equates to a price-fixing agreement. If firms restrict output directly, price will rise in order to limit demand to the reduced supply. Reducing output, and dividing markets have the same anticompetitive effects.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] Antitrust & Trade Law, Clayton Act

Any action to enforce any cause of action under *15 U.S.C.S. §§ 15*, *15a*, or *15c* shall be forever barred unless commenced within four years after the cause of action accrued. *15 U.S.C.S. § 15b*.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

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

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN11[] Tolling of Statute of Limitations, Fraud

Although 15 U.S.C.S. § 15b mandates a four-year statute of limitations for civil antitrust actions, it is well established that the doctrine of fraudulent concealment tolls the limitation period when a plaintiff's cause of action has been obscured by the defendant's conduct. In order to establish the applicability of the doctrine, an antitrust plaintiff must show three things: (1) fraudulent concealment; (2) failure on the part of the plaintiff to discover his cause of action notwithstanding such concealment; and (3) that such failure to discover occurred notwithstanding the exercise of due care on the part of the plaintiff. Where an action implicating fraudulent concealment is sought to be brought in a class posture, the court must decide whether the required elements of proof are too individualized to permit such treatment.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Governments > Legislation > Statute of Limitations > Tolling

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12[] Prerequisites for Class Action, Predominance

The question of concealment by an antitrust defendant is a common question, subject to being uniformly resolved on behalf of all members of the class. However, the question of discovery of the cause of action by a plaintiff presents an individual question. Similarly, the issue of due diligence seemingly raises an individual question. Thus, the broad issue of fraudulent concealment presents both common and individual issues; therefore, the determination whether an antitrust action involving fraudulent concealment may proceed as a class action turns upon which aspect of the issue may be considered to predominate.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] Class Actions, Certification of Classes

Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Fed. R. Civ. P. 23(b)(3), any per se rule that treats the presence of such issues as an automatic disqualifier is rejected. In other words, the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3). Predominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test. The inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did.

Counsel: Kenneth W. Starr (argued), Christopher Landau, Kannon K. Shanmugam, Grant M. Dixton, Kirkland & Ellis, Washington, D.C., Attorneys for Appellants International Paper Company, Union Camp Corporation, Weyerhaeuser Company, Gaylord Container Corporation, Tenneco, Inc., Tenneco Packaging and Packing Corporation of America.

Barbara W. Mather (argued), Pepper, Hamilton LLP, Philadelphia, PA, Attorneys for Appellants Jefferson-Smurfit Corp., Stone Container Corp. and Smurfit-Stone Container Corp.

Steven J. Harper, Steven C. Seeger, Kirkland & Ellis, Chicago, IL. Daniel B. Huyett, Matthew W. Rappleye, Stevens & Lee, Reading PA, Attorneys for Appellants International Paper Company and Union Camp Corporation.

Douglas J. Kurtenbach, James H. Schink, Timothy A. Duffy, Barak S. Echols, Kirkland & Ellis, Chicago, IL. Ralph G. Wellington, Sherry Swirsky, Schnader, Harrison, Segal & Lewis LLP, Philadelphia, PA, Attorneys for Appellants Weyerhaeuser Company, Gaylord Container Corporation, Tenneco, Inc., **[**2]** Tenneco Packaging and Packaging Corporation of America.

Edward M. Posner, Paul H. Saint-Antoine, Isabel C. Duffy, Drinker Biddle & Reath LLP, Philadelphia, PA, Attorneys for Appellant Georgia Pacific Corporation.

R. Mark McCareins, Dane A. Drobny, Michael J. Mayer, Andrew D. Shapiro, Winston & Strawn, Chicago, IL, Attorneys for Appellants Jefferson-Smurfit Corp., Stone Container Corp. and Smurfit-Stone Container Corp.

Richard C. Rizzo, Jennifer R. Clarke, Will W. Sachse, Donald C. Le Gower, Dechert Price & Rhoads, Philadelphia, PA, Attorneys for Appellant Temple-Inland, Inc.

Howard I. Langer (argued), Sandals & Langer, LLP, Philadelphia, PA, Lead Counsel for All Appellees.

Eugene A. Spector (argued), Jeffrey J. Corrigan, William G. Caldes, Spector Roseman & Kodroff, P.C., Philadelphia, PA. Michael J. Freed, Steven A. Kanner, William London, Much Shelist Freed Denenberg Ament & Rubenstein, P.C., Chicago, IL, Gary L. Specks, Esquire, Kaplan, Fox & kilsheimer, LLP, Chicago, Il., Robert A. Skirnick, Meredith, Cohen, Greenfogel & Skirnick, New York, NY, Attorneys for Appellees General Refractories Company and Co-Lead Counsel for Corrugated Sheet Plaintiffs.

Robert J. LaRocca, Kohn, Swift & Graf, P.C., Philadelphia, PA, Attorney for Appellees Oak Valley Farms, Inc., Garrett Paper, Inc. and Local Baking **[**3]** Products, Inc.

H. Laddie Montague, Martin Twersky, Berger & Montague, P.C., Philadelphia, PA, Attorneys for Appellee Garrett Paper, Inc.

Roberta D. Liebenberg, Donald L. Perelman, Fine Kaplan & Black, Philadelphia, PA, Attorneys for Appellee Local Baking Products, Inc.

W. Joseph Bruckner, Janelle K. Beitz, Lockridge Grindal Nauen PLLP, Minneapolis, MN, Attorneys for Appellees Oak Valley Farms, Inc., Garrett Paper, Inc. and Local Baking Products, Inc.

Mark Reinhardt, Mark Wendorf, Reinhardt & Anderson, St. Paul, MN, Attorneys for Appellee Albert I. Halper Corrugated Box Company.

Judges: Before: McKEE, FUENTES and ALDISERT, Circuit Judges.

Opinion by: ALDISERT

Opinion

[*148] OPINION OF THE COURT

ALDISERT, Circuit Judge:

This appeal by manufacturers of linerboard [1] **[**5]** requires us to decide if the district court erred in granting two motions for class certification by groups of plaintiffs who brought ***antitrust law*** suits alleging that the linerboard manufacturers engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. Appellants contend that plaintiffs failed to establish **[**4]** that the putative class met the requirements of *Rule 23(b)(3), Federal Rules of Civil Procedure*, which compel the court to:

> find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [2]

Appellants are represented through briefs and oral argument by two groups of manufacturers, the "International Paper Appellants" [3] and the "Georgia Pacific Appellants." [4]

After individual law suits were filed in the Northern District of Illinois and the Eastern District of Pennsylvania, [5] the cases were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Pennsylvania for coordinated and consolidated pretrial proceedings.

[6]** The district court established two classes:

> All persons in the United States who purchased corrugated containers directly from any Defendant at any time during the period October 1, 1993 through November 30, 1995, but excluding Defendants, their respective parents, subsidiaries **[*149]** and affiliates and federal, state and local governmental entities and political subdivisions.
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> * * * *
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> All individuals and entities who purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities.

In re Linerboard Antitrust Litig., 203 F.R.D. 197, 203 (E.D. Pa. 2001) (emphasis added). These classes are presented before us as the "Box Appellees" and the "Sheet Appellees."

The district court concluded that the putative classes met the requirements of *Rule 23(a)* and noted that:

> there is an overlap between the predominance requirement of *Rule 23(b)(3)* and the prerequisite of *Rule 23(a)(2)* that common questions exist. "The courts have **[**7]** repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that *Rule 23(b)(3)* was satisfied." 4 NEWBERG ON CLASS ACTIONS, § 18-26.

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[1] Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard. Appellants are major integrated manufacturers and sellers of linerboard, corrugated sheets and corrugated boxes.

[2] In the posture of the case presented to us, Appellants are not ipsis verbis challenging the district court's determination that the putative classes met the requirements of *Rule 23(a)*.

[3] International Paper Co., Weyerhaeuser Paper Co., Gaylord Container Corp., Union Camp Corp., Tenneco Inc., Tenneco Packaging Corp. of America.

[4] Georgia-Pacific Corp., Temple-Inland Inc., Jefferson-Smurfit Corp., Stone Container Corp. and Smurfit-Stone Container Corp.

[5] A detailed history of the litigation, and action of the Judicial Panel on Multi-District Litigation for coordinating and consolidating pre-trial proceedings, is set forth in *In re Linerboard Antitrust Litig., 203 F.R.D. 197 (E.D. Pa. 2001)*.

Id. at 214.

The court then decided that the putative classes had met the requirements of Rule 23(b). The court determined first, that plaintiffs presented sufficient evidence to support claims that the conspiracy to raise the price of linerboard correspondingly raised the price of corrugated products. It went on to "conclude[] that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular class members." Id. at 220.

I.

The International Paper Appellants argue that the district court erred in holding that Appellees have sufficiently demonstrated that they will be able to prove common impact at trial. In support of this major premise, they contend that the court erred in applying a legal presumption of impact and failing to apply rigorous scrutiny to plaintiffs' proffered impact evidence. They contend also that the **[**8]** court erred in ignoring the individual issues raised by plaintiffs' claim of fraudulent concealment.

For their part, the Georgia Pacific Appellants argue that the district court erred because here the existence of injury, and hence potential liability, requires an inherently individualized inquiry. Similarly, they argue that the court erred in certifying classes because the existence of fraudulent concealment also requires an inherently individualized inquiry.

HN1[] We review a district court's grant of class certification under an abuse of discretion standard. Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 165-166 (3d Cir. 2001).

> In Katz v. Carte Blanche Corp., 496 F.2d 747, 756-757 (3d Cir. 1974) (in banc), we articulated the standard of review applicable to class action decisions. We must decide whether the 23(a) prerequisites have been met, whether the district court correctly identified the issues involved and which are common, and whether it properly identified the comparative fairness and efficiency criteria. If the court's analysis on these points is correct, then, "it is fair to say that we will ordinarily defer to its exercise **[**9]** of discretion" embodied in the **[*150]** findings on predominance and superiority. Id.

Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir. 1977).

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a). Pursuant to Rule 23(f), Federal Rules of Civil Procedure, Appellants timely petitioned this court for permission to appeal the district court's September 4, 2001, Order. We granted the petition and allowed the appeal by an order dated December 18, 2001, and now affirm.

II.

In presenting their theory of antitrust liability, Appellees averred that even though demand for linerboard was strong and rising between 1989 and 1992, the manufacturers' prices for linerboard had fallen; that the manufacturers attempted to increase prices during 1991, 1992 and the first half of 1993, but the price increase announcement did not "stick" and, therefore, the manufacturers had to rescind them. It was at this point in September 1993, plaintiffs allege, that Roger Stone, president of Stone Container Corporation, the largest corrugated paper manufacturer, reported that "the past five years have been the only five-year period (going back as far **[**10]** as the 1920's) when the containerboard industry has had consistently declining prices. It's never happened before, never happened in the depression, but it's happened these last five years." App. at 710.

According to plaintiffs, declining prices were attributed to excess inventory or inventory overhang. They also maintained that Stone Container masterminded a two-fold plan among the manufacturers to lower the industry inventory to a five-week supply for a 2.5 million ton threshold, in order to implement price increases. The Packaging Corporation of America stated in the fall of 1993:

> Weakness in containerboard pricing during the first half of 1993 was more supply-related than demand-related. Earlier this year, industry inventories of containerboard hovered above 2.9 [million] tons and nearly [six] weeks of supply, above the 2.5-2.6 [million] tons and 5.0-5.2 week range usually required to sustain a price increase.

App. at 1553.

The plan was two-fold. First, the manufacturers would close their mills for "market downtime," thereby reducing industry inventory at mills and box plants. Second, Stone would purchase inventory from other manufactures while idling its own **[**11]** mills. In implementing this conspiracy, during late June and early July 1993, Roger Stone conducted a telephone survey of his competitors. He coordinated the industry-wide downtime and agreed to have his company purchase a significant volume of linerboard from its competitors rather than meet the requirements from its own production. Stone took downtime of approximately 180,000 tons of containerboard by shutting six of its mills during the following weeks and months.

The manufacturers closed their mills between July and December. By October 1993, they had concerted their actions and had lowered total inventories to the desired level of less than a five-week supply. A total of 435,000 tons had been withdrawn from the market. Inventory reached "a twenty-year low in terms of weeks of supply . . . ." App. at 733. In October 1993, Appellants successfully increased their prices for containerboard and boxes for the first time in more than two years. Each raised its container prices by an identical amount. Subsequently, the major manufacturers continued their pattern of taking substantial **[*151]** downtime and implementing price increases. In late November, less than two months after the successful **[**12]** October 1 price increase, Stone announced another $ 30 per ton increase to be effective on January 1, 1994, even though analysts were not expecting another attempt to raise containerboard prices until February or March of that year. Other manufacturers joined, and the price increase became effective in March 1994.

In April 1994, Appellants justified another containerboard price increase citing low inventory. Between the summer of 1993 and March 1995, seven containerboard price increases were implemented in the industry. Linerboard prices in the eastern United States rose in six consecutive escalations from a low of around $ 270 to $ 290 per ton in the third quarter of 1993 to $ 530 per ton by April 1995. Plaintiffs allege that the roughly 90% recovery in prices resulted in a sharp resurgence in industry profitability as the containerboard increases were passed through in the form of finished box prices. Even the most debt-laden industry players had returned to profitability by the fourth quarter of 1994. App. at 1265.

Thus, plaintiffs' theory of antitrust liability is based on poly-syllogisms: (1) Prices in the marketplace are controlled by the economic laws of supply and demand, **[**13]** to wit, if a product is in short supply, the price will increase. During the period in question, linerboard was in short supply. Therefore, during this period, the price of linerboard increased. (2) Closing down production will create a shortage in supply and a corresponding price increase. The linerboard manufacturers closed down production. Therefore, the linerboard manufacturers created a shortage in supply and a price increase.

III.

We address first, the contention that the court erred in applying a presumption of impact, in order to demonstrate that questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The district court did apply such a presumption, relying on the oft-quoted statement in Bogosian, familiarly described as ***HN2***[] the "Bogosian short-cut": [6]

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases **[**14]** at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in

[6] See Affidavit of Dr. Robin Cantor, App. at 608-629.

> different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. "[The] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by . . . proof of some damage flowing from the unlawful conspiracy . . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. Under these circumstances, proof on a common basis would be appropriate. Even if the variation in price dynamics among regions or marketing **[*152]** areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price, it might be possible to designate subclasses to conform with these variations. See *In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 281 (S.D.N.Y. 1971)*.

Bogosian, 561 F.2d 434, 455 (3d Cir. 1977) **[**15]** (emphasis omitted). [7]

Appellants challenge the following determination of the district court:

> Plaintiffs **[**16]** have shown that they plan to prove common impact by introducing generalized evidence which will not vary among individual class members. For example, plaintiffs contend that even though prices may have varied among regions, the alleged conspiracy caused these prices to rise throughout the country. Although the prices for corrugated sheets and boxes may have increased due to demand, because defendants allegedly conspired to reduce production of linerboard, the price was higher than it would have been under competitive conditions. Such allegations, supported by the evidence presented, are of the kind contemplated by the Third Circuit in Bogosian and Newton. See also, Lumco Indus.,[*Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 173 (E.D. Pa. 1997)]*.
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> The Court recognizes that defendants dispute plaintiffs' allegations. However, at the class certification stage, "the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law." Lumco Indus., 171 F.R.D. at 174. "Plaintiffs need only make **[**17]** a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." Id. (citing *In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524 (M.D. Fla. 1996))*. Therefore, the Court concludes that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular plaintiff class members.

Linerboard, 203 F.R.D. at 220.

A strong argument can be made that the Bogosian concept of presumed impact was properly applied here. The economic laws of supply and demand run in tandem with the tenets of logic. A reduction in supply will cause prices to rise. A deliberate cut in supply, as alleged here, is a deliberate interference with market forces. Coincident with this interference with the normal market forces, linerboard prices in the eastern United States rose in six consecutive price increases, from a low of around $ 270 to $ 290 per ton in third quarter 1993 to $ 530 per ton by

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[7] The panel was unanimous on this point. The dissent would have affirmed the grant of summary judgment, contending that plaintiffs had six years of discovery in order to decide on a theory of liability and should not have been given additional time to do so.

> This is not a pro se case. Plaintiffs' counsel are competent, experienced and, in fact, nationally renowned attorneys in the antitrust field . . . In my view [after six years], this case has long since passed the stage where anyone concerned--parties, lawyers, or judges--should have to speculate as to the theory of the litigation . . . Moreover, until the theory of the case is settled, it will not be known which facts are "relevant" facts. Facts are only relevant insofar as they support a valid legal theory.

Bogosian, 561 F.2d at 457 (Aldisert, J., dissenting).

April 1995. Reduced to its essence, what Appellants **[**18]** say is that there is no correlation between the reduction in supply of linerboard and the subsequent **[*153]** price increases. What they really contend is that plaintiffs' argument is anchored on the familiar fallacy of post hoc propter hoc, the fallacy of inferring causation from temporal succession only, a reasoning from what happens in sequence is merely an assumption of a causal connection.

The post hoc accusation is trumped, however, by the laws of economics. If the facts do, in fact, support plaintiffs' theory that "an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price[,]" *Bogosian, 561 F.2d at 455*, this would be a demonstration of the laws of supply and demand at work.

IV.

But there is more to this case than exclusive reliance on the presumed impact theory. The district court used a belt and suspenders rationale to support its conclusion that the putative class had met its burden of showing impact. In addition to relying on the Bogosian short cut, it credited the testimony of plaintiffs' experts, opinions that were supported by charts, studies **[**19]** and articles from leading trade publications. These experts suggested that advanced econometric models could be effectively prepared to establish class-wide impact.

A.

In reaching its decision, the district court made note of plaintiffs' expert Dr. John Beyer, who presented two possible means of assessing impact on a class-wide basis--multiple regression analysis, and the benchmark or yardstick approach, which he described as methods of showing "an antitrust impact by generalized proof." Affidavit of Dr. John C. Beyer, App. at 673-675. See also, *In re Plastic Cutlery Antitrust Litig., 1998 U.S. Dist. LEXIS 3628*, No. CIV. A. 96- CV-728, 1998 WL 135703, at *7 (E.D. Pa. Mar. 20, 1998); *In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 485-486 (W.D. Pa. 1999)* (identifying multiple regression analysis as a method of proving impact).

Dr. Beyer made an extensive empirical investigation into the behavior of linerboard and corrugated box prices over time, which proved a basis for his opinion of common impact. He stated that he had studied the structure of the industry, including Appellants' market power, geographical overlap, the fungible nature of the products, the inelastic demand and lack **[**20]** of a substitute. He found that "corrugated container prices are strongly influenced by linerboard prices." Because of these industry characteristics "all class members would be impacted by higher corrugated container prices." App. at 672.

Significantly, Dr. Beyer stated that he found that linerboard and corrugated box prices were closely correlated. He concluded that linerboard transaction prices, as well as corrugated containerboard prices, behaved similarly over time across different regions of the country and across different types of linerboard. These findings, sometimes referred to as "structure in pricing," demonstrated to Dr. Beyer that "despite any variations in particular boxes or customers, prices for all corrugated containers would have responded over time to linerboard price increases in a similar manner . . . ." Id. Based on this qualitative analysis, he concluded that the "alleged conspiracy would have had a common, class-wide impact, and that all purchasers of corrugated containers would have paid a higher price as a result of the conspiracy." *Id. at 673*. We deem his conclusion to be significant because it was supported by charts and studies.

[*154] In discussing these feasible **[**21]** approaches, which could be used to provide quantitative methods for corroborating his opinion on impact and for estimating damages, he suggested as a potential benchmark, the potential prices charged for linerboard during a competitive period when there would be no effects of the conspiracy. He explained that the necessary data was available to do the analysis and described the types of data he would use. He discussed also a multiple regression model "to isolate the effects of various influences on corrugated container prices, thereby allowing a determination of the impact of any one of the variables, including, in this case, the impact of the conspiracy." *Id. at 674*.

B.

The plaintiffs also presented an affidavit of Dr. Robin C. Cantor who stated that "based on my analysis of the pricing data and company records, I conclude that the alleged unlawful conduct to raise linerboard prices would have impacted all members of the proposed class through higher corrugated sheet prices." App. at 612. We deem this conclusion to also be extremely significant.

Such a conclusion was supported by relevant data. For example, she indicated that the containerboard industry is relatively concentrated **[**22]** and that during the relevant period, 77 percent of linerboard and 71 percent of the "corrugated medium" was produced by the top ten firms and that overall, 73 percent of containerboard production was concentrated in the top ten firms. *Id. at 614*. She also indicated that benchmark prices are published weekly in a number of sources including "The Yellow Sheet," "Pulp and Paper Week" and "Pulp & Paper's North American Fact Book," and that "according to a Weyerhaeuser document, 'linerboard is the industry's indicator price.'" *Id. at 619*. Dr. Cantor recognized that "corrugated boxes are the most popular shipping containers in the world. Over 90 percent of all products in the United States are shipped in corrugated cardboard boxes." *Id. at 623* (quoting the American Forest and Paper Association website). Emphasizing this dominance over the shipping industry, Dr. Cantor remarked that:

> the market began to turn in the third quarter of 1993 when containerboard producers announced an estimated 400,000 tons of downtime to reduce linerboard and medium inventories just as box shipments began to pick up. [(quoting Linerboard: Prices Soar to Record Levels as Shortage Condition Prevail, PULP **[**23]** & PAPER WEEK, Vol. 69, No. 1 at 13).] The industry is gradually responding to the soft linerboard market by announcing significant downtime to be taken in the third quarter. Announcements to date of downtime by Stone, Temple-Inland, Union Camp, IP and [Packaging Corporation of America] amount to roughly 300,000-350,000 tons of production or 5.4% of the industry's capacity during the three month period." [(quoting Linerboard Markets--Industry Report, Donaldson, Lufkin & Jenrette Securities, August 10, 1993).]

App. at 626.

She also indicated that there are several accepted statistical or mathematical approaches that could be used to determine the percentage or absolute overcharge due because of the effect of a conspiracy to manipulate prices. App. at 628. She suggested that "benchmarking," which uses "competitive prices for other comparable products to estimate the pattern of prices but-for the alleged misconduct[,]" could be effectively employed in this situation. Id. Another proffered model would "compare[] prices during non-conspiratorial **[*155]** periods with product prices during the alleged conspiracy," and yet a third approach would use revenue, production and profit data **[**24]** to derive prices that are consistent with "yardstick" competitive performance levels.

Most significantly, she concluded:

> In sum, containerboard and corrugated sheet products exhibit sufficient characteristics and their sale and production exhibit sufficient economic conditions to control for product variations in a price analysis. In combination, these characteristics and conditions indicate that a price-fixing conspiracy would have a common impact on all members of the proposed class and that feasible methods can be used to estimate damages reliably on a class-wide basis.

App. at 629.

C.

Based on the foregoing, we conclude that the district court did not err in determining that plaintiffs showed that they could establish injury on a class-wide basis. Plaintiffs produced affidavits of expert witnesses, Dr. Beyer and Dr. Cantor, who effectively utilized supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages. We decide that this was not a case where plaintiffs relied solely on presumed impact and damages.

In commenting on plaintiffs' submissions, the district court referred to the teachings **[**25]** of Newton for the proposition that ***HN3***[] this court does not require plaintiffs to have selected a particular econometric model for demonstrating impact (or proving damages) at the class certification stage. In *In re Corrugated Container Antitrust*

Litig., 80 F.R.D. 244 (S.D. Tex. 1978), the identical situation was presented to that court where plaintiff had identified two generally accepted methodologies, which he planned on using to determine impact and damages. Relying heavily on Bogosian, the court accepted that contention and certified the class. *Id. at 251-252*. Without explicitly so stating, the district court, like the Corrugated Container court, did not require the experts to pick one particular method over another at the class certification stage, recognizing that the certification stage is early in the overall litigation process. *Linerboard, 203 F.R.D. at 219*.

Accordingly, we reject the contention that plaintiffs did not demonstrate that sufficient proof was available, for use at trial, to prove antitrust impact common to all the members of the class.

V.

A significant portion of Appellants' briefing, and a major emphasis at oral argument, **[**26]** was that the factual allegations alleged here track precisely the factual scenario in Newton, and therefore, the district court erred in not following the holding of Newton and denying class certification. At oral argument, counsel for Appellants referred to Newton as "providing the guide for resolution in this case" and referred to a single sentence contained therein that constituted, in his formulation, a "teaching that holds with respect to both of our submissions today." [8] That passage reads as follows: "If **[*156]** proof of the essential elements of the cause of action requires individual treatment, the class certification is unsuitable." *Newton, 259 F.3d at 172* (citing *Binder v. Gillespie, 184 F.3d 1059, 1063-1066 (9th Cir. 1999)* (upholding class decertification where presumption of reliance and loss unavailable), cert. denied, *528 U.S. 1154, 145 L. Ed. 2d 1070, 120 S. Ct. 1158 (2000))*.

[27]** We have several problems with this argument. In and of itself, the quotation can be interpreted as the obverse of *Rule 23(b)(3), Federal Rules of Civil Procedure*, in the sense that "if any questions affecting individual members" predominate over "questions of law and fact," class certification is unsuitable. Clearly, if proof of the essential elements of the cause of action require individual treatment, then there cannot be a predominance of "questions of law and fact common to the members of the class."

Equally important, the quotation at issue must be considered in the precise context in which it was used in Newton. It formed the final sentence of a paragraph in which we discussed permissible presumptions proof of reliance and injury in securities cases. Having cited a number of cases upholding presumptions of reliance in *Rule 10b-5* claims, we stated that where a presumption of reliance and loss was not available, as in Binder, it would be necessary for each plaintiff to prove the essential elements of the cause of action, and, if so, class certification would be unsuitable. *Newton, 259 F.3d at 172*. In Binder, the court affirmed the denial of class certification, stating **[**28]** that "the district court reasoned that the class would have to satisfy the reliance element through a presumption; otherwise individual questions of reliance would predominate over questions common to the class." *Binder, 184 F.3d at 1063*.

A.

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> Counsel: Let me, if I may, begin with this Court's decision in Newton, which we believe provides the guide for resolution in this case.
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> And I would like to guide the Court . . . to the language in Newton. And if you will indulge me, I'm going to quote one sentence. . . . If proof, if proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.
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> Now, that teaching holds with respect to both our submissions today. [Co-counsel] has been speaking about causation or impact or injury. It also goes to proof of the essential elements of fraudulent concealment, the second part of our submission today.

Transcript of Oral Argument in In re Linerboard Antitrust Litig., No. 01-4353 (before the Court of Appeals for the Third Circuit, recorded in Philadelphia, Pennsylvania, July 19, 2002, at 16-17).

We consider it useful to identify the precise flashpoint of controversy at stake in Newton. Roscoe Pound taught us that *HN4*[] the judicial process distinguishes discrete functions in the appellate decisional process: (1) finding or choosing (or creating) the law where the dispute is over the choice of the controlling legal precept; (2) if there is no dispute as to its selection, a disagreement over its interpretation; and (3) where there is agreement on the precept and its interpretation, the sole question is the application of the law to the facts, which Pound described as "application of the abstract grounds of decision to the facts of the particular case." [9] The precise holding in Newton was that the facts common to the members of the class did not predominate. No new legal precept was created; no new nuance of interpretation was forthcoming. It was merely the application of ruling case law in this court to the facts of that case. **[**29]**

HN5[] The process of justifying a court's decision always requires application of a legal precept to a particular factual situation. The application may be purely mechanical, as it is in most cases. If the facts are similar to those in an earlier case announcing **[*157]** a rule of law, the doctrine of precedent becomes operative. Where there is no quarrel over the choice and interpretation of the legal precept, here *Rule 23(b)(3)*, the root controversy usually is traced to a value judgment of whether there is sufficient similarity between the fact situations under comparison. Edward R. Levi amply described this kind of assessment when he stated: "the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar. . . . The finding of similarity or difference is the key step in the legal process." [10] To predict a court's actions in a precept-application controversy, therefore, **[**30]** requires a prediction of what facts in the compared cases a given court, at a given time, will deem either material or insignificant. The facts considered material are "adjudicative facts," described by Hart and Sacks as "facts relevant in deciding whether a given general proposition is or is not applicable to a particular situation." [11]

B.

HN6[] For Appellants' argument to prevail, therefore, they must demonstrate that the facts in Newton are substantially similar to the facts in the case at bar, what logicians call inductive reasoning by analogy, or reasoning from one particular case to another. To draw an analogy between two entities is to indicate one or more respects in which they are similar and thus argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because **[**31]** of the similarities in the two sets. Because a successful analogy is drawn by demonstrating the resemblances or similarities in the facts, the degree of similarity is always the crucial element. You may not conclude that only a partial resemblance between two entities is equal to a substantial or exact correspondence.

HN7[] Logicians teach that one must always appraise an analogical argument very carefully. Several criteria may be used: (1) the acceptability of the analogy will vary proportionally with the number of circumstances that have been analyzed; (2) the acceptability will depend upon the number of positive resemblances (similarities) and negative resemblances (dissimilarities); or (3) the acceptability will be influenced by the relevance of the purported analogies. IRVING M. COPI & KEITH BURGESS-JACKSON, INFORMAL LOGIC 166 (3d ed. 1996); Arthur L. Goodheart, Determining the Ratio Decidendi of a Case, 40 YALE L.J. 161, 179 (1930); JOHN H. WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 118 (3d ed. 1942); JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE 98-142 (8th ed. 1916) ("Two things resemble each other in one or more respects; a **[**32]** certain proposition is true of one; therefore it is true of the other.").

For Appellants to draw a proper analogy, they had the burden in the district court, as they do here, of showing that the similarities in the facts of the two cases outweigh the differences. They cannot do so, for two significant reasons. First, in Newton it was clear that not all members of the putative class sustained injuries; here, all members sustained injuries because of the artificially increased prices. Secondly, in Newton there were hundreds of

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[9] Roscoe Pound, The Theory of Judicial Decision, 36 HARV. L. REV. 940, 950-951 (1923).

[10] Edward H. Levi, Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 501-504 (1948)

[11] HENRY HART & ALBERT SACKS, THE LEGAL PROCESS 384 (tent. ed. 1958).

millions of stock transactions involved, thus making the putative class extremely unmanageable; here, an astronomical number of transactions is not present. The classes are manageable.

We reversed the district court's determination of class certification in Newton because **[*158]** it involved a putative securities class action in which purchasers of stocks charged that their broker-dealers breached their duty to execute trades on the most favorable terms reasonably available. *Newton, 259 F.3d at 161-163*. The gravamen of the complaint was that their brokers could have received a better price for securities had they used a computer system other than the central **[**33]** National Best Bid and Offer system ("NBBO"). The evidence disclosed that on some occasions, the NBBO price was better than on other computer systems, at times, the prices were the same, and at other times, the NBBO price was worse than on other systems. *Id. at 177-180*. Under those circumstances, we concluded that not every class member was injured by the failure of the brokers to find the best possible price. *Id. at 187-188*.

Critical to our determination of whether class certification was proper, we noted that in determining how to execute a client's order, a broker-dealer must take into account order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market. Id. We were very specific in this respect:

> These factors would appear to vary from class member to class member and, for each class member, from trade to trade. Whether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade **[**34]** was requested. This Herculean task, involving hundreds of millions of transactions, counsels against finding predominance.
> * * * *
> The alleged injuries in Newton arise out of the execution of hundreds of millions of trades, not a single act of fraudulent conduct. The distinct facts among the hundreds of thousands of plaintiffs involving hundreds of millions of trades will determine whether securities violations occurred. Because plaintiffs' claims will require an economic injury determination for each trade, we hold the putative class fails to satisfy the predominance requirement.

Id. at 187, 190.

Contrasting the Newton facts with those in the case at bar, here there was no evidence that the individuals and entities who purchased corrugated containers or corrugated sheets from Appellants during the relevant two-year period had participated in hundreds of millions of commercial transactions. More important, the Newton court was staring a situation in the face where they would necessarily examine every stock purchase or sale because not every member of the putative class was injured. By direct contrast, with certain limited exceptions relating to purchasers **[**35]** whose contracts were tied to a factor independent of the price of linerboard, all purchasers of corrugated sheets and boxes were injured. They were all affected by the increased price of linerboard that reflected in the price paid by plaintiffs.

For the foregoing reasons, we conclude that we cannot accept the analogue so vigorously urged by Appellants because the negative resemblances (dissimilarities) between Newton and the case at bar seriously outweigh the positive resemblances (similarities).

VI.

The Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, ***HN8***[] bans Clayton Act lawsuits by persons who are not direct **[*159]** purchasers from the defendant antitrust violator. Appellants argue that the district court should have denied class certification, under the teachings of Illinois Brick, because members of the proposed classes purchased corrugated sheets or boxes, of which linerboard was a mere ingredient, and did not purchase linerboard per se. Appellees respond, as they did in the district court, that the facts here come within the purview of our decision and rationale in *In re Sugar Indus. Antitrust Litig., 579 F.2d 13 (3d Cir.*

1978), **[**36]** in which we held that the purchasers of candy made by the sugar manufacturers were not barred from bringing suit under the *§ 1* of the Sherman Act, *15 U.S.C. § 1*, and *§ 4* of the Clayton Act, *15 U.S.C. § 15*.

We posed the question succinctly: Does Illinois Brick bar suit by a plaintiff who purchases directly from the alleged offender, but buys a product which incorporates the price-fixed product as one of its ingredients? We held that there was no bar.

Our reasoning began with an explication of the rationale behind Illinois Brick:

> The Court grounded its conclusion on several bases, including the possibility of exposing the defendant to multiple liability and the evidentiary complexities that would arise in apportioning the overcharge among those in the chain who had suffered injury. The Court also expressed concern that if the direct purchaser could not make a full recovery of the overcharge, the wrongdoer would be able to keep some of the fruits of its illegality. Based on this reasoning, the Court held that the plaintiff, which purchased a completed building, was not permitted to sue the manufacturer of concrete block which had **[**37]** been incorporated into the structure.

In re Sugar, 579 F.2d at 17.

We then explained why this rule would not apply to the purchasers of candy made with the price-fixed sugar:

> As the defendants here point out, the product which plaintiff purchased competes not with sugar, but with other candy, and more than one ingredient determines the price. To this extent, there will be some additional complications underlying the damage claims. However, this must not be allowed to obscure the fact that the plaintiff did purchase directly from the alleged violator. True, the price-fixed commodity had been combined with other ingredients to form a different product. But just as the sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers. The situation is the same as if the general contractor which sold the building to the plaintiff in Illinois Brick were the manufacturer of the concrete block which went into the structure. In that situation, the concern which the Supreme Court expressed about the proration of overcharge among a number of entities in the chain would not have been present.
>
> Nor is that problem of allocation among various **[**38]** distributors present in the case sub judice. Plaintiff is a direct purchaser and, therefore, entitled to recover the full extent of the overcharge.

579 F.2d at 17-18.

In the case at bar, the district court met this issue head-on, and we agree completely with its analysis. It emphasized that the putative class plaintiffs purchased corrugated sheets or boxes directly from Appellants, and, like the candy in In re Sugar, which contained allegedly price-fixed sugar, the corrugated sheets and boxes contain linerboard that was subject to an agreement on output, which is equivalent to a price-fixing agreement. Accordingly, the putative class members are direct purchasers and are entitled to recover the full **[*160]** amount of any overcharge. See *Gen. Leaseways v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594-595 (7th Cir. 1984)* ***HN9***[] ("An agreement on output also equates to a price-fixing agreement. . . . [If] firms restrict output directly, price will . . . rise in order to limit demand to the reduced supply. . . . Reducing output, and dividing markets have the same anticompetitive effects.").

VII.

This is not a securities case. It is an antitrust case involving allegations **[**39]** that several United States manufacturers of linerboard engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. It is well settled that ***HN10***[] "any action to enforce any cause of action under *section 15*, *15a*, or *15c* . . . shall be forever barred unless commenced within four years after the cause of action accrued." *15 U.S.C. § 15b*.

Appellants contend that Appellees' claims are timed-barred because most of the class period--from October 1993 to November 1995--ended more than four years before the filing of the sheet and box complaints in May 1999. Appellees agree on the time period, but respond that the four-year statute of limitations should be tolled under the doctrine of fraudulent concealment because they had no knowledge of the alleged conspiracy or of any facts that might have led to the discovery thereof in the exercise of reasonable diligence. They contend that it was not until approximately February 25, 1998, when the Federal Trade Commission issued a press release, a complaint and a proposed consent decree against Appellant Stone Container **[**40]** Corporation, describing certain facets of anti-competitive conduct, that they became aware of Appellants' misadventures.

A.

HN11[] Although *§ 15b* mandates a four-year statute of limitations for civil antitrust actions, it is well established that the doctrine of fraudulent concealment tolls the limitation period when a plaintiff's cause of action has been obscured by the defendant's conduct.

> In order to establish the applicability of the doctrine, an antitrust plaintiff must show three things: (1) fraudulent concealment; (2) failure on the part of the plaintiff to discover his cause of action notwithstanding such concealment; and (3) that such failure to discover occurred [notwithstanding] the exercise of due care on the part of the plaintiff.

70 A.L.R. FED. 498 (1984).

Where an action implicating fraudulent concealment is sought to be brought in a class posture, we must decide whether the required elements of proof are too individualized to permit such treatment.

"It generally has been recognized that *HN12*[] the question of concealment by [an] antitrust defendant is a common question, subject to being uniformly resolved on behalf of all members of the class." **[**41]** *In re Flat Glass, 191 F.R.D. at 487* (citing *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 519 (S.D.N.Y. 1996)*; *In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 154-155 (E.D. Pa. 1979))*. "However, the question of discovery of the cause of action by a plaintiff presents an individual question." Id. "Similarly, the issue of due diligence seemingly raises an individual question." Id. "Thus, the broad issue of fraudulent concealment presents both common and individual issues; therefore, the determination whether an antitrust action involving fraudulent concealment may proceed as a class action turns **[*161]** upon which aspect of the issue may be considered to predominate." Id. (citing *Hedges Enters., Inc. v. Cont'l Group, Inc., 81 F.R.D. 461, 476 (E.D. Pa. 1979))*.

The cumulative experience of the judiciary has not been uniform in this regard. Some courts have regarded the issue of concealment to predominate, and have held that class certification is permissible, even though some individual questions are present. Other courts have considered individual questions to be too pervasive to permit it to be handled as a class matter. In **[**42]** this judicial circuit, there has been a division of authority, with some cases supporting each view. [12]

[43]** B.

Appellants argue that common issues of proof do not predominate with respect to the fraudulent concealment issue and that therefore a class action is not the appropriate vehicle for deciding Appellees' claims. International Paper Appellant's Brief at 38-43. They suggest that fraudulent concealment involves a "two-pronged" inquiry--a concealment by the defendant and plaintiff's actual knowledge of it or failure to use due care to discover it--and cannot be established unless both prongs are satisfied. In asserting their position, they rely on the language of the Court of Appeals for the Fourth Circuit: "when the defendant's affirmative defenses (such as . . . the statute of

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[12] In some cases, the courts held that common questions predominated, and that class actions therefore were permissible. See *In re Flat Glass, 191 F.R.D. 472 (W.D. Pa. 1999)*; *In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322 (E.D. Pa. 1976)*; *Hedges Enters., Inc. v. Cont'l Group, Inc., 81 F.R.D. 461 (E.D. Pa. 1979)*; *In re Fine Paper Antitrust Litig., 82 F.R.D. 143 (E.D. Pa. 1979)*; *In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302 (E.D. Pa. 1980)*. On the other hand, other Third Circuit District Court cases have expressed the view that questions relating to fraudulent concealment in antitrust class actions do not present sufficiently common issues as to permit class action treatment. See *Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140 (E.D. Pa. 1976)*; *In re Anthracite Coal Antitrust Litig., 78 F.R.D. 709 (M.D. Pa. 1978)*; *Wolfson v. Artisans Sav. Bank, 83 F.R.D. 547 (D. Del. 1979)*; *Susquehanna v. H & M, Inc., 98 F.R.D. 658 (M.D. Pa. 1983)*.

limitations) may depend on facts peculiar to each plaintiff's case, class certification is erroneous." Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 342 (4th Cir. 1998) (alteration in original) (internal quotation marks omitted); see also, Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140 (E.D. Pa. 1976); In re Anthracite Coal Antitrust Litig., 78 F.R.D. 709 (M.D. Pa. 1978); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978). **[**44]**

They argue that a number of Appellees are barred from asserting a fraudulent concealment defense to the statute of limitations because they either had prior knowledge of the conspiracy, or did not act with the requisite due diligence, emphasizing that this sort of inquiry is highly personal and is susceptible only to individualized proof and, therefore, inappropriate for class treatment. [13]

[45] [*162]** To be sure, certain determinations involving the fraudulent concealment defense to the statute of limitations will require individualized proof, which might vary among the assorted Appellees. However, most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings. In rejecting the rationale in Broussard, the Court of Appeals for the First Circuit determined:

> ***HN13***[] Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an

[13] Appellants introduced evidence that "each of the five named plaintiffs stands in a unique position with respect to fraudulent concealment that will have to be individually adjudicated if that plaintiff is to recover." International Paper Appellant's Brief at 46. They refer to Lisa Garrett, president of Garrett Paper, who testified that she was "sure" that something illegal was afoot when Garrett Paper's prices for corrugated boxes increased during the alleged class period, that she "plain as day told [her] salesman that" Appellants were fixing prices, and that she knew such activity was illegal. International Paper Appellant's Brief at 46-47.

Similarly, Appellants contend that Appellee Oak Valley was also aware of the price increases and allegedly told Stone Container that "you'd better lower your box prices," though Oak Valley is uncertain whether that conversation took place during the class period. International Paper Appellant's Brief at 47. They emphasize that Oak Valley testified that it "accepted the increases in the matter of course and never really questioned it." Id. They assert also that although Local Baking now says it had no knowledge during the alleged class period of changes in the average market price for corrugated products, or of any downtime taken by linerboard manufacturers, Local Baking has testified that it was told by Appellant Stone Container that prices were increasing because of a decrease in linerboard. They refer to the testimony of David Halper, president of Alfred I. Halper Corrugated Box Co., Inc., who testified that he was aware of the increased prices that Appellants had charged Halper during the class period, and that he had even complained to Appellants about the increases. Appellants argue that Halper has no greater knowledge today about the existence of a conspiracy than he did during the alleged class period.

Finally, they note that General Refractories sold all of its operating assets in 1994, in the middle of the class period and years before any complaint was ever filed in this case. They state that there were no communications, other than invoices, between Appellants and General Refractories during the class period, and that General Refractories could not identify any facts discovered after the class period that led to filing its complaint, and in particular none that led to the naming of entities other than Stone Container as defendants. International Paper Appellant's Brief at 48-49. And, in contrast to Garrett Paper and Halper, Appellants contend that General Refractories does not appear to have had any suspicion of wrongdoing during the alleged class period based on price increases for corrugated sheets.

It is Appellants' case that the factual complexities relating to these five named plaintiffs underscores the inherently individualized nature of a fraudulent concealment analysis. Appellants insist that the named Appellees would have to prove, among other things: (1) that Garrett Paper's conceded awareness of alleged illegality does not qualify as actual "discovery;" (2) that Garrett Paper's considered inaction in the face of such awareness qualifies as "due diligence;" (3) that Garrett Paper's asserted small size excuses its inaction; (4) that none of the other named Appellees knew or had reason to know about the alleged illegality in the exercise of due diligence, even though some of them complained about the price increases whereas others were not even aware of those increases; (5) that something was "fraudulently concealed" from all putative class members, even though some of them have conceded that they are aware of no more incriminating facts now than they were during the alleged conspiracy; (6) that unique relationships do not affect the due-diligence inquiry; (7) that named Appellees who claimed not to have known of Stone Container's downtime exercised "due" diligence, when such downtime was widely publicized in the industry at the time; (8) that General Refractories, which went out of business in the middle of the class period, is held to a due-diligence standard even after that point; and (9) that alleged oral misrepresentations made to some named Appellees but not others, regarding the reasons for the price increases does not affect the due-diligence analysis. ***Id. at 49-50***.

> automatic disqualifier. In other words, the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under *Rule 23(b)(3)*. See 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 23.46[3] (3d ed. 1999). Predominance **[**46]** **[*163]** under *Rule 23(b)(3)* cannot be reduced to a mechanical, single-issue test.

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000). We accept this reasoning as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit in Broussard.

Notwithstanding the individual determinations that will undoubtedly arise at trial, common issues of concealment predominate here because "the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *In re Flat Glass, 191 F.R.D. at 488*. Key questions will not revolve around whether Appellees knew that the prices paid were higher than they should have been or whether Appellees knew of the alleged conspiracy among Appellants. Instead, the critical inquiry will be whether "defendants successfully concealed the existence of the alleged conspiracy, which proof will be common among the class members in each class." Id. [14] It is the fact of concealment that is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking. These allegations of proof are **[**47]** all common to the defendants, not the plaintiffs. It is not the conspiracy of the defendant that is relevant on the issue of tolling the statute of limitations, it is the act of concealing the conspiracy.

C.

Moreover, any individualized facts of fraudulent concealment may be adjudicated **[**48]** in the same fashion and at the same time as individual damages issues. As a leading treatise on class actions explains: "Challenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." NEWBERG & CONTI, NEWBERG ON CLASS ACTIONS § 4.26 (3d ed.)

Many courts faced with similar circumstances have certified class status with the expectation that individual questions concerning fraudulent concealment can be resolved at a later damages phase. See *In re Flat Glass, 191 F.R.D. at 488* (citing *In re Fine Paper, 82 F.R.D. at 154-155*) ("Bifurcation of this litigation into liability and damage segments remains an option if the predominating elements of the question of fraudulent concealment do not prove susceptible to generalized proof."). See also, *In re Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 385 (S.D.N.Y. 1996)* (Individualized issues raised in fraudulent concealment should be considered when court addresses **[**49]** each putative class member's damage claim.); *Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 43 (S.D.N.Y. 1990)* (holding that individualized claims and defenses on statute of limitations issue can be adjudicated in separate determinations of damages).

Accordingly, we hold that common issues of fraudulent concealment predominate.

[*164] * * * *

We have considered all contentions presented by the parties and conclude that no further discussion is necessary.

The judgment of the district court will be affirmed.

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[14] See, e.g., *Abramovitz v. Ahern, 96 F.R.D. 208, 218 (D. Conn. 1982)* (issue of whether fraudulent concealment would toll the statute of limitations was common to all class members); *In re Plywood Antitrust Litig., 76 F.R.D. 570, 586 (E.D. La. 1976)* ("fraudulent concealment issues appear to be generally common to all members in each class"); *In re Sugar, 73 F.R.D. at 348*; *In re Fine Paper, 82 F.R.D. at 154-155* ("The key question on the issue of fraudulent concealment will relate to whether defendants successfully concealed the existence of the alleged conspiracy, and the proof of this contention [what defendants did] will necessarily be common among the class members.").

[Major v. Microsoft Corp.](#)

Court of Civil Appeals of Oklahoma, Division Three

September 6, 2002, Filed

Case No. 97,888

Reporter

2002 OK CIV APP 120 *; 60 P.3d 511 **; 2002 Okla. Civ. App. LEXIS 103 ***; 73 O.B.A.J. 80; 2003-1 Trade Cas. (CCH) P73,933

JONATHAN C. MAJOR, on his own behalf and on behalf of those similarly situated, Plaintiff/Appellant, vs. MICROSOFT CORPORATION, a Washington Corporation, Defendant/Appellee.

Subsequent History: **[***1]** Released for Publication September 6, 2002.

Prior History: APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA. HONORABLE GREGORY K. FRIZZELL, TIRAL JUDGE.

Disposition: AFFIRMED.

Core Terms

purchaser, indirect, allegations, antitrust, anti trust law, conspiracy, damages, amended petition, cost-plus, operating system, vertical, trial court, end user, price-fixing, overcharge, ownership, monopoly, district court, Oklahoma Consumer Protection Act, manufacturers, prices

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN1[ ] **Remedies, Damages**

See *15 U.S.C.S. § 15*.

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

HN2[] **Private Actions, Purchasers**

Nothing in federal antitrust legislation prevents the states from allowing indirect purchasers to bring antitrust actions under state statutes. The states are authorized to provide a cause of action for indirect purchasers based on their states' antitrust laws. Congress has not preempted the field of ***antitrust law***, but rather intends the federal antitrust laws to supplement, not displace, state antitrust remedies.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Civil Procedure > Remedies > Damages > Monetary Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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

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

HN3[] **Costs & Attorney Fees, State Regulation**

Okla. Stat. tit. 79, § 205 (Supp. 2000) of the Oklahoma Antitrust Reform Act, *Okla. Stat. tit. 79, § 201* et seq. (Supp. 2000), provides that any person who is injured in his or her business or property by a violation of the act may obtain appropriate injunctive or other equitable relief and monetary damages and shall recover threefold the damages sustained, and the cost of suit, including a reasonable attorney fee.

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

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN4[] **Regulated Practices, Private Actions**

See *Okla. Stat. tit. 79, § 212* (Supp. 2000).

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN5[] **Appeals, Record on Appeal**

Okla. Sup. Ct. R. 1.202, Okla. Stat. tit. 12, ch. 15, app. (Supp. 2000) provides that in any case in which the court determines after argument or submission on the briefs that no reversible error of law appears, and the opinion or findings of fact and conclusions of law of the trial court adequately explains the decision, the court may affirm by an opinion citing this rule.

Counsel: Donald L. Kahl, T. Lane Wilson, Anthony J. Jorgenson, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, Oklahoma, and Michael E. Smith, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Oklahoma City, Oklahoma, For Plaintiff/Appellant.

Kenneth N. McKinney, Keith D. Tracy, Ronald L. Walker, McKinney & Stringer, P.C., Oklahoma City, Oklahoma, and David B. Tulchin, Joseph E. Neuhas, Sullivan and Cromwell, New York, New York, For Defendant/Appellee.

Judges: OPINION BY CAROL M. HANSEN, Presiding Judge. ADAMS, J. AND MITCHELL, J. CONCUR.

Opinion by: CAROL M. HANSEN

Opinion

[512]** OPINION BY CAROL M. HANSEN, Presiding Judge:

[*P1] Plaintiff, Jonathan C. Major, purchased a Windows 98 operating system from Office Depot in Tulsa County. Upon installing this system on his computer, Major was required to register his ownership as an end user licensee of the system. He later purchased a new computer from Gateway in January of 2000. Windows 98 was pre-installed on that computer. Before using the system, he was again required to **[***2]** register with Microsoft.

[*P2] Major originally filed this action against Defendant Microsoft in Tulsa County, Oklahoma, district court seeking damages for its violation of the Oklahoma Antitrust Reform Act. *79 O.S. Supp. 2000 §§ 201 et seq.* The trial court granted Microsoft's motion to dismiss, but allowed Major to replead. Major filed an amended petition seeking similar damages but including violations of the Oklahoma Uniform Commercial Code, *12A O.S. Supp. 2000 § 2-302*, and the Oklahoma Consumer Protection Act, *15 O.S. Supp. 2000 §§ 751 et seq.*

[*P3] After removal to federal court and return to Oklahoma, the trial court dismissed the action pursuant to Microsoft's renewed motion to dismiss. Major now appeals the dismissal.

[*P4] Microsoft is a for-profit corporation, organized and existing under the laws of the State of Washington. It focuses primarily on developing and licensing computer software. It markets and licenses its Windows 98 operating system for Intel-based personal computers throughout the United States, including the State of Oklahoma. Major complained Microsoft possessed monopoly power, including **[***3]** the power to control price and to exclude competition. He alleged Microsoft had unlawfully sought to acquire, maintain and expand its monopoly power by anticompetitive and unreasonable exclusionary conduct. As a result, Microsoft knowingly and intentionally licensed its Windows 98 operating system for Intel-based personal computers, without regard to competition, at a monopoly price in excess of that which Microsoft would have been able to charge in a competitive market. Therefore, Major claims all members of the class similarly situated are entitled to damages according to proof as to the difference between a competitive price and the unlawful monopoly price that they incurred as end user licensees.

[*P5] In 1977, the United States Supreme Court decided the case of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. That decision studied the issue of standing to sue for treble damages under the Clayton Act, *15 U.S.C.A. § 15 (1976)*. In *Illinois Brick,* the State of Illinois brought suit against concrete block manufacturers alleging price fixing in violation of § 4 of the Clayton Act. That section provides **[***4]** ***HN1***[] "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may bring suit to recover damages sustained by him." The Court held the state, as an indirect purchaser, did not have standing to pursue the action because it did not buy concrete blocks directly from the manufacturers, and thus was not the party "injured in his business or property within the meaning of section 4 of the Clayton Act" The Court drew a line at which the law will not permit remote antitrust claims to be asserted. This bright line has become known **[**513]** as the "indirect-purchaser rule. [1]

[1] Hundreds of state and federal cases, too numerous to mention, have Cited *Illinois Brick.*

[*P6] Ten years later the United States Supreme Court clarified its ruling in *Illinois Brick in* *California v. ARC Am. Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86*. It held that ***HN2***[] nothing in federal antitrust legislation prevented the states from allowing indirect purchasers to bring antitrust **[***5]** actions under state statutes. The Court stated the statutes of Alabama, California and Minnesota (the plaintiffs expressly allowed indirect purchasers to sue. That decision, however, did not create a cause of action for indirect purchasers, but rather merely authorized the states to provide a cause of action for indirect purchasers based on their states' antitrust laws. It concluded Congress had not preempted the field of ***antitrust law***, but rather intended the federal antitrust laws to supplement, not displace, state antitrust remedies. *See,* *Comes v. Microsoft Corporation, 646 N.W.2d 440 (Iowa. 2002)* and cases cited therein. [2] Since that time other jurisdictions have interpreted their state antitrust laws to give standing to indirect purchasers. *Bunker's Glass Company v. Pilkington, 202 Ariz. 481, 47 P.3d 1119 (Ariz. App. 2002)*.

[*P7] **[***6]** ***HN3***[] *Section 205* of the Oklahoma Antitrust Reform Act, provides that any person who is injured in his or her business or property by a violation of the act may obtain appropriate injunctive or other equitable relief and monetary damages and shall recover threefold the damages sustained, and the cost of suit, including a reasonable attorney fee. This is almost identical to the language of the federal act quoted above.

[*P8] Oklahoma Legislature has spoken. The controlling section of the Oklahoma Act is the final section, *§ 212*. That section states:

> ***HN4***[] The provisions of this act shall be interpreted in a manner consistent with Federal ***Antitrust Law*** *15 U.S.C., Section 1 et seq.* and the case law applicable thereto.

[*P9] Accordingly, under *§ 212*, we are required to apply the holdings of *Illinois Brick* to the present appeal.

[*P10] Major does not actively argue this Court should not follow *Illinois Brick.* In his briefs at trial Major makes two arguments in defense to Microsoft's motion to dismiss. He claims because he was required to register as an end user licensee, he is a direct purchaser, not an indirect one. He argues he suffered a unique injury **[***7]** as a direct result of Microsoft's practices. He further points out *Illinois Brick* provides for three exceptions to the indirect purchaser rule: (a) Vertical Price-Fixing Conspiracy, (Microsoft in conjunction with Compac, Dell and NEC); (b) an Ownership or Control exception; and, (c) the cost-plus contract exception. He also argues the trial court erroneously dismissed his claims under the Uniform Commercial Code, *12A O.S. Supp. 2000 § 2-302*, and the Oklahoma Consumer Protection Act.

[*P11] The trial court in its journal entry dismissing Major's case, attached and incorporated herein, made a detailed legal analysis of these claims. We see no reason to repeat that analysis here. ***HN5***[] Rule 1.202, Oklahoma Supreme Court Rules, 12 O.S. Supp. 2000, Ch. 15 App. provides that in any case in which the court determines after argument or submission on the briefs that no reversible error of law appears, and (d) the opinion or findings of fact and conclusions of law of the trial court adequately explains the decision, the court may affirm by an opinion citing this rule. We have examined the record, more particularly the briefs of the parties in the trial **[***8]** court, and hold the trial court should be affirmed under this rule.

[*P12] AFFIRMED.

ADAMS, J. AND MITCHELL, J. CONCUR.

[514]** EXHIBIT "A"

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

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[2] *Comes,* in a footnote, refers to *In re Microsoft Corporation Antitrust Litigation, 127 F. Supp. 2d 702 (D. Md. 2001)*. That decision held the plaintiffs as indirect purchasers were barred from bringing claims for alleged overcharges under federal law, pursuant to *Illinois Brick,* but reserved comment on whether *Illinois Brick* was incorporated into the state law of a number of states.

STATE OF OKLAHOMA

JONATHAN C. MAJOR, on his own behalf and on behalf of those similarly situated, Plaintiff, vs. MICROSOFT CORPORATION, a Washington Corporation, Defendant.

Case No. CJ-2000-1704

May 24, 2002, Filed

ORDER

This matter comes before the Court on the Renewed Motion to Dismiss of defendant Microsoft Corporation ("Microsoft").

On November 17, 2000; this Court entered an order dismissing the original Petition: The Court concluded that the claims as originally pled were barred by the rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, barring antitrust damage claims by indirect purchasers. However, the Court granted plaintiff Jonathan C. Major ("Major") the opportunity to replead and, on December 14, 2000, Major filed his First Amended Petition. On January 12, 2001, Microsoft removed the case to the United States District Court for the Northern District of Oklahoma. The Judicial Panel on Multidistrict Litigation then issued **[***9]** a Conditional Transfer Order, transferring the case to the United States District Court for the District of Maryland, for consolidation with all other federal court putative class action antitrust actions pending against Microsoft. The U.S. District Court for the Northern District of Oklahoma subsequently remanded the case to this Court, and Microsoft filed its Renewed Motion to Dismiss.

In his First Claim for Relief in the First Amended Petition, Major claims Microsoft has violated Oklahoma's Antitrust Reform Act, *79 O.S. §§ 201, et seq.* by monopolizing trade and commerce relating to operating systems for Intel-based personal computers within the State of Oklahoma. Major further alleges Microsoft has conspired with distributors to fix prices for its Windows 98 operating system at an unlawful monopoly price. In his Second Claim for Relief, Major and the putative class claim entitlement to a modification of the price provisions of their contracts for the purchase and use of Windows 98 under the "unconscionability" section of the Oklahoma Uniform Commercial Code ("UCC"), *12A O.S. § 2-302*. In his Third Claim for Relief, Major **[***10]** contends that Microsoft's conduct and business practices constitute unfair and deceptive business practices as those terms are defined in the Oklahoma Consumer Protection Act ("CPA"), *15 O.S. §§ 751, et seq.* and that he and each member of the putative class is entitled to recover damages therefor.

A motion to dismiss for failure to state a cause of action will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. *12 O.S. § 2012*, Committee Comment; *Brock v. Thompson, 1997 OK 127, P7, 948 P.2d 279, 284*. Under most circumstances a plaintiff's petition is only dismissible for want of a cognizable legal theory of liability or for insufficient facts under the advanced theory. *Lockhart v. Loosen, 1997 OK 103, P5, 943 P.2d 1074, 1078*. A petition must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief. *Frazier v. Bryan Memorial Hospital Authority, 1989 OK 73, P13, 775 P.2d 281, 287*. **[***11]**

This Court previously ruled that the Illinois Brick direct purchaser rule was incorporated into Oklahoma law when Oklahoma enacted its Antitrust Reform Act (the "Act") in 1998. Federal antitrust statutes were adopted almost verbatim. The Oklahoma legislature manifested its clear intent to harmonize the Act with federal ***antitrust law*** when it enacted *§ 212*, which states:

> The provisions of this act shall be interpreted in a manner consistent with Federal ***Antitrust Law*** *15 U.S.C., Section 1 et seq.* and the case law applicable thereto.

Oklahoma has chosen not to legislatively overturn the direct purchaser rule. Therefore, this Court concluded - and again concludes - that the Illinois Brick direct purchaser rule is controlling law in Oklahoma. [1]

[*12]** **[**515]** The Court rejected - and again rejects - Major's argument that the End User Licensing Agreement ("EULA") made Major a direct purchaser by giving him a direct contractual relationship with Microsoft. The EULA does not make Major or those similarly situated "direct buyers." Major did not purchase his product directly from Microsoft. The Court concludes that the relationship established through the EULA between Microsoft and the end user is insufficient to make the end user a direct purchaser for the purposes of Illinois Brick, See, e.g. *Minuteman, L.L.C. v. Microsoft Corp.,795 A.2d 833, 147 N.H. 634 (N.H. 2002)*; *Siena v. Microsoft Corp.796 A.2d 461, 2002 WL 971877 (R.I. 2002)*; *Vacco v. Microsoft Corp. 793 A.2d 1048, 260 Conn. 59 (Conn. 2002)*; and *Pomerantz v. Microsoft Corp., 50 P.3d 929, 2002 WL 926997 (Colo. App. 2002)*.

Major asserts three exceptions to the Illinois Brick direct purchaser rule: 1) a vertical price-fixing conspiracy exception; 2) the control exception, applicable to purchases from an entity owned or controlled by the antitrust violator; **[***13]** and 3) the cost-plus contact exception.

1. Vertical Price-Fixing Conspiracy.

Major alleges that Microsoft entered into "a Vertical price-fixing conspiracy" with the three largest PC manufacturers - Compaq, Dell and NEC. First Amended Petition, P50.

Illinois Brick does not mention a "vertical conspiracy" exception. Judge Posner, writing for a Seventh Circuit panel, wrote that "Utilicorp implies that the only exceptions to the Illinois Brick doctrine are those stated in Illinois Brick itself." In re Brand name *Prescription Drugs Antitrust Litigation, 123 F.3d 599, 605 (7th Cir. 1997)*.

Even if one assumes a vertical price-fixing conspiracy exception is cognizable, it applies only to one who purchases an overpriced good from a member of the price-fixing conspiracy, as such an individual arguably bears the overcharge directly and the policy factors underlying Illinois Brick are not at issue. *In re Mid-Atlantic Toyota Antitrust Litigation. 516 F. Supp. 1287, 1294-5 (D.Md. 1981)*. In this case, Major alleges he purchased a copy of Windows 98 from Office Depot and a computer with Windows 98 preinstalled from Gateway. Major does **[***14]** not allege a purchase from a member of the conspiracy; his allegations are insufficient to avoid the direct purchaser rule.

Alternatively and in addition, Major's First Amended Petition fails because he has not joined the alleged co-conspirators. See, e.g., *McCarthy v. Recordex Service, Inc., 80 F.3d 842, 854-55 (3rd Cir. 1996)*. The narrow exception to the rule requiring joinder, set forth in *Lowell v. American Cyanamid Co., 177 F.3d 1228 (11th Cir. 1999)*, is inapplicable here. In Lowell no problems of double recovery were present because only one illegal act (the vertical conspiracy) was present and only one set of potential plaintiffs existed. Here, Major alleges a separate antitrust violation - monopolization of the market for Windows 98 - which potentially caused injury to direct purchasers other than the alleged co-conspirators. Thus, this case presents problems of double recovery to which the Illinois Brick doctrine is applicable.

Alternatively and in addition, Major has failed to allege a vertical conspiracy to fix prices at which Major and the putative class purchased the products (the PCs) sold by the original equipment manufacturers **[***15]** ("OEMs").

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[1] Under Illinois Brick, indirect purchasers lack standing to proceed. The rationale behind the rule, as explained by the United States Supreme Court, is that "the direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers." *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 208, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*. It also "serves to eliminate multiple recoveries." Id., at *497 U.S. 199, 212, 111 L. Ed. 2d 169, 110 S. Ct. 2807*. Finally, the rule provides the direct purchasers, those in the best position to observe an alleged violator's conduct, with incentives to bring private antitrust actions and thus promotes the vigorous enforcement of the antitrust laws. *Id. at 214-215*. The Court recognizes that its decision in Illinois Brick often denies relief to consumers who have paid inflated prices because of their status as indirect purchasers. *Utilicorp, 497 U.S. at 211-212*.

2. The Ownership or Control Exception. .

The Court in Illinois Brick noted, in a footnote, that in some situations an indirect purchaser might be permitted to maintain an antitrust action "where the direct purchaser [in this case the OEMs and/or distributors of upgrade CD ROMS] is owned or controlled by its customer." *Illinois Brick, 431 U.S. at 736 n. 16, 97 S. Ct. at 2070 n. 16, 52 L. Ed. 2d at 719 n. 16*. Courts have narrowly construed this exception and limited it to relationships involving such functional economic **[**516]** or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale. *Jewish Hospital Ass'n v. Stewart Mech. Enterp., Inc., 628 F.2d 971, 975 (6th Cir. 1980)*. The Seventh Circuit has limited the control exception to situations where a defendant controls the direct purchasers "through interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, trust agreements, and other modes of control separate from ownership of a majority of the wholesalers' common stock." In **[***16]** re Brand name *Prescription Drugs Antitrust Litigation, 123 F.3d 599, 605 (7th Cir. 1997)*. Another federal court has held that "to fall within the realm of the [ownership or control] exception to the general rule of Illinois Brick, [the indirect purchaser] must show that [a party] owns or exerts such significant control over (the direct purchaser] as to be virtually the same entity." *Fisher v. Wattles, 639 F. Supp. 7, 9 (M.D. Pa. 1985)*.

In the present case, Major has alleged that Microsoft dictates *the price that it charges OEMs* for Windows depending upon the degree to which the individual OEMs have complied with Microsoft's wishes in pursuing its "jihad" in the "browser war." First Amended Petition, P61. Major does not allege that Microsoft owns or directly controls the OEMs and distributers of upgrade CD ROMS or that Microsoft controls or determines the pricing of Windows 98 by resellers. In short, Major has not alleged such functional economic or other unity that there effectively has been only one sale. *Pomerantz v. Microsoft Corp.,50 P.3d 929, 2002 WL 926997* at *7 (Colo. App. 2002). Absent such an allegation, **[***17]** the rationale behind Illinois Brick clearly applies - the finder of fact would have to apportion the alleged overcharge between the OEMs and the indirect purchasers. "That's just what the Supreme Court in … Illinois Brick … told the federal courts not to do." In re Brand name *Prescription Drugs Antitrust Litigation, 123 F.3d 599, 606 (7th Cir. 1997)*. Unless the alleged control extends to the price charged for operating systems or computers, the "problems of proving the amount of the pass-on remain undiminished." *Jewish Hospital, 628 F.2d at 975*. Accordingly, the "control" exception to the Illinois Brick rule does not save the First Amended Petition.

3. The Pre-Existing Cost-Plus Contract Exception.

In Illinois Brick, the Supreme Court observed:

> In a [pre-existing cost-plus contract] situation, the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand **[***18]** that complicates the determination in the general case. *431 U.S. at 736*.

Plaintiff alleges, on information and belief, that OEMs and distributors "have passed all of Microsoft's monopoly price on to Plaintiff and the Class" and, as such, the transaction is "the functional equivalent of a cost-plus contract." Amended Petition, P69. Plaintiff does not allege a pre-existing cost-plus contract. If a seller's recovery of costs equates to a "pre-existing cost-plus contract," the exception to Illinois Brick would swallow the rule. As the Supreme Court explained in *Kansas v. Utilicorp. 497 U.S. 199, 218, 110 S. Ct. 2807, 2817-18, 111 L. Ed. 2d 169 (1990)*, where utilities were required by law to pass on all of their costs, "we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." The Supreme Court held that even where a utility raised its prices to cover its costs, the Court could not ascertain its precise injury because the utility's customers made no commitment to purchase any particular quantity of gas and the utility itself had no guarantee of **[***19]** any particular profit. The utility could claim injury as a consequence of elasticity of demand - the decreased volume of sales caused by the higher prices the utility had to charge. The Court went farther to state that "even if the utility customers **[**517]** had a highly inelastic demand for natural gas…the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception." If the legally required pass-on in Utilicorp did not qualify as a cost-plus contract, Major's conclusory allegations of pass-on cannot do so.

4. Plaintiff's Claims of Unique and Direct Injury.

Major argues he has standing because Microsoft has caused him to suffer unique injury as a direct result of its practices. Specifically, Major alleged that end-users "were deprived of the benefits of competition including, but not limited to, technological innovation, market choice, product variety, and substitutable supply, and were forced to purchase multiple copies of Windows." P80, First Amended Petition. Major also alleges that the illegal tie-in of Internet Explorer to the operating system resulted in multiple injuries to all Windows **[***20]** 98 purchasers. Such injuries include: loss of speed and memory caused by the technological tie; loss of operating system stability and increased susceptibility to viruses or security breaches; and deprivation of consumer choice. The MDL Court assigned to Microsoft antitrust litigation has rejected claims for injury to the market as a whole, including the alleged denial of better, technologically superior products. *In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702, 710-711 (D.Md. 2001)*. The MDL Court held that consumer allegations of denial of the benefit of technologically superior products and competition are allegations of "a generalized societal harm and, under well-established principles, the suffering of such damage is insufficient to confer standing." *Id. at 711* see also *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 n. 8, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* ("The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity").

Major's claim of "performance degradation" resulting from the tie-in of Internet Explorer is simply a claim that he **[***21]** should have obtained more than he did and that Microsoft charged too much for the product. The measure of damages is the amount of the overcharge, and the problems identified in Illinois Brick persist.

5. Major's Claim for Modification of an Unconscionable Contract Term.

Section 2-302 of the Uniform Commercial Code is not a basis for affirmative relief. *Cowin Equip. Co. v. General Motors Corp., 734 F.2d 1581, 1582 (11th Cir. 1984)*; *Best v. United States Nat'l Bank,78 Ore. App. 1, 714 P.2d 1049, 1055-1056 (Ore. App. 1986)* (surveying cases in numerous states that *§ 2-302* is not a basis for an award of damages).

6. Major's Claim Under the Oklahoma Consumer Protection Act.

Major's claims under the Oklahoma Consumer Protection Act ("CPA") are predicated on the same factual allegations underlying Major's antitrust claim. As set forth above, the Oklahoma legislature has expressed the clear intention that Oklahoma's antitrust laws be interpreted in a manner consistent with federal ***antitrust law***. Microsoft contends that indirect purchasers whose claims are barred under the antitrust laws should not be permitted to assert a claim under the **[***22]** CPA for the same allegedly anticompetitive conduct.

Upon consideration of the arguments an authorities presented by the parties, this Court concludes that the CPA should not extend to anticompetitive conduct and that Major should not be permitted under the law to avoid the United States Supreme Court's policy choices expressed in Illinois Brick by recasting his claims of anticompetitive conduct as a Consumer Protection Act claim. This particular issue must obviously be resolved by our appellate courts. Courts in other states have refused to permit an end-run around Illinois Brick by permitting other statutory claims upon the same factual allegations underlying the state antitrust claim. Vacco v. Microsoft, *260 Conn. 59, 793 A.2d 1048, 2002 WL 519752 (Conn. 2002)*; *Blewett v. Abbott Laboratories, 86 Wn. App. 782, 938 P.2d 842 (Wash. App. 1997)* ("[This is the same claim with a different label.... We will not interpret the **[**518]** state ***antitrust law*** in a manner that 'rewards creative pleading at the expense of consistent application of legal principles.'")

For the reasons set forth above, Defendant's Renewed Motion to Dismiss is granted.

IT IS SO **[***23]** ORDERED this 24th day of May, 2002.

GREGORY K. FRIZZELL

DISTRICT JUDGE

End of Document

Turicentro v. Am. Airlines

United States Court of Appeals for the Third Circuit

March 7, 2002, Argued ; September 9, 2002, Filed

No. 01-3135

Reporter

303 F.3d 293 *; 2002 U.S. App. LEXIS 18467 **; 2002-2 Trade Cas. (CCH) P73,795; 1 A.L.R. Fed. 2d 719

TURICENTRO, S.A.; CENTRO AMERICA TRAVEL AGENCIE, LTD; NEGOCIOS GLOBO, S.A.; FRONTERAS DEL AIRE, S.A., ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, Appellants v. AMERICAN AIRLINES INC.; CONTINENTAL AIRLINES INC.; DELTA AIRLINES INC.; INTERNATIONAL AIR TRANSPORT ASSOCIATION; UNITED AIRLINES INC.

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. D.C. Civil Action No. 01-cv-00468. (Honorable J. Curtis Joyner).

Turicentro, S.A. v. Am. Airlines, Inc., 152 F. Supp. 2d 829, 2001 U.S. Dist. LEXIS 10649 (E.D. Pa. 2001).

Disposition: Affirmed.

Core Terms

commerce, import, Antitrust, foreign trade, Improvements Act, Sherman Act, defendants', Airlines, anti trust law, foreign nation, conspiracy, travel agent, plaintiffs', export, district court, commissions, transactions, domestic, anticompetitive, markets, subject matter jurisdiction, reasonably foreseeable, Passenger, effects, air carrier, give rise, alleges, commission rate, travel agency, geographical

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN1[] **Jurisdiction, Jurisdictional Sources**

Federal jurisdiction obtains for any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. *28 U.S.C.S. § 1337(a)*.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

The Sherman Antitrust Act regulates restraints and monopolies.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. §§ 1, 2.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Sherman Act, Jurisdiction

15 U.S.C.S. § 4 provides: The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of the Sherman Act.

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

HN5[] Standards of Review, De Novo Review

The appellate court exercises plenary review over a legal conclusion.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6[] Appeals, Standards of Review

In a Fed. R. Civ. P. 12(b)(1) appeal, the appellate court reviews only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN7[] Subject Matter Jurisdiction, Jurisdiction Over Actions

Challenges to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may be "facial" or "factual." Facial attacks contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true. In contrast, a trial court considering a factual attack accords plaintiff's allegations no presumption of truth. In a factual attack, the court must weigh the evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings. Where the challenge to the district court's jurisdiction was a factual one under Fed. R. Civ. P. 12(b)(1), the appellate court is not confined to the allegations in the complaint (nor is the district court) and can look beyond the pleadings to decide factual matters relating to jurisdiction.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Section 402 of the Foreign Trade Antitrust Improvements Act provides: The Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -- (1) such conduct has a direct, substantial, and reasonably foreseeable effect -- (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of the Sherman Act other than this section. If the Sherman Act applies to such conduct only because of the operation of paragraph (1)(B), then the Sherman Act shall apply to such conduct only for injury to export business in the United States. *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN9[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act is described as "inelegantly phrased." In rather convoluted language, the Foreign Trade Antitrust Improvements Act introduces two requirements that must be satisfied for a plaintiff to state a valid antitrust claim regarding conduct involving trade or commerce with foreign nations. The first is whether the conduct in fact involves trade or commerce (other than import trade or import commerce) with foreign nations, as those terms are understood under the statute. *15 U.S.C.S. § 6a*. The second evaluates whether defendants' conduct has a direct, substantial, and reasonably foreseeable anticompetitive effect on United States commerce and whether that conduct "gives rise" to a Sherman Act claim. *15 U.S.C.S. § 6a(1)-(2)*. The first inquiry focuses on defendants' conduct, while the second inquiry focuses on the geographical effect of that conduct.

Governments > Legislation > Interpretation

HN10[] **Legislation, Interpretation**

Absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] International Aspects, Foreign Trade Antitrust Improvements Act

The plain language of the Foreign Trade Antitrust Improvements Act does not limit its scope to "export" or "wholly foreign" commerce. Instead, it addresses whether defendants' conduct involves trade or commerce (other than import trade or import commerce) with foreign nations. *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > General Overview

HN12[] International Aspects, Foreign Trade Antitrust Improvements Act

The first inquiry, regarding the two requirements that must be satisfied for a plaintiff to state a valid antitrust claim regarding conduct involving trade or commerce with foreign nations, derives from *15 U.S.C.S. § 6a* of the Foreign Trade Antitrust Improvements Act. The court must determine whether the conduct plaintiffs describe is trade or commerce with foreign nations or import trade or commerce with foreign nations. Stated differently, under the Foreign Trade Antitrust Improvements Act, the Sherman Antitrust Act applies to conduct "involving" import trade or import commerce with foreign nations, provided other jurisdictional hurdles are cleared.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Business & Corporate Law > Foreign Corporations > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Insurance Company Operations > Conducting Business > Foreign Insurers

HN13[] International Aspects, Commerce With Foreign Nations

The phrase "trade or commerce with foreign nations" includes transactions between foreign and domestic commercial entities, not just transactions involving a foreign sovereign. Generally, the conduct must involve a

United States purchaser or seller. But where conduct allegedly violating the Sherman Act is directed at the competitiveness of a foreign market, such conduct involves "foreign trade or commerce."

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

International Law > Authority to Regulate > General Overview

HN14[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The initial sentence of *15 U.S.C.S. § 6a*, along with its "import trade or commerce" parenthetical, provides that the ***antitrust law*** shall apply to conduct "involving" import trade or commerce with foreign nations (provided, of course, that jurisdiction is found to exist under the Sherman Act itself).

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Since the Foreign Trade Antitrust Improvements Act (FTAIA) clearly states that the Sherman Act is not applicable to trade or commerce other than import trade or import commerce, the Sherman Act continues to apply to import trade and import commerce, thereby rendering the FTAIA's requirement of a direct, substantial, and reasonably foreseeable effect inapplicable to an action alleging an impact on import trade and import commerce.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN16[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The dispositive inquiry is whether the conduct of defendants, not plaintiffs, involves "import trade or commerce." The Foreign Trade Antitrust Improvements Act does not define the term "import," but the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The statutory term "involving" has a precise meaning. Regarding the comparison between the "import trade or commerce" language with another provision of *15 U.S.C.S. § 6a*: Admittedly, the Foreign Trade Antitrust Improvements Act differentiates between conduct that "involves" such import commerce, and conduct that directly, substantially, and foreseeably affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction.

Antitrust & Trade Law > Sherman Act > Claims

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Sherman Act, Claims**

Generally, federal antitrust laws do not extend to protect foreign markets from anticompetitive effects and do not regulate the competitive conditions of other nations' economies. But it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN19[] **Antitrust & Trade Law, Sherman Act**

The geographic target of the alleged anticompetitive conduct matters greatly. There is a distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets. The antitrust laws apply to the latter sort of conduct and not the former.

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] Antitrust & Trade Law, Sherman Act

United States antitrust laws only apply when a price-fixing conspiracy affects the domestic economy.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

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

HN21[] Class Actions, Appellate Review

It is the general rule that issues raised for the first time at the appellate level will not be reviewed.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Civil Procedure > ... > Justiciability > Standing > General Overview

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN22[] International Aspects, Foreign Trade Antitrust Improvements Act

The standing inquiry in antitrust cases is dependent on the finding of subject matter jurisdiction.

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

HN23[] Private Actions, Standing

To sue under the United States antitrust laws, plaintiffs must have suffered an injury the antitrust laws were intended to prevent, and the injury must flow from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

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

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] International Aspects, Foreign Trade Antitrust Improvements Act

A plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the Foreign Trade Antitrust Improvements Act.

Counsel: ROBERT J. LaROCCA, ESQUIRE (ARGUED), Kohn, Swift & Graf, Philadelphia, Pennsylvania, Attorney for Appellants.

GEORGE G. GORDON, ESQUIRE (ARGUED), JENNIFER R. CLARKE, ESQUIRE, Dechert, Price & Rhoads, Philadelphia, Pennsylvania, Attorneys for Appellee, American Airlines, Inc.

ANN T. FIELD, ESQUIRE, Cozen & O'Connor, Philadelphia, Pennsylvania, Attorney for Appellee, Continental Airlines, Inc.

FRANCIS P. NEWELL, ESQUIRE, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pennsylvania, Attorney for Appellee, Delta Airlines, Inc.

BERT W. REIN, ESQUIRE (ARGUED), JOHN B. WYSS, ESQUIRE, Wiley, Rein & Fielding, Washington, D.C., BRUCE P. MERENSTEIN, ESQUIRE, Schnader, Harrison, Segal & Lewis, Philadelphia, Pennsylvania, Attorneys for Appellee, International Air Transport Association.

RICHARD J. FAVRETTO, ESQUIRE, Mayer, Brown, Rowe & Maw, Washington, D.C., Attorney for Appellee, United Airlines, Inc.

Judges: Before: SCIRICA and COWEN, Circuit Judges, and RESTANI, Judge, United States Court of International Trade. **[**2]** [*]

Opinion by: SCIRICA

Opinion

[*296] OPINION OF THE COURT

SCIRICA, Circuit Judge.

At issue in this proposed class action is the extraterritorial scope of the Sherman Antitrust Act and its application in this case. The putative plaintiff class comprises certain foreign travel agents located outside the United States who allege major United States air carriers and their trade association illegally conspired to lower their sales commissions. The District Court held the Foreign Trade Antitrust Improvements Act, *15 U.S.C. § 6a*, deprived it of subject matter jurisdiction, barring plaintiffs' claim. We will affirm.

I.

The major United States air carriers have delegated the licensing of travel agents to their trade association, the International Air Transport Association (IATA). [1] All travel agents must have an IATA license to access reservation

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[*] The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

[1] IATA was founded in 1945 by the then-major global airlines, with the goals of promoting international air transportation and providing a means for collaboration. Section 412(b) of the Federal Aviation Act required the Civil Aeronautics Board to approve any agreement by air carriers it did not find "adverse to the public interest" or "in violation of the act." See Federal Aviation Act of 1958, 49 U.S.C. § 1382, amended by International Air Transportation Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1979); see also CAB Order 80-4-113, Apr. 15, 1980 (describing the statute). In addition, § 414 of the Federal Aviation Act required the CAB to immunize from the antitrust laws transactions specifically approved or necessarily contemplated by an order of approval under § 412, provided such immunity was found to be required in the public interest. Id. Before the passage of the Airline Deregulation Act of 1978, such immunity attached automatically under § 414 upon approval. Id.

The CAB approved the organization of IATA in 1946 and granted indefinite approval to the IATA in 1955, after several one-year temporary approvals. IATA Traffic Conference Resolution, 6 CAB 639 (1945); CAB Order E-9305, June 15, 1955. Prior to 1979, agreements affecting foreign air transportation were approved and immunized by the CAB under broad public interest standards. After the passage of the Airline Deregulation Act, IATA amended its agreement, replacing its "Provisions for the Conduct of the IATA Traffic Conferences." See CAB Order 80-4-113 (describing the amendment).

The government has continued, more recently in the form of the Department of Transportation, to exercise regulatory oversight over the Provisions for the Operation of IATA Traffic Conferences. See generally DOT Order 88-3-67, Mar. 31, 1988.

systems of United States-based airlines. In order to make a customer reservation, a travel agent can only enter the airline's electronic system with an IATA number. The travel agent's commission is automatically **[**3]** computed from a database in the airline's electronic system.

[4]** The Passenger Tariff Coordinating Conference is an IATA committee of airline company representatives who determine and fix the commission rates for travel **[*297]** agents. At the July 1999 Passenger Tariff Coordinating Conference meeting in Montreal, Canada, the Conference reduced commissions paid to IATA-accredited agents in Central America and Panama to a flat seven-percent rate. Previous commission rates had varied from country to country and ranged as high as eleven percent.

On December 27, 1999, Grupo Taca, an alliance of the principal Central American airlines (and not a party to this suit), announced it would pay Central American travel agents only six-percent commissions. The next day, American Airlines announced it would pay six-percent commissions on tickets sold in Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. Soon thereafter, Continental Airlines, United Airlines, and Delta Airlines followed suit.

Defendants American Airlines, Delta Airlines, and United Airlines are members of the Passenger Tariff Coordinating Conference. Defendant Continental Airlines is not. None of the airline defendants' representatives attended the 1999 Passenger Tariff Coordinating **[**5]** Conference meeting in Montreal. The minutes of the meeting reflect that "U.S.-based TC [Tariff Commission] Members were prohibited by their authorities from participating in such discussions and . . . were therefore not present for this part of the Agenda." The complaint alleges that during the Montreal meeting, an unidentified Passenger Tariff Coordinating Conference member proposed the reduction in commissions because new technology had streamlined the travel agents' traditional ticket-selling functions.

The named plaintiffs are two San Jose, Costa Rica travel agencies and two Managua, Nicaragua travel agencies, who filed suit on behalf of a class of similarly situated travel agencies. The complaint alleged that four major United States air carriers -- American Airlines, Continental Airlines, Delta Airlines, and United Airlines -- and IATA violated the Sherman Antitrust Act by conspiring to lower travel agents' commissions, a form of horizontal price fixing constituting a per se violation of the antitrust laws. See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-26, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. All four airline defendants are based in the United **[**6]** States, providing air passenger service between United States cities and locations within Latin America and the Caribbean (and elsewhere).

Plaintiffs contend defendants implemented the conspiracy in December 1999, when they began paying the lower six-percent commissions. The reduced commissions allegedly affected United States commerce because reservations on the four defendant airlines account for a substantial portion of the business of Latin American and Caribbean travel agents. The complaint alleges the Passenger Tariff Coordinating Conference meeting in Montreal disguised a pre-arranged agreement by United States air carriers to create the illusion of non-involvement in the reduction of commission rates, in an attempt to avoid antitrust liability under United States laws. Plaintiffs contend defendants assisted in planning this agenda, were aware the vote would be taken and endorsed the reduced rates. Plaintiffs claim the loss of substantial commissions, causing one member of the proposed class to close its business. They request treble damages.

The District Court dismissed the action under *Fed. R. Civ. P. 12(b)(1)*, holding, "Plaintiffs aver nothing from which this Court could **[**7]** find that Defendants' purported conspiracy caused any injury which was felt in the U.S. or which affected the American economy in any way." *Turicentro, S.A. v. Am. Airlines, Inc., 152 F. Supp. 2d 829, 834 (E.D. Pa. 2001)*. The **[*298]** District Court did not address defendants' other arguments in support of dismissal. We must determine whether the District Court erred in finding the Foreign Trade Antitrust Improvements Act deprived it of subject matter jurisdiction.

II.

We have jurisdiction under *28 U.S.C. § 1291*.

III.

HN1[] Federal jurisdiction obtains for "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." *28 U.S.C. § 1337(a)*. HN2[] The Sherman Antitrust Act regulates "restraints and monopolies." *Sections 1* and *2* of the Act provide:

> HN3[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other **[**8]** person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C. §§ 1, *2*. [2]

Federal courts have often disagreed about the extraterritorial scope of the Sherman Act. Various judicial constructions of the Act were developed over the last century. See *Den Norske Stats Oljeselskap AS v. HeereMac VOF et al., 241 F.3d 420, 423-24 (5th Cir. 2001)* ("Statoil") ("The history of this body of case law is confusing and unsettled."). *Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909)* (Holmes, J.), was the first time the Supreme Court considered the extraterritorial application of the Sherman Act, holding it did not apply to conduct occurring **[**9]** outside United States borders. *Id. at 357-58*. Over time, the Supreme Court altered its approach, holding plaintiffs could bring Sherman Act claims against foreign defendants, provided some of defendants' conduct occurred within the United States. See, e.g., *United States v. Sisal Sales Corp., 274 U.S. 268, 275-76, 71 L. Ed. 1042, 47 S. Ct. 592 (1927)*.

In 1945, the Court of Appeals for the Second Circuit established an "effects test" to determine whether there was antitrust jurisdiction over foreign conduct. See *United States v. Aluminum Corp. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945)* (Hand, J.). Aluminum Corp. held that a federal court had jurisdiction over the conduct of a foreign corporation where the conduct was intended to, and did in fact, affect United States commerce. *Id. at 443* ("We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." (citation omitted)). Over the next half-century, the "effects test," despite its apparent simplicity, proved difficult to apply in many Sherman Act cases. Considerations of international comity, not **[**10]** expressly considered in Aluminum Corp., occasionally entered the analysis of later courts. See, e.g., *Am. Rice, Inc. v. Ark. Rice Growers Co-op. Ass'n, 701 F.2d 408, 413-16 (5th Cir. 1983)*; *Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-15 (9th Cir. 1976)*.

Legislating on this background, Congress in 1982 enacted Title IV of the Export Trading Company Act -- known as the **[*299]** Foreign Trade Antitrust Improvements Act -- to facilitate domestic exports and to clarify the application of United States antitrust laws to foreign conduct. The Foreign Trade Antitrust Improvements Act encourages United States exports by facilitating the formation of export trading companies and by exempting certain export transactions from the antitrust laws. *15 U.S.C. § 4001(b)*; *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy . . . ."). The Foreign Trade Antitrust Improvements Act also promotes the "certainty in assessing the applicability of American ***antitrust law*** to **[**11]** international business transactions and proposed transactions." H.R. REP. NO. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2494. [3]

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[2] HN4[] *15 U.S.C. § 4* provides, "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of [the Sherman Act]."

[3] As the United States Court of Appeals for the Fifth Circuit has observed, "The federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws . . . . However, as far as this appeal is concerned, our work is simplified by Congress' passage in 1982 of the FTAIA, which specifically exempts certain foreign conduct from the antitrust laws." *Statoil, 241 F.3d at 423-24*.

Although passed two decades ago, few federal courts have had occasion to apply the Foreign Trade Antitrust Improvements Act. In one such case, we held the Act demonstrated Congress's intent to exempt from the Sherman Act export transactions not injuring the United States economy, thereby relieving exporters from a competitive disadvantage in foreign trade. *Carpet Group Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 71 (3d Cir. 2000)*; see also H.R. REP. NO. **[**12]** 97-290 (1982), reprinted in 1982 U.S.C.C.A.N. 1234 ("It is the purpose of this act to increase United States exports of products and services by . . . modifying the application of the antitrust laws to certain export trade."). In Carpet Group, we held defendants' conduct controlled the inquiry over subject matter jurisdiction. *227 F.3d at 73* ("The crux of [plaintiffs'] case involves [defendants'] conduct in the United States, not conduct abroad. We hold that these activities are not the type of conduct Congress intended to remove from our antitrust jurisdiction when it enacted the FTAIA."); see also *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1086-87 (D.C. Cir. 1998)* (alleged injury to advertisers in the United States satisfied the Foreign Trade Antitrust Improvements Act, regardless of the geographic location of the supplier plaintiffs).

In Carpet Group, we addressed the applicability of the Foreign Trade Antitrust Improvements Act before considering general subject matter jurisdiction under the *Sherman Antitrust Act. 227 F.3d at 69*. We will employ a similar approach here. If the Foreign Trade **[**13]** Antitrust Improvements Act does not bar this suit, then it will be necessary to address subject matter jurisdiction under the Sherman Act.

Plaintiffs contend there is subject matter jurisdiction and the Foreign Trade Antitrust Improvements Act does not bar their claim. As noted, the District Court dismissed plaintiffs' claim under *Fed. R. Civ. P. 12(b)(1)*, holding:

> Assuming as true that the alleged conspiracy and the actions taken in furtherance thereof did occur within United States commerce, the plaintiffs aver nothing from which this Court could find that Defendants' purported conspiracy caused any injury which was felt in the U.S. or which affected the American economy in any way.

[*300] *152 F. Supp. 2d at 834*. ***HN5***[] We exercise plenary review over this legal conclusion. *Gould Elec., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000)*. ***HN6***[] In this *Rule 12(b)(1)* appeal, "we review only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court." *Licata v. United States Postal Serv., 33 F.3d 259, 260 (3d Cir. 1994)*; see also *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)* **[**14]** (when considering a "facial" attack under *Rule 12(b)(1)*, "the court must consider the allegations of the complaint as true"). [4]

[15]** IV.

HN8[] Section 402 of the Foreign Trade Antitrust Improvements Act provides:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless --
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect --
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

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[4] ***HN7***[] Challenges to subject matter jurisdiction under *Rule 12(b)(1)* may be "facial" or "factual." Facial attacks, like this one, contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true. *NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 & n.7 (3d Cir. 2001)*. In contrast, a trial court considering a factual attack accords plaintiff's allegations no presumption of truth. In a factual attack, the court must weigh the evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings. Accord *Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1260-61 (11th Cir. 1997)*; *Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990)*; *Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981)*. In *Cestonaro v. United States, 211 F.3d 749 (3d Cir. 2000)*, we said, "Because the government's challenge to the District Court's jurisdiction was a factual one under *Fed. R. Civ. P. 12(b)(1)*, we are not confined to the allegations in the complaint (nor was the District Court) and can look beyond the pleadings to decide factual matters relating to jurisdiction." *Id. at 752* (citation omitted).

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of [the Sherman Act] other than this section.
If [the Sherman Act] applies to such conduct only because of the operation of paragraph (1)(B), then[the Sherman Act] shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (1997).

As noted, the central issue on appeal is whether the Foreign Trade Antitrust Improvements Act bars subject matter jurisdiction in this Sherman Antitrust Act case. Therefore, our primary task is one of statutory interpretation. **[**16]** Cf. *United States v. Knox, 32 F.3d 733, 744 (3d Cir. 1994)*. ***HN9***[] We have described the Foreign Trade Antitrust Improvements Act as "inelegantly phrased." *Carpet Group, 227 F.3d at 69* (quoting *United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997))*. In rather convoluted language, the Foreign Trade Antitrust Improvements Act introduces two requirements that must be satisfied for a plaintiff to state a valid antitrust claim regarding "conduct involving trade or commerce . . . with foreign nations." [5] **[**17]** The first is whether the conduct in fact involves "trade or commerce (other than import trade or import commerce) with foreign nations," as **[*301]** those terms are understood under the statute. *15 U.S.C. § 6a*. The second evaluates whether defendants' conduct has "a direct, substantial, and reasonably foreseeable" anticompetitive effect on United States commerce and whether that conduct "gives rise" to a Sherman Act claim. Id. *§ 6a(1)-(2)*. The first inquiry focuses on defendants' conduct, while the second inquiry focuses on the geographical effect of that conduct. [6]

[18]** A.

HN12[] The first inquiry derives from *§ 6a* of the Foreign Trade Antitrust Improvements Act: "[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . ." We must determine whether the conduct plaintiffs describe is "trade or commerce with foreign

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[5] Whether plaintiffs are United States citizens is irrelevant to our inquiry. *15 U.S.C. § 15* ("Suits by persons injured") provides jurisdiction for damage claims brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Id. The legislative history of the Export Trading Company Act states, "Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations." H.R. REP. NO. 97-686, reprinted in 1982 U.S.C.C.A.N. 2495. *And in Pfizer, Inc. v. India, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*, the Supreme Court held that allowing foreign plaintiffs to enforce United States antitrust laws helped compensate victims while deterring future violations. *Id. at 314-15*.

[6] Plaintiffs contend the Foreign Trade Antitrust Improvements Act's principal purpose was to reduce the growing United States trade deficit. For this reason, they suggest the Foreign Trade Antitrust Improvements Act does not bar their suit because their claim involves neither "export" nor "wholly foreign" commerce, the only types of activity covered by the statutory language. Because defendants, United States companies, allegedly colluded within the United States to fix prices paid in United States dollars, plaintiffs maintain the conduct at issue cannot be described as "export commerce" or "wholly foreign commerce."

We disagree. Shreds of the Foreign Trade Antitrust Improvements Act's legislative history can be interpreted as supporting plaintiffs' argument relating to the statute's purpose. E.g., H.R. REP. NO. 97-686, reprinted in 1982 U.S.C.C.A.N. 2499 (employing the "export or purely foreign commerce" language. But as noted, the legislative history contains other justifications for the Act as well. E.g., id., reprinted in 1982 U.S.C.C.A.N. 2494 (noting the Foreign Trade Antitrust Improvements Act's "promotion of certainty in assessing the applicability of American ***antitrust law*** to international business transactions and proposed transactions"). It would therefore appear that the text of the Act demonstrates more than one purpose. More importantly, the Supreme Court has held that ***HN10***[] "absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians, 466 U.S. 765, 772, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (1984)* (quotation and citations omitted). ***HN11***[] The plain language of the statute does not limit its scope to "export" or "wholly foreign" commerce. Instead, it addresses whether defendants' conduct "involves trade or commerce (other than import trade or import commerce) with foreign nations." *15 U.S.C. § 6a*. We must, of course, apply the plain text of the statute.

nations" or "import trade or commerce with foreign nations." [7] Stated differently, under the Foreign Trade Antitrust Improvements Act, the Sherman Antitrust Act applies to conduct "involving" import trade or import commerce with foreign nations, provided other jurisdictional hurdles are cleared. Carpet Group, 227 F.3d at 69.

1.

HN13[] The phrase "trade or commerce with foreign nations" includes transactions **[*302]** between foreign and domestic commercial entities, not just transactions involving a foreign sovereign. See, e.g., Hartford Fire Ins., 509 U.S. at 796 (Sherman Act applicable to London **[**19]** insurers engaging in unlawful conspiracies to affect United States markets); see also United States v. Holliday, 70 U.S. 407, 417, 18 L. Ed. 182 (1866) ("Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals."). Generally, the conduct must involve a United States purchaser or seller. Cf. Statoil, 241 F.3d at 426; In re Copper Antitrust Litig., 117 F. Supp. 2d 875, 882 (W.D. Wisc. 2000) ("The term 'commerce . . . with foreign nations' generally refers to transactions in which a foreign seller deals with an American purchaser, or vice versa . . . ." (citations omitted)). [8] But where conduct allegedly violating the Sherman Act is directed at the competitiveness of a foreign market, such conduct involves "foreign trade or commerce." See Kruman v. Christie's Int'l PLC, 284 F.3d 384, 395 (2d Cir. 2002) ("When there is conduct directed at reducing the competitiveness of a foreign market . . . such conduct involves foreign trade or commerce, regardless of whether some of the conduct occurred in the United States.").

[20]** The complaint alleges a conspiracy between four domestic airlines and their trade association to fix commissions paid to foreign travel agents located outside the United States. Defendants' alleged conduct was directed at reducing the competitiveness of Costa Rican, Nicaraguan, and similarly situated foreign travel agents, all of whom were foreign-based. Therefore, the complaint properly alleges trade or commerce with foreign commercial entities. [9]

[21]** 2.

Next we consider whether defendants' conduct involves "trade or commerce with foreign nations" that is "import trade or import commerce." If so, plaintiffs' claims could still be cognizable under the Sherman Act, because the Foreign Trade Antitrust Improvements Act only removes certain non-import commerce from federal antitrust jurisdiction. See Carpet Group, 227 F.3d at 69 **HN14**[] ("The initial sentence of Section 6a, along with its 'import trade or commerce' parenthetical, provides that the ***antitrust law*** shall apply to conduct 'involving' import trade or commerce with foreign nations (provided, of course, that jurisdiction is found to exist under the Sherman Act itself)."). In Carpet Group, we held, **HN15**[] "Since the FTAIA clearly states that the Sherman Act is not applicable to trade or commerce other than import trade or import commerce, the Sherman Act continues to apply to import trade and import commerce, thereby rendering the FTAIA's requirement of a direct, substantial, and reasonably foreseeable effect inapplicable to an action alleging **[*303]** an impact on import trade and import commerce." Id. at 72 (quoting 54 Am. Jur. 2d § 18, at 77)). [10]

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[7] Of course, the conduct need not necessarily be one or the other.

[8] Article I, Section 8 of the United States Constitution gives Congress the authority to regulate interstate commerce and "commerce with foreign nations."

[9] Moreover, plaintiffs' argument is undermined by their pleadings. Section One of the Sherman Act, on which plaintiffs base their claims, prohibits "trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. The complaint does not allege trade or commerce "among the several States." Therefore, to be cognizable, plaintiffs' allegations must depict a restraint of "trade or commerce with foreign nations." Plaintiffs cannot argue their allegations do not encompass "trade or commerce . . . with foreign nations" for Foreign Trade Antitrust Improvements Act purposes without sacrificing their ultimate statutory claim under the Sherman Act.

[10] Plaintiffs contend our holding in Carpet Group established a general rule that if defendants' alleged conduct is "based" in the United States, the Foreign Trade Antitrust Improvements Act is no bar to federal antitrust jurisdiction. But Carpet Group provides

[22]** ***HN16***[] The dispositive inquiry is whether the conduct of defendants, not plaintiffs, involves "import trade or commerce." *Id. at 71-72*. The Foreign Trade Antitrust Improvements Act does not define the term "import," but the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad. See, e.g., Webster's Third New International Dictionary (1986) (defining an "import" as "something (as an article of merchandise) brought in from an outside source (as a foreign country)"); Black's Law Dictionary (6th ed. 1990) (defining an "import" as a "product manufactured in a foreign country, and then shipped to and sold in this country"). The travel agent plaintiffs contend the airlines "imported" their services for the purpose of selling airplane tickets. But the complaint alleges that defendants -- the four air carriers and their trade association -- only set the rates that foreign-based travel agents could charge for their services. Defendants did not directly bring items or services into the United States. Therefore, they cannot be labeled "importers." Nor have they engaged in "import trade or commerce."

In Kruman, defendants' conspiracy **[**23]** was "directed at controlling the prices they charged for their services in foreign auctions." *284 F.3d at 395*. The Court of Appeals for the Second Circuit found defendants' conduct did not involve "import trade or commerce":

> The relevant inquiry is whether the conduct of the defendants -- not the plaintiffs -- involves import trade or commerce. The plaintiffs did not describe conduct by the defendants that was directed at an import market. To the contrary, the defendants' conspiracy appears to have been directed at controlling the prices they charged for their services in foreign auctions. As the district court aptly observed, the commerce that is the focus of this case is the charging of fixed commissions on the purchase and sale of goods at foreign auctions, not the trade in and subsequent movement of the goods that were purchased and sold.

Id. (quotations and citations omitted). That "some of the goods purchased in those auctions may ultimately have been imported by individuals into the United States" was immaterial to determining if defendants were involved in "import trade or import commerce." *Id. at 395-96*. In this respect, the facts **[**24]** here are similar. The alleged conspiracy in this case was directed at commission rates paid to foreign travel agents based outside the United States. That some of the services plaintiffs offered were purchased by United States customers is not dispositive under this inquiry. Defendants were allegedly involved only in unlawfully setting extra-territorial commission rates. Their actions did not directly increase or reduce imports into the United States.

HN17[] The statutory term "involving" has a precise meaning. [11] In Carpet Group, we **[*304]** compared the "import trade or commerce" language with another provision of the statute:

> Admittedly, the FTAIA differentiates between conduct that "involves" such [import] commerce, and conduct that "directly, substantially, and foreseeably" affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction.

227 F.3d at 72. Unlike in Carpet Group, where the defendant association identified itself as an organization of "rug importers," none of the airline defendants or the IATA self-identifies as an "importer" here. Id. Nor, under the terms of the statute, were defendants "involved" **[**25]** in any of plaintiffs' "exporting activity."

Nor do we agree with plaintiffs' contention that a foreign travel agent's access to a computer system based in the United States "transforms" "foreign commerce" into "import commerce." Again, our focus remains on the conduct of defendants, not plaintiffs, rendering this argument extraneous. But we note that under plaintiffs' interpretation, a legion of activities transacted by foreign merchants with some connection to instruments in the United States economy -- a telephone, a fax machine, an Internet connection -- would constitute "import commerce."

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no such bright line. In Carpet Group the defendants' "import" activity was clear: "Plaintiffs charge that Defendants engaged in a course of activity designed to ensure that only United States importers, and not United States retailers, could bring oriental rugs manufactured abroad into the stream of American commerce." *227 F.3d at 72*. To that extent, the facts of Carpet Group are clearly distinguishable.

[11] As noted, *15 U.S.C. § 6a* provides:"[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . ."

Although defendants paid commissions in United States dollars, neither the payments nor their calculations on computers based in the United States are properly considered "imports." No items or services **[**26]** were brought into the United States by the payments alone. Nor can plaintiffs demonstrate that defendants' conduct reduced imports of goods or services into the United States. Therefore, defendants were not involved in "import trade or import commerce," but rather were engaged in "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." *15 U.S.C. § 6a*.

B.

As we have stated, the Foreign Trade Antitrust Improvements Act bars plaintiffs' claim unless defendants' conduct has "a direct, substantial, and reasonably foreseeable" anticompetitive effect on United States commerce, and that conduct "gives rise" to a Sherman Act claim. [12] *15 U.S.C. § 6a(1)-(2)*. We turn now to this second aspect of the statutory analysis.

[27]** 1.

Plaintiffs allege defendants' conduct has substantially reduced their business values, forcing at least one member of the putative class out of business. But the District Court found the complaint contained no allegations amounting to any "effect" on United States commerce, failing to satisfy the requirements of *15 U.S.C. § 6a(1)(A)*. *152 F. Supp. 2d at 834*.

We agree. The "direct, substantial, and reasonably foreseeable effect" test was intended to serve as "a simple and straightforward clarification of existing American law." H.R. REP. NO. 97-686, reprinted in 1982 U.S.C.C.A.N. 2487-88. The House Judiciary Committee Report accompanying **[*305]** the Foreign Trade Antitrust Improvements Act stated: "Since Judge Learned Hand's opinion in *United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945)*, it has been relatively clear that it is the situs of the effects, as opposed to the conduct, that determines whether United States ***antitrust law*** applies." H.R. REP. NO. 97-686, reprinted in 1982 U.S.C.C.A.N. 2490.

The Foreign Trade Antitrust Improvements Act's emphasis on the geographical "effect" of allegedly illegal conduct reiterates **[**28]** longstanding antitrust principles. [13] Above all, the United States antitrust laws strive to maintain competition in our domestic markets. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** 4 (2000) ("The general goal of the antitrust laws is to promote 'competition' . . . ."). ***HN18***[] Generally, federal antitrust laws do not extend to protect foreign markets from anticompetitive effects and "do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (citations omitted); see also *Statoil, 241 F.3d at 421* (applying Matsushita to an Foreign Trade Antitrust Improvements Act claim). But it is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins., 509 U.S. at 796*.

[29]** ***HN19***[] The geographic target of the alleged anticompetitive conduct matters greatly. As the Court of Appeals for the Second Circuit recently observed, "There is a distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets. The antitrust laws apply to the latter sort of conduct and not the former." *Kruman, 284 F.3d at 393*.

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[12] The Supreme Court's opinion in Pfizer does not alter our analysis, because it preceded the enactment of the Foreign Trade Antitrust Improvements Act by four years. Moreover, the holding in Pfizer is cabined to the question of whether a foreign government qualified as a "person" under the *Sherman Act. 434 U.S. at 320* (holding "that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff").

[13] To reiterate, while the analysis of the "trade or commerce (other than import trade or import commerce) with foreign nations" prong focuses exclusively on defendants' conduct, the analysis of the "direct, substantial, and reasonably foreseeable" prong focuses exclusively on the geographical effect of defendants' conduct.

Plaintiffs claim that collusion by United States air carriers to fix commissions paid to foreign travel agents satisfies the statutory language. But that allegation does not characterize an "effect" on United States commerce. The alleged collusion is the reason for the lawsuit. It does not designate the geographical effect of defendants' allegedly illegal activity. That certain activities might have taken place in the United States is irrelevant if the economic consequences are not felt in the United States economy. Fixing the commissions paid foreign travel agents might constitute an illegal conspiracy. [14] But this conspiracy only targets the commissions foreign travel **[**30]** agents would receive for work performed outside the United States. ***HN20***[] United States antitrust laws only apply when a price-fixing conspiracy affects the domestic economy. Cf. *Statoil, 241 F.3d at 427-28* (rejecting plaintiffs' attempt to equate "effect" and "conduct" in this context as "not true to the plain language of the FTAIA" and an overly "expansive reading of the antitrust laws" never intended **[*306]** by Congress). Several antitrust actions have been dismissed on analogous grounds. See, e.g., *Matsushita, 475 U.S. at 582 n.6* ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce.") (citation omitted) *In re Copper Antitrust Litig., 117 F. Supp. 2d at 887* ("It is irrelevant that some of defendants' conduct took place in the United States. It was not the conduct that caused plaintiffs' injuries."); *Liamuiga Tours v. Travel Impressions, Inc., 617 F. Supp. 920, 924 (E.D.N.Y. 1985)* (dismissing a plaintiff service operator's claim against an American wholesale tour operator operating in St. Kitts, where all "effects" from the conspiracy were felt outside the United States). Therefore, **[**31]** plaintiffs cannot state a cognizable Sherman Act claim, given the plain text of the Foreign Trade Antitrust Improvements Act. [15]

[32]** We do not reach plaintiffs' contentions, first raised on appeal, that defendants' conduct could have affected travel agencies and travelers based in the United States. See *United Parcel Serv., Inc. v. Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local Union No. 430, 55 F.3d 138, 140 n.5 (3d Cir. 1995)* ***HN21***[] ("It is the general rule that issues raised for the first time at the appellate level will not be reviewed.") (citations omitted). The complaint only sought class certification for "all IATA-accredited travel agents in Latin America and the Caribbean, excluding any travel agencies owned in whole or in part by defendants to this litigation, or their affiliates or subsidiaries." That plaintiffs now seek to include United States companies or tourists in the class cannot alter our jurisdictional analysis, because those claims were first raised on appeal. Cf. *Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 734-36 (3d Cir. 1970)*.

Nor need we remand these proceedings to allow plaintiffs to demonstrate "newly discovered effects" on United States commerce. Though they had ample notice of possible deficiencies in their complaint, plaintiffs made **[**33]** no attempt to amend before the District Court ruled on the motion to dismiss. Moreover, the District Court appropriately considered the possible "effects" of defendants' actions, and how they impacted its jurisdiction. Given these circumstances, we will not grant leave to amend.

2.

Even if plaintiffs identified a "direct, substantial, and reasonably foreseeable" anticompetitive effect on United States commerce, they would need to demonstrate the anticompetitive effect "gives rise to a claim" under the Sherman Act. *15 U.S.C. § 6a(2)*. We will not consider this element. But we note the meaning of *15 U.S.C. § 6a(2)* has split two of our sister circuits. In Statoil, the Court of Appeals for the Fifth Circuit, in a divided opinion, held:

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[14] The Foreign Trade Antitrust Improvements Act's legislative history provides, "The full committee added language to the Sherman and FTC Act amendments to require that the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." H.R. REP. NO. 97-686, reprinted in 1982 U.S.C.C.A.N. 2496-97.

[15] The travel agents were permanently located outside the United States, where they performed services for travelers based in their countries and elsewhere, including the United States. In this sense, the facts here are distinguishable from those described in the dissenting opinion in Statoil: "The claim is that defendants allocated the market for hundreds of millions of dollars of commerce -- an allegation that placed United States markets at the mercy of monopoly charges in an industry vital to national security. The charged conspiracy was no foreign cabal whose secondary effects only lapped at United States shores." *241 F.3d at 431* (Higginbotham, J., dissenting).

> Based on the language of *Section 2* of the FTAIA, the effect on United States commerce -- in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of **[*307]** Mexico -- must give rise to the claim that Statoil asserts against the defendants. That is, Statoil's injury must stem from the effect of higher prices for heavy-lift services in the Gulf.

241 F.3d at 427; **[**34]** see also *Matsushita, 475 U.S. at 584 n.7* ("However one decides to describe the contours of the asserted conspiracy -- whether there is one conspiracy or several -- respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief."). But in Kruman, the Court of Appeals for the Second Circuit, without referencing Statoil, reached the contrary conclusion:

> [A] violation of the Sherman Act is not predicated on the existence of an injury to the plaintiff. . . . Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only requires that the domestic effect violate the substantive provisions of the Sherman Act.

284 F.3d at 399-400. We need not take sides in this dispute. Plaintiffs have failed to allege a "direct, substantial, and reasonably foreseeable effect" on United States commerce. *15 U.S.C. § 6a(1)*. We reserve consideration on this element.

For these reasons, plaintiffs' claims are barred by the Foreign Trade Antitrust Improvements Act. Therefore, they may not state a cognizable Sherman **[**35]** Act claim.

V.

Defendants also contend plaintiffs lack standing under United States antitrust laws, a proposition not squarely addressed by the District Court. [16] This argument implicates many of the same issues as the jurisdictional analysis under the Foreign Trade Antitrust Improvements Act. And for the reasons noted, we likewise find plaintiffs lack antitrust standing. See *Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (holding ***HN22***[] the standing inquiry in antitrust cases is dependent on the finding of subject matter jurisdiction).

HN23[] To sue under the United States antitrust laws, plaintiffs must have suffered an injury the antitrust laws were intended to prevent, and the injury must flow from that which makes the defendants' acts unlawful. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111-13, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; **[**36]** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 927 (3d Cir. 1999)*; *Int'l Raw Materials, Inc. v. Stauffer Chem. Co., 978 F.2d 1318, 1328 (3d Cir. 1992)*; see also *Pfzizer, 434 U.S. at 314* ("Congress' foremost concern in passing the antitrust laws was the protection of Americans. . . .").

Plaintiffs' injuries occurred exclusively in foreign markets. They are not of the type Congress intended to prevent through the Foreign Trade Antitrust Improvements Act or the Sherman Act. Cf. *In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 716 (D. Md. 2001)* ***HN24***[] ("a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA"). Unlike in Carpet Group, where the plaintiffs' harm was "inextricably intertwined with the defendants' wrongdoing," *227 F.3d at 77* (quotation and citations omitted), the conduct at issue here was not directly related to the United States marketplace.

[*308] VI.

Defendant IATA urges us to affirm on the basis **[**37]** of its alleged statutory immunity under Sections 412 and 424 of the Federal Aviation Act, *49 U.S.C. §§ 41308-41309*. The Act allows the Secretary of Transportation to "exempt a person affected by the order from the antitrust laws to the extent necessary to allow the person to proceed with the

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[16] For this reason, undoubtedly, the issue has not been extensively briefed by the parties.

transaction specifically approved by the order and with any transaction necessarily contemplated by the order." Id. *§ 41308(b)*. Because we need address only the jurisdictional issues, we will not address this matter.

VII.

For the foregoing reasons we will affirm the judgment of the District Court. The Foreign Trade Antitrust Improvements Act acts as a bar to plaintiffs' proposed Sherman Antitrust Act class action.

[Telecor Communs., Inc. v. Southwestern Bell Tel. Co.](#)

United States Court of Appeals for the Tenth Circuit

September 10, 2002, Filed

Nos. 01-6067 and 01-6138

Reporter

305 F.3d 1124 *; 2002 U.S. App. LEXIS 18624 **; 2002-2 Trade Cas. (CCH) P73,801

TELECOR COMMUNICATIONS, INC., an Oklahoma corporation; ADVANCED COMMUNICATIONS, INC., an Oklahoma corporation; COINLINK LLC, an Oklahoma limited liability company; JACK KEELER, d/b/a Americall; KENNETH MERITT, d/b/a Oklahoma Heartland Payphone Services; DON OWENS, d/b/a Owens Communications Company; PAYPHONE PLUS LLC, an Oklahoma limited liability company; REDLANDS COMMUNICATIONS, INC., an Oklahoma corporation; and SOONER TELECOMMUNICATIONS, INC., an Oklahoma corporation; Plaintiffs - Appellees, v. SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri corporation, Defendant - Appellant.

Subsequent History: [1]** As Corrected September 17, 2002.

US Supreme Court certiorari denied by *Southwestern Bell Tel. Co. v. Telecor Communs., Inc., 538 U.S. 1031, 123 S. Ct. 2073, 155 L. Ed. 2d 1060, 2003 U.S. LEXIS 3703 (May 19, 2003)*

Prior History: Appeal from the United States District Court for the Western District of Oklahoma. (D.C. No. 98-CV-1249-C).

[Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 2000 U.S. Dist. LEXIS 23923 (W.D. Okla., Mar. 1, 2000)](#)

Disposition: Affirmed.

Core Terms

payphone, contracts, relevant market, district court, consumers, interchangeability, antitrust, damages, anti-competitive, monopsony, anti trust law, payphone, cell phone, end-user, argues, Plaintiffs', customers, summary judgment, prices, award damages, monopoly, buyers, immunity, sellers, regulation, Telephone, state action, lockup, monopolization, instructions

LexisNexis® Headnotes

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

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

HN1[] **Market Definition, Relevant Market**

The first step in analyzing a monopoly claim is to define the relevant market in which the defendant was operating. The relevant market inquiry has two components: geographic market and product market.

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

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

HN2[] **Market Definition, Relevant Market**

The market power query begins with the determination of the relevant market, that is, a market relevant to the legal issue before the court. The market which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced--price, use and qualities considered. A court also looks to the geographic reach of the group of sales or sellers to determine the relevant market. Further, because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes.

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

HN3[] **Regulated Practices, Market Definition**

To define a market in product and geographic terms in an antitrust action is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.

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

HN4[] **Regulated Practices, Market Definition**

By defining the relevant market in an antitrust action, a court identifies the firms that compete with each other. Plugged into the market power inquiry, the court may then determine whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.

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

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Regulated Practices, Market Definition**

It is well settled that defining the relevant market in an antitrust action is an issue of fact, but an appellate court reviews a district court's grant of summary judgment on that issue de novo.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] **Summary Judgment, Burdens of Proof**

Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.

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

HN7[] **Regulated Practices, Market Definition**

The basic relevant product market test in an antitrust action is "reasonable interchangeability." Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. A market is elastic if demand goes down as price goes up. A market is cross-elastic if rising prices for product A cause consumers to switch to product B.

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

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

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

HN8[] **Relevant Market, Product Market Definition**

In determining the relevant product market in an antitrust case, reasonable interchangeability does not depend upon product similarity. Many courts have addressed the situation where two or more products or services have similar functions but different physical characteristics. These cases make clear that the relevant inquiry remains whether the differences in type render the products poor substitutes and that the resolution of this question depends on the evidence in the case.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

"Monopsony" is a condition of the market in which there is but one buyer for a particular commodity.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Remedies, Damages**

The United States Supreme Court's treatment of monopsony cases strongly suggests that suppliers are protected by antitrust laws even when the anti-competitive activity does not harm end-users. It is clear that the anti-competitive buyer's price-fixing agreement is the sort of combination condemned by the Sherman Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers. The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

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

HN11[] Regulated Practices, Market Definition

Antitrust laws apply not only to restraints on output markets, but to input markets as well, including both labor and input commodities.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

While antitrust prosecutions for restraints on input markets are relatively rare, this is explained by the fact that restraints on input markets arise only in the unusual circumstance of an effective monopsony--a single purchaser, or a group of purchasers acting in concert. And monopsony in turn arises only when the resource is uniquely valuable in its current use, so that even if the price is depressed by monopsony, sellers are unable to find alternative buyers.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

Even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN14[] Standards of Review, Abuse of Discretion

Admissibility of evidence under the Noerr-Pennington doctrine is reviewed for abuse of discretion.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN15[] **Antitrust & Trade Law, Exemptions & Immunities**

The Noerr-Pennington doctrine is rooted in the *First Amendment*. The Noerr-Pennington doctrine provides general immunity from antitrust liability under the Sherman Act to private parties who petition the government for redress of grievances, notwithstanding the anti-competitive purpose or consequences of their petitions. However, Noerr-Pennington does not bar the introduction of all evidence within its scope. It would of course still be within the province of the trial judge to admit this evidence, if he deems it probative and not unduly prejudicial, if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN16[] **Exemptions & Immunities, Parker State Action Doctrine**

State action immunity in an antitrust action is a question of law, which an appellate court reviews de novo.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN17[] **Exemptions & Immunities, Parker State Action Doctrine**

In the antitrust context, state-action immunity is disfavored, much as are repeals by implication.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN18[] **Exemptions & Immunities, Parker State Action Doctrine**

Private parties regulated by the state must show two elements in order to demonstrate that they are entitled to state action immunity in an antitrust action. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the state. To meet the first prong, the state policy does not have to compel the private party to engage in anticompetitive conduct. If the state policy expressly permits, but does not compel, anticompetitive conduct, the private party may still qualify for state action immunity. The second prong mandates that the state exercise ultimate control over the challenged anticompetitive conduct.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN19[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's refusal to give a particular instruction for abuse of discretion. The appellate court does not decide whether the instructions are flawless, but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to decide those issues. So long as the charge as a whole adequately states the law, the refusal to give a particular requested instruction is not grounds for reversal.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

HN20[] **Jury Trials, Jury Instructions**

An appellate court applies plain error review where defendants cite their own proffered jury instructions, but do not indicate a place in the record in which they objected to the trial court's instruction.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN21[] **Judgments, Relief From Judgments**

A jury's damages award must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN22[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's disposition of a motion for remittitur or new trial on damages for a manifest abuse of discretion. In order to establish an abuse of discretion, the party that moved unsuccessfully for a new trial on the basis of an excessive verdict carries the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence. In applying the abuse of discretion standard, the appellate court is also mindful that absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN23[] **Remedies, Damages**

Even where a "persuasive" explanation of a jury's damages award indicates an award contrary to law, the possibility of a proper explanation, however slight the chance, will suffice to sustain the damages award.

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

HN24[] **Private Actions, Remedies**

In an antitrust case, future damages may be recovered for past misconduct but not for future misconduct.

Civil Procedure > Remedies > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN25[] **Civil Procedure, Remedies**

The standard against which a district court's order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct.

Counsel: Donald L. Flexner, Boies, Schiller & Flexner LLP, Washington D.C. (D. Kent Meyers and Richard C. Ford, Crowe & Dunlevy, Oklahoma City, OK, Scott E. Gant, Boies, Schiller & Flexner LLP, Washington, D.C., and David A. Barrett, Boies, Schiller & Flexner LLP, New York, NY, with him on the briefs), for Defendant-Appellant.

Robert D. Edinger (Jonathan E. Miller and Linda G. Kaufmann, with him on the briefs), Edinger & Blakley, P.C., Oklahoma City, OK, for Plaintiffs-Appellees.

Judges: Before EBEL and KELLY, Circuit Judges, and WINDER, * Senior District Judge. KELLY, Circuit Judge, dissenting.

Opinion by: EBEL

Opinion

[*1128] **EBEL**, Circuit Judge.

* The Honorable David K. Winder, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

Southwestern Bell Telephone Company appeals from a jury verdict finding it guilty of monopolistic behavior in violation of Oklahoma state law and assessing damages of over $ 7 million, trebled to over $ 20 million. At issue is Southwestern Bell's domination of the Oklahoma pay phone market, a **[**2]** market it legally monopolized, under the oversight of the Oklahoma Corporation Commission (OCC), until November 1996. The plaintiffs are nine independent pay phone service providers whose efforts to compete with Southwestern Bell succeeded only in whittling down the latter's market share to roughly 80 percent after two years of competition. On appeal, Southwestern Bell challenges several aspects of the district court's rulings, most notably its definition of the relevant market. While we do not embrace the district court's analysis in its entirety, we nevertheless believe that the challenged rulings were proper, and we therefore **AFFIRM**.

BACKGROUND

In the decades up until November 1996, Southwestern Bell enjoyed a legal monopoly over the provision of pay phone services in the state of Oklahoma. As early as 1990, the Oklahoma legislature had decided to move from monopoly to competition in this market, but it entrusted the implementation of that transition to the OCC, which failed to end Southwestern Bell's monopoly until passage of the 1996 Telecommunications Act, *47 U.S.C. § 276(b)*, forced its hand. After a four-month rulemaking proceeding, the OCC **[**3]** authorized new pay phone providers in November 1996, subject to certain regulatory requirements.

Pay phone service providers ("PSPs") such as Southwestern Bell and the Plaintiffs typically do not own the land on which the pay phones are located. Rather, they make a deal with the party that owns the land ("location owner"): the PSP gets permission to place the pay phone on the location, and in exchange the location owner gets a commission, typically a percentage of the phone's receipts.

The Plaintiffs' evidence at trial showed that, prior to the Oklahoma legislature's 1990 decision to end its pay phone monopoly, Southwestern Bell had projected that it would lose 77 percent of its pay phone revenues in the first year of open competition. (The facts discussed here were disputed at trial and are presented in the light most favorable to the Plaintiffs.) In response, in 1991 Southwestern Bell undertook an intentional campaign to make entry into the Oklahoma pay phone market more difficult by attempting to secure every possible pay phone location through long-term contracts between Southwestern Bell and the location owners. This "lock up" campaign continued through 1996 and **[*1129]** accelerated **[**4]** dramatically with what Southwestern Bell termed "the Blitz" in 1995-96 on the eve of the coming of competition.

The contracts contained several provisions designed to freeze out Southwestern Bell's competitors, including automatic renewal terms and stiff penalties for early termination. [1] In addition to the lock up, Southwestern Bell employed several other measures to freeze out competition, including erecting a bureaucratic maze to discourage location owners who tried to terminate their contract, failing to remove its pay phones when requested to do so, and damaging the pay phone location when removing a phone. [2]

[5]** Southwestern Bell's anti-competitive actions were highly successful. Although its competitors offered better commissions to location owners and better phones at cheaper rates to customers, at the end of the second year of

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[1] According to one witness, early termination fees could be as high as $ 7,200 on a location that might be paying the location owner only about $ 200 a year in commissions.

[2] By way of further example, many of Southwestern Bell's contracts called for a 50% reduction in the commissions payable by Southwestern Bell to the location owner if the location owner allowed competitive pay phones on its location alongside Southwestern Bell's pay phones. This was tantamount to precluding competitive pay phones because, in the unlikely event that the additional phones would increase total revenues for that location (there was evidence that Southwestern Bell would usually already have placed the optimal number of phones at a given location), the location owner would receive a much smaller percentage of those revenues. The damage Southwestern Bell did to the property when withdrawing its phones also made the property less attractive to providers of competitive pay phones.

competition Southwestern Bell retained more than 87 percent of the market, with no single competitor above 2.4 percent.

The Plaintiffs filed suit against Southwestern Bell claiming violations of federal and state ***antitrust law***. The district court issued four different written decisions, two pre-trial and two post-verdict. The first order, filed March 1, 2000, dealt with the relevant product market pursuant to cross-motions for summary judgment. The Plaintiffs argued that the relevant market was the provision of pay phone facilities and services to location owners. Southwestern Bell argued that the product market should be evaluated from the viewpoint of the end-user of the phone services and should therefore include both pay phones and cell phones, which Southwestern Bell argued were reasonably interchangeable at the end-user level. The district court did not address whether the market should be evaluated at the level of the location owners or at the level of the **[**6]** end-users, but it did rule that pay phones and cell phones were not reasonably interchangeable, and thus, that the market should be limited to pay phones. Ultimately, the jury instructions submitted by the district court defined the relevant market simply as "the provision of pay phone and pay phone related services" without differentiating whether it should be evaluated at the level of the location owners or at the level of the end-users. Southwestern Bell does not claim to have objected to this instruction, so it is clear that the parties allowed the jury to determine which set of customers should be used in evaluating monopoly power.

The second order, filed March 23, 2000, addressed various motions in limine, none at issue on appeal. The third order, filed January 31, 2001 (after the jury found Southwestern Bell liable for state antitrust violations but not liable for federal antitrust violations), rejected Southwestern Bell's motion for a new trial on the issue of **[*1130]** damages. The central contention addressed in that order was whether the damages awarded were based improperly on anticipated future illegal conduct. The fourth order, also filed January 31, 2001, rejected Southwestern **[**7]** Bell's motion for judgment as a matter of law or new trial. That motion argued, inter alia, that the jury improperly was allowed to consider Southwestern Bell's lobbying efforts before the OCC and its pre-November 1996 conduct, that the verdict failed to account for the temporary contractual nature of Southwestern Bell's market power, and that the verdict violated the state action doctrine. Southwestern Bell appeals the district court's resolution of all of these issues.

DISCUSSION

The district court had jurisdiction over the federal antitrust claims pursuant to *28 U.S.C. § 1337* and over the state antitrust claims pursuant to *28 U.S.C. § 1367*. We have jurisdiction under *28 U.S.C. § 1291*.

A. Relevant Product Market

HN1[] The first step in analyzing a monopoly claim is to define the relevant market in which the defendant was operating. See *Full Draw Prods. v Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999)*; *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 (10th Cir. 1994)*. The relevant market inquiry has two components: geographic market and product market. **[**8]** *Full Draw Prods., 182 F.3d at 756*. Only the latter is at issue in this appeal. Southwestern Bell contends that the relevant product market should include cell phones as well as pay phones, while the Plaintiffs argue that the market is limited to pay phones. The parties' underlying interests in this regard are conflicting: Southwestern Bell wishes to define the market as broadly as possible (which would make it more difficult for a jury to find that it exercised monopoly power), and the Plaintiffs wish to define the market as narrowly as possible (which would make it easier to find monopoly power). The parties filed cross-motions for summary judgment on market definition, and the court granted the Plaintiffs' motion, ruling that cell phones were not part of the relevant market.

We have previously explained the relevant product market analysis as follows:

> ***HN2***[] The market power query begins with the determination of the relevant market, that is, a market relevant to the legal issue before the court. The market which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That

> market **[**9]** is composed of products that have reasonable interchangeability for the purposes for which they are produced--price, use and qualities considered. We also look to the geographic reach of the group of sales or sellers to determine the relevant market. Further, because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes.
>
>> ***HN3***[] To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.
>
> Although these concepts provide a shorthand for rule of reason analysis, we **[*1131]** would be amiss to imply their application is necessarily facile. Each may be problematic:
>
>> There is no subject in ***antitrust law*** more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify--for **[**10]** working purposes--the very complex economic interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes. . . .
>
> ***HN4***[] By defining the relevant market, however, we identify the firms that compete with each other. Plugged into the market power inquiry, we may then determine whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.

SCFC ILC, Inc., 36 F.3d at 966 (internal quotation marks, citations, and alterations omitted). ***HN5***[] It is well settled that defining the relevant market is an issue of fact, *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*, but we review the district court's grant of summary judgment on that issue de novo. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999)*.

Most of the district court's discussion of the relevant product market issue was devoted to explaining why Southwestern Bell's submissions on this issue (arguing that the relevant market included cell phones) were unpersuasive. However, **[**11]** although the inadequacies of Southwestern Bell's relevant market evidence do support the district court's denial of Southwestern Bell's motion for summary judgment on the relevant market issue (which denial Southwestern Bell does not challenge on appeal), they do not support the court's grant of summary judgment on the issue in favor of the Plaintiffs. Because the Plaintiffs had the burden of proof on the relevant market issue, *Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558, 1569 n.15 (10th Cir. 1991)*, the Plaintiffs were obligated to make an affirmative showing of their proposed relevant market sufficient to sustain a reasonable jury finding. See *McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998)* ***HN6***[] ("Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment." (internal quotation marks omitted)).

The district court's belief that the Plaintiffs had satisfied their burden was based on its **[**12]** view that certain consumers would not purchase cell phones no matter how much Southwestern Bell raised the rates for pay phone services. We do not believe that such an assertion, even assumed to be true, justifies excluding cell phones from the relevant product market (assuming for the moment that the product market has to be evaluated at the end-user level).

HN7[] The basic relevant product market test is "reasonable interchangeability." *SCFC, 36 F.3d at 966*. Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *Westman Comm'n Co., 796 F.2d at 1221*. A market is elastic if demand goes down as price goes up. A market is cross-elastic if rising prices for product *A* cause consumers to switch to product *B*.

The district court held that, because "common sense" suggests that there exist some people (namely, poor people who use pay phones because they have no phone **[*1132]** service at home or work) who would not switch to cell phones if pay phone prices increased, therefore Southwestern Bell's definition **[**13]** of the relevant product market to include cell phones was illogical. The problem with that reasoning is that neither the court below nor the parties on appeal cite anything in the record to support a conclusion that the number of "non-cross-elastic" pay phone users was significant enough to render the market as a whole non-cross-elastic. (Indeed, neither the court below nor the parties in the briefing point to anything in the record to support the district court's conclusion that non-cross-elastic pay phone users exist at all, although surely some must.) Thus, this is not a case where the summary judgment movant (the Plaintiffs) alleged record-supported facts which the non-movant (Southwestern Bell) failed to rebut.

Therefore, the district court's belief that there are non-cross-elastic pay phone users does not provide a sufficient basis for granting summary judgment in favor of the Plaintiffs as to the scope of the relevant market. The remainder of the district court's stated basis for its ruling is equally unavailing:

> Although cell phones and pay phones perform similar functions, these items are not reasonably interchangeable. Local calls may be made on a pay phone for approximately **[**14]** thirty-five cents. A pay phone user does not need to make the financial or contractual commitment associated with cellular telephone service. A pay phone is stationary and available to anyone in the vicinity. In contrast, a cell phone is available only to those in possession of such equipment.

HN8[] Reasonable interchangeability does not depend upon product similarity, a point well summarized in the ABA's treatise on ***antitrust law***:

> Many courts have addressed the situation where two or more products or services have similar functions but different physical characteristics. These cases make clear that the relevant inquiry remains whether the differences in type render the products poor substitutes and that the resolution of this question depends on the evidence in the case. In du Pont, for example, the Court concluded that all flexible wrappings belonged in the same market, notwithstanding differences in burst strength, gas permeability, grease resistance, and other factors. The Court based its conclusion upon the extensive competition that existed between cellophane and other pliable wrappings, despite cellophane's physical advantages.

1 ABA Section of ***Antitrust Law***, **[**15]** ***Antitrust Law*** Developments 508 (4th ed. 1997). Although the product differences cited by the court below are all reasons that the jury might rely upon were it to find that the relevant market did not include cell phones, we cannot agree that such differences support summary judgment on this factual issue.

However, regardless of the interchangeability of pay phones and cell phones at the end-user level, there is no doubt that pay phones and cell phones are not interchangeable at the location-owner level, and that is the level where the Plaintiffs argued that Southwestern Bell has monopolized competition. In other words, the Plaintiffs argue that Southwestern Bell's interchangeability argument is wrongly directed at showing that cell phones and pay phones are interchangeable for end-users, but that is not the market where the Plaintiffs are complaining of Southwestern Bell's anti-competitive behavior. Rather, it is the location owners who define the market where the anti-competitive behavior took place - that is, the Plaintiff's claim that they compete with Southwestern Bell **[*1133]** for locations upon which to place their pay phones, and that is the market Southwestern Bell has monopolized.

[16]** Southwestern Bell insists that, despite the fact that it competes with the Plaintiffs in supplying pay phones to location owners, the end-user market for telephone services must still be considered. In support of this assertion, Southwestern Bell first argues that "market power must be identified from [the consumer's] perspective." The only support Southwestern Bell offers for this assertion is *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. But du Pont does not support the proposition for which it is cited; the Court there merely stated that "in considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal." *Id. at 395* (internal quotation marks omitted). The reference to consumers makes perfect sense in du Pont given that the market at issue (sale of cellophane wrap and other flexible wrappings) indisputably was a consumer market. Although Southwestern **[**17]** Bell is correct that antitrust laws were "especially intended to serve consumers," that hardly suffices to prove that a monopolist may act with impunity so long as end-use consumer prices are unaffected. And, in any event, the Plaintiffs' antitrust theory was that the location owners were consumers of the placement of pay phone facilities on their locations, and that the price for such location placements was affected by Southwestern Bell's monopolistic conduct.

Southwestern Bell also argues that the relevant market should include the end-user market (and thus include cell phones) because pay phone service providers like Southwestern Bell are properly viewed as buyers rather than sellers in their relationships to location owners. That is, Southwestern Bell argues that the location owners are not "customers" of Southwestern Bell at all; Southwestern Bell argues that it is the customer of the location owners. [3]

[18]** Thus, Southwestern Bell attempts to characterize this action as a "monopsony" claim. [4] A monopsony, Southwestern Bell argues, is not actionable unless it "injures consumers by forcing up the price of the end product. Where the risk of that happening is slight or nonexistent, however, monopsony power per se does not create an antitrust concern." *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995)*. Thus, because the end-users' ability to switch from pay phones to cell phones prevented them from being harmed by Southwestern Bell's monopsony, [5] Southwestern Bell contends that its conduct is not actionable.

On its merits, **[**19]** Southwestern Bell's monopsony argument is unpersuasive. ***HN10***[] The **[*1134]** Supreme Court's treatment of monopsony cases strongly suggests that suppliers (under Southwestern Bell's theory of the market, the location owners) are protected by antitrust laws even when the anti-competitive activity does not harm end-users. In its leading monopsony case, the Supreme Court stated:

> It is clear that the [anti-competitive buyer's price-fixing] agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers.
>
> . . . .
>
> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-36, 92 L. Ed. 1328, 68 S. Ct. 996 (1948) (citations omitted). In Mandeville Island **[**20]** Farms, the Court held that the plaintiff sugar beet growers had stated a valid monopsony claim under § 2 of the Sherman Act against a sugar beet buyer who colluded with other buyers to pay uniform prices for beets. Significantly, as the two dissenting justices observed, the plaintiffs' complaint did not allege that the defendants' actions affected end-user prices. *Id. at 247-48* (Jackson, J., dissenting).

Tenth Circuit case law also appears to reject the notion that a monopsony plaintiff must prove end-user impact. In *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951 (10th Cir. 1990)*, we rejected a monopsony

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[3] The contracts themselves do not establish whether Southwestern Bell is more properly viewed as the buyer or seller, providing simply that the location owner, in exchange for prescribed commission payments, "hereby grants SWBT the right to install and maintain SWBT public pay telephone(s) and associated equipment . . . at the location specified herein," and that the phone remains the property of Southwestern Bell during the contract period.

[4] ***HN9***[] "Monopsony" is a "condition of the market in which there is but one buyer for a particular commodity." Black's Law Dictionary 1007 (6th ed. 1990).

[5] As stated earlier, at least on this record, the Plaintiffs have not yet demonstrated that cell phones and pay phones are not reasonably interchangeable at the end-user level.

defendant's argument that injury to sellers without injury to end-users is not cognizable antitrust injury. *Id. at 962*; cf. *Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 579-80 (10th Cir. 1961)* ("The prolonged existence of a price-fixing conspiracy [by buyers] in an integrated industry such as ours is proof of damages to those [parties] whose prices are directly affected thereby. In that respect, our case is noticeably akin to *Mandeville Island Farms v. American Crystal Sugar, 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996*. **[**21]** "). This approach is consistent with the case law of other circuits. See *Khan v. State Oil Co., 93 F.3d 1358, 1361 (7th Cir. 1996)* (Posner, J.) ("This is a form of monopsony pricing, which is analytically the same as monopoly or cartel pricing and so treated by the law. E.g., Mandeville Island . . . ." (dicta)), vacated on other grounds, *522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*; *United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990)* ("It is theoretically possible to have a middleman who is a monopolist upstream but not downstream . . . .").

An especially insightful analysis of relevant market analysis in monopsony cases comes from the Second Circuit. In *Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001)*, the plaintiffs were managerial, professional, and technical employees who brought a Sherman Act § 1 suit against fourteen major oil companies, alleging that the companies shared information about, and thereby artificially depressed, the salaries paid to such classes of employees. *Id. at 195*. The relevant market issue in Todd was slightly different than that at issue here, but the language used by the **[**22]** court in addressing that issue is directly relevant here. In Todd, the district court had held that the market proposed by the plaintiffs was over-inclusive to the extent that the plaintiffs had failed to show that the various **[*1135]** types of employees within the asserted relevant market (accountants, lawyers, engineers, etc.) were interchangeable with one another. *Id. at 201*. The Second Circuit rejected this conclusion:

> The market is not the market of competing sellers [the employees selling their services] but of competing buyers [the companies buying these services]. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes. A greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question.
>
> . . . . Plaintiff is right to urge that the proper focus is . . . the commonality and interchangeability of the buyers, not the commonality or interchangeability of the sellers. The question is not the interchangeability of, for example, lawyers with engineers. At issue is the interchangeability, from the perspective of a [managerial, professional, or technical] employee, **[**23]** of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry.

Id. at 202 (citations omitted).

Opinions from other courts, as well as the writings of economists, reinforce this view. As Judge Wald summarized in a dissenting opinion:

> The Supreme Court has clearly held that ***HN11***[] antitrust laws apply not only to restraints on output markets, but to input markets as well, including both labor, [citation omitted], and input commodities, e.g., [Mandeville Island Farms] (sugar refiners' agreement to fix input prices paid for sugar beets violates Sherman Act, which "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but instead "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated"). See also *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (Sherman Act prohibits any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" and agreements **[**24]** to make "purchases [of inputs] at or under the market are one species of [unlawful] price-fixing"); *American Tobacco Co. v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)* (applying ***antitrust law*** to restraints on input market for tobacco as well as output market for tobacco products); *Swift & Co. v. United States, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905)* (same, for livestock inputs and meat outputs). Cf. *National Macaroni Mfr's Ass'n v. Federal Trade Comm'n, 345 F.2d 421, 426 (7th Cir. 1965)* (purpose and effect of agreement to fix composition of macaroni product was to depress input price of semolina, thereby violating Sherman Act).

> Economists too have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets. See, e.g., ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 36-43 (1993); see also *Mandeville Farms, 334 U.S. at 241-44* (describing how restraints on input market adversely affect output market). ***HN12***[] While antitrust **[**25]** prosecutions for restraints on input markets are relatively rare, this is explained by the fact that restraints on input markets arise only in the unusual circumstance of an effective monopsony--a single purchaser, or a group of purchasers acting in concert. And monopsony **[*1136]** in turn arises only when the resource is uniquely valuable in its current use, so that even if the price is depressed by monopsony, sellers are unable to find alternative buyers. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 150 (1981) (monopsony can arise when "resources have substantially greater value in some uses than in others" so the "sole purchaser . . . will . . . be able to force the [seller] . . . to accept a monopsony price"); BLAIR & HARRISON, supra, at 43-44 (inelasticity of supply facilitates collusive monopsony). Thus, for example, in the Mandeville Island Farms case, the sugar refiners' monopsonistic price-fixing scheme was effective because growers could not easily find other buyers or profitably switch to other crops when refiners conspired to fix the price of sugar beets. See *334 U.S. at 240-42*. Nonetheless, according to the economists, there is a dead-weight loss **[**26]** associated with imposition of monopsony pricing restraints. Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products. See, e.g., HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ***ANTITRUST LAW*** § 1.2, at 17-18 (1985); BLAIR & HARRISON, supra, at 42-43, 72. So, ***HN13***[] even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.

Brown v. Pro Football, Inc., 311 U.S. App. D.C. 89, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) (emphasis omitted), aff'd, *518 U.S. 231, 135 L. Ed. 2d 521, 116 S. Ct. 2116 (1996)*. The two district court cases cited by Southwestern Bell - both of which contain language suggesting that harm to end-users is at least a relevant consideration in determining whether a monopsony is actionable under ***antitrust law***, see *Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1203* **[**27]** (stating that, where there is little risk that monopsony "can injure consumers by forcing up the price of the end product . . . monopsony power per se does not create an antitrust concern"); *Addamax Corp. v. Open Software Found., Inc., 888 F. Supp. 274, 280 (D. Mass. 1995)* (noting that "only with control of a downstream market can the monopsonist decrease output and raise prices") - are inadequate to overcome the unmistakable import of the case law cited above.

Accordingly, we affirm the district court's summary judgment ruling excluding cellular phones from the relevant market definition. Location owners are the relevant customers for purposes of locating Southwestern Bell's pay phone facilities, and from the location owners' perspective, cellular phone services and pay phone services are not interchangeable.

B. Noerr-Pennington Doctrine

The district court allowed the Plaintiffs to introduce evidence regarding allegedly misleading statements that Southwestern Bell made to the OCC. Southwestern Bell argues that admission of such evidence violated its *First Amendment* right to petition the government, as embodied in the Noerr-Pennington doctrine. **[**28]** See *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. The district court held, and the Plaintiffs argue on appeal, that the evidence was admissible because it was **[*1137]** offered, not for the improper purpose of showing that Southwestern Bell violated antitrust laws by misleading the OCC, but rather for the proper purpose of supporting the claim that Southwestern Bell acted for an improper monopolistic purpose (namely, showing that the pre-competition campaign to lock up the market in long-term contracts was done for monopolistic purposes). We conclude that the district court's admission of the evidence was not an abuse of discretion. See *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1374 (2d Cir. 1988)* ***HN14***[] (reviewing admissibility of evidence under Noerr-Pennington doctrine for abuse of discretion).

The Plaintiffs argued to the jury at trial that Southwestern Bell, upon realizing that competition was coming soon, engaged in an all-out effort (referred to as the **[**29]** "Blitz") to lock as many location owners as possible into multi-year, automatically renewing contracts with unreasonable termination fees. Southwestern Bell argued that the Blitz was unrelated to the coming of competition, and was instead merely an effort to take advantage of new federal regulations allowing pay phone service providers to choose the long distance provider for the pay phone ("PIC rights"). The OCC, the state agency responsible for pay phone operations, considered ordering a "fresh look" rule that would have given location owners a window of time in which to void their existing contracts with Southwestern Bell in order to enter into a contract with another pay phone service provider. The state attorney general supported the fresh start, viewing it as an efficient alternative to fact-finding to determine whether Southwestern Bell was moving to lock up location owners in long term contracts.

Ultimately, the OCC decided against the fresh look, but during the course of its deliberations it submitted the following interrogatory to Southwestern Bell: "Please state whether Southwestern Bell Telephone is attempting to get all current pay-phone customers to sign a new contract. **[**30]** If so please state the reason." Southwestern Bell replied "No. . . . Southwestern Bell is not attempting to obtain new contracts from all site owners that are currently under contract, nor is Southwestern Bell attempting to obtain contracts from all site owners with whom Southwestern Bell does not have a current contract." In a draft answer to this question not submitted to the OCC, Southwestern Bell had drafted "Southwestern Bell Telephone has strived to secure a contract on all pay phones since 1988." The draft answer went on to say that Southwestern Bell's motivation to obtain long-term contracts was to enable it "to secure the placement long enough to protect the large investment." Southwestern Bell's cross-examination of the witness through whom this evidence was presented (Rick Chamberlain, formerly of the Oklahoma Attorney General's office) suggests that its position was that it was not then "attempting" to get "all" customers to sign a new contract, as some of its existing customers already under contract were not contacted during the "Blitz." In addition to objecting to the admission of the interrogatory response, Southwestern Bell argues generally that Chamberlain's testimony **[**31]** improperly allowed the jury to consider the fact that Southwestern Bell opposed the fresh look proposal.

HN15[] The Noerr-Pennington doctrine is rooted in the *First Amendment*. As we have explained previously, "the Noerr-Pennington doctrine provides general immunity from antitrust liability under the Sherman Act to private parties who petition the government for redress of grievances, notwithstanding the anti-competitive purpose or consequences of their petitions." *Cardtoons, L.C. v. Major **[*1138]** League Baseball Players Assoc., 208 F.3d 885, 894 (10th Cir. 2000)* (en banc). However, Noerr-Pennington does not bar the introduction of all evidence within its scope, as the Supreme Court recognized in footnote three of its Pennington decision: "It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial . . . if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *381 U.S. at 670 n.3*.

Southwestern Bell argued to the trial court prior to introduction of this evidence that, under the Noerr-Pennington doctrine, "what we **[**32]** told the Corporation Commission can't support any inference in the case and ought not come in at all." The district court rejected this argument, expressly relying on Pennington footnote three. After cross-examining Chamberlain, Southwestern Bell requested, and the court immediately issued over the Plaintiffs' objection, the following cautionary instruction to the jury:

> Every citizen, including the plaintiffs and Southwestern Bell, has a right under the Constitution to petition the government and be heard on issues pertaining to rule-making proceedings like that at the Corporation Commission. The exercise of that right is immune from scrutiny under the antitrust laws. Therefore, I instruct you that Southwestern Bell Telephone Company's exercise of its right to petition by participating in rule-making proceedings and advocating any position it chose at the Oklahoma Corporation Commission did not violate the antitrust laws.

Later, the jury was instructed without objection that it may consider the purpose or intent of the anti-competitive act (i.e., the lock up efforts), and its pretextual nature, in assessing its legality. Further, the jury was specifically reminded per **[**33]** jury instruction that Southwestern Bell's communications with the OCC "did not violate the antitrust laws," but that "you may consider this evidence if you find it tends to show the purpose and character of the transactions under scrutiny."

Southwestern Bell argues that introduction of the evidence from the OCC proceedings violated the Noerr-Pennington doctrine because it was offered for the sole purpose of convincing the jury to find an antitrust violation based on Southwestern Bell's interactions with the OCC. The Plaintiffs counter that the evidence was not offered to establish monopolistic liability based upon Southwestern Bell's interactions with the OCC, but rather to show that the "purpose" of the Blitz was to stifle competition, and that the explanation Southwestern Bell offered at trial (that the "Blitz" was to secure PIC rights) was pretextual. The Plaintiffs argue:

> In its opening statement and throughout trial, SWBT attempted to convince the jury that the Blitz was intended to secure 'PIC' long distance rights, not to preempt competition as Plaintiffs alleged. But SWBT's response to the OCC's factual inquiry does not contain any 'PIC' rights explanation for **[**34]** the Blitz. It also contradicted a 'draft' response in which SWBT admitted it had been attempting to get all its customers under contract for years. Finally, it contradicted testimony from SWBT management that, on the eve of competition, SWBT sent contract solicitation letters to all of its Oklahoma customers not already under contract. SWBT's response (and other evidence) proved SWBT's 'PIC' rights justification was pretextual, and the true purpose of the Blitz was predatory.

[*1139] Restated, the Plaintiffs' "purpose" rationale for the use of this evidence is that, if the true impetus for the Blitz had been to secure PIC rights, the Southwestern Bell would not have submitted a misleading response to the OCC interrogatory. Because the draft response suggests that Southwestern Bell was willing to disclose one innocent explanation for its contracting, the argument goes, it follows that Southwestern Bell also would have relied on the innocent PIC explanation if that had been a motivating factor, and the fact that it did not do so tends to prove that the PIC theory was a post-hoc pretext. This rationale for the evidence's admission falls within the scope of Pennington's footnote three. Whether **[**35]** or not the jury would have found the evidence persuasive on this point, such an inference certainly would have been permissible.

Assuming that there is some proper purpose for admitting Southwestern Bell's interrogatory response and draft response (along with testimony regarding the context of that exchange), Southwestern Bell argues that the evidence still was inadmissible under Pennington footnote three because the probative value did not outweigh the prejudice. We disagree. In light of the legitimate purpose underlying the evidence's admission and the cautionary jury instruction given by the district court, admission of the evidence was not an abuse of discretion. [6]

[**36] C. State Action Doctrine

Southwestern Bell argues that "the state action doctrine (or analogous principles of state law) bars any use of SWBT's pre-November 1996 contracts to prove antitrust violations." The district court rejected Southwestern Bell's state action arguments on the ground that the doctrine applies only to federal antitrust claims, not state antitrust claims for which Southwestern Bell was found liable here. ***HN16***[] State action immunity is a question of law, which we review de novo. See *Trigen-Okla. City Energy Corp. v. Okla. Gas & Elec. Co., 244 F.3d 1220, 1225* (10th Cir.), cert. denied, *534 U.S. 993, 151 L. Ed. 2d 377, 122 S. Ct. 459 (2001)*. The Supreme Court has stated ***HN17***[] in the antitrust context that "state-action immunity is disfavored, much as are repeals by implication." *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 623, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*.

We decline to address whether the state action doctrine applies to state antitrust claims. Even assuming that it does, the doctrine's requirements are not met under the circumstances of this case. ***HN18***[] Private parties regulated by the state must show two elements in order **[**37]** to demonstrate that they are entitled to state action

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[6] Southwestern Bell's challenges to the other aspects of Chamberlain's testimony fall flat, as the only testimony potentially problematic under Noerr-Pennington - the fact that Southwestern Bell opposed the fresh look proposal - was elicited by Southwestern Bell during cross-examination. See *Whiteley v. OKC Corp., 719 F.2d 1051, 1055 (10th Cir. 1983)*.

immunity. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the State." *Trigen, 244 F.3d at 1226* (internal quotation marks omitted). To meet the first prong, "the state policy does not have to compel the private party to engage in anticompetitive conduct. If the state policy expressly permits, but does not compel, anticompetitive conduct, the private party may still qualify for state action immunity." Id. (emphasis added). Here, it is clear that no state policy expressly permitted Southwestern Bell to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie **[*1140]** that competition. As the Plaintiffs note, the Oklahoma legislature's 1990 decision to bring competition to the pay phone market (a decision not implemented until 1996) suggests an opposite state policy. The second prong "mandates that the State exercise ultimate control over the challenged anticompetitive conduct." Id. (internal quotation marks omitted). Here, the state **[**38]** likely was not even aware of the full extent of Southwestern Bell's lock up conduct, let alone exercising ultimate control over it. The state action immunity doctrine does not apply to this case. [7]

Southwestern Bell offers **[**39]** a cursory alternative argument that the Plaintiffs' claims are barred by the exclusivity of the OCC's jurisdiction. The only authority cited in support of this argument is Trigen. However, Trigen is obviously distinguishable. All of the state antitrust claims in Trigen involved a challenge to rates charged by a regulated utility with a continuing legal monopoly. *244 F.3d at 1228* (stating that "we construe all of Trigen's state law claims as collateral attacks on [Oklahoma Gas & Electric] filed rates"). The rates charged by the utility were determined by the OCC, not by the utility. Id. Trigen's conclusion that a challenge to the state-mandated rates charged by the utility amounted to an unlawful collateral attack was derived from the Oklahoma Constitution's requirement that an "appeal from an order of the OCC 'affecting the rates, charges, services, practices, rules or regulations of public utilities . . . shall be to the Supreme Court [of Oklahoma] only . . . .' *Okla. Const. art IX, § 20*." *Id. at 1228* (emphasis added, ellipses in original).

The exclusive jurisdiction of the OCC is not implicated here because, unlike the plaintiff **[**40]** in Trigen, the Plaintiffs are not challenging any order of the OCC, or any action by Southwestern Bell mandated by an order of the OCC. The OCC's refusal to impose the fresh look does not imply that it was endorsing Southwestern Bell's lock up campaign. To the contrary, the record suggests that the OCC's ignorance of the lock up campaign's scope may have contributed to its decision not to impose the fresh look. Although Southwestern Bell asserts that "plaintiffs chose not to appeal to the Oklahoma Supreme Court" the OCC's decision not to adopt the fresh look, Southwestern Bell fails to offer any basis for concluding that such an appeal from agency inaction was available. See *Okla. Const. art. 9, § 20*. In any event, the Plaintiffs are not complaining about anything the OCC did or did not do. They are complaining about anti-competitive unilateral activity by Southwestern Bell that was neither mandated, nor authorized, nor reviewed, nor even known about by the OCC. Accordingly, we conclude that Southwestern Bell's exclusive jurisdiction argument fails.

D. Market Power through Contracts

Southwestern Bell argues that the trial court improperly allowed the jury to **[**41]** consider the multi-year, automatically renewing contracts between Southwestern Bell **[*1141]** and the location owners as evidence of market power. It argues that its contract power was limited because the duration of the contracts from which that power derived was limited; such necessarily temporary control of a market cannot constitute monopoly, it argues. The district court rejected this argument:

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[7] Cf. *Central Telecomm., Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986)*, where the Eighth Circuit rejected a cable provider's argument that "as a matter of law, it could not have possessed monopoly power because [the municipality] regulated price and entry in the cable television business." *Id. at 726*. The court recognized that TCI had the power to raise the price of premium channels without the approval of the municipality and that it "used its entrenched position and . . . various unethical or illegal practices . . . to exclude competition." Id. Of course, in the case before us, Southwestern Bell cannot even claim that its long-term contracts with coercive terms and its anti-competitive "Blitz" were regulated, or even known, by the OCC.

> Defendant bases its argument . . . on assumptions rejected by the jury. First, Defendant argues that entry into the pay phone market is easy. As noted by Plaintiffs, such an argument flies in the face of the testimony of numerous witnesses that Defendant's contract activities had imposed substantial barriers to making a profitable entry into the market. Plaintiffs' argument was bolstered by Defendant's own internal memos reflecting an intent to make it hard for competitors to take customers away from Defendant. Further, the very language of Defendant's contracts evidences a persistent control over the market. Weighing the evidence in favor of Plaintiffs as the Court must, there is clear support that Defendant's intent and the actual effect of the contracts was that they can last forever. Not **[**42]** only did Defendant impose significant restrictions on how the contract could be terminated, it also severely restricted who could terminate a contract. Moreover, Defendant's own internal memos reflect its intent that the contracts never terminated but had anniversary dates. This evidence was sufficient for the jury to find Defendant's contracts were more than temporary or transitory. Finally, the jury was presented evidence that even when Plaintiffs secured a location in which to place a pay phone, Defendant's actions of quoting high termination fees, removing equipment early, or failing to remove equipment, were directed at preventing the switch. Considering this evidence in the light most favorable to Plaintiffs, it is clear the jury acted reasonably in finding Defendant held a monopoly.

On appeal, Southwestern Bell merely reasserts that temporary contract power cannot constitute monopoly power, making no effort to challenge the district court's conclusion that the jury properly could have concluded that the contracts were meant to, and did, have a non-temporary (indeed nearly permanent) effect. That Southwestern Bell presented evidence from which the jury could have reached **[**43]** the contrary conclusion does not warrant reversal.

Southwestern Bell also argues that the district court erred in refusing to issue the following jury instruction:

> If the evidence demonstrates that the defendant's alleged restrictive, exclusionary or predatory conduct will necessarily be temporary, the defendant will not possess the degree of market power required for the monopolization or attempt to monopolize claim. An example of temporary conduct is conduct that is limited by the duration of a contract.

As given, Southwestern Bell argues, the instructions erroneously permitted the jury to premise monopoly liability on contract power, even if the jury did not accept the Plaintiffs' arguments about the non-temporary nature of the contracts.

HN19[] We review the court's refusal to give a particular instruction for abuse of discretion. *Coletti v. Cudd Pressure Control, 165 F.3d 767, 771 (10th Cir. 1999)*. "We do not decide whether the instructions are flawless, but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to decide those issues. So long as the charge as a whole adequately states the law, the refusal **[**44]** to give a particular requested instruction is not grounds for reversal." **[*1142]** Id. (internal quotation marks, citations, and alteration omitted).

Although Southwestern Bell offered its alternative instruction, there is no indication that it objected to the instructions the court did offer. As such, we review the court's instructions for plain error. *United States v. Voss, 82 F.3d 1521, 1530 (10th Cir. 1996)* ***HN20***[] (applying plain error review where "defendants cite their own proffered instructions, [but] have not indicated a place in the record in which they objected to the court's instruction"); *Fed. R. Civ. P. 51* ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

We reject Southwestern Bell's challenge to the instructions, finding that the instructions as a whole were adequate to alert the jury to consider the duration of the effects of any anti-competitive contracts. The jury was told that, in determining "whether any of defendant's practices were predatory or exclusionary," it should **[**45]** consider various factors, including "the duration of any foreclosure of competition caused by [Southwestern Bell's] conduct."

Further, the district court properly rejected Southwestern Bell's proffered instruction, which by listing "conduct that is limited to the duration of the contract" as an example of "temporary conduct," would have misled the jury into believing that any anti-competitive conduct authorized by contract immunizes that conduct from state antitrust scrutiny. That tendered instruction further incorrectly assumed that contracts of any duration, even those contracts here that could be found to be essentially perpetual, should be considered "temporary" and thereby immune from the ***antitrust law***. Thus, the tendered instruction was misleading and incorrect (as well as unnecessary in light of the correct instructions that were given). Thus, refusing to give that instruction was not error. [8]

[46] E. Damages Based on Future Misconduct**

Southwestern Bell argues that the damages awarded below necessarily and impermissibly reflect an award of future damages flowing from future misconduct. The district court rejected this argument:

> Even if Defendant immediately ceased all anti-competitive practices following the verdict, the effects of its prior bad acts would continue. Defendant still holds numerous long-term contracts which affect future competition. There was no suggestion or evidence at trial that those contracts would cease to exist or be terminated by defendant. Additionally, there was evidence of the business growth Plaintiffs would have experienced if allowed to enter a healthy **[*1143]** market when it was newly opened if not for Defendant's conduct.

We agree that the jury's damages award is proper.

At trial, the Plaintiffs' damages model totaled over $ 27 million, while Southwestern Bell's damages model was under $ 1 million. The district court instructed the jury that it "may consider evidence relating to the profits each plaintiff has not received in the past, and will not receive in the future, because of defendant's past unlawful conduct" (emphasis **[**47]** added), and forbade the jury to award purely speculative damages. The jury, per general verdict form not objected to by either party, awarded damages of $ 7,465,450.

Southwestern Bell faces a steep uphill climb in attempting to overturn the jury's damages award. In addressing a challenge to a jury's damages award in an antitrust case, the Supreme Court held that ***HN21***[] the award "must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 566, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*. This court has explained further that:

> ***HN22***[] We review a district court's disposition of a motion for remittitur or new trial on damages for a manifest abuse of discretion. . . .
>
> > In order to establish an abuse of discretion, the party that moved unsuccessfully for a new trial on the basis of an excessive verdict carries the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence. In applying the abuse of discretion standard, we are also mindful that absent an award so excessive **[**48]** or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.

Hynes v. Energy West, Inc., 211 F.3d 1193, 1206 (10th Cir. 2000) (quoting *Campbell v. Bartlett, 975 F.2d 1569, 1577 (10th Cir. 1992))*. We have said that, ***HN23***[] even where a "persuasive" explanation of the jury's damages award indicates an award contrary to law, the possibility of a proper explanation, "however slight the chance," will suffice to sustain the damages award. *United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219, 1228*

[8] Southwestern Bell cites *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683 (10th Cir. 1989)*, as support, but that case by no means forecloses the consideration of contractual activity in determining monopoly liability. In Colorado Interstate Gas, the potential monopolist's market power derived solely from a contract with a fixed expiration date, and the court found this to be an insufficient basis for monopoly liability under the circumstances in light of "the certainty that the market will return to the status quo at a predetermined date and the fact that [the alleged monopolist] has no power to prevent the erosion of its market share." *Id. at 697 n.24*. By contrast, Southwestern Bell's liability was based on a whole system of contracts with exclusionary terms (including provisions that the district court found could cause many of them, in fact, to last forever), as well as an abundance of other anti-competitive conduct.

(10th Cir. 2000) (rejecting defendant's double recovery claim, even though the damages were precisely the sum of the two amounts that could not be aggregated, because "the jury's award was well within the range of proof"). Against this background, Southwestern Bell's damages arguments fall short.

Both parties agree that, HN24[] in an antitrust case, future damages may be recovered for past misconduct but not for future misconduct. The Plaintiffs focus their defense of the **[**49]** judgment on the proposition that the jury could have awarded the damages it did solely by reference to past misconduct. Looking only to the pay phone locations that they allegedly had already lost at the time of trial as a result of Southwestern Bell's monopolistic behavior (1,863 pay phones), the Plaintiffs calculate that the total damages flowing from the deprivation of these 1,863 phones was $ 7,490,187 (roughly $ 35,000 greater than the jury awarded). Of this number, roughly $ 2.74 million is profits lost prior to trial, and the remainder is profits lost after trial as a result of Southwestern Bell's continuing enforcement of its contracts with respect to these 1,863 phones.

Southwestern Bell does not challenge the Plaintiffs' arithmetic, but does contest **[*1144]** the logical underpinnings of their argument. It contends that the future enforcement of past contracts is future misconduct, not past misconduct. The essence of Southwestern Bell's position is this: "Any damages from existing contracts are avoidable, either by SWBT ceasing to enforce unlawful contracts, or by an injunction barring their enforcement." We do not believe that either ground justifies overturning the damages award.

[50]** First, Southwestern Bell contends that damages arising from the future enforcement of the contracts are avoidable because SWBT would stop enforcing "unlawful contracts." Southwestern Bell acknowledges that, as the district court noted, it presented no evidence at trial that it would "cease to enforce" the contracts, but contends on appeal that "it is absurd to require a defendant, arguing that contracts are legal, to tender witnesses to promise that it would not enforce lawful agreements in the future." However, Southwestern Bell never offered in the record any assurance that it would cease to enforce its contracts with location owners. Southwestern Bell suggests that such evidence is unnecessary because the law presumes that the antitrust defendant will obey the law, which compels the conclusion that Southwestern Bell would not enforce unlawful contracts. Southwestern Bell offers no authority, binding or otherwise, suggesting that the presumption of lawful behavior extends to the forfeiture of existing contract rights. Indeed, as the Plaintiffs note, they never sought a ruling on the enforceability of individual contracts, nor would such a ruling be proper in the absence **[**51]** of the thousands of contracting third-party location owners in this litigation. Presumably not all of the location owners would want to terminate their contracts with Southwestern Bell. If Southwestern Bell were to decide unilaterally that it would treat the contracts as null and void, it may expose itself to breach of contract claims by the location owners. This suit was about holding Southwestern Bell accountable to the Plaintiffs for its past monopolistic behavior, and the future enforceability of its contracts vis-a-vis all the location owners was simply not before the court. Under such circumstances, the district court was not obligated to assume that Southwestern Bell would voluntarily terminate its contracts with location owners.

Second, Southwestern Bell argues that the district court erred by upholding damages based upon future enforcement of past contracts rather than entering an injunction forbidding Southwestern Bell to enforce its contracts. As an initial matter, Southwestern Bell does not indicate that it requested or consented to such an injunction either before or after the jury decided the damages issue. Even assuming that the possibility of injunctive relief was **[**52]** raised before the district court, Southwestern Bell offers no support for its position that the possibility of issuing a contract-voiding injunction renders damages based upon continuing enforcement of the contracts improper as a matter of law. Neither of the cases cited by Southwestern Bell supports such a proposition. National Society of Professional Engineers v. United States, 435 U.S. 679, 697-98, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978), addressed the quite different question of whether a court could injunctively limit an antitrust defendant's free speech rights. The interplay between the money damages for future action and the availability of injunctive relief was not even remotely implicated. The same may be said of the district court case cited by Southwestern Bell, Board of Regents v. NCAA, 601 F. Supp. 307 (W.D. Okla. 1984). The case is **[*1145]** relevant only in that it provides an example of a decision to enjoin the enforcement of contracts found to violate the antitrust laws. See id. at 308. Southwestern Bell offers no relevant authority in support of its argument that the possibility of a contract-avoiding injunction forecloses **[**53]** the availability of damages based on future enforcement of continuing contracts. We perceive no justification for creating such a rule, and therefore reject Southwestern Bell's argument.

As the Supreme Court recognized in National Society of Professional Engineers, *HN25*[] "the standard against which the [district court's] order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *435 U.S. at 698*. There is no reason to doubt that the jury's damages award did just that.

CONCLUSION

The judgment below is **AFFIRMED**. [9]

Dissent by: KELLY

Dissent

KELLY, Circuit Judge, dissenting.

I would reverse on three grounds and respectfully dissent. In my view, the district court erred (1) by defining the relevant market on summary judgment, (2) in allowing the jury to base antitrust liability on contracts that were subject to OCC regulation and thereby immune from collateral attack under the state **[**54]** action and exclusive jurisdiction doctrines, and (3) in allowing damages for future enforcement of contracts that are necessarily void as against public policy under the jury's interpretation of the evidence.

1. Defining the Product Market on Summary Judgment.

Plaintiffs prevailed upon their state-law monopolization and restraint of trade claims, [1] which require proof of a relevant market. "A relevant market is determined by consideration of two elements: (1) A relevant *geographic*

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[9] All outstanding motions are denied.

[1] *Okla. Stat. Ann. tit. 79, § 203* provides in pertinent part:

> A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.
>
> B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.
>
> . . . .
>
> D. As used in this section:
>
> 1. "Monopolize" means:
>
> a. the possession of monopoly power in the relevant market, and
>
> b. the willful acquisition or maintenance of that power by exclusionary conduct as distinguished from growth or development as a consequence of a superior product and/or service, business acumen, or historic accident;
>
> 2. "Monopoly power" means the power to control market prices or exclude competition;
>
> . . . .

market; that is, the geographical territorial area involved; and (2) a relevant *product* market-the type or area of goods or services in which the product which is subject to the restraint effectively competes." *Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, 587 P.2d 1360, 1364 (Okla. 1978)* (italics in original). Despite genuine issues of material fact, the district court granted the Plaintiffs' motion for summary judgment on relevant product market. The court defined the relevant market "as the provision of public pay phones and related pay phone services for the territory in Oklahoma in which SWBT operates as a Local Exchange Carrier." Aplt. App. 2149. **[*1146]** It did so on the strength of **[**55]** its holding that SWBT's expert's conclusion concerning the interchangeability of pay phones and cell phones was "simply unreasonable given the facts in the record." Id.

[56]** The district court incorporated its summary judgment ruling in its jury instructions defining the relevant market for the restraint of trade and monopoly claims. Aplt. App. 3470, 3483, 3500. According to this court, "the parties allowed the jury to determine which set of customers should be used in evaluating monopoly power," the pay-phone location owners or the end-users (consumers) of pay-phone services. [2] Ct. Op. at 6.

We readily recognize that the district court could not have properly granted summary judgment on whether the relevant market includes cell phones as well as pay phones. See *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468-69, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* **[**57]** (non-movant in antitrust case need only prove its inferences are reasonable, as opposed to "economically senseless"). Equally problematic is the district court's exclusion of SWBT's expert testimony on the product market issue without benefit of a Daubert analysis. See *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*; see also *United States v. Velarde, 214 F.3d 1204, 1209 (10th Cir. 2000)* (The [district] court must, on the record, make some kind of reliability determination.") (emphasis in original). Yet this court concludes that "regardless of the interchangeability of pay phones and cell phones at the end-user level, there is no doubt that pay phones and cell phones are not interchangeable at the location-owner level, and that is the level where the Plaintiffs argued that Southwestern Bell has monopolized competition." Ct. Op. at 12; see also *id. at 20*. Without question, the various "levels" of distribution for pay-phone services are implicated.

There is no dispute that defining the relevant market is a factual matter normally entrusted to the trier of fact, here the jury. See *Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 975 (10th Cir. 1990)*; **[**58]** *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*; *Telex Corp. v. Int'l Bus. Machs. Corp., 510 F.2d 894, 915 (10th Cir. 1975)* (per curiam). The jury should have been allowed to determine the relevant market because there was a factual dispute on summary judgment as to whether Plaintiff's theory was correct. See III Aplt. 743-48; V Aplt. App. 1281-83. This court's holding that end-users of phone services do not matter is in considerable tension with the Supreme Court's holdings that the relevant product market is made up of "commodities reasonably interchangeable by consumers for the same purposes," meaning that the cross-elasticity of demand between products must be similar but need not be identical. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; see also *United States v. Continental Can Co., 378 U.S. 441, 443, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. While it is true that du Pont involved a consumer market for cellophane **[**59]** and flexible packaging and that Plaintiffs here allege that the market involves competing for pay phone locations of location owners, **[*1147]** neither reason compels the Plaintiffs' definition of the relevant product market.

In du Pont, the government accused du Pont of monopolizing the market for cellophane, and the issue before the Court was whether the relevant product market consisted of cellophane alone or all flexible wrappings. *351 U.S. at 380-81*. Notwithstanding the government's attempt to define the relevant market narrowly, the Court held "that

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See also *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1543-44 (10th Cir. 1996)* (discussing elements of restraint of trade in Oklahoma).

[2] In defining the relevant product market as a matter of law, the district court effectively rejected SWBT's contention that it should be evaluated at the level of the end users. This legal ruling is before us. See *Ruyle v. Continental Oil Co., 44 F.3d 837, 841 (10th Cir. 1994)*.

cellophane's interchangeability with the other materials mentioned suffices to make it part of this flexible packaging market." *Id. at 400*.

In this case, the Plaintiffs argue for a narrower market, one lacking any interchangeable commodities. See *Eastman Kodak, 504 U.S. at 481* (holding that a relevant market may consist of a single product or service and must be evaluated from the perspective of the choices available to Kodak equipment owners). It is undisputed that no public cellphones are available to location owners. The contractual support for Plaintiffs' theory-that the SWBT standard contract identifies **[**60]** the location owner as a "customer"-is illusory at best. See Aplt. App. 1115-16 (contract); see also *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1272 (9th Cir. 1975)* (relevant products were franchises available to concessionaire, not concession products marketed to consumers or concession services to major league baseball teams). The contracts actually provide that location owners are paid a commission by SWBT for "the right to install and maintain SWBT public pay telephone(s) and associated equipment (payphone equipment)" on their property. Aplt. App. 1115-16 (contract). This suggests that payphone service providers do not sell payphones or payphone services to location owners, but rather sell payphone services to traditional consumers (end users) and use the location owners as a method of distribution. In any event, as the district court acknowledged and the record confirms, the factual issues surrounding the relevant product market and the perspective from which it should be evaluated were hotly contested on summary judgment. Aplt. App. 2142.

This circuit has cautioned about overly restrictive definitions of the relevant product market, **[**61]** notwithstanding that a potential distributor alleged antitrust injury from a manufacturer's refusal to deal. In Westman, a distributor of kitchen equipment alleged that Hobart, a kitchen equipment manufacturer, refused to grant a distributorship in violation of § 1 of the Sherman Act. The district court viewed one type of distribution method ("one stop shopping") as comprising the relevant product market. This court reversed, holding that the relevant product market must be defined by interchangeability of products from the perspective of consumers, not distributors. After noting that "the purpose of the antitrust laws is the promotion of consumer welfare," *Westman, 796 F.2d at 1220*, the court stated:

> In defining the relevant market as "one-stop shopping," the trial court apparently focused on the system of product distribution rather than the market facing the consumer of restaurant equipment. The trial court's focus justified the conclusion that "one-stop distribution" is an effective way to compete in the market. But the fact that "one-stop distribution" is an effective or even superior way to compete does not mean that the relevant market is limited **[**62]** to those who use that method of competition. "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."

[*1148] *Id. at 1220-21* (citation omitted). Finding that other restaurant equipment was reasonably interchangeable, the court held "that the relevant product market at a minimum consisted of the products generally sold by restaurant equipment dealers, whether or not those dealers carried a wide enough range of products and brands to be classed as 'one stop shopping' distributors." *Id. at 1221* (emphasis added). Although Westman involved a § 1 claim, its holding concerning the relevant market is also fully applicable to a § 2 monopolization claim. See Thurman Indus. Inc. v. Pay ' *N Pak Stores, Inc., 875 F.2d 1369, 1373, 1378 (9th Cir. 1989)* (market definition required for § 1 and § 2 claim). The district court's grant of summary judgment in this case foreclosed jury consideration of evidence that showed that cellphones competed for consumers' business, took customers from payphone providers and constrained pricing, all of which could have enabled **[**63]** the jury to conclude cellphones were in the relevant market. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (antitrust laws protect against injury to competition, not competitors); *Beville v. Curry, 2001 OK 1, 39 P.3d 754, 759-60, 764 (Okla. 2001)* ("The *sine qua non* of an antitrust claim is injury to competition.") (emphasis in original), reh'g granted, (Oct. 9, 2001). In other words, SWBT was entitled to be heard by a jury on the allegation that it lacked the power to control market prices or exclude competition vis-a-vis the relevant market it contended for. See Aplees. Sur-Reply Br. at 6 (arguing that monopoly claim verdict could be affirmed on either theory); see also *Beville, 39 P.3d at 760* ("Market power is the preliminary threshold inquiry and is often dispositive of antitrust cases."). One need not accept SWBT's monopsony argument to conclude that the relevant market should have been decided by the jury, not the district court. See *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)* **[**64]** (holding that proof of relevant market is essential under § 2).

The evidence plainly "presented a sufficient disagreement to require submission to a jury . . . ." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

2. Rejecting the State-Action and Exclusive Jurisdiction Doctrines.

Although this court declines to decide whether the state-action doctrine applies to state antitrust claims, it seems clear that it does apply, contrary to the district court's holding. Aplt. App. 3942-43. Oklahoma's ***antitrust law*** is to "be interpreted in a manner consistent with federal ***antitrust law*** . . . and the case law applicable thereto." *Okla. Stat. Ann. tit. 79, § 212*; see also *Teleco, Inc. 587 P.2d at 1362*; *Oakridge Investments, Inc. v. S. Energy Homes, Inc., 1986 OK CIV APP 8, 719 P.2d 848, 850 (Okla. Ct. App. 1986)*. Nothing suggests that Oklahoma would reject the state-action doctrine which we have applied to federal antitrust claims in similar circumstances. See *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Elec. Co., 244 F.3d 1220, 1225-1226 (10th Cir. 2001)* (recognizing Oklahoma's **[**65]** policy of allowing regulation instead of competition in electricity sales); *S. Disposal, Inc. v. Tex. Waste Mgmt., 161 F.3d 1259, 1263 (10th Cir. 1998)* (recognizing Oklahoma's policy of allowing regulation instead of competition in waste disposal services).

This court decides that the state action does not apply to the circumstances of this case because (1) "it is clear that no state policy expressly permitted Southwestern Bell to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to **[*1149]** stymie the competition," and (2) "the state likely was not even aware of the full extent of Southwestern Bell's lock up conduct, let alone exercising ultimate control over it." Ct. Op. at 27-28.

Here, the state plainly made clear its intent to regulate telephone services, including payphone services, until the OCC permitted competition. See *Okla. Const. art. IX, §§ 18*, *34*; [3] *Okla. Stat. Ann. tit. 17, § 131* (OCC issues certificate of convenience and necessity); *Okla. Stat. Ann. tit. 17, § 139.1* (directing the OCC to "promulgate and enforce operating requirements for coin-activated telephones and credit card-activated **[**66]** telephones available for public use owned or operated by corporation or persons other than telephone corporations authorized by the Commission to operate within service areas."); *Southwestern Bell Tel. Co. v. Oklahoma, 1992 OK 5, 825 P.2d 262, 265* (recognizing that local exchange companies are a state-created exception to prohibition on monopolies); Aplt. App. 3711-3724 (1985) (OCC 1985 Tariff Order rejecting competitive payphones, and ordering that SWBT "be and hereby is the only authorized provider of coin phone service within its territory."). Rather than concentrating on the particular field of regulation, this court focuses upon the effects of alleged anti-competitive conduct beyond November 1996. But the proper inquiry is whether Oklahoma intended to displace competition in the payphone market with a regulatory program until November 1996. See *S. Motor Carriers Rate Conference v. United States, 471 U.S. 48, 64-65, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*. The answer is clear-not until the OCC determined how and when competition could begin did Oklahoma change its policy.

[67]** The OCC had ultimate control over SWBT's alleged anti-competitive conduct, which goes to satisfy the two-part Midcal test for state action immunity. See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* ("First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself.") (citation

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[3] *Okla. Const. art. 9, § 18* provides in part:

> The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

omitted). Concerning the first part, the state need only permit the conduct to occur-approval is unnecessary. *Trigen, 244 F.3d at 1226*. As discussed above, Oklahoma plainly regulated the field. Concerning the second part, state officials must have and exercise power to review alleged anti-competitive acts. *Patrick v. Burget, 486 U.S. 94, 101, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*.

We have twice concluded that Oklahoma's pervasive regulation of electric utilities satisfied the "active supervision" requirement. See id.; *Lease Lights, Inc. v. Pub. Serv. Co. of Okla., 849 F.2d 1330, 1334 (10th Cir. 1988)*. In Trigen, we based satisfaction of the active **[**68]** supervision requirement on the OCC's regulatory authority. *244 F.3d at 1226*. In Lease **[*1150]** Lights, we looked not only at the OCC's grant of authority but also considered actual proceedings of the OCC. 849 F.2d at 1334.

In this case, not only OCC's regulatory authority, but also its actual proceedings and rulemaking, support the active supervision requirement. Specifically in 1996, the OCC was concerned with competition and addressed it in a formal rulemaking proceeding which resulted in administrative regulations. Aplt. App. 3725 (Notice of Rulemaking) (OCC proposed to establish rules including "what safeguards are necessary to protect the interest of competitive payphone service providers"); Aplt. Add. tab 8 (Okla. Admin. Code. tit, 165, ch. 58 (Facilitation and Provisioning of Payphone Service); id. at tab 12 (OCC's Agency Rule Report Establishing Pay Telephone Service Rules).

Tellingly, an assistant attorney general in arguing for the "fresh look" proposal before the OCC stated:

> And it's hard for me to imagine that anyone would seriously argue that existing payphone service contracts are not a significant barrier to new entrants. The incumbent **[**69]** LECs have had decades of monopoly status in order to identify the most lucrative sites within their service territories, and they have had months to gain a competitive advantage through going out and renegotiating those contracts. The payphone rules, we believe, should allow a renegotiation window.

Aplt. Add. tab 11 at 22 (Rick Chamberlain testimony before the OCC); [4] see also Aplt. App. 3729-3741 (Oklahoma Attorney General's brief before OCC arguing that OCC had jurisdiction to consider payphone service and the location of payphones and existing LEC contracts were a barrier to competition). Various providers complained to the OCC about the renegotiation tactics of SWBT as hindering competition, even including SWBT's May 1, 1996 letter to location owners. Aplt. App. 3743-3748 (Textel Communications, Inc.'s); 3752-3765 (Cherokee Communications, Inc.). The record reveals that parties were divided over the fresh look proposal, whether the OCC had jurisdiction to entertain it, and whether it was constitutional. Ultimately, the OCC voted against adopting it, but indicated its willingness to reconsider the matter with discussion and investigation, at the invitation of the industry. **[**70]** Aplt. Add. tab 12 at 11. All of this suggests that the OCC could and did consider the alleged anti-competitive conduct of SWBC. The fact that the OCC might not have been aware of the full extent of SWBT's alleged anti-competitive conduct (which is pure speculation) or declined to intervene is of no moment-the heart of this case is SWBT's pre-competition contracts which the OCC reviewed and allowed to remain in effect. SWBT's alleged bad acts are insufficient to defeat state action immunity. See *Trigen, 244 F.3d at 1227* (even if OG&E had committed certain improper acts in the regulated sale of electricity, state action immunity was proper).

[71]** **[*1151]** The exclusivity of the OCC's jurisdiction over matters concerning payphones is apparent. No appeal was taken from the OCC's decision not to impose a fresh look. Although this court questions whether such an appeal could have been maintained, the constitutional provision allows an appeal "from any action" of the OCC "prescribing . . . practices, rules or regulations" and "by any party affected, or by any person deeming himself aggrieved by any such action . . . ." *Okla. Const. art. 9, § 20*. This is hardly a limited grant of standing. In the context

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[4] The Plaintiffs argue that this transcript should be stricken as it was not before the district court. See *United States v. Kennedy, 225 F.3d 1187, 1190-91 (10th Cir. 2000)*. I would grant SWBT's motion to supplement the record pursuant to ***Fed. R. App. P. 10(e)(2)(C)***, because the substance of Mr. Chamberlain's comments is contained in his testimony before the district court, Aplt. App. 4622, and the payphone regulatory system in Oklahoma was always an issue in this case. Further, given that the district court held that the state-action doctrine did not apply, inclusion of this transcript in no way results in the appellate court deciding an issue with evidence that might have made a difference to the district court.

of the fresh look proposal, the OCC was exercising its constitutional and statutory authority to promulgate the payphone rules and regulations. Aplt. Add. tab 12 at 3. The court's suggestion that an appeal could not have been taken from agency inaction ignores the forest for the trees. Moreover, the Oklahoma Supreme Court has passed on OCC inaction before. *Turpen v. Okla. Corp. Comm'n, 1988 OK 126, 769 P.2d 1309, 1325 (Okla. 1988)* (OCC did not err in deciding to address imputed value issue later). Analogous to Trigen, the Plaintiffs' state antitrust claims based upon pre-November 1996 conduct are nothing more than a collateral attack **[**72]** on the OCC's right to supervise, regulate and control matters relating to the performance of transmission company public duties and of correcting abuses. See *Okla. Const. art. 9, § 18*. A major part of Plaintiffs' case concerns SWBT's pre-competition contracts, which the OCC reviewed and allowed to remain in effect and which plainly come within the OCC's constitutional and statutory jurisdiction.

3. Allowing Damages for Future Enforcement of Contracts

The court is undoubtedly correct that antitrust damages are not subject to a rigorous standard of proof; estimates and reasonable inferences of damages are sufficient. See *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 567, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. At the same time, an antitrust plaintiff has the burden of proof and damages cannot be speculative. See Wells Real Estate, inc. v. *Greater Lowell Bd. of Realtors, 850 F.2d 803, 816 (1st Cir. 1988)*. Future damages are permissible, but only to the extent that they are based upon past wrongdoing. **[**73]** *Lawlor v. Loewe, 235 U.S. 522, 536, 59 L. Ed. 341, 35 S. Ct. 170 (1915)*.

In Oklahoma, a statutory antitrust action is in the nature of tort, and is not an action on contract. *McDonald v. Amtel, Inc., 1981 OK 78, 633 P.2d 743, 745 (Okla. 1981)*. Here, however, the contracts were integral to the proof of damages. Whether based upon SWBT continuing to enforce its contracts or on the rationale of free and open competition beginning in 1996, the damage award in this case presupposes that SWBT's anti-competitive acts will continue post-verdict and the contracts will continue to be enforced. This assumption is wrong as a matter of law. It must be remembered that the Plaintiffs prevailed upon their state-law restraint of trade claim and that such acts, and contracts which are the product of such acts, are "against public policy and illegal." *Okla. Stat. Ann. tit. 79, § 203(A)*; *First Nat'l Pictures v. Pappe, 1934 OK 644, 170 Okla. 279, 39 P.2d 526, 530 (Okla. 1934)* ("If [a] contract was made in violation of the anti-trust laws, it was an illegal and unenforceable contract"); see also *United States v. Addyston Pipe & Steel Co., 85 F. 271, 290 (6th Cir. 1898)* **[**74]** (holding that contracts where the primary purpose is to restrain trade are void). Plainly, the damage award based upon future damages is inappropriate and inconsistent with the objectives of ***antitrust law*** when an injunction against future anti-competitive conduct would solve the problem. See *United **[*1152]** States v. Or. State Med. Soc., 343 U.S. 326, 333, 96 L. Ed. 978, 72 S. Ct. 690 (1952)*.

4. Conclusion.

The district court erred in defining the relevant product market and not applying the state action or exclusive jurisdiction doctrines to bar the Plaintiffs' claims arising prior to payphone competition. The damages award represents impermissible future damages based upon future anti-competitive conduct that would be unlawful.

Because a new trial would be required on remand, the district court again would have to consider the admissibility of SWBT's interrogatory answer and its draft response under the Noerr-Pennington doctrine. Given that the pre-November 1996 conduct is not actionable and that the district court found that the interrogatory was poorly worded and resulted in an accurate but incomplete response, this line of inquiry would carry an even stronger **[**75]** danger of unfair prejudice than before, even with a limiting instruction. Though it may be admissible under footnote 3 of Pennington, such evidence still has to shed some light on "the purpose and character of the particular transactions under scrutiny," *United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, which would include transactions subsequent to November 1996. Plainly, the jury in this case was exposed to the theory that SWBT's advocacy before the OCC demonstrated its intent to monopolize. Aplt. App. 4708; Aplt.

App. 8379-80 (closing argument). Though the district court instructed the jury to disregard an answer espousing this theory, it points to the need for caution with this evidence.

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In re Terazosin Hydrochloride Antitrust Litig.

United States District Court for the Southern District of Florida

September 11, 2002, Decided; September 11, 2002, Filed September 12, 2002, Entered on Docket

CASE NO. 99-MDL-1317-SEITZ/BANDSTRA

Reporter

2002 U.S. Dist. LEXIS 29916 *

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION. THIS ORDER RELATES TO: United Wisconsin Services, Inc., et al. v. Abbott Laboratories, N.D. Ill., Case No. 99-7410 Grosskrueger, et al. v. Abbott Laboratories, et al., N.D. Ill., Case No. 99-7410 Reid, et al. v. Abbott Laboratories, et al., D.D.C. Case No. 00-00323 Scafani v. Abbott Laboratories, et al., N.D. Cal., Case No. 00-00508 Mednick v. Abbott Laboratories, et al., C.D. Cal. Case No. 00-3468 O'Keefe v. Abbott Laboratories, et al., S.D. Fla., Case No. O'Neal v. Abbott Laboratories, et al., N.D. Ala., Case No. 00-1504 Grund v. Abbott Laboratories, et al., S.D. Fla., Case No. Blue Cross and Blue Shield of Alabama, Inc. v. Abbott Laboratories, et al., S.D. Fla., Case No. 00-1303-Civ-Seitz Bernstein v. Abbott Laboratories, E.D. Mich., Case No. 00-72974 Blue Cross and Blue Shield of Michigan v. Abbott Laboratories, et al., W.D. Mich., Case No. 5:01-CV-95 Ala. Medicaid Agency v. Abbott Laboratories, et al., S.D. Ala., Case No. 01-0129

Core Terms

indirect, purchasers, motion to dismiss, antitrust claim, consumer protection, named plaintiff, unjust enrichment, terazosin, trade practice, allegations, antitrust, IN-PART, dismissal with prejudice, unconscionable

Counsel: **[*1]** For Valley Drug Company, Plaintiff: Daniel Berger, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA USA; David Sorensen, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA USA; Eric L. Cramer, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA USA; Mitchell Wayne Berger, LEAD ATTORNEY, Berger Singerman, Fort Lauderdale, FL USA; R. Bryant McCulley, LEAD ATTORNEY, Boies Schiller & Flexner, Hanover, NH USA; Rene Devlin Harrod, LEAD ATTORNEY, Office of the County Attorney, Fort Lauderdale, FL USA; Richard Drubel, LEAD ATTORNEY, Boies Schiller & Flexner, Hanover, NH USA; Samuel D. Heins, LEAD ATTORNEY, Heins Mills & Olson, Minneapolis, MN USA.

For Louisiana Wholesale, Drug Co., Inc., Plaintiff: Aubrey B. Calvin, LEAD ATTORNEY, The Calvin Law Firm, Houston, TX USA; Barry S. Taus, LEAD ATTORNEY, Garwin Bronzaft Gerstein & Fisher LLP, New York, NY USA; Bruce E. Gerstein, LEAD ATTORNEY, Garwin Bronzaft Gerstein & Fisher LLP, New York, NY USA; Mitchell Wayne Berger, LEAD ATTORNEY, Berger Singerman, Fort Lauderdale, FL USA; Rene Devlin Harrod, LEAD ATTORNEY, Office of the County Attorney, Fort Lauderdale, FL USA.

For Walgreen Co., Inc., etal, Plaintiff: Scott Eliot Perwin, LEAD **[*2]** ATTORNEY, Kenny Nachwalter, P.A., Miami, FL USA.

For State of Florida, Plaintiff: Cory A. Johnson, LEAD ATTORNEY, Attorney General Office, Department Of Legal Affairs, Tallahassee, FL USA; Patricia Ann Conners, LEAD ATTORNEY, Attorney General Office, Antitrust Section-Dept. Of Legal Affairs, The Capital, Tallahassee, FL USA.

For State of Kansas, Plaintiff: Patricia Ann Conners, LEAD ATTORNEY, Attorney General Office, Antitrust Section-Dept. Of Legal Affairs, The Capital, Tallahassee, FL USA.

For State of Colorado, Plaintiff: Patricia Ann Conners, LEAD ATTORNEY, Attorney General Office, Antitrust Section-Dept. Of Legal Affairs, The Capital, Tallahassee, FL USA.

For Blue Cross And Blue Shield of Alabama; Consol Plaintiff: Kimberly R. West, LEAD ATTORNEY, Wallace Jordan Ratliff & Brandt, Birmingham, AL USA; Matthew D. Fridy, LEAD ATTORNEY, Wallace Jordan Ratliff & Brandt, Birmingham, AL USA; Pamela B. Slate, LEAD ATTORNEY, Slate Kennedy LLC, Montgomery, AL USA.

For Sherman Act Class Plaintiffs, Louisiana Wholesale Drug Co. & Valley Drug Co., Consol Plaintiff: Mitchell Wayne Berger, LEAD ATTORNEY, Berger Singerman, Fort Lauderdale, FL USA; Rene Devlin Harrod, LEAD ATTORNEY, Office of the County **[*3]** Attorney, Fort Lauderdale, FL USA.

For Rite Aid Corporation, Consol Plaintiff: Joseph T. Lukens, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Philadelphia, PA USA; Monica L. Rebuck, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA.

For Samuel Lloyd, Consol Plaintiff: Michael D. Hausfeld, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll, Washington, DC USA.

For Antonio Lopez-Souto, Consol Plaintiff: Michael D. Hausfeld, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll, Washington, DC USA.

For Martin Bernstein, Consol Plaintiff: Elwood S. Simon, LEAD ATTORNEY, Elwood S. Simon & Associates, Birmingham, MI USA; John Zuccarini, LEAD ATTORNEY, Elwood S. Simon & Associates, Birmingham, MI USA.

For Char-Mar Pharmacy, Inc., Consol Plaintiff: David Scott Mandel, LEAD ATTORNEY, Mandel & Mandel LLP, Miami, FL USA.

For Indirect Purchaser Plaintiffs; Consol Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll, Washington, DC USA; Geoffrey M. Horn, LEAD ATTORNEY, Lowey Dannenberg Bemporad & Selinger, One North Lexington Avenue, The Gateway, White Plains, NY USA; Matthew D. Fridy, **[*4]** LEAD ATTORNEY, Wallace Jordan Ratliff & Brandt, Birmingham, AL USA; Richard W. Cohen, LEAD ATTORNEY, Lowey Dannenberg Bemporad & Selinger, One North Lexington Avenue, The Gateway, White Plains, NY USA; Robert Cecil Gilbert, LEAD ATTORNEY, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Miami, FL USA; Stephen Lowey, LEAD ATTORNEY, Lowey Dannenberg Bemporad & Selinger, One North Lexington Avenue, The Gateway, White Plains, NY USA.

For Alabama Medicaid Agency, Consol Plaintiff: Blue Cross & Blue Shield of Michigan,; Consol Plaintiff: Matthew D. Fridy, LEAD ATTORNEY, Wallace Jordan Ratliff & Brandt, Birmingham, AL USA.

For Kaiser Foundation Health Plans, Inc., Consol Plaintiff: Andrew Craig Udin, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi, Washington, DC USA; Scott Ray Strand, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi, Minneapolis, MN USA; W. Scott Simmer, LEAD ATTORNEY, PRO HAC VICE, Blank Rome, Washington, DC USA.

For Illinois Plaintiffs; Consol Plaintiff: Gregory Charles Ward, LEAD ATTORNEY, The Ward Law Group, PL, Miami, FL USA; W. Scott Simmer, LEAD ATTORNEY, PRO HAC VICE, Blank Rome, Washington, DC USA; Emmet J. Bondurant, PRO HAC VICE, Bondurant Mixson & Elmore, Atlanta, GA USA; **[*5]** Jason J. Carter, PRO HAC VICE, Bondurant Mixson & Elmore, Atlanta, GA USA; Jay Kim, Kim Vaughan Lerner LLP, Fort Lauderdale, FL USA.

For Geneva Pharmaceuticals, Inc., Defendant: Brendan G. Woodard, LEAD ATTORNEY, White & Case, New York, NY USA; Candace Dohn Banks, LEAD ATTORNEY, Akerman Senterfitt, Suntrust International Center 1 Se 3rd Avenue 28th Floor, Miami, FL USA; Paul Olszowka, LEAD ATTORNEY, White & Case, New York, NY USA; Paul Alan Shelowitz, LEAD ATTORNEY, Stroock & Stroock & Lavan LLP, Miami, FL USA; Robert Alexander Milne, LEAD ATTORNEY, White & Case, New York, NY USA; Wayne A. Cross, LEAD ATTORNEY, White & Case, New York, NY USA.

For Abbott Laboratories, Defendant: David M. Rosenzweig, LEAD ATTORNEY, Munger Tolles & Olson, San Fransisco, CA USA; Jeffrey I. Weinberger, LEAD ATTORNEY, Munger Tolles & Olson, San Fransisco, CA USA; Jon W. Zeder, LEAD ATTORNEY, Hall, Lamb, Hall & Leto, P.A., Miami, FL USA; Rohit K. Singla, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA USA; Samuel N. Weinstein, LEAD ATTORNEY, Munger Tolles & Olson, San Fransisco, CA USA; Stuart N. Senator, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA USA.

For All Defendants, Defendant: Jon W. Zeder, **[*6]** Hall, Lamb, Hall & Leto, P.A., Miami, FL USA.

For Trustee of Correction Officers Benevolent Association Security Benefits Fund - Retirees; Consol Defendant: Kevin William Brown, LEAD ATTORNEY, KW Brown PL, Coral Gables, FL USA.

For Corrections Officers Benevolent Association Security Benefits Funds Active, Consol Defendant: Kevin William Brown, LEAD ATTORNEY, KW Brown PL, Coral Gables, FL USA.

For Trustee of Local 445 Freight Division Welfare Fund, Consol Defendant: Kevin William Brown, LEAD ATTORNEY, KW Brown PL, Coral Gables, FL USA.

For Trustee of Local 445 Construction Division Welfare Fund, Consol Defendant: Kevin William Brown, LEAD ATTORNEY, KW Brown PL, Coral Gables, FL USA.

For New York City Transit Authority, Consol Defendant: Kevin William Brown, LEAD ATTORNEY, KW Brown PL, Coral Gables, FL USA.

For Prescription Access Litigation (Pal), Consol Defendant: Ricardo L. Carmona, LEAD ATTORNEY, Ricardo L Carmona PA, Coral Gables, FL USA.

Herman Price, Claimant, Pro se, Bronx, NY USA.

Norton Price, Claimant, Pro se, Bronx, NY USA.

For Geneva Pharmaceuticals, Inc.; Intervenor Defendant: Brendan G. Woodard, LEAD ATTORNEY, White & Case, New York, NY USA; Candace Dohn Banks, LEAD ATTORNEY, **[*7]** Akerman Senterfitt, Suntrust International Center 1 Se 3rd Avenue 28th Floor, Miami, FL USA; Wayne A. Cross, LEAD ATTORNEY, White & Case, New York, NY USA.

For Abbott Laboratories, Intervenor Defendant: David M. Rosenzweig, LEAD ATTORNEY, Munger Tolles & Olson, San Fransisco, CA USA; Jeffrey I. Weinberger, LEAD ATTORNEY, Munger Tolles & Olson, San Fransisco, CA USA; Jon W. Zeder, LEAD ATTORNEY, Hall, Lamb, Hall & Leto, P.A., Miami, FL USA; Rohit K. Singla, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA USA; Samuel N. Weinstein, LEAD ATTORNEY, Munger Tolles & Olson, San Fransisco, CA USA; Stuart N. Senator, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA USA.

Judges: PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE.

Opinion by: PATRICIA A. SEITZ

Opinion

ORDER GRANTING IN-PART AND DENYING IN-PART DEFENDANTS' MOTION TO DISMISS CERTAIN STATE COUNTS OF THE INDIRECT PURCHASER PLAINTIFFS' THIRD AMENDED COORDINATED COMPLAINT

THIS CAUSE is before the Court on Defendants' Motion to Dismiss Certain State Law Counts of the Indirect Purchaser Plaintiffs' Third Amended Coordinated Complaint [**D.E. No. 492**]. The Indirect Purchaser Plaintiffs ("Plaintiffs") filed their Coordinated Third Amended Class Action Complaints **[*8]** ("Third Amended Complaint") on behalf of all persons or entities that after October 15, 1995, purchased, other than for resale, prescription drugs containing terazosin hydrochloride ("terazosin"). Defendants Abbott Laboratories ("Abbott"), Geneva Pharmaceuticals, Inc. ("Geneva"), and IVAX Pharmaceuticals, Inc. ("IVAX"),[1] formerly known as Zenith Goldline Pharmaceuticals, Inc., have moved to dismiss, pursuant to *Fed. R. Civ. P. 12(b)(6)*, certain state law claims in the Third Amended Complaint. Having carefully considered the arguments raised by the parties, and for the reasons stated below, the Court will grant in-part and deny in-part Defendants' motion.

[1] IVAX recently settled with the Indirect Purchaser Plaintiffs.

I. BACKGROUND

In Spring 1998, Abbott entered into secret accords with generic drug makers Geneva and IVAX to forestall competition in its lucrative and exclusive domestic market for terazosin. Abbott's drug, "Hytrin," was the only terazosin drug available in the United States for the treatment of hypertension or enlarged prostate until Geneva introduced its generic version of Hytrin on August 12, 1999. See *In re Terazosin Hydrochloride Antitrust Litig., 164 F.Supp.2d 1340 (S.D. Fla. 2000)* (recounting terms of agreements, which sought to preclude Geneva and IVAX from marketing the first generic terazosin hydrochloride drugs in the nation for **[*9]** some time, removed the risk that they would buy or sell the right to introduce such drugs in the interim, and enlisted them as allies who would oppose or at least ignore other companies' applications to produce such drugs).

Both the indirect purchasers and the direct purchasers,[2] as well as several states, have filed class action complaints alleging that the Defendants' clandestine accords violated federal and state antitrust or consumer protection statutes. On December 13, 2000, this Court granted the direct purchasers' motion for a partial summary judgment that these agreements were patently anti-competitive, unreasonable, and illegal *per se* under section one of the Sherman Antitrust Act, *15 U.S.C. § 1*. See id.[3] Ten months later, upon a finding that "the class action mechanism offers the most efficient method for adjudicating the direct purchasers' suits," this Court granted the direct purchasers' consolidated motion for class certification. *In re Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 552 (S.D. Fla. 2001)*.[4]

With respect to the indirect purchasers' claims, on July 2, 2001, the Court granted Defendants' motion to dismiss certain counts of the indirect purchasers' Second Amended Complaint ("July 2nd Order"). See *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365 (S.D. Fla. 2001)*. Relying primarily on the Supreme Court's decisions **[*10]** in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, and their state progeny, the Court dismissed with prejudice the Plaintiffs' federal Sherman Act and Arizona antitrust claims, and deferred judgment on the New Jersey antitrust claims. The Court also dismissed those claims brought under the Tennessee Trade Practices Act, *Tenn. Code Ann. §§ 47-25-101-112*, and dismissed without prejudice Plaintiffs' common law unjust enrichment claims. Finally, and perhaps most importantly, the Court dismissed without prejudice Plaintiffs' claims based on the laws of those states for which there was no named plaintiff with standing to pursue a claim.[5]

Plaintiffs thereafter filed a Third Amended Complaint which purports to cure many of the legal defects outlined in this Court's July 2" Order. In substance, Plaintiffs' Third Amended Complaint seeks relief under the antitrust laws, consumer protection laws, and/or unjust enrichment laws in eighteen states and the District of Columbia. Defendants move to dismiss in the following respects: (1) pursuant to this Court's prior ruling, Plaintiffs' claims under the laws of Illinois, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, South Dakota, and West Virginia are subject to dismissal for lack of **[*11]** standing;[6] (2) Plaintiffs' New Jersey law

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[2] Direct purchasers are those entities that purchased terazosin principally for resale.

[3] Pursuant to *28 U.S.C. § 1292(b)*, this Court certified its December 13, 2000 Order for review by the Eleventh Circuit, which subsequently accepted the appeal. As of this date, there has been no ruling from the Eleventh Circuit.

[4] Pursuant to *Fed. R. Civ. P. 23(f)*, this matter is also pending before the Eleventh Circuit.

[5] Specifically, the Court dismissed those claims brought under the laws of: Maine, Minnesota, Mississippi, New Mexico, New Jersey, North Carolina, North Dakota, South Dakota, and West Virginia.

[6] In a footnote, Defendants also challenge the standing of named Plaintiffs Clarence Reid, who purchased Hytrin in the District of Columbia during the relevant time period, and David Grund, who purchased Hytrin in Maine during the relevant time period. (Defs.' Memorandum at 7, n. 6). Essentially, Defendants argue that these two individuals do not adequately represent the entire end payers class in their respective states and thus Plaintiffs' claims in those states should be dismissed. Realizing, however,

claims are barred as a matter of law; (3) Plaintiffs' unjust enrichment claims under the laws of Alabama and Illinois must be dismissed as a matter of law; (4) Plaintiffs' Nevada antitrust claims must be dismissed as a matter of law; and (5) Plaintiffs' consumer protection claims under the laws of New Mexico and New York[7] must also be dismissed as a matter of law.

II. DISCUSSION

A. Standard of Review

To survive a *Rule 12(b)(6)* motion to dismiss, a complaint need only provide a short and plain statement of the claim and the grounds on which it rests. *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. A *Rule 12(b)(6)* motion tests not whether the plaintiff will prevail on the merits, but instead, whether the plaintiff has properly stated a claim. See *Fed. R. Civ. P. 12(b)(6)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* (overturned on other grounds by *Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982))*. Thus, a court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. In deciding such a motion, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the nonmovant's favor. See *Scheuer, 416 U.S. at 236*. Regardless of what standard a court uses, the threshold of sufficiency **[*12]** that a complaint must meet to survive a motion to dismiss is exceedingly low. *Ancata v. Prison Health Svcs., Inc., 769 F.2d 700, 703 (11th Cir. 1985)* (citation omitted).

B. Standing

In order to establish standing, a plaintiff must allege: (1) an injury in fact; (2) causation; and (3) redressability. *Miccosukee Tribe of Indians of Fla. v. Southern Everglades Restoration AllianceS, 304 F.3d 1076, 2002 WL 2013529, *2 (11th Cir. 2002)* (citing *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998))*. With these well established requirements in mind, this Court, in the July 2nd Order, concluded that "no named plaintiff suffered an injury giving rise to an antitrust claim in Arizona,[8] Maine, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, North Dakota, South Dakota or West Virginia." *160 F.Supp.2d at 1371*. Thus, because "the named plaintiffs cannot rely on unidentified persons within those states to state a claim for relief," id., Plaintiffs were granted leave to amend to identify specific named plaintiffs who suffered an injury in each jurisdiction.

Defendants argue that there is still not any named plaintiff with standing to bring suit under the laws of ten states listed in the Third Amended Complaint: Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, North Dakota, South Dakota, and West Virginia; and two newly added states, Illinois and Nevada. In response, Plaintiffs maintain that named Plaintiff United Wisconsin Services, Inc. ("UWSI"), **[*13]** [9] a managed healthcare provider, purchased Hytrin and generic terazosin in sixteen of the nineteen jurisdictions listed in the Complaint, including the ten for which Defendants argue lack of standing.

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that such an argument is more appropriately addressed on a motion for class certification, Defendants abandon this argument in their reply memorandum. (Defs.' Reply Memorandum, Ex. B). Accordingly, the Maine and District of Columbia claims remain.

[7] Plaintiffs indicate in their Response that they are withdrawing their New York claim based on *N.Y. Gen. Bus. L. § 349*. (Plaintiffs' Memorandum in Opposition at 20, n. 12). Accordingly, that claim will be dismissed with prejudice.

[8] Those claims brought under Arizona law were dismissed with prejudice on other grounds.

[9] UWSI is now known as Cobalt Corporation.

Plaintiffs allegations with respect to UWSI are sufficient to establish standing in those ten states at issue. Despite Defendants' arguments to the contrary, UWSI is not limited to pursuing a claim under the laws of Wisconsin only. Rather, as made clear by the Eleventh Circuit in *Griffin v. Dugger, 823 F.2d 1476 (11th Cir. 1987)*, and as was reemphasized by this Court, the critical inquiry is whether "at least one named plaintiff has suffered the injury that gives rise to that claim" in each particular state. *823 F.2d at 1483*. In other words, Plaintiffs must allege that at least one named Plaintiff suffered a legally redressable injury for each state. By specifically alleging that UWSI purchased Hytrin and generic terazosin in sixteen states and was injured as a result of such purchases, (Third Amended Complaint, ¶ 8(s)), Plaintiffs meet their burden.[10] Therefore, Plaintiffs have standing and Defendants' motion on this issue is denied.

C. New Jersey

Similar to the Second Amended Complaint, Plaintiffs' Third Amended Complaint again alleges a violation of New **[*14]** Jersey's Consumer Fraud Act, *N.J. Stat. Ann. §§ 56:8-1, et seq.* Likewise, the Court is again faced with the New Jersey Supreme Court not having decided whether antitrust or unfair competition allegations state a claim for relief under the New Jersey Consumer Fraud Act. In the July 2nd Order, the Court, although inclined to dismiss the New Jersey claims, reserved ruling on this issue pending the outcome of the appeal in Kieffer v. Mylan Labs., Inc., 1999 WL 1567726, *3 (N.J. Super. Ct. Law. Div. 1999), where the trial judge held that allegations of anti-competitive behavior cannot state a claim under the Consumer Fraud Act. Kieffer, 1999 WL 1567726, at *6. However, as noted by the parties, the appeal was dismissed without decision following a settlement of that action.

The Court will follow the reasoning set out in Kieffer and dismiss Plaintiffs' New Jersey claims. To allow suits by indirect purchasers under the Consumer Fraud Act "would abrogate the bar to indirect purchaser suits for such acts, and allow the proverbial 'end run' to be made by plaintiffs." Kieffer, 1999 WL 1567726, at *4-5. Therefore, because the long shadow of *Illinois Brick* precludes Plaintiffs' New Jersey claims, they will be dismissed with prejudice.

D. Alabama and Illinois

Unable to bring antitrust claims in Alabama and Illinois,[11] Plaintiffs attempt to state a claim for unjust enrichment under **[*15]** the laws of those two states. Defendants argue that because Plaintiffs' cannot bring their antitrust claims in these two states, they should also not be able to bring unjust enrichment claims. In essence, Defendants try to use the same (successful) argument that defeated Plaintiffs' New Jersey claims to defeat these claims. Defendants argument is unavailing in this instance.

Unlike New Jersey, both Alabama and Illinois are Illinois Brick repealer states and thus permit indirect purchasers to bring antitrust claims. See *740 Ill. Comp. Stat. 10/7(2) (2002)* ("No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages..."); *Ala. Code § 6-5-60 (2002)* ("Any person, firm, or

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[10] It is worth noting that with respect to standing requirements in general, the required showing depends on the stage of the litigation at which the standing issue is being decided. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351(1992)*. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id. at 561*. Similarly, many of Defendants' substantive arguments with respect to UWSI' s adequacy as a named Plaintiff and whether its claims are typical of those of the class are more appropriately raised in response to Plaintiffs' already filed motions for class certification.

[11] Alabama's ***antitrust law*** applies only to conduct that is completely intrastate in nature. See *Abbott Labs. v. Durrett, 746 So. 2d 316, 329 (Ala. 1999)*. In Illinois, an antitrust class action on behalf of indirect purchasers may only be brought by the Attorney General. See *740 Ill. Comp. Stat. 10/7(2) (2002)*; see also *Gaebler v. New Mexico Potash Corp., 285 Ill. App. 3d 542, 676 N.E.2d 228, 230, 221 Ill. Dec. 707 (Ill. App. Ct. 1996)*.

corporation injured or damaged by an unlawful trust, combine or monopoly or its effect, *direct or indirect*, may, in each instance of such injury or damage, recover...") (emphasis added). As such, there is not the concern of Plaintiffs making an "end-run around" Illinois Brick. Other (non-Illinois Brick) limitations on bringing an antitrust action in these states are not relevant in evaluating whether Plaintiffs state a claim for unjust enrichment.

Thus, after reviewing the allegations in support ofPlaintiffs' **[*16]** claims for unjust enrichment, and noting that Defendants do not attack these claims on their merit, the Court must conclude that Plaintiffs Alabama and Illinois claims are sufficient to survive a motion to dismiss.

E. Nevada

Plaintiffs Third Amended Complaint adds new claims under Nevada's Unfair Trade Practices Act, which as of October 1, 1999, allows those injured "indirectly" to bring an action for damages. See *Nev. Rev. Stat. § 598A.210 (2002)*. Defendants, however, argue that because all of the conduct at issue in this lawsuit occurred prior to the effective date of the statute, Plaintiffs' claims must be dismissed. In response, Plaintiffs maintain that the 1999 Amendment to Nevada's ***antitrust law*** was a mere clarification of existing rights and thus may be applied retroactively to rescue Plaintiffs' claims.

Plaintiffs rely primarily upon Pooler v. R.J. Reynolds Tobacco Co., 2001 WL 403167 (Nev. Dist. Ct. 2001) (unpublished opinion), where the Nevada District Court held that indirect purchasers could bring suit for conduct occurring before the effective date of the amendment. In reaching its conclusion, the Court held that "the 1999 amendment...does no more than reaffirm[] the original legislative intent: any person injured by an alleged violation of the act may sue." Id. at *1. Defendants, **[*17]** to support their position, call upon Nevada's common law presumption that statutes are presumed to be prospective in application. See, e.g., *Madera v. State Industrial Insurance System, 114 Nev. 253, 956 P.2d 117, 120 (Nev. 1998)* ("statutes are presumptively prospective"); *McKellar v. McKellar, 110 Nev. 200, 871 P.2d 296, 298 (Nev. 1994)* ("there is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied."). In addition, Defendants cite to case law, see Krotz v. Microsoft Corp., No. A416361 (Nev. Dist. Ct. 2000) (holding that 1999 amendment created a *new* right for indirect purchasers) (emphasis added), and to relevant legislative history, see Minutes of the Assembly Committee on Commerce and Labor, 70th Sess. (Feb. 15, 1999) (stating that amendment was a "change" in the law).

After carefully considering both positions, the Court finds the better reasoned conclusion is to decline to apply the statute retroactively. Although the Pooler court presents a compelling argument in favor of retroactive application, this Court does not find there to be a clear indication that the Amendment was intended to apply retroactively. Absent such a clear statement, the Court must presume that the statute as written **[*18]** only applies to conduct occurring after October 1, 1999. Moreover, a plain reading of the statute and the case law reveals a cause of action that did not previously exist for indirect purchasers. Therefore, Plaintiffs' Nevada antitrust claims must be dismissed.[12]

F. New Mexico

The final target of Defendants' motion is Plaintiffs' claim under the consumer protection law of New Mexico, which states that "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." *N.M. Stat. Ann. § 57-12-3 (2002)*. Plaintiffs allege that by virtue of the gross disparity between the value received by Plaintiffs and the price paid to Defendants for terazosin, Defendants have committed an unconscionable trade practice. See *N.M. Stat. Ann. § 57-12-2(E)(2)* (2002). Defendants, in addition to claiming that this claim is outside the scope of leave granted by the Court, argue that Plaintiffs fail to state a claim for an unconscionable trade practice under New Mexico's consumer protection statute.

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[12] For the reasons stated above in section III(D), Plaintiffs' Nevada unjust enrichment claim remains.

With respect to Defendants' first argument, that Plaintiffs improperly added this claim, the Court disagrees that it placed such stringent limitations on the manner in which Plaintiffs' may amend their Complaint. **[*19]** Indeed, while the Court will, on occasion, explicitly limit the scope of amendments, such was not done in this case. On the merits, Defendants' *12(b)(6)* argument is equally unavailing. After all but conceding that an unconscionable trade practice can form the basis of a claim under *N.M. Stat. Ann. § 57-12-2(E)*, Defendants attempt to argue that Plaintiffs do not allege the necessary "gross disparity." The Court finds, however, that the issue of gross disparity is a question of fact which is not properly dealt with on a motion to dismiss. See In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litig., Case No. D-0101-CV-20001697 (Order Granting In Part and Denying In Part Motion to Dismiss Unfair Practices Act Claim Under *1-012(B)(6)*, NMRA) (N.M. 1st Jud. Dist. Aug. 15, 2001) (Transcript at 23) (stating that issue of what constitutes unconscionable is question of fact). Moreover, Plaintiffs allegations on this point are sufficient. Therefore, Defendants' motion to dismiss Plaintiffs' New Mexico consumer protection claim is denied.

III. CONCLUSION

By alleging that a named Plaintiff suffered an injury giving rise to the relevant claims in each state listed in the Third Amended Complaint, Plaintiffs have **[*20]** cured the fundamental defect in their previous Complaint. With respect, however, to the New Jersey claims, the Nevada antitrust claims, and the New York consumer protection claim, Plaintiffs have failed to state a claim under the applicable law. All other claims remain. Accordingly, it is

ORDERED that Defendants' Motion to Dismiss Certain State Law Counts of the Indirect Purchaser Plaintiffs' Third Amended Coordinated Complaint is GRANTED IN-PART and DENIED IN-PART. Plaintiffs' consumer protection claims and unjust enrichment claim on behalf of the New Jersey class are DISMISSED WITH PREJUDICE. Plaintiffs' antitrust claims on behalf of the Nevada class are DISMISSED WITH PREJUDICE. Plaintiffs' consumer protection claim on behalf of the New York class is DISMISSED WITH PREJUDICE. Defendants' motion is denied in all other respects,

DONE and ORDERED in Miami, Florida, this 11th day of September, 2002.

/s/ Patricia A. Seitz

PATRICIA A. SEITZ

UNITED STATES DISTRICT JUDGE

End of Document

N. Am. Energy Sys., LLC v. New Eng. Energy Mgmt.

United States District Court for the District of Connecticut

September 13, 2002, Decided

3:01CV1230(AHN)

Reporter

269 F. Supp. 2d 12 *; 2002 U.S. Dist. LEXIS 26155 **

NORTH AMERICAN ENERGY SYSTEMS, LLC, JEFFREY A. ALBANO and GREGORY HUDSON v. NEW ENGLAND ENERGY MANAGEMENT, INC., SCOTT HINSON, MICHELLE GALLICCHIO, NORTHEAST UTILITIES SERVICE COMPANY, INC., THE CONNECTICUT LIGHT & POWER COMPANY and THE WESTERN MASSACHUSETTS ELECTRIC COMPANY

Prior History: *N. Am. Energy Sys., LLC v. New Eng. Energy Mgmt., Inc., 2002 U.S. Dist. LEXIS 26156 (D. Conn., Sept. 9, 2002)*

Disposition: Defendants' motion to dismiss claims granted.

Core Terms

antitrust, small business, relevant market, antitrust claim, interchangeable, allegations, anti trust law, anticompetitive, violations, employees, customer, energy, intentional interference, motion to dismiss, conservation, shareholders, costs

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. A court may dismiss a complaint only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims. In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Regulated Industries, Higher Education & Professional Associations

A plaintiff claiming a violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C.S. §§ 1 and 2, must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized. The burden of defining the relevant market falls to the plaintiff. In order to make out its antitrust claims, a plaintiff must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN3[] Antitrust & Trade Law, Sherman Act

For purposes of the Sherman Act, the relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand. Interchangeability implies that one product is roughly equivalent to another for the use to which it is put: while there may be some degree of preference for one over the other, either would work effectively. To determine whether a complaint's proposed relevant market definition is legally sufficient, a court must analyze not the commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purposes. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

Though price is a factor to be considered in assessing interchangeability, it is not the sole consideration.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN5[] Standing, Requirements

In order to have standing to bring a private antitrust action, a plaintiff must allege more than just a personal injury. An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. In examining this requirement, a court must keep in mind the fundamental tenet that the antitrust laws were enacted for the protection of competition, not competitors.

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN6[] Intentional Interference, Elements

To state a claim for intentional interference with prospective economic advantage under Connecticut law, there must be evidence that the interference resulted from the defendants commission of a tort. A claim is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself.

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN7[] Intentional Interference, Elements

To establish a claim of intentional interference with prospective economic advantage under Connecticut law, the plaintiffs bear the burden of establishing that the defendant engaged in intentional interference without justification, not malice alone.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] Air & Space Transportation, Antitrust

A party seeking to invoke a court's jurisdiction bears the burden of alleging sufficient facts to show that he has a right to bring the action. It is well established that neither employees nor shareholders of a corporation, much less prospective employees and shareholders, have standing to bring claims for antitrust violations affecting the corporation. The rationale underpinning the rule that shareholders do not have standing to bring an antitrust action in their individual capacity is that the antitrust laws are not designed to allow recovery for anyone incidentally injured by a violation of the antitrust laws.

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

HN9[] Private Actions, Standing

A narrow exception exists to allow employees to assert antitrust claims where the terminated employee is an essential participant in an antitrust scheme and the employee's termination is a necessary means to accomplish the scheme.

Counsel: [1]** For Jeffrey Albano, Gregory Hudson, North American Energy Sys, LLC, PLAINTIFFS: Louis A Craco, Jr, Allegaert, Berger & Vogel, New York, NY USA.

For New England Energy MGMT, Inc, Scott Hinson, DEFENDANTS: Ira B Grudberg, David L. Belt, Jacobs, Grudberg, Belt & Dow, PC, New Haven, CT USA.

For Michelle Gallicchio, DEFENDANT: James Sicilian, Michael P Shea, Day, Berry & Howard, Hartford, CT USA.

For Northeast Utilities Service Co, Inc, Connecticut Light & Power Co, Western Mass Electric Co, DEFENDANTS: James Sicilian, Michael P Shea, Day, Berry & Howard, Hartford, CT USA. Duncan Ross MacKay, Northeast Utilities, Hartford, CT USA.

Judges: Alan H. Nevas, United States District Judge.

Opinion by: Alan H. Nevas

Opinion

[*14] *RULING ON MOTION TO DISMISS*

The plaintiffs, North American Energy Systems, LLC ("NAES"), Jeffrey Albano ("Albano") and Gregory Hudson ("Hudson"), bring this action against the defendants New England Energy Management, Inc. ("NEEM"), Scott Hinson ("Hinson"), Michelle Gallicchio ("Gallicchio"), Northeast Utilities Service Company, Inc. ("NUSCO"), the Connecticut Light & Power Company ("CL&P") and the Western Massachusetts Electric Company ("WMECO") (collectively, "NU") alleging **[**2]** violations of Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2*. Plaintiffs also bring state law claims for intentional interference with prospective economic advantage and for violations of the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110b et seq.* ("CUTPA").

Now pending before the court are defendants' Motions to Dismiss. For the following reasons, the motions [doc. # s 12 & 14] are GRANTED.

STANDARD OF REVIEW

HN1[] In deciding a motion to dismiss under *Rule 12(b)(6)*, the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. *See Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*; *Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991)*. A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *see also Still v. DeBuono, 101 F.3d 888 (2d Cir. 1996)*. The **[**3]** issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." *United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990)* (citing *Scheuer, 416 U.S. at 236*). In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. *See Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991)*.

FACTS

According to plaintiffs' Amended Complaint, various companies of the Northeast Utilities System developed the Small Business Energy Advantage Program (the "Small Business Program") to help small businesses reduce their costs and improve performance by installing more energy efficient equipment and determining ways to reduce energy demands. NU elected to use a network of "Contractor/Arrangers" ("C/As") to locate eligible businesses, evaluate their needs and provide the cost reducing services. Prospective C/As have to be approved by NU prior to participating in NU's Small Business Program. [1]

[1] Nothing, however, prevents an individual or firm from offering these same services to these businesses independent of NU's Small Business Program.

[4]** **[*15]** Under the terms of the Small Business Program, the defendant utility companies bear some portion of the customers' costs and also offer interest free loans to the customers to cover the costs of the Small Business Program, including the C/A fees. The source of the loans come from a fund established from ratepayers' fees. Customers of the Small Business Program continue to pay their usual rates until the loans are paid in full. It is anticipated that the savings in energy costs will cover the cost of loan repayment.

NU stated in its description of the Small Business Program that it maintains the right to limit the number of C/As and that the goal is to keep the number to a minimum in order to facilitate close relationships with the utility companies, ensure customer satisfaction and promote communication with all parties involved in the transactions.

In March 2001, NAES responded to a request by NU for proposals to serve as C/As for one year beginning April 2001. The proposal described NAES's qualifications and listed plaintiffs Albano and Hudson among NAES's employees. At the time, Albano and Hudson were employed by NEEM, which performed a significant amount of C/A work under the **[**5]** Small Business Program. According to their complaint, Albano and Hudson planned to resign from NEEM once NU approved NAES's proposal. On March 23, 2001, Albano spoke with a representative of NU to determine the status of the NAES proposal. The representative told him that it "looked good." Later, Gallicchio, Senior Program Administrator of Marketing and Conservation Programs with NU, telephoned NAES to determine whether Albano and Hudson were in fact employed by NAES. Arnold Frumin, the President of NAES explained their status and plans to her. Gallicchio allegedly told Frumin that the NAES application would be denied because certain requested information had not been provided. When asked for an opportunity to supplement the proposal, Gallicchio referred him to Maureen Bazan, also an employee of NU, who agreed to allow the additional submission. In early April 2001, Ms. Bazan wrote to NAES informing it that the application had been denied for failure to comply with the Request for Quotations. NAES again resubmitted a proposal, which was denied in late April.

Upon learning of Albano and Hudson's plans to join NAES, Hinson, owner and president of NEEM, fired them both.

Plaintiffs allege **[**6]** that defendant NEEM has colluded with the defendants to prevent other potential C/As from being approved by NU and that such collusion has thwarted competition in the market for C/A services to otherwise qualified businesses and individuals. Plaintiffs contend that since the inception of the Small Business Program, NU has allocated the majority of the C/A assignments to NEEM. Defendants' actions have resulted in the exclusion of plaintiffs from the market and have damaged the public by "frustrating the laudable goals of the Program." (Pl.'s Compl. 64.)

DISCUSSION

I. *The Antitrust Claims*

NU asserts that plaintiffs antitrust claims should be dismissed because (1) the complaint fails to allege a relevant market and (2) the complaint does not allege anticompetitive effects or antitrust injury. The court agrees.

[*16] A. The Complaint Does Not Properly Allege a Relevant Market

HN2[] A plaintiff claiming a violation of *§§ 1& 2* of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized. *See* *Kramer v. Pollock-Krasner Found.. 890 F. Supp. 250, 254 (S.D.N.Y. 1995)*; *see also* *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).* **[**7]** The burden of defining the relevant market falls to the plaintiff. *See* *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*; *Hack v. Yale President & Fellows of Yale College, 16 F. Supp. 2d 183, 196 (D.Conn. 1998)*. In order to make out their antitrust claims, plaintiffs "must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed." *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)* (citation omitted).

HN3[] "The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand." *Id*. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put: while there may be some degree of preference for one over the other, either would work effectively." *Allen-Myland, Inc. v. International Business Mach. Corp., 33 F.3d 194, 206 (3d Cir. 1994)* (internal quotations omitted). To determine whether the complaint's proposed relevant market definition is legally sufficient, **[**8]** a court must analyze "not [the] commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purposes." *Hack, 16 F. Supp. 2d at 196* (quoting *Queen City Pizza, Inc., 124 F.3d at 438*).

> Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Queen City Pizza, 124 F.3d at 436; *see also* *Hack, 16 F. Supp. 2d at 196* (stating that a complaint may be dismissed where it does not define the relevant market by reference to the rule of reasonable interchangeability and cross-elasticity); *Tower Air, Inc. v. Federal Exp. Corp., 956 F. Supp. 270 (E.D.N.Y. 1996)* (same); *Re-Alco, 812 F. Supp. at 391* (same); *E. & G. Gabriel v. Gabriel Bros., Inc., 1994 U.S. Dist. LEXIS 9455, No. 93 civ. 0894(PKL), 1994 WL 369147, at *3 (S.D.N.Y. July 13, 1994)* **[**9]** (same).

In the Amended Complaint, plaintiffs briefly address these key issues of "reasonable interchangeability" and "cross-elasticity of demand;" however, it fails to sufficiently define the relevant market. Plaintiffs allege that NU's subsidies "permit the delivery to eligible customers of services under the Program at no cost or at greatly reduced cost" and that such services are not interchangeable with similar services provided outside the Small Business Program at significantly higher costs to the customer. (Pl.'s Compl. 622.)

HN4[] Though price is a factor to be considered in assessing interchangeability, it is not the sole consideration. *See* *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)*. Plaintiff's attempt to establish a market consisting only of services provided through NU's Small Business Program based on price differential is misplaced and defines the market too narrowly. The only difference identified by **[*17]** plaintiffs between C/A services through the Small Business Program and those that could be provided independent of the Small Business Program is in the cost **[**10]** to the customer. A relevant product market, however, may span a range of prices. *See* *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 326, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* (rejecting argument that medium-priced shoes are in a different product marked than lower-priced shoes); *AD/SAT v. Associated Press, 181 F.3d 216, 228 (2d Cir. 1999)* ("We are not persuaded that the difference in prices for rush electronic and non-rush delivery services indicates that distinct markets for these services exist."). [2]

Plaintiffs also attempt to argue that NU has created a market by using outside firms to **[**11]** provide the conservation services. Even though NU is not required to use C/As to provide conservation services, plaintiffs imply that because NU has chosen to do so, it has created a market with the concomitant obligation to contract with all willing suppliers. Defendants argue that such a theory would result in the creation of a new market anytime NU, or any entity, hires an outside source to perform needed services, such as providing security or fixing office equipment. NU would risk creating a monopoly if it did not distribute the work evenly among the outside service providers.

Plaintiff likens this to a "government contracting situation" where there may exist a single buyer market. This is inapposite. In the context of government as a single buyer, the government is subject to competitive bidding requirements imposed by the Federal Acquisition Regulations. That is not the case with NU. It is under no obligation to hire any outside source to perform the conservation services and has no requirements in the event it chooses to do so.

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[2] Defendants note that by distinguishing between NU C/A services and non-NU C/A services "Plaintiffs have argued themselves out of the realm of ***antitrust law*** altogether." If customers of the Small Business Program would not purchase conservation services unless the services were free, then there exists in reality no market for such services and no opportunity to create a monopoly.

The government contracting cases relied upon by the Plaintiffs are easily distinguishable from the case at hand. In the cases involving the government, **[**12]** the government was not the entity violating the antitrust laws; rather, the violators were the companies bidding on the government contract. For example, in *Tower Air, Inc. v. Federal Express Corp., 956 F. Supp. 270, 281 (E.D.N.Y. 1996)*, the charge was that the bidders for the government contract engaged in anticompetitive activity among themselves, not with the government (buyer). If NU is the buyer, it is in a position similar to the government and could not be the target of antitrust liability.

Plaintiffs have failed to establish that outsourcing the provision of conservation services has created a relevant market under the antitrust laws.

B. The Complaint Fails to Allege an Anticompetitive Effect or Antitrust Injury

Defendants next argue that because plaintiffs have failed to allege that the purported monopoly has had an actual adverse effect on competition in the provision of energy conservation services, they cannot establish anticompetitive effects in a relevant market. The court agrees.

HN5[] In order to have standing to bring a private antitrust action, a plaintiff must allege more than just a personal injury. *See Balaklaw v. Lovell, 14 F.3d 793, 797 **[*18]** (2d Cir. 1994)*; **[**13]** *George Haug Co. v. Rolls Royce Motor Cars, 148 F.3d 136, 139*. An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. In examining this requirement, a court must keep in mind "the fundamental tenet that the antitrust laws . . . were enacted for the protection of *competition*, not *competitors."* *Balaklaw, 14 F.3d at 797* (citations and internal quotation marks omitted).

Plaintiffs fail to assert an antitrust injury. They make the conclusory allegation that defendants have colluded "to prevent other potential C/As from receiving approval, thereby thwarting competition in the market for the provision of C/A services. . . ." (Pl.'s Compl. 64.) They also assert that the public has been injured because "NEEM's stranglehold on this market has frustrated the laudable goals of the program." *See id*. The plaintiffs also allege a laundry **[**14]** list of bad acts, such as fraud and violations of environmental regulations, committed by the defendants.

These conclusory allegations are insufficient to establish an actual antitrust injury. *See Capital Imaging Assocs. v. Mohawk Valley Med. Assoc., 996 F.2d 537, 543 (2d Cir. 1993)* (Plaintiff must allege that "the challenged action has had an actual adverse effect on competition as a whole in the relevant market."); *John's Insulation, Inc. v. Siska Constr. Co., Inc., 774 F. Supp. 156, 163 (S.D.N.Y. 1991)* ("Conclusory allegations which merely recite the litany of antitrust [injuries] will not suffice."). The allegation that NEEM received the majority of C/A assignments does little to establish an injury to competition. Plaintiffs complaint alleges injury to Plaintiffs as a disappointed competitor. It does not sufficiently allege injury to competition. *See Balaklaw, 14 F.3d at 797*.

Plaintiffs allegations regarding fraud and violations of environmental and workplace regulations, though they may have merit in another context, do not implicate the antitrust laws and cannot serve as the basis for an antritust injury.

Plaintiffs have **[**15]** failed to define a relevant market and have not established that defendants actions led to anticompetitive effects or an antitrust injury; therefore, the Plaintiffs cannot maintain the antitrust claims, counts one through four of the Amended Complaint.

II. *State Law Claims*

In addition to the antitrust claims, Plaintiffs also bring claims against all defendants for violations of CUTPA and against NEEM and Hinson for intentional interference with prospective economic advantage. Because the court has determined that the plaintiffs failed to state a claim under the antitrust laws, the plaintiffs' state law claims may not go forward.

A. CUTPA Claim

Plaintiffs concede that because the allegations forming the basis of the CUTPA claim are the same as those underlying the antitrust claims, the CUTPA claim must fail if the antitrust claims fail. The court, having dismissed the antitrust claims, must also dismiss the CUTPA claim for failure to state a cause of action. *See CDC Techs. Inc. v. IDEXX Lab., Inc., 7 F. Supp. 2d 119 (D.Conn. 1998)*.

B. Intentional Interference with Prospective Economic Advantage

Plaintiffs charge defendants NEEM and Hinson with intentional **[**16]** interference **[*19]** with prospective economic advantage. ***HN6***[] To state such a claim under Connecticut law, "there must be evidence that the interference resulted from the defendants commission of a tort. [A] claim is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself." *Downes Patterson Corp. v. First Nat'l Supermarkets, Inc., 64 Conn. App. 417, 429, 780 A.2d 967 (2001)*.

Plaintiffs allege that NEEM and Hinson acted maliciously. This will not suffice to support this claim. ***HN7***[] Under Connecticut law, plaintiffs bear the burden of establishing that NEEM and Hinson engaged in intentional interference without justification, not malice alone. *See 4 Restatement (Second, Torts § 766*, comment (s)(1979); *Daley v. Aetna Life and Cas. Co., 249 Conn 766, 775 (1999)*. This, they have not done.

Even if this interference claim had merit, the court, having dismissed the antitrust claims and, thus, the basis for original federal jurisdiction, would decline to exercise supplemental jurisdiction over this state law claim. *See 28 U.S.C. § 1367*.

III. *Standing of the* **[**17]** *Individual Plaintiffs*

The individual plaintiffs, Albano and Hudson, former employees of NEEM and one-time prospective employees and shareholders of NAES, lack standing to assert antitrust and CUTPA claims.

HN8[] A party seeking to invoke the court's jurisdiction bears the burden of alleging sufficient facts to show that he has a right to bring the action. *See Warth v. Seldin, 422 U.S. 490, 518, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)*. It is well established that neither employees nor shareholders of a corporation, much less *prospective* employees and shareholders, have standing to bring claims for antitrust violations affecting the corporation. *See Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 528 n.5, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991)* ("Employees have generally been denied standing to enforce competition laws because they lack competitive standing and direct injury."); *Adams v. Pan Am. World Airways, Inc., 264 U.S. App. D.C. 174, 828 F.2d 24 (D.C. Cir. 1981)* (affirming dismissal in antitrust case for lack of standing by former airline employees against airline that allegedly drove **[**18]** their former employer out of business); *Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir. 1986)* (holding that shareholders lacked standing to assert antitrust claim); *Vincel v. White Motor Corp., 521 F.2d 1113, 1119 (2d Cir. 1975)*. "The rationale underpinning [the rule that shareholders do not have standing to bring an antitrust action in their individual capacity] is that the antitrust laws are not designed to allow recovery for anyone incidentally injured by a violation of the antitrust laws." *Schulz v. Pataki, 137 F. Supp. 2d 80, 82 (N.D.N.Y.)*.

Likewise, termination from NEEM cannot confer standing on the plaintiffs to assert antitrust claims. *See Vinci v. Waste Mgmt. Inc., 80 F.3d 1372, 1376 (9th Cir. 1996)*. The Ninth Circuit has carved out ***HN9***[] a narrow exception to allow employees to assert antitrust claims where the terminated employee is an "essential participant" in the antitrust scheme and the employee's termination is a "necessary means" to accomplish the scheme. *See Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739 (9th Cir. 1984)*. In the scenario contemplated by *Ostrofe*, the **[**19]** employee has "the greatest incentive to challenge the antitrust violation." *Vinci, 80 F.3d at 1376*. The complaint makes no allegations that would bring it within the *Ostrofe* exception. Plaintiffs do not allege that they were an essential part of the antitrust **[*20]** scheme or that they were fired as a means to accomplish the antitrust scheme.

The individual plaintiffs also fail to establish standing to bring the CUTPA claims. Any possible injury suffered by plaintiffs is an indirect injury and therefore cannot confer standing pursuant to CUTPA. *See* *Collins v. Gulf Oil Co., 605 F. Supp. 1519, 1523 (D.Conn. 1985)*.

The individual plaintiffs failed to meet their burden of establishing standing to bring the antitrust and CUTPA claims.

CONCLUSION

For the foregoing reasons, the Defendants' motions to dismiss [doc. # s 12 & 14] are GRANTED.

SO ORDERED this 13th day of September, 2002, at Bridgeport, Connecticut.

Alan H. Nevas

United States District Judge

[Journal Publ'g Co. v. Hartford Courant Co.](#)

Supreme Court of Connecticut

September 17, 2002, Officially Released

(SC 16677)

Reporter

261 Conn. 673 *; 804 A.2d 823 **; 2002 Conn. LEXIS 350 ***; 31 Media L. Rep. 1097; 2002-2 Trade Cas. (CCH) P73,803

JOURNAL PUBLISHING COMPANY, INC. v. THE HARTFORD COURANT COMPANY

Prior History: [*1]** Petition for a bill of discovery seeking, inter alia, certain information concerning contractual arrangements between the defendant and certain of its newspaper comic strip syndicators, brought to the Superior Court in the judicial district of Hartford, where the court, Bryant, J., issued a memorandum of decision granting the petition in part; thereafter, the court granted the parties' motions to reargue, issued a supplemental memorandum of decision and rendered judgment for the plaintiff, from which the defendant appealed.

Journal Publ. Co. v. Hartford Courant Co., 2001 Conn. Super. LEXIS 2129 (Conn. Super. Ct. July 25, 2001).

Disposition: Reversed and remanded with direction.

Core Terms

comics, bill of discovery, trial court, probable cause, newspaper, discovery, publish, cause of action, exclusivity provision, strips, contracts, contractual, subpoena, argues, present case, potential cause, anti trust law, quotation, edition, marks, anticompetitive, procompetitive, Inquirer, syndicated, weekend, cases, plaintiff's claim, rule of reason, documents, features

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > Perpetuation of Testimony

HN1[] **Methods of Discovery, Perpetuation of Testimony**

See *Conn. Gen. Stat. § 52-156a(a)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Conn. Gen. Stat. § 35-26*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

See *Conn. Gen. Stat. § 35-28*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN4[] Regulated Practices, Trade Practices & Unfair Competition

See *Conn. Gen. Stat. § 42-110b(a)*.

Civil Procedure > ... > Discovery > Methods of Discovery > Perpetuation of Testimony

HN5[] Methods of Discovery, Perpetuation of Testimony

The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. As a power to enforce discovery, the bill is within the inherent power of a court of equity. It may be entertained notwithstanding the statutes and rules of court relative to discovery. Furthermore, because a pure bill of discovery is favored in equity, it should be granted unless there is some well-founded objection against the exercise of the court's discretion. To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. Although the petitioner must also show that he has no other adequate means of enforcing discovery of the desired material, the availability of other remedies for obtaining information does not require denial of the equitable relief sought.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN6[] Discovery, Relevance of Discoverable Information

Discovery is confined to facts material to the plaintiff's cause of action and does not afford an open invitation to delve into the defendant's affairs. A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action. A plaintiff should describe with such details as may be reasonably available the material he seeks and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess will turn up evidence helpful to his case. What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court's discretion.

Civil Procedure > ... > Discovery > Methods of Discovery > Perpetuation of Testimony

Civil Procedure > Discovery & Disclosure > General Overview

HN7[] Methods of Discovery, Perpetuation of Testimony

The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. Its existence or nonexistence is determined by the court on the facts found. Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong. Whether particular facts constitute probable cause is a question of law.

Civil Procedure > Appeals > Appellate Briefs

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

HN8[] **Appeals, Appellate Briefs**

When the parties have not briefed or argued law that could have affected the case, the Supreme Court of Connecticut decides the case on the basis on which it was tried and decided in the trial court, and as briefed and argued in the high court.

Civil Procedure > ... > Discovery > Methods of Discovery > Perpetuation of Testimony

HN9[] **Methods of Discovery, Perpetuation of Testimony**

In Connecticut, the standard for determining whether a trial court's unchallenged factual findings warrant the granting of a bill of discovery is whether the facts demonstrate that there is probable cause to bring a potential cause of action.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN10[] **Pleading & Practice, Pleadings**

The right of a plaintiff to recover is limited by the allegations of the complaint, and any judgment should conform to the pleadings, the issues, and the prayers for relief.

Civil Procedure > Appeals > Record on Appeal

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Records

HN11[] **Appeals, Record on Appeal**

One specific purpose of a motion for articulation of the factual basis of a trial court's decision is to clarify an ambiguity or incompleteness in the legal reasoning of the trial court in reaching its decision. Further articulation is unnecessary where the memorandum of decision adequately states its factual basis, and where the record is adequate for informed appellate review of the judgment.

Civil Procedure > Appeals > Standards of Review > General Overview

HN12[] **Appeals, Standards of Review**

Where a Connecticut trial court has clearly set forth its factual findings and the record is also clear that the trial court was made aware of the legal standards pertaining to the parties' claims, an appellate court assumes that the trial court applied the correct legal standards.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the common law of Connecticut, an anticompetitive covenant ancillary to a lawful contract is enforceable if the restraint upon trade is reasonable. To satisfy this requirement of reasonableness, the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest. This principle is known as the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services. If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Certain agreements or practices, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Such agreements constitute per se antitrust violations. The rule of reason is intended to be the prevailing standard applied for the purpose of determining whether a particular act did or did not bring about the wrong against which the statute provides in a given case. Per se rules of illegality should be applied only to conduct that is shown to be manifestly anticompetitive.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Conn. Gen. Stat. § 35-44b*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN17[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Exclusivity provisions in contracts between newspapers and syndicators are, as a general rule, presumptively legal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN18[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The antitrust laws are enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Courts > Common Law

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

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

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

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

HN19[] Regulated Practices, Trade Practices & Unfair Competition

In determining whether a practice violates the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq.* (CUTPA), Connecticut case law applies the following criteria for determining when a practice is unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers, competitors, or other businessmen. All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. Thus, a violation of CUTPA may be established by showing either an actual deceptive practice or a practice amounting to a violation of public policy. Furthermore, a party need not prove an intent to deceive to prevail under CUTPA.

Counsel: William M. Rubenstein, with whom were Michelle H. Seagull and, on the brief, Chad A. Landmon, for the appellant (defendant).

Richard P. Weinstein, with whom was Nathan A. Schatz, for the appellee (plaintiff).

Judges: Sullivan, C. J., and Borden, Katz, Vertefeuille and Zarella, Js. In this opinion KATZ and ZARELLA, Js., concurred.

Opinion by: SULLIVAN

Opinion

[*675] [828]** SULLIVAN, C. J. The plaintiff, Journal Publishing Company, Inc., filed this petition for a bill of discovery pursuant to *General Statutes § 52-156a (a)*, [1] seeking discovery **[*676]** of certain information **[***2]** from the defendant, The Hartford Courant Company. Following a court trial, the trial court determined that there was probable cause to believe that the plaintiff had a cause of action against the defendant for: (1) tortious interference with a contract; (2) antitrust violations; and (3) violations of the Connecticut Unfair Trade Practices Act (CUTPA), *General Statutes § 42-110a et seq.* Accordingly, the trial court granted the petition in part and ordered the defendant to provide certain **[**829]** information to the plaintiff. This appeal followed. We conclude that the plaintiff has not established probable cause to support any of the causes of action found by the trial court and, accordingly, reverse the judgment.

The record reveals the following relevant facts and procedural history. On September 5, 2000, the plaintiff filed a petition to perpetuate testimony, to conduct depositions and to order production of documents before action. The plaintiff claimed in its petition that there was probable cause to believe that the defendant wrongfully had excluded the plaintiff from the market for Sunday comic strips in violation of *General Statutes §§ 35-26* [2] and 35-28 (b) [3] and

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[1] *General Statutes § 52-156a (a)* provides:

> ***HN1***[] "(1) A person who desires to perpetuate testimony regarding any matter that may be cognizable in the Superior Court may file a verified petition in the superior court for the judicial district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (A) That the petitioner expects to be a party to an action cognizable in the superior court but is presently unable to bring it **[***3]** or cause it to be brought, (B) the subject matter of the expected action and the petitioner's interest therein, (C) the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, (D) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (E) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.
>
> "(2) The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the manner provided by section 52-57; but if such service cannot with due diligence be made upon any expected adverse party named in the **[***4]** petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by section 52-57, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.
>
> "(3) If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this section; and the court may make orders for the production of documents and things and the entry upon land for inspection and other purposes, and for the physical or mental examination of persons. For the purpose of applying this section to depositions for perpetuating testimony, each reference in this section to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.
>
> "(4) If a deposition to perpetuate testimony is taken **[***5]** under this section, it may be used in any action involving the same subject matter subsequently brought in the Superior Court."

[2] General Statutes § 35-26 provides: "***HN2***[] Every contract, combination, or conspiracy in restraint of any part of trade **[***6]** or commerce is unlawful."

[3] General Statutes § 35-28 provides: ***HN3***[] "Without limiting section 35-26, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: (a) Fixing, controlling, or maintaining prices, rates,

(d) and had engaged in an unfair method of competition and an unfair act or **[*677]** practice in the conduct of the trade or commerce of selling or distributing newspapers in violation of General Statutes § 42-110b. [4] Accordingly, the plaintiff sought to examine all documents between the defendant and certain national syndicators of the comic strips regarding the distribution of the Sunday comics, and to conduct a deposition of a representative of the defendant's newspaper regarding the same issue.

On March 2, 2001, the trial court held a hearing on the plaintiff's petition. Elizabeth Ellis gave the following testimony on behalf of the plaintiff. The plaintiff publishes a newspaper, the Journal Inquirer, which is circulated in seventeen towns in Connecticut and Massachusetts. Ellis has **[***7]** been the newspaper's publisher for thirty years. The defendant publishes a newspaper, the Hartford Courant, which also is circulated in those seventeen towns. The Journal Inquirer is published on Monday through Friday in the afternoon and on Saturday in the morning and contains three pages of nationally syndicated comic strips. The Hartford Courant is published seven days a week and contains eleven syndicated comic strips that are published also by the Journal Inquirer. Ellis testified, on the basis of her knowledge of the newspaper business, that newspapers that publish comic strips have written agreements with the syndicators of the comic strips.

The Journal Inquirer receives its comic strips from the syndicators on a daily basis. Each comic strip is printed with a release, or expected publication, date. The Journal Inquirer considers itself contractually bound to honor those dates.

Over the course of a number of years prior to the year 2000, Ellis made several unsuccessful attempts on **[*678]** behalf of the plaintiff to acquire from certain syndicators the right to publish the Sunday edition of their comics. The plaintiff intended to publish the Sunday comics either in a Sunday newspaper **[***8]** or in a "weekend edition" that would be published on Saturday **[**830]** morning and would have certain features of a Sunday newspaper.

At some point in the year 2000, the Hartford Courant ran an advertisement indicating that the Sunday edition of that newspaper soon would be available on Saturdays. When Ellis became aware of that fact, she called the syndicators of certain comic strips in another attempt to obtain the right to publish the Sunday comics. When she was unable to do so, she wrote a letter to the defendant requesting that it release the exclusivity provisions of its contracts with the syndicators of nine Sunday comic editions and permit the syndicators to distribute the comics to the plaintiff. [5] The defendant's parent corporation acknowledged receipt of the letter and indicated that it would respond after it had had an opportunity to look into the matter. The plaintiff received no further response to Ellis' letter.

Ellis also telephoned Walter Mahoney, the vice president of one of the syndicators, Tribune Media, to inquire why the to Journal **[***9]** Inquirer was restricted from publishing the Sunday comics on Saturday when the Hartford Courant was permitted do so. Ellis was not successful in her attempt to persuade Mahoney to allow the plaintiff to publish the Sunday comics.

On the day before the hearing on the plaintiff's petition, Ellis telephoned the publisher of the Hartford Courant, Jack Davis, to ask why the defendant objected to the Journal Inquirer's publishing the same Sunday comics that the Hartford Courant published in its early Sunday edition. Davis responded that it was important **[*679]** for the Hartford Courant to have a unique product so that people would want to buy that newspaper rather than another.

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quotations, or fees in any part of trade or commerce; (b) fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale, or supply of any part of trade or commerce; (c) allocating or dividing customers or markets, either functional or geographical, in any part of trade or commerce; or (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person."

[4] General Statutes § 42-110b provides in relevant part: ***HN4***[] "(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ."

[5] We note that the defendant claims that the existence of such exclusivity provisions was not established by the evidence presented at the hearing.

On cross-examination, Ellis testified that Editor & Publisher magazine contains a list of the Sunday comics that are available for publication from syndicators. That magazine lists more than 200 syndicated Sunday comics.

Following the hearing, the trial court found that the defendant had contracts with the syndicators that it had amended at some point to allow it to publish Sunday comic strips on Saturday, prior to their release date. It also found that, under the terms of the amended contracts, the syndicators had agreed not **[***10]** to permit the plaintiff to publish the Sunday comic strips on Saturday. Finally, it found that both the defendant and one of the syndicators had acknowledged to the plaintiff the existence of such a preclusive contractual provision.

The trial court also concluded that the plaintiff had established that there was probable cause to believe that the defendant had (1) modified its contract with the syndicators with the intention of limiting the plaintiff's contractual rights; (2) violated CUTPA by engaging in unscrupulous or oppressive acts; and (3) persuaded the syndicators to refuse to deal with the defendant in violation of the antitrust statutes. Accordingly, the trial court rendered judgment for the plaintiff and ordered the defendant to disclose the portion of its contracts with the syndicators who also contracted with the plaintiff governing the publication of Sunday comics. The defendant appealed from that judgment to the Appellate Court, and we transferred the appeal to this court pursuant to *Practice Book § 65-1* and *General Statutes § 51-199 (c)*.

The defendant claims on appeal: (1) that the trial court's findings of fact were not supported by the evidence **[*680]** presented at **[**831]** the hearing; **[***11]** and (2) that, in reaching its legal conclusions, the trial court misconstrued and misapplied the legal standard for granting a bill of discovery. The plaintiff contends, to the contrary, that the evidence supported the trial court's factual findings. It further contends that the record is inadequate for review of the trial court's legal conclusions. The plaintiff also argues, however, that, even if the court's conclusions are reviewable, the defendant's challenge to those conclusions is without merit. Finally, the plaintiff argues that, if this court reverses the judgment of the trial court, it should remand the case for a new hearing at which the plaintiff should be permitted to subpoena and examine a representative of the defendant to obtain additional factual support for its claims.

We conclude that the evidence presented at the March 2, 2001 hearing was sufficient to support the factual findings on which the trial court relied in reaching its legal conclusions. We also conclude, however, that those factual findings were insufficient to support a finding of probable cause that the plaintiff had a cause of action against the defendant on the grounds alleged in its petition. Accordingly, **[***12]** we reverse the judgment of the trial court. We also conclude that the plaintiff is not entitled to a new hearing.

Before examining the merits of the defendant's claims, "a brief discussion of the bill of discovery is appropriate. ***HN5***[] The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. . . . As a power to enforce discovery, the bill is within the inherent power of a court of equity that has been a procedural tool in use for centuries. . . . The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery. . . . Furthermore, because a pure bill of discovery is favored in equity, it **[*681]** should be granted unless there is some well founded objection against the exercise of the court's discretion. . . .

"To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. . . . Although the petitioner must also show that he has no other adequate means of enforcing **[***13]** discovery of the desired material, the availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought. . . . This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . The remedy is designed to give facility to proof. . . .

HN6[] "Discovery is confined to facts material to the plaintiff's cause of action and does not afford an open invitation to delve into the defendant's affairs. . . . A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action. . . . A plaintiff should describe with such details as may be reasonably available the material he seeks . . . and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [his] case. . . . What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court's discretion." (Citations omitted; internal quotation marks omitted.) *Berger v. Cuomo, 230 Conn. 1, 5-7, 644 A.2d 333 (1994)*. **[**832]** **[***14]**

HN7[] "The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action. Probable cause is the knowledge of facts sufficient to justify a **[*682]** reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or nonexistence is determined by the court on the facts found. . . . Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong." [6] (Citation omitted; internal quotation marks omitted.) *Id. at 7*. "Whether particular facts constitute probable cause is a question of law." *McMahon v. Florio, 147 Conn. 704, 707, 166 A.2d 204 (1960)*.

I

We first address the defendant's claim that the evidence presented at the March 2, 2001 hearing did not support the trial court's factual findings. Specifically, the defendant challenges the court's findings that: (1) the defendant amended its contracts with the syndicators so that it could publish the Sunday comic strips on Saturday, prior to their release date; (2) both the defendant and one of the syndicators acknowledged to the plaintiff the existence of a preclusive contractual condition; and (3) under the amended contracts, the syndicators agreed that they would not allow the plaintiff to publish the Sunday comic strips on Saturday.

As a threshold matter, we note that the plaintiff does not claim that **[***16]** it was harmed in any way by the defendant's **[*683]** publication of the Sunday comics on Saturday. Rather, it claims only that it was injured by the syndicators' refusal to allow it to publish those comics. The court therefore could not have relied on its finding that the defendant and the syndicators amended their contracts to allow such publication as support for its legal conclusions. Furthermore, if there was other evidence to support the trial court's finding of an exclusive contract between the defendant and one of the syndicators, it is irrelevant whether they expressly acknowledged its existence. We conclude, therefore, that we need not consider whether the evidence presented at the hearing supported the trial court's findings that the defendant and the syndicators amended their contracts or acknowledged the existence of an exclusive contract. Accordingly, we need determine only whether the evidence presented at the hearing supported the trial court's finding that the defendant and the syndicators had exclusivity agreements with respect to the Sunday comics. We conclude that the evidence was sufficient to support this finding.

We note that the existence of contractual exclusivity provisions **[***17]** between the defendant and the syndicators with respect to the publication of the Sunday comics was not a fact relied on by the plaintiff in support of its bill of discovery but, rather, was one of the items of information sought **[**833]** by the plaintiff in its petition. It would defy common sense, therefore, to conclude that, in order for the trial court to grant the petition, the plaintiff was required to establish by a preponderance of the evidence that the defendant and the syndicators had exclusive contractual arrangements. [7] We conclude, **[*684]** instead, that the plaintiff was required to establish only that there was

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[6] Both of the parties and the trial court treated the probable cause standard for evaluating an alleged cause of action set forth in *Berger v. Cuomo, supra, 230 Conn. at 1*, as the applicable standard in this case. Accordingly, we leave for another day the questions of whether (1) the standards governing equitable bills of discovery also govern petitions filed pursuant to *§ 52-156a*; see *Cadle Co. v. Drubner, 64 Conn. App. 69, 777 A.2d 1286 (2001)* **[***15]** (applying *Berger* standards to *§ 52-156a* petition); and (2) the probable cause language in *Berger* was an unduly constricted interpretation of our prior jurisprudence governing bills of discovery. See *Aetna Life & Casualty Co. v. Union Trust Co., 230 Conn. 779, 788 n.5, 646 A.2d 799 (1994)* (***HN8***[] when parties have not briefed or argued law that could affect case, "we decide [the] case on the basis on which it was tried and decided in the trial court, and briefed and argued in this court").

[7] Both parties agree that the evidentiary standard for determining whether unchallenged factual findings support the granting of a bill of discovery is whether the findings **[***18]** constitute probable cause to believe that the plaintiff has a cause of action against the defendant. See footnote 6 of this opinion. The parties do not address, however, the question of what is the proper evidentiary standard for evaluating disputed factual findings.

probable cause to believe both that the defendant and the syndicators had such arrangements and that those arrangements provided the basis for a cause of action. See Berger v. Cuomo, supra, 230 Conn. at 7 (HN9[] standard for determining whether trial court's unchallenged factual findings warrant granting of bill of discovery is whether facts demonstrate "that there is probable cause to bring a potential cause of action").

The following evidence supported the trial court's finding that there was probable cause to believe that the defendant and the syndicators had an agreement that prevented the syndicators from allowing the plaintiff to publish the Sunday comics. Ellis testified that, almost one year before the hearing, she had written to the defendant requesting that it release the exclusivity provisions for certain comic strips. Shortly thereafter, the defendant, through its parent corporation, responded only that it would look into the matter. The defendant provided no additional response. The trial court reasonably could have inferred from this testimony that, if the defendant did not have an exclusivity agreement with the syndicators, the natural response to the plaintiff's request would have been for it to deny the existence of such an arrangement or to assert that it had no control over the matter. Accordingly, the trial court could **[***19]** have inferred the existence of such an agreement from the defendant's failure to make a denial or to assert the absence of control.

Ellis also testified that she called Davis to inquire why the defendant objected to the plaintiff's having access to the Sunday comics. Davis responded that it was important for the newspaper to have a unique product. The trial court reasonably could have inferred from this response that the defendant believed that it had the ability to maintain the uniqueness of its Sunday **[*685]** newspaper by preventing the plaintiff from having access to the Sunday comics that it published.

Ellis also testified that, at some point in the year 2000, the Hartford Courant started publishing the Sunday comics in its early Sunday edition, which is actually published on Saturday. Prior to that time, Ellis had considered the plaintiff to be contractually bound to honor the release dates printed on the comics. The trial court reasonably could have inferred from this testimony that the syndicators' refusal to permit the plaintiff to publish the Sunday comics was not based on their reluctance to release the Sunday comics for publication before their release date, but, rather, on some **[***20]** other consideration that applied to the plaintiff, but not to the defendant.

We conclude that, on the basis of this evidence, the trial court reasonably could have determined that there was probable cause to believe that the defendant and the syndicators had a contractual arrangement that prevented the syndicators from allowing the plaintiff to publish the Sunday comics published by the defendant.

[834]** II

We next consider whether, if proven, the existence of such exclusive contracts, in and of itself, would constitute probable cause to believe that the plaintiff had a cause of action against the defendant. The trial court concluded that there was probable cause to believe that, by entering into exclusive contracts with the syndicators, the defendant had (1) tortiously interfered with the plaintiff's contractual rights; (2) violated CUTPA; and (3) violated Connecticut's antitrust laws. The defendant argues that the plaintiff never claimed, and the evidence did not establish, that the defendant had interfered with the plaintiff's contractual relations. It also argues that the plaintiff did not establish probable cause to believe that all of the elements of an antitrust claim **[*686]** exist. Finally, **[***21]** it argues that, in the absence of an antitrust violation, the plaintiff could not establish probable cause to believe that a violation of CUTPA existed. We assume, for purposes of our analysis, that the contracts between the defendant and the syndicators contained exclusivity provisions. We agree with the defendant, however, that the existence of such provisions would not constitute probable cause with respect to any of the causes of action found by the trial court.

A

We first consider whether the trial court properly determined that the existence of an exclusive contractual arrangement constituted probable cause to believe that the defendant tortiously had interfered with the plaintiff's contractual arrangements. The defendant argues that the plaintiff never made any such claim before the trial court and, even if it had, that the claim was not supported by the evidence. The plaintiff concedes that it had made no such claim.

We previously have recognized that ***HN10***[] "the right of a plaintiff to recover is limited by the allegations of the complaint . . . and any judgment should conform to the pleadings, the issues and the prayers for relief." (Citation omitted; internal quotation marks omitted.) **[***22]** *Kawasaki Kisen Kaisha, Ltd. v. Indomar, Ltd., 173 Conn. 269, 272, 377 A.2d 316 (1977)*. We conclude, therefore, that the trial court should not have raised this issue sua sponte. Accordingly, we need not consider whether the evidence established probable cause to believe that the plaintiff had a cause of action for tortious interference with its contractual relations.

B

We next consider the defendant's claim that the trial court improperly determined that there was probable cause to believe that the defendant had violated Connecticut's **[*687]** antitrust statutes. Specifically, the defendant claims that the plaintiff failed to demonstrate that: (1) competition is likely to be harmed by the existence of the exclusivity provisions; (2) the syndicators would have allowed the plaintiff to publish the Sunday comics in the absence of an exclusive agreement with the defendant and, therefore, that the plaintiff was harmed by the agreement; and (3) the existence of the exclusivity provisions, in and of itself, is violative of the antitrust laws. We conclude that the first and third claims are conceptually inseparable, and, accordingly, we treat them as a single claim. We also conclude that the existence **[***23]** of contractual exclusivity provisions between the defendant and the syndicators, if proved, would not, in and of itself, establish probable cause to believe that the antitrust laws have been violated. Because this determination is dispositive of the appeal, we need not consider the defendant's second claim.

[835]** As a preliminary matter, we address the plaintiff's claim that the record is inadequate to review the defendant's challenge to the trial court's legal conclusions. The following additional facts and procedural history are relevant to this claim. On September 7, 2001, the defendant, pursuant to *Practice Book § 66-5*, filed in the Appellate Court a motion for articulation of the factual and legal basis of the trial court's May 7, 2001 memorandum of decision. In accordance with the Practice Book, the motion was forwarded to the trial court for a ruling. The trial court denied the motion. The plaintiff claims that, because the trial court refused to provide the necessary articulation of its conclusion that there was probable cause to believe that the defendant had violated antitrust laws, the memorandum of decision does not set forth the necessary factual or legal basis for appellate **[***24]** review.

"The general purpose of [the relevant] rules of practice and their interplay is to ensure that there is a trial **[*688]** court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . ***HN11***[] One specific purpose of a motion for articulation of the factual basis of a trial court's decision is to clarify an ambiguity or incompleteness in the legal reasoning of the trial court in reaching its decision. . . . Further articulation . . . is unnecessary where the [memorandum of decision] adequately states its factual basis, and where the record is adequate for informed appellate review of the [judgment]." (Citations omitted; internal quotation marks omitted.) *State v. Cobb, 251 Conn. 285, 383, 743 A.2d 1 (1999)*, cert. denied, *531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000)*.

In the present case, ***HN12***[] the trial court clearly set forth its factual findings and stated that those findings established probable cause to believe that the defendant had "persuaded the syndicators to refuse to deal with the [plaintiff] in violation of the Antitrust Act." The record is also clear that the court was made aware of the legal standards pertaining to ***antitrust*** **[***25]** ***law*** as set forth by the parties in their briefs to that court. In such cases, we assume that the trial court has applied the correct legal standards. See *State v. Crumpton, 202 Conn. 224, 232, 520 A.2d 226 (1987)*. Accordingly, we conclude that the record is adequate for review.

The plaintiff claims that the exclusivity provision in the contracts between the defendant and the syndicators of certain Sunday comics violated *General Statutes §§ 35-26* and *35-28 (b)* and *(d)*. [8] It claims that the effect of the provision was to prevent the plaintiff from offering those comics as part of an expanded weekend edition of its

[8] See footnotes 2 and 3 of this opinion for the text of those statutes.

newspaper that would compete with the defendant's Sunday newspaper. The defendant counters that such exclusivity provisions are presumptively legal and procompetitive and, accordingly, that in the **[*689]** absence of any evidence that the contracts impaired competition as a whole, the plaintiff failed to establish probable cause to believe that a violation had occurred. We agree with the defendant.

This court previously has recognized that ***HN13***[] "under the common law, the well-settled rule is that an anticompetitive covenant **[***26]** ancillary to a lawful contract is enforceable if the restraint upon trade is reasonable. . . . To satisfy this requirement of reasonableness, we have stated that the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest." (Citations omitted; **[**836]** internal quotation marks omitted.) *Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 225-26, 413 A.2d 1226 (1979)*. This principle has come to be known as the "rule of reason." *Id. at 225*.

HN14[] "In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. . . . The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services." (Citation omitted.) *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996)*. "If a plaintiff meets his initial burden of adducing adequate evidence of market **[***27]** power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id. at 1367-68*.

"There are [however] ***HN15***[] certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without **[*690]** elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (Internal quotation marks omitted.) *Elida, Inc. v. Harmor Realty Corp., supra, 177 Conn. at 227*. Such agreements constitute "per se" antitrust violations. Id. "The 'rule of reason' was intended to be the prevailing standard to be applied for the purpose of determining whether a particular act had or had not brought about the wrong against which the statute provided in a given case. . . . 'Per se' rules of illegality should be applied only to conduct which is shown to be 'manifestly anticompetitive.'" (Citation omitted.) *Id. at 230-31*.

A number of courts have concluded that the exclusive licensing of syndicated features to newspaper publishers is presumptively procompetitive and, therefore, does not **[***28]** violate the federal antitrust statutes. [9] See *Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996)*, cert. denied, *520 U.S. 1265, 117 S. Ct. 2435, 138 L. Ed. 2d 196 (1997)*; *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Service, 616 F. Supp. 502 (D.N.J. 1985)*. In *Paddock Publications, Inc.*, the plaintiff, a publisher of a daily newspaper in the Chicago area, claimed that two larger newspapers in the same geographical area had "locked up the 'most popular' or 'best' supplemental [syndicated] services and features, [thereby] injuring consumers by frustrating competition." *Paddock Publications, Inc. v. Chicago Tribune Co., supra, at 44*. The plaintiff conceded that "many quality comics and features [were] available to it . . . but insisted that the best ones [were] committed to its larger rivals." Id. The District Court dismissed the complaint for failure to state a claim on which relief might have been granted. Id. On **[*691]** appeal, the Court of Appeals, implicitly applying the rule of reason, concluded that "exclusive stories and features help the newspapers differentiate themselves, the better to compete with one another. A market in which every **[***29]** newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one." *Id. at 45*. It also concluded that there was no evidence that the plaintiff had ever attempted to outbid the rival **[**837]** newspapers for the syndicated features; *id. at 44*; or that those newspapers had colluded with each other, thereby harming consumers. *Id., at 45*.

Finally, the court in *Paddock Publications, Inc.*, rejected the plaintiff's implicit claim that the syndicated features were "essential facilities"; *id. at 44*; that "could not feasibly be duplicated [and therefore] must be shared among

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[9] *General Statutes § 35-44b* provides: ***HN16***[] "It is the intent of the General Assembly that in construing sections 35-24 to 35-46, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."

rivals . . . ." *Id. at 45*. It concluded, rather, that "this case does not involve a single facility that monopolizes one level of production and creates a potential to extend the monopoly to others. We have, instead, competition at each level of production; no one can 'take over' another level of production by withholding access from disfavored **[***30]** rivals." Id. Accordingly, the Court of Appeals affirmed the judgment of the District Court dismissing the claim. *Id. at 47*.

In *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Service, supra, 616 F. Supp. at 502*, the court considered a similar claim. Applying the rule of reason rather than a per se standard; *id. at 506*; the court determined that "the ability to present a unique product in the newspaper or broadcast media contributes to the value of a paper or television station and enhances its competitive edge in the market place. Limited exclusivity grants are thus the custom of these industries. . . . One aspect of the [competing newspaper's] competitive draw would be lessened if another newspaper in the area published the same articles on **[*692]** the same day, or even worse, published the articles before the [competing newspaper] chose to use them." *Id. at 510*. "In the end, such exclusive subscriptions result in each interested area newspaper contracting with a different service, thus guaranteeing that the reading public has access to a wider variety of news reporting and opinions." *Id. at 511*. Accordingly, the court granted the defendants' motion for summary judgment. **[***31]** *Id. at 512*.

The plaintiff in this case in effect concedes that, under *Paddock Publications, Inc.,* and *Woodbury Daily Times Co.,* ***HN17***[] exclusivity provisions in contracts between newspapers and syndicators are, as a general rule, presumptively legal. It argues, however, that, because of the unusual factual circumstances of this case, those cases are not applicable here. Specifically, the plaintiff claims that, because the syndicators in this case have permitted the plaintiff to publish the same comics as the defendant on Monday through Saturday, the defendant cannot claim that the exclusivity provisions provide it with the marketplace advantage of being identified with those comics. Therefore, the plaintiff contends, the sole purpose and effect of the contractual restriction was to suppress competition in the market for expanded weekend newspapers, whether published on Saturday or Sunday, without any redeeming value for the marketplace. Accordingly, the plaintiff argues, the trial court properly concluded that the exclusivity provisions constituted per se violations of the antitrust laws. See *Elida, Inc. v. Harmor Realty Corp., supra, 177 Conn. at 227* (recognizing that per se rule is applicable **[***32]** to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable" [internal quotation marks omitted]).

Thus, the plaintiff implicitly concedes that, if the exclusivity provisions had prevented the plaintiff from publishing certain comics on a daily basis, they would **[*693]** be presumptively legal. It argues, however, that, because the provisions prevent the plaintiff from publishing the comics *only* on Sunday, they do not enhance the defendant's competitiveness while they do impair **[**838]** the plaintiff's ability to compete and, accordingly, are presumptively illegal. We are not persuaded.

First, the exclusivity provisions complained of by the plaintiff in this case are, on their face, *less* restrictive than the exclusivity provisions found, under a rule of reason analysis, to be procompetitive in *Paddock Publications, Inc.,* and *Woodbury Daily Times Co.* We cannot perceive any reason why the fact that the plaintiff is permitted to publish the comics at issue on Monday through Saturday should relieve it of the burden of establishing the existence of the actual anticompetitive effects of preventing it from **[***33]** publishing the comics in a weekend edition, or impose on the defendant the burden of establishing redeeming procompetitive virtues of the provisions.

More fundamentally, we simply cannot reconcile the plaintiff's claim that the exclusivity provisions constitute per se violations of the antitrust laws because their only purpose is to suppress competition in the market for expanded weekend newspapers, with its claim that the provisions have no redeeming procompetitive virtues. If the provisions suppress competition, they do so only by making the defendant's Sunday newspaper more desirable to consumers than competing weekend newspapers that are prevented from publishing the same Sunday comics. This is the same procompetitive effect that the exclusivity provisions challenged in *Paddock Publications, Inc.*, and *Woodbury Daily Times Co.* were found to have had on the markets in those cases. Accordingly, we conclude that the exclusivity provisions between the defendant and the syndicators do not constitute per se violations of the antitrust statutes.

[*694] We also conclude that, under the rule of reason, the plaintiff has not met its burden of establishing probable cause to believe that "the alleged **[***34]** . . . agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." *Orson, Inc. v. Miramax Film Corp., supra, 79 F.3d at 1367*. The plaintiff produced no evidence supporting "the existence of [any] actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services." Id. Rather, the evidence showed only that the plaintiff's inability to publish those comic strips may have been a factor in its decision whether to publish an expanded weekend newspaper. It is not unreasonable to infer from this evidence that the plaintiff believed that its planned weekend edition would be more competitive if it contained the Sunday edition of all of the comics that its newspaper contains on a daily basis. ***HN18***[] "The antitrust laws, however, were enacted for the protection of *competition*, not *competitors* . . .." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

We also reject the plaintiff's claim, essentially raised as an alternate ground for affirmance, that there is probable cause **[***35]** to believe that the eleven Sunday comic strips at issue in this case constitute an "essential facility" because the syndicators are the only source of those particular comics. The evidence showed that there are hundreds of syndicated comic strips available to the plaintiff. There simply is no evidence that the eleven comic strips that the plaintiff is prevented from publishing are essential for the publication of a viable newspaper. See *Paddock Publications, Inc. v. Chicago Tribune Co., supra, 103 F.3d at 45* (rejecting "essential facilities" claim where case did "not involve a single facility that **[*695]** monopolizes one level of production and creates a potential to extend the monopoly to others").

[839]** We conclude that, in the absence of any evidence establishing the existence of any actual anticompetitive effects of the exclusivity provisions, the plaintiff has not established probable cause to believe that the antitrust statutes were violated.

III

The defendant also claims that the trial court improperly concluded that there was probable cause to believe that the defendant had violated CUTPA. It argues that, because the CUTPA claim was predicated solely on the antitrust claim, and because the **[***36]** plaintiff did not establish probable cause to believe that the antitrust laws had been violated, there is no basis for the claim. The plaintiff contends, to the contrary, that, even if the antitrust laws were not violated, the trial court properly found probable cause to believe that the defendant had engaged in unscrupulous or oppressive acts. We agree with the defendant.

"It is well settled that ***HN19***[] in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businessmen]. . . .

"All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair **[*696]** because of the degree to which **[***37]** it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . Furthermore, a party need not prove an intent to deceive to prevail under CUTPA." (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Service, Inc. v. Montes, 223 Conn. 80, 105-106, 612 A.2d 1130 (1992)*.

The trial court concluded that there was probable cause to believe that the defendant had engaged in "unscrupulous or oppressive acts, causing a substantial injury to the readers of the [plaintiff's] publication and to the [plaintiff]." In light of the evidence presented at the hearing, the "unscrupulous or oppressive acts" referred to by the trial court could only have been the exclusivity provisions in the contracts between the defendant and the syndicators. As noted by the court in *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News*

Service, supra, 616 F. Supp. at 510, however, "limited exclusivity grants are . . . the custom" in the newspaper industry. Moreover, such provisions are generally procompetitive **[***38]** and, as such, are in furtherance of public policy and presumptively legal. See Paddock Publications, Inc. v. Chicago Tribune Co., supra, 103 F.3d at 45. We conclude that, in the absence of any evidence of substantial injury to consumers or to the plaintiff, [10] these customary, procompetitive and presumptively legal contractual provisions do not constitute probable cause to believe that the criteria of the "cigarette rule" have been met. Accordingly, we conclude that the trial court improperly determined **[**840]** **[*697]** that there was probable cause to believe that the defendant had violated CUTPA.

IV

We next address the plaintiff's claim that it is entitled to a new hearing at which it should be allowed to subpoena a representative of the defendant to provide additional facts in support of its bill of discovery. We disagree.

The following additional facts and procedural history are relevant to this claim. Prior to the hearing on the bill of discovery, the plaintiff attempted to serve **[***39]** a subpoena directed to Marty Petty, a former publisher of the Hartford Courant, or, in the alternative, the defendant's designee with knowledge of its relationship with the syndicators. The subpoena directed the production of "any and all correspondence by and between [the syndicators] and the [defendant] in regard to restrictions on access to the agreements between the syndicators and the [defendant] related to the so-called Sunday comics, and the nature and extent of distribution of the so-called Sunday Hartford Courant which includes the Sunday comics." Service was attempted at the offices of the defendant's headquarters. At the time that the attempted service was made, however, Petty was no longer employed by the defendant.

The defendant moved to quash the subpoena on the grounds that: (1) service had not been made on Petty and the defendant was, therefore, not required to respond to the subpoena; and (2) the plaintiff was not entitled to any discovery until after a ruling on its petition for a bill of discovery. The trial court granted the motion to quash, concluding that the plaintiff was required to establish probable cause to believe that it had a cause of action against the **[***40]** defendant before the plaintiff would be entitled to discovery.

[*698] Thereafter, the plaintiff filed a second subpoena directed to Louis J. Golden, the deputy publisher of the Hartford Courant. The subpoena directed production of the same documents listed in the first subpoena. The defendant again filed a motion to quash and a motion for sanctions against the plaintiff for its failure to abide by the trial court's order quashing the first subpoena. The motion to quash was argued before the trial court at the commencement of the hearing on the bill of discovery. The trial court granted the motion.

The plaintiff now argues that, if this court determines that the record before the trial court did not establish probable cause to believe that the plaintiff had a cause of action against the defendant, this court should remand the case for a hearing at which the plaintiff should be allowed to subpoena a representative of the defendant to provide limited testimony as to the *existence* of the contractual exclusivity provisions, as distinct from their substance. The plaintiff concedes that it should not be able to compel production of the same information sought in the bill of discovery by use of a **[***41]** subpoena, but argues that the bill of discovery was aimed at the history, nature and substance of the contractual provisions, not their mere existence, of which the plaintiff already knew indirectly through hearsay.

We conclude that the plaintiff is not entitled to a new hearing. We have assumed for purposes of our analysis that the restrictive contractual provisions exist and have determined that their existence does not constitute probable cause to believe that the plaintiff has a cause of action against the defendant. Accordingly, nothing would be gained by allowing the plaintiff to establish the existence of the contractual provisions through direct testimony by a representative of the defendant.

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[10] As we have noted, the only injury claimed by the plaintiff is that the inability to publish the eleven Sunday comic strips at issue may make its planned weekend edition less competitive than it otherwise would have been.

[*699] The judgment is reversed and the case is remanded with direction to render **[**841]** judgment denying the petition for a bill of discovery.

In this opinion KATZ and ZARELLA, Js., concurred.

Dissent by: BORDEN

Dissent

BORDEN, J., with whom VERTEFEUILLE, J., joins, dissenting. Until 1994, when we decided *Berger v. Cuomo, 230 Conn. 1, 644 A.2d 333 (1994)*, and included therein one brief passage of dictum; see *id. at 7-8*; which I discuss later in this opinion, our law on the bill of discovery was adequate to protect both **[***42]** those who sought such a bill and those who sought to resist it. By applying the *Berger* dictum dispositively to the facts of the present case, the majority has, in my view, unduly raised the bar to the issuance of a bill of discovery. I therefore dissent.

Our jurisprudence regarding bills of discovery prior to *Berger* may be summarized as follows. Two types of the bill of discovery exist at equity: the bill of discovery and relief, and the pure bill of discovery. The former is reserved for those circumstances in which a plaintiff not only seeks some information or document in the possession of the adverse party, but also requests that the court take some affirmative action on the asserted cause of action. The bill of discovery and relief is, therefore, the equitable equivalent of a plenary action at law. See generally G. Bispham, Principles of Equity (11th Ed. 1931) § 525, pp. 437-38 (bill of discovery and relief vehicle by which claim made for both discovery and equitable remedy; pure bill of discovery aids prosecution of legal claim); 3 J. Story, Equity Jurisprudence (14th Ed. 1918) § 1930, p. 519 (pure bill of discovery, as distinguished from bill of discovery and relief, seeks no **[***43]** remedy other than disclosure of certain information or documentation); 1 J. Pomeroy, Equity Jurisprudence (5th Ed. 1941) § 191, p. 277 (same). The second type of bill, the pure bill of discovery, is at issue in the **[*700]** present case and is the only bill addressed in this dissent.

A pure bill of discovery "is an action in equity ancillary to the original action. The only relief sought [therein] is a discovery of facts to be used as evidence in that action. . . . *A pure bill of discovery is favored in equity and will be granted unless there is some well-founded objection against the exercise of the court's jurisdiction*. *Peyton v. Werhane, 126 Conn. 382, 389, 11 A.2d 800* [1940]; *Skinner v. Judson, 8 Conn. 528, 533* [1831]; Swift, Evidence, p. 116; 2 Swift, Digest, p. 210; 1 [J. Pomeroy, supra] §§ 142, 144, 190a, 191, 195; 17 Am. Jur. 6, § 3; see *Middletown Bank v. Russ, 3 Conn. 135, 140* [1819]; *Hoyt v. Smith, 23 Conn. 177, 186* [1854]; *Norwich & W.R. Co*. v. *Storey, 17 Conn. 364, 371* [1845]; *Welles v. Rhodes, 59 Conn. 498, 506, 22 A. 286* [1890]. To sustain a pure bill of discovery, a party must show that the matter he seeks to discover is material and necessary to the proof of, or is needed **[***44]** to aid in the proof of, another action, already brought or about to be brought, and that he has no other adequate means of enforcing discovery of the matter. *3 [J. Story, supra*] §§ 1930, 1943; 1 [J. Pomeroy, supra, § 191, pp. 278-79 and] §§ 197a, 197b; Hare, Discovery, [1849] p. 110; 17 Am. Jur. 8. [In this regard, it] might be stated parenthetically that the cases in other jurisdictions, and the earlier cases in this state, make a distinction between pure bills of discovery and bills for discovery and relief. *In the latter, the petitioner must show that he has stated a valid cause of action for the equitable relief in support of which he seeks to invoke the equitable powers of the court for a discovery*. *Middletown Bank v. Russ, supra* [140]; *Norwich & W.R. Co*. v. *Storey, supra* [371]; *Welles v. Rhodes, supra* [506]; Story, Equity Pleadings (9th **[**842]** Ed.) § 324a; 1 [J. Pomeroy, supra] § 229, p. 404.

"The law of discovery has been invested at times with unnecessary mystery. There are few fields where **[*701]** considerations of practical convenience should play a larger role. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases **[***45]** will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs. . . . There were other reasons in times past, when parties were not permitted to be witnesses, and when there was no compulsory process for the production of books or documents. *Carpenter v. Winn, 221 U.S. 533 [31 S. Ct. 683, 55 L. Ed. 842 (1911)]*; *Pressed Steel Car Co*. v. *Union Pacific R. Co., 240 Fed. 135, 136* [1917]. Today the remedy survives, chiefly, if not wholly, to give facility to proof. . *Sinclair Refining Co*. v *Jenkins Petroleum Process Co., 289 U.S. 689, 693, 53 S. Ct. 736, 77 L. Ed. 1449* [1933]. The right to a discovery, however, does not extend to all material facts but only to those which pertain to a party's cause of action or defense. Discovery cannot be used to pry into the opposing party's case or to find out the evidence by which that case will be supported. *Peyton v. Werhane, supra [126 Conn. at 389*]; *Downie v. Nettleton, 61 Conn. 593, 596, 24 A. 977* [1892]; 1 [J. Pomeroy, supra] § 201. Discovery does not sanction **[***46]** impertinent intrusion, and there must be a showing of good faith and probable cause. *Sinclair Refining Co*. v. *Jenkins Petroleum Process Co., supra, at 697*. In passing upon the bill, the court exercises a discretionary power within recognized limits. [Id.]; see *Kiessling v. Kiessling, 134 Conn. 564, 568, 59 A.2d 532* [1948]; *May v. Young, 125 Conn. 1, 10, 2 A.2d 385* [1938]; *Katz v. Richman, 114 Conn. 165, 171, 158 A. 219* [1932]; 1 [J. Pomeroy, supra] §§ 202, 203; 3 Story, Equity Jurisprudence [supra] § 1936." (Emphasis added; internal quotation marks omitted.) *Pottetti v. Clifford, 146 Conn. 252, 257-59, 150 A.2d 207 (1959)*. "The granting of a bill and the **[*702]** terms of the judgment rendered call for the exercise by the trial court of a sound discretion as to what is reasonably necessary." *Id. at 263*.

Furthermore, this statement of the legal principles applicable to the pure bill of discovery is consistent with those articulated in the authoritative treatises on equity. According to those authorities, the party seeking a bill of discovery "must . . . state a case which will, if he is the plaintiff at law, constitute a good ground of action . . . . If it is clear that the action . . . is unmaintainable **[***47]** at law, Courts of Equity will not entertain a bill for any discovery in support of it, since the discovery could not be material, but must be useless. *This however is so delicate a function that Courts of Equity will not undertake to refuse a discovery upon such grounds unless the case is entirely free from doubt. If the point be fairly open to doubt or controversy, Courts of Equity will grant the discovery and leave it to Courts of Law to adjudicate upon the legal rights of the party seeking the discovery."* (Emphasis added.) *3 J. Story, Equity Jurisprudence, supra*, § 1941, pp. 525-26; see also 1 J. Pomeroy, supra, § 198, pp. 303-304 ("if the result of the controversy at law is doubtful, even when the defendant in the suit for a discovery has denied the plaintiff's title, or has set up matter which if true would operate as a complete defense, the court of equity will, in general, grant the discovery, and leave the issue to be tried and finally determined by the court of law").

[843]** Gauged by these standards, it is clear to me that the trial court did not abuse its discretion in issuing this limited bill of discovery. The court made specific findings that: (1) the material sought would **[***48]** be necessary or helpful to prove claims in a suit yet to be filed; (2) the plaintiff had no alternative means of obtaining the information other than by a court order; (3) there was a good faith basis to conclude that the material was **[*703]** necessary for the plaintiff to determine whether the defendant had violated the law; and (4) there was probable cause to believe that the plaintiff has a cause of action against the defendant on one or more of the bases stated in its petition. [1] As previously stated, such a bill is favored, and should be issued absent a well-founded objection to it. The fact that, ultimately, the plaintiff may not prevail on the lawsuit it intends to bring, should not constitute such an objection. Moreover, the discovery sought in the present case was limited to one contract document. Thus, this was not an instance in which the plaintiff sought to misuse the bill of discovery as a tool to pry needlessly into the defendant's affairs. Finally, even if the document sought ultimately did not support the plaintiff's cause of action, it hardly can be maintained that, at such an early stage of the proceedings, when the trial court exercised its discretion to issue the bill, **[***49]** the ultimate liability of the defendant on the claims that the plaintiff intends to bring was entirely free from doubt or controversy.

Indeed, as I read the majority opinion, it does not quarrel with the proposition that, measured solely by these standards, the trial court did not abuse its discretion in ordering the bill of discovery in the present case. Instead, the majority relies on, and applies in a very stringent way, the following passage from *Berger v. Cuomo, supra, 230 Conn. at 7-8*: "*The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action.* 'Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or nonexistence is determined by the court on the facts found.' . . . *Cosgrove Development* **[*704]** *Co*. v. *Cafferty, 179 Conn. 670, 671, 427 A.2d 841 (1980)*. Moreover, the plaintiff who seeks discovery in equity **[***50]** must

[1] I discuss later in this opinion my disagreement with the majority regarding the quantum of proof necessary to meet the probable cause standard for the issuance of a bill of discovery.

demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong. *The plaintiff need not, however, state each claim with technical precision; he need only set forth facts that fairly indicate that he has some potential cause of action.* Pottetti v. Clifford, supra, 146 Conn. at 259." (Emphasis added.)

I perceive several flaws in endorsing the probable cause standard articulated in *Berger*. For instance, the first, emphasized sentence of the previously quoted passage, which the majority singularly relies on in reversing the judgment of the Appellate Court in the present case, has no citation for the proposition stated therein, because none is available. Prior to *Berger*, we had never imposed a showing of detailed facts on a bill of discovery. Moreover, the last sentence of the passage in *Berger*, quoted from *Pottetti*, is inconsistent with the first sentence. Indeed, it is that last sentence that defines the contours of the notion of probable cause in the context of a bill of discovery: without stating or proving each claim with technical precision, the plaintiff need only set forth **[**844]** facts *fairly indicating that it has some potential cause of action*. **[***51]** Unless it is clear that it has none, whether that potential cause of action ultimately will survive a motion to strike or a motion for summary judgment, or whether the plaintiff will prevail on the merits after a trial, is to be left to a later determination, when and if that action is brought.

Thus, the majority has taken the requirement that the plaintiff establish "a valid cause of action," which is applicable only to the bill of discovery and relief; *Pottetti v. Clifford, supra, 146 Conn. at 258*; and applied it to the present case, which involves the pure bill of **[*705]** discovery. [2] In other words, the majority has imposed on both types of the bill of discovery the requirement that the plaintiff show the existence of probable cause with respect to each and every element of the cause of action that he intends to file. That this is the effect of the majority opinion is demonstrated by the detailed legal analyses that it presents in order to refute the plaintiff's potential causes of action. Neither our law, nor the law of equity generally, supports such a rigorous standard for the issuance of a bill.

As a practical matter, the majority's analysis requires a party who seeks to gain access to a single document, as in the present **[***53]** case, in order to facilitate its proof of the cause of action that it intends to bring--or, as is more likely, in order simply to determine whether it can, in good faith, bring such an action--to be able to establish a prima facie case on the merits of that potential cause of action. In effect, the party must demonstrate, and the trial court must determine, in advance of the issuance of the bill, that the plaintiff's underlying claim, in aid of which it seeks the bill of discovery, has merit. The issuance of a bill of discovery has never had to surmount such a high threshold.

[*706] Moreover, as a matter of policy, it should not have to do so. First, erecting such a high threshold is likely to inhibit, unduly, the bringing of bills of discovery, even where their laudable goal is to help the potential plaintiff who has a good faith--but mistaken--belief that he has a cause of action against the defendant to determine whether there is such a valid claim. For example, if the document in the present case is as legally benign as the majority says it is, and if the majority is as correct on the applicable law as it purports to be, then the issuance of the bill would, in all likelihood, demonstrate **[***54]** to the plaintiff the futility of its intended, potential causes of action. In that event, then, the result of the issuance of the bill would be that a claim that otherwise might have been brought will not be brought. We should not, as a matter of policy, rule out that possible result.

The majority's approach, moreover, effectively penalizes the cautious and prudent **[**845]** lawyer who, rather than simply alleging her cause of action and thereby engaging the full panoply of judicial machinery--discovery requests, depositions, interrogatories, and the like--instead seeks only to gain access to limited information or documents in

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[2] Although we did not expound upon our suggestion in *Pottetti* that a party seeking to sustain **[***52]** a bill of discovery and relief bears a greater burden than one who utilizes a pure bill of discovery, the reasoning behind such a distinction is obvious. As previously indicated, a bill of discovery and relief goes beyond an informational request and requires the court to resolve a party's substantive claims. Because, in that circumstance, the function of the court does not end upon disposition of the pure discovery request, but rather continues through a consideration of the merits of the case, it makes sense to require the court to determine, at the outset, whether there exists probable cause to support the various elements of the causes of action alleged. When dealing with a pure bill of discovery, however, the court's only function is to pass upon the necessity of a party's informational request. Imposition of the more stringent probable cause standard articulated in *Berger* is thus improper in such a case because the underlying claims are not before the court for disposition on the merits, as are the claims in a proceeding on a bill of discovery and relief.

order to determine that she will be able to prove that action. This record amply demonstrates such a cautious and prudent course of conduct.

Second, if the plaintiff nonetheless brings a bill of discovery despite the high threshold set by the majority in the present case, believing in good faith that it can surmount it, it will then have to put on its best version of a prima facie case, and the trial court will have to delve as deeply into the merits, not of the matter before it, but of the potential claim asserted in the bill, as the majority has done in the present case. **[***55]** Thus, every bill of discovery will be, in effect, a minitrial of the potential claim, without, however, the critical document or documents sought by the bill.

[*707] The unnecessary burdens of such a regime on the administration of justice are obvious. First, requiring a court to evaluate the probable success of a claim before suit is even initiated and without critical information sought in the bill itself is unfairly prejudicial and may, ultimately, thwart the administration of justice by needlessly defeating a potentially good cause of action. Second, as discussed previously, the majority's application of *Berger* creates a disincentive to utilize pure bills of discovery and an incentive to file suit and avail oneself of the vast array of discovery tools commonly employed in the initial stages of litigation. There is no justification, however, for the attendant waste of judicial resources that otherwise may be saved by first exploring the availability of information or evidence to support a claim in a bill of discovery. Third, forcing the trial court to evaluate the merits of a potential cause of action up front may result in the wasteful repetition of its duties, as there may be instances **[***56]** in which the trial court, after a detailed analysis of the claim such as the majority employs in this appeal, finds probable cause to bring a claim in a proceeding on the bill of discovery, but subsequently determines, in ruling on a motion to strike, motion to dismiss, or motion for summary judgment, that the claim is, ultimately, unsupportable.

I recognize what may lie behind the majority's high threshold, namely, a fear of opening the proverbial floodgates to numerous, bad faith fishing expeditions under the guise of bills of discovery. This fear, however, is unfounded. First, before *Berger*, and under *Pottetti*, no such flood of bills has ever occurred. This is undoubtedly because, in most cases, plaintiffs have the necessary information to state their claims, and then can use the normal rules of discovery to gain what they need in order to prove those claims. Furthermore, it is undoubtedly expensive to file and litigate a separate bill of discovery; there is, therefore, an economic disincentive **[*708]** to frivolous filings. Finally, the trial court always has the discretion to weed out bad faith claims, and to sanction parties and counsel for engaging in such conduct. I have full confidence **[***57]** in the abilities of our trial judges to recognize when the bill is being abused.

I would, therefore, affirm the judgment of the trial court issuing the bill of discovery.

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Broadway Theatre Corp. v. Buena Vista Pictures Distrib.

United States District Court for the District of Connecticut

September 19, 2002, Filed

Civ. Action No., 3:00CV706 (SRU)

Reporter

2002 U.S. Dist. LEXIS 27368 *; 2002 WL 32502100

BROADWAY THEATRE CORP. v. BUENA VISTA PICTURES DISTRIBUTION, et al.

Disposition: Defendants' motion for summary judgment denied.

Core Terms

Distributors, clearances, theaters, unfair, license, public policy, competitors, consumers, practices, movies, films, genuine issue of material fact, summary judgment, anti trust law, offend, antitrust, deceptive, first-run, nonmoving, summary judgment motion, substantial injury, business practice, movie theater, cases

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate when the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

When ruling on a summary judgment motion, the court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN3[] **Summary Judgment, Evidentiary Considerations**

When a motion for summary judgment is properly supported by documentary and testimonial evidence, the nonmoving party may not rest upon the conclusory allegations or denials of the pleadings, but rather must present sufficient probative evidence to establish a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN4[] **Entitlement as Matter of Law, Genuine Disputes**

To present a genuine issue of material fact on a motion for summary judgment, there must be contradictory evidence such that a reasonable jury could return a verdict for the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Entitlement as Matter of Law, Genuine Disputes**

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he bears the burden of proof at trial, then summary judgment is appropriate. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN6[] **Entitlement as Matter of Law, Genuine Disputes**

If there is no genuine issue of material fact, summary judgment may enter.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN7[] Trade Practices & Unfair Competition, State Regulation

The Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq.*, prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. *Conn. Gen. Stat. § 42-110b*.

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

Governments > Courts > Common Law

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN8[] State Regulation, Claims

Liability under the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq.*, is established using three criteria to determine if a business practice is unfair or deceptive: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers competitors or other businessmen. All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] Regulated Practices, Trade Practices & Unfair Competition

The practice of granting clearances may violate public policy if the theater over which a clearance is granted is not in substantial competition with the licensed theater. If the theaters are in substantial competition, the clearances at issue would not violate public policy; if the theaters are not in substantial competition, the clearances might well violate public policy.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10[] Regulated Practices, Trade Practices & Unfair Competition

The United States Supreme Court has held that there should be no clearance between theaters not in substantial competition.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

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

HN11[] State Regulation, Claims

Antitrust laws and the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, outlaw different types of conduct. A practice may be violative of an "established concept of unfairness" even if it is not violative of any statute or the common law. Thus, the fact that a practice is not outlawed by the antitrust laws does not necessarily preclude that practice from CUTPA's reach as otherwise "unfair."

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN12[] State Regulation, Claims

An antitrust claim will fail if the plaintiff can show only harm to a competitor, while that harm would be sufficient to sustain a Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, claim if the other elements of CUTPA have been met.

Business & Corporate Compliance > ... > Scope of Copyright Protection > Assignments & Transfers > State Regulations

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Copyright Law > ... > Ownership Rights > Distribution > General Overview

HN13[] Copyright, State Regulation of Assignments & Transfers

The right to transfer or license copyrighted material for use by others under the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulations; it has meant that the copyright owner has the exclusive right to transfer the material for a consideration to others.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

HN14[] Federal & State Law Interrelationships, Federal Preemption

The Copyright Act does not prohibit regulation of unfair competition, even if the competition touches upon copyrighted material. Indeed, the federal Copyright Act preempts any state law creating rights that are equivalent to any of the exclusive rights within the general scope of copyright. *17 U.S.C.S. § 301(a)*.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN15[] Trade Practices & Unfair Competition, State Regulation

Conn. Gen. Stat. § 42-110g(f) provides that a Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq.*, action may not be brought more than three years after the occurrence of a violation.

Counsel: [*1] For Broadway Theatre Corp, Plaintiff: Peter C. Spodick, New Haven, CT.

For Buena Vista Pictures Distribution, Columbia Pictures Industries, Inc., Dreamworks Distribution, LLC, Lions Gate Films Inc, Metro-Goldwyn-Mayer Distribution Co, Miramax Film Corp, New Line Cinema Corp., Paramount Pictures Corp., Sony Pictures Releasing Corp, Universal Film Exchanges, Inc., Warner Bros. Distributing, USA Films, LLC, Defendants: Benjamin A. Solnit, Tyler, Cooper & Alcorn, New Haven, CT. Elizabeth K. Andrews, Tyler, Cooper & Alcorn, New Haven, CT. Richard W. Bowerman, Tyler, Cooper & Alcorn, New Haven, CT.

For City of New Haven, Movant: Jonathan H. Beamon, New Haven, CT.

Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Broadway Theater Corporation ("Broadway") owns and operates the York Square Cinema ("York Square"), a medium-size, three-screen movie theater in downtown New Haven, Connecticut. Broadway sued a number of major motion picture distributors [1] ("the Distributors"), claiming that their practice of licencing certain "first-run" films exclusively to the suburban **[*2]** New Haven movie theaters Showcase Cinema Orange and/or Showcase Cinema North Haven (the "Showcases"), violates the Connecticut Unfair Trade Practices Act ("CUTPA"), *Conn. Gen. Stat. §§ 42-110a et seq*. The Distributors have moved for summary judgment, arguing that the challenged distribution

[1] Defendants in this action are Buena Vista Pictures Distribution, Columbia Pictures Industries Inc., Dreamworks Distribution L.L.C., Lions Gate Films Inc., Metro-Goldwyn-Mayer Distribution Co., Miramax Film Corp., New Line Cinema Corp., Paramount Pictures Corp., Sony Pictures Releasing Corp., Universal Firm Exchanges Inc., Warner Bros. Distributing, and USA Films L.L.C.

practice, known in the motion picture industry as giving "clearance" over particular theaters, is a "reasonable, customary, pro-competitive business practice" and therefore does not violate CUTPA. Distributors further contend that Broadway's complaint is based on defective antitrust allegations, that any CUTPA challenge to the Distributors' policy is preempted by the federal *Copyright Act and* that CUTPA's three-year statute of limitations bars Broadway's claims. For the following reasons, the Distributors' motion is denied.

[*3] STANDARD OF REVIEW

HN1[] Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; see also *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

HN2[] When ruling on a summary judgment motion, the court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson, 477 U.S. at 255*; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*; see also *Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir.)*, *cert*. *denied*, *506 U.S. 965, 121 L. Ed. 2d 359, 113 S. Ct. 440 (1992)*. ***HN3***[] When a motion for summary judgment is properly supported by documentary and testimonial evidence, however, the nonmoving party may not rest upon the conclusory allegations **[*4]** or denials of the pleadings, but rather must present sufficient probative evidence to establish a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995)*. ***HN4***[] To present a genuine issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." *Anderson, 477 U.S. at 248*.

HN5[] If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he bears the burden of proof at trial, then summary judgment is appropriate. *Celotex, 477 U.S. at 322*. In such a situation, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id. at 322-23*; *accord*, *Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d Cir. 1995)* (movant's burden satisfied if it can point to an absence of evidence to support an essential element **[*5]** of nonmoving party's claim). In short, ***HN6***[] if there is no genuine issue of material fact, summary judgment may enter. *Celotex, 477 U.S. at 323*.

DISCUSSION

Clearances as Unfair Practices

Broadway brought a one-count complaint alleging violation of CUTPA and requesting monetary and injunctive relief. CUTPA ***HN7***[] prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce." *Conn. Gen. Stat. § 42-110b*. It is a broad statute enacted in response to "legislative concern that the existing pattern of common-law, legislative and administrative standards is insufficient to avoid unfairness in commercial relations." 1 Robert M. Langer, John T. Morgan & David L. Belt, The Connecticut Unfair Trade Practices Act 27 (1994) ("CUTPA Treatise"). ***HN8***[] Liability under CUTPA is established using three criteria to determine if a business practice is unfair or deceptive:

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is **[*6]** within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether

it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businessmen].

Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc., 202 F.3d 489, 501 (2d Cir. 2000). "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." Id.

The Distributors' motion for summary judgment challenges Broadway's CUTPA claims on several grounds. The Distributors claim that their granting of clearances over the York Square cannot offend public policy because the granting of such clearances is a rational business decision -distributors prefer to license films to the higher-grossing Showcases than to smaller venues like the York Square. The Distributors, however, have not shown they would be harmed by offering first-run films to both the York Square and the Showcases, or even that they gain an economic advantage from the use of **[*7]** clearances. Indeed, some evidence in the record suggests that licensing the same movie to both the York Square and the Showcases might actually benefit the Distributors by increasing their total revenues for the film. In any event, the Distributors' purported preference [2] for exhibiting films in the larger Showcases over the York Square does not shield the practice of granting clearances against a CUTPA claim.

The Distributors also claim that the practice of granting clearances generally does not offend public policy and therefore **[*8]** cannot violate CUTPA. The use of clearances, the Distributors argue, does not offend public policy because other cases challenging clearances have upheld the practice. The Distributors cite several cases in which antitrust challenges to clearances have failed. See Theee Movies of Tarzana v. Pacific Theatres, 828 F.2d 1395 (9th Cir. 1987); Soffer v. National Amusements, 1996 U.S. Dist. LEXIS 19751, 1996 WL 194947 (D. Conn. 1996). The Distributors contend that, because these antitrust decisions have found clearances to be pro-competitive, the use of clearances cannot be an unfair practice under CUTPA. This argument fails for at least two reasons: the existence of genuine issues of material fact concerning the level of competition among the relevant theaters and the differing standards governing antitrust and CUTPA cases.

Notwithstanding the Distributors' arguments, ***HN9***[] the practice of granting clearances may violate public policy if the theater over which a clearance is granted is not in substantial competition with the licensed theater. If the theaters are in substantial competition, the clearances at issue would not violate public policy; if the theaters are not in substantial competition, **[*9]** the clearances might well violate public policy. In the landmark antitrust decision United States v. Paramount, 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948), ***HN10***[] the Supreme Court held that "there should be no clearance between theaters not in substantial competition." Id. at 146. In Theee Movies of Tarzana v. Pacific Theatres, 828 F.2d 1395 (9th Cir. 1987), the Ninth Circuit elaborated on the reasoning behind Paramount. The court explained that clearances between theaters in substantial competition are pro-competitive. This is because theaters that are denied a licence to a certain movie will show alternative movies, thus providing consumers more movies to choose among and encouraging competition among movies for box office dollars. Id. at 1399-1401. Nothing in Paramount or Theee Movies, however, suggests that a clearance between theaters not in substantial competition would be consistent with the antitrust laws or with public policy in general.

There are genuine issues of material fact whether the York Square and the Showcases serve substantially the same geographic market and whether they are in substantial competition. Broadway **[*10]** presents evidence that the York Square services, at least in part, a discrete urban population. Spodick deposition, Defs.' Ex. 2 at 76.17-77.11, Pl.'s Ex. 12. Much of that population does not drive. Koch Declaration, Pl.'s Ex. 25. Because public transportation to suburban theaters is sparse and inconvenient, Broadway argues that a significant portion of New Haven's population has no access to first-run films that play only in suburban New Haven theaters. Id. Additionally, because New Haven's urban center contains a high proportion of racial minorities, senior citizens, students and individuals with disabilities, Broadway alleges that the Distributors' practice disadvantages these populations. Id.,

[2] The record does not suggest that the Distributors prefer clearances over the York Square, but rather that clearances are a required condition of the Showcases' bids to license certain movies available through the Distributors; the Distributors apparently acquiesce to the Showcases' demands for clearances. These circumstances certainly affect the degree of unfairness of Distributors' actions, but do not eliminate the possibility of CUTPA liability against the present defendants.

Pl.s Ex. 17. In contrast, the Distributors' offer evidence that the theaters service the same population. Hoover Declaration (the York Square and Showcase North Haven are 6.8 miles apart). [3] Based on the evidence presented in connection with the motion for summary judgment, a genuine issue of material of fact exists regarding whether or not Broadway and the Showcases are in substantial competition, whether they service substantially the same geographic market and, consequently, **[*11]** whether the practice of granting clearances over the York Square offends public policy. [4] Resolution of these issues may require expert testimony and certainly will require a more fully developed factual record than the one now before the court.

[*12] In addition, ***HN11***[] antitrust laws and CUTPA outlaw different types of conduct. A practice may be violative of an "established concept of unfairness" even if it is not violative of any statute or the common law. Thus, the fact that a practice is not outlawed by the antitrust laws does not necessarily preclude that practice from CUTPA's reach as otherwise "unfair." See *Sorisio v. Lenox, Inc., 701 F. Supp. 950, 963 (D. Conn.)*, *aff'd*, *863 F.2d 195 (2d Cir. 1988)* (plaintiff's claim of a violation of public policy failed because ***antitrust law*** had not been violated and defendant's conduct was not otherwise unfair); 1 CUTPA Treatise 23 ("There may be some instances in which CUPTA could be a significant addition to ***antitrust law***."). The fundamental purpose of antitrust laws is to protect competition, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* ("The antitrust laws, however, were enacted for the protection of *competition*, not *competitors*.") (internal quotation omitted), while the purpose of CUTPA is to protect consumers, competitors and businesses. See *Salmon Bros. Realty Corp. v. Yost, 2001 Conn. Super. LEXIS 2777, 2001 WL 1232054* ***[*13]*** *at *2 (Conn. Super. Sept. 26, 2001)* ("purpose of CUTPA is to protect… competitors and other business people from unfair competition") (citing *Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 496-98, 656 A.2d 1009 (1995))*. Thus, ***HN12***[] an antitrust claim will fail if the plaintiff can show only harm to a competitor, while that harm would be sufficient to sustain a CUTPA claim if the other elements of CUTPA have been met.

The Distributors also contend that Broadway's CUTPA claim must fail because there is no substantial injury to consumers, competitors or other businesses. See *Sporty's Farm, 202 F.3d at 501*. The record before the court contains evidence from which a jury could conclude that the Distributors' use of clearances causes substantial injury within the scope of CUTPA. If the York Square and the Showcases have different primary markets, then the challenged use of clearances may injure consumers by denying a specific population access to many first-run movies. Furthermore, the practice may unfairly disadvantage the York Square, vis-a-vis its competitors, as well as other businesses. Broadway offers evidence that, when viewed in Broadway's **[*14]** favor, indicates that the Distributors use clearances to harm independent or small theaters. For example, while the Distributors provide the Showcases clearances over the York Square and the only other independently owned movie theater in New Haven County, they do not grant clearances over competing, chain-owned movie theaters in Connecticut. In Westbrook and Old Saybrook, the Distributors license the same, first-run movies simultaneously to two, nationally owned multiplexes within six miles of one another. Pl.'s Ex. 8. In Branford, the Distributors had traditionally granted the Showcases clearances over a local, independently owned theater. When the locally owned Branford theater closed and was replaced with a nationally owned Hoyts theater, the Distributors ended their practice of granting the Showcases clearance over Branford. Spodick deposition, Defs.' Ex. 2 at 286.12-24. A jury could find that, although the Distributors are willing to license films at the same time to the New Haven suburban Showcases and Hoyt theaters, they persist in granting clearances over the York Square. A jury could also find that the Distributors' use of

[3] Plaintiff's exhibits are numbered according to the tab number they appear after in Plaintiff's Exhibits and Declarations in Opposition to Defendants' Motion for Summary Judgment. At times these numbers differ from the number listed for the same exhibit in Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment.

[4] The Distributors cite evidence that both the York Square and the Showcases advertise in the New Haven Register newspaper as support for the proposition that the cinemas draw from the same, greater New Haven market. The Register also includes listings for movie theaters throughout Connecticut and carries ads for movie theaters in Fairfield County. Additionally, both the Showcases and the York Square list show times in the Connecticut Post, a newspaper with a readership drawn primarily from Fairfield County. Evidence of ad placement in the same Connecticut papers provides little, if any, support for the Distributors' contentions that the York Square and Showcases serve the same geographic market and that they are in substantial competition.

clearances is an unfair practice aimed at promoting **[*15]** large, nationalchain movie theaters over smaller or independently owned theaters, regardless of whether the independent theater is in substantial competition with the national theater and regardless of whether the independent theater can provide the Distributors revenues equivalent to the national multiplexes. Thus, a genuine issue of material fact remains whether the challenged business practice causes injury to consumers, competitors and/or other businesses.

Additionally the Distributors argue that the challenged clearances cannot violate CUTPA because the practice is not immoral, unethical, oppressive, unscrupulous or deceptive. As discussed above, a business practice can be an unfair or deceptive practice under CUTPA based on the degree it meets any or all of the following criteria: (1) it offends public policy; (2) is immoral, unethical, oppressive or unscrupulous; (3) it causes substantial injury to consumers, competitors or other businesses. Id. Consequently, even if the Distributors' practices are not immoral, unethical, oppressive, unscrupulous or deceptive, summary judgment must be denied because a genuine issue of material fact exists regarding whether, under the **[*16]** circumstances of this case, the challenged practices are unfair, offend public policy, and/or cause substantial injury to consumers, competitors and/or other businesses.

Copyright Preemption

The Distributors argue that, even if Broadway can sufficiently satisfy all of the elements of CUTPA, the claim should be dismissed because it is preempted by federal copyright law. Most of the precedent cited by the Distributors involves the dismissal of redundant state law claims in cases where the plaintiff brought federal copyright claims and state law claims based on the same facts. [5] Those cases have no relevance to the case at hand, in which plaintiff has not, and could not, allege a copyright violation.

[*17] The Distributors do cite one related, though distinguishable, case, *Orson Inc. v. Miramax Film Corp., 189 F.3d 377 (3d Cir. 1999)*. In Orson the Third Circuit, sitting en banc, reviewed the Pennsylvania Feature Motion Picture Fair Business Practices Law. That Pennsylvania statute contained a number of restrictions on motion picture licensing, including a prohibition on blind bidding and a ban on the use of minimum guarantees. [6] The court upheld the vast majority of the Pennsylvania law. The panel, however, ruled that the Copyright Act preempted a provision prohibiting a licensing agreement, "which grants an exclusive first-run for more than 42 days without providing for expansion in the same geographical area." *Id. at 381*. The court reasoned that the provision interfered with a copyright owner's right to refuse to license to a given party, because in order to license at anyone after the initial 42 days, the distributor had to license to a second, competing party. *Id. 385-86*.

[*18] Broadway's CUTPA claim does not interfere with the Distributors' copyright rights to distribute to whom they choose. Broadway challenges the Distributors' use of clearances in the New Haven vicinity as unfair. If Broadway were to succeed on its claim and the Distributors were enjoined from including clearances over the York Square in license agreements with the Showcases, the Distributors would still have the right to distribute and license only to parties of their choosing. Even without clearances, were Broadway and a distributor unable to reach a mutually satisfactory licensing arrangement on a given film, neither party would be required to enter into such an arrangement. As the court noted in Orson,

> ***HN13***[] The right to transfer or license copyrighted material for use by others under … the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulations; it has meant that the copyright owner has the *exclusive right* to transfer the material for a consideration to others.

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[5] The Distributors cite, *inter allia*, *Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992)*; *Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983)*; ***Titan Sports v. Turner Broadcasting Systems, 981 F. Supp. 65, 69 (D. Conn. 1997)***.

[6] In blind bidding a distributor licenses a film "prior to its completion and without offering exhibitors a chance to trade screen the final product." *Orson, at 384*. Minimum guarantees are the minimum return an exhibitor agrees to pay a distributor, regardless of what the film grosses.

Id. at 386 (emphasis in original) (quoting *Warner Bros. v. Wilkinson, 533 F. Supp. 105 (D. Utah 1981)).* **[*19]**

HN14[] The Copyright Act does not prohibit regulation of unfair competition, even if the competition touches upon copyrighted material. See 1 CUTPA Treatise 81. Indeed, the federal Copyright Act preempts any state law creating "rights that are equivalent to any of the exclusive rights within the general scope of copyright." *17 U.S.C. § 301(a)*. CUTPA does not create rights equivalent to those established by the Copyright Act. Nor would restraining the granting of clearances requested by a competing theater necessarily interfere with the right to license a copyrighted work. Accordingly, the Distributors' preemption argument fails.

Statute of Limitations

Connecticut General Statutes section 42-110g(f) ***HN15***[] provides that a CUTPA action "may not be brought more than three years after the occurrence of a violation." The Distributors contend that Broadway's claim is barred by the statute of limitations because the Distributors have granted clearances over the York Square for decades and Broadway has had notice of this practice since the beginning. Broadway counters that each license is a separate contract that starts the statute anew. **[*20]** Consequently, Broadway bases its claim only on those licenses entered into during the statutory period. Pl.'s Opposition to Summary Judgment at 14.

Broadway's reasoning comports with this District's holding in *Duprey v. Connecticut DMV, 191 F.R.D. 329, 342 (D. Conn. 2000)*. In Duprey, a group of handicapped citizens brought an action under the *Americans with Disabilities Act* against the Connecticut Department of Motor Vehicles for charging a fee on handicap parking permits, a practice that had been going on for much longer than the three-year statutory period. The court concluded that each time the Department of Motor Vehicles charged plaintiffs for a handicapped parking permit "there was a separate violation of the ADA, which started the running of the statute of limitations."*Id*. A similar result is appropriate in this case. Because each license constituted a discrete alleged CUTPA violation, Broadway's claims based on license agreements entered into within the three years prior to the filing of the complaint are not time barred. To conclude otherwise would insulate standardized or repeated unfair trade practices from challenge once they had been instituted **[*21]** for three years. Such a result would run counter to CUTPA's broad mandate to eliminate "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Conn. Gen. Stat. § 42-110b*. Because of the statute of limitations, however, Broadway's potential damages are limited to harm suffered as a result of actions taken by the Distributors within the three-year statutory period.

CONCLUSION

For the forgoing reasons, Defendants' Motion For Summary Judgment [Doc. # 33] is DENIED. It is so ordered.

Dated at Bridgeport this 19th day of September 2002.

/s Stefan R. Underhill

Stefan R. Underhill United States District Judge

End of Document

Loeb Indus. v. Sumitomo Corp.

United States Court of Appeals for the Seventh Circuit

May 16, 2002, Argued; September 5, 2001, Argued; September 13, 2001 [**], Submitted ; September 20, 2002, Decided

Nos. 00-3979, 01-1148, Nos. 01-3229, 01-3230, No. 01-3485

Reporter

306 F.3d 469 *; 2002 U.S. App. LEXIS 19728 **; 2002-2 Trade Cas. (CCH) P73,813; Comm. Fut. L. Rep. (CCH) P29,168

LOEB INDUSTRIES, INCORPORATED, LOS ANGELES SCRAP IRON & METAL CORPORATION, and METAL PREP COMPANY, INCORPORATED, Plaintiffs-Appellants, v. SUMITOMO CORPORATION and GLOBAL MINERALS AND METALS CORPORATION, Defendants-Appellees. LOEB INDUSTRIES, INCORPORATED, LOS ANGELES SCRAP IRON & METAL CORPORATION, and METAL PREP COMPANY, INCORPORATED, Plaintiffs-Appellants, v. JPMORGAN CHASE & CO., [*] Defendants-Appellees. OCEAN VIEW CAPITAL, INCORPORATED, formerly known as TRIANGLE WIRE & CABLE, INCORPORATED, Plaintiff-Appellant, v. SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION, GLOBAL MINERALS AND METALS CORPORATION, et al., Defendants-Appellees. VIACOM, INCORPORATED, as successor by merger to CBS CORPORATION, formerly known as WESTINGHOUSE ELECTRIC CORPORATION, and EMERSON ELECTRIC COMPANY, Plaintiffs-Appellants, v. GLOBAL MINERALS AND METALS CORPORATION and CREDIT LYONNAIS ROUSE, LTD., Defendants-Appellees.

Subsequent History: **[**1]** Rehearing and Rehearing En Banc Denied January 30, 2003, Reported at: *2003 U.S. App. LEXIS 1722*.

Rehearing denied by, Rehearing, en banc, denied by *Ocean View Capital, Inc. v. Sumitomo Corp. of Am., 2003 U.S. App. LEXIS 1722 (7th Cir. Wis., Jan. 30, 2003)*

US Supreme Court certiorari denied by *Credit Lyonnais Rouse, Ltd. v. Ocean View Capital, Inc., 156 L. Ed. 2d 111, 123 S. Ct. 2247, 2003 U.S. LEXIS 4295 (U.S., 2003)*

US Supreme Court certiorari denied by *Sumitomo Corp. of Am. v. Ocean View Capital, Inc., 156 L. Ed. 2d 111, 123 S. Ct. 2248, 2003 U.S. LEXIS 4296 (U.S., 2003)*

US Supreme Court certiorari denied by *Global Minerals & Metals Corp. v. Viacom Inc., 156 L. Ed. 2d 111, 123 S. Ct. 2251, 2003 U.S. LEXIS 4297 (U.S., 2003)*

Prior History: Appeals from the *United States District Court for the Western District of Wisconsin. Nos. 99 C 377, 99 C 468, 99 C 621, 99 C 801, 00 C 274, 00 C 528*. Barbara B. Crabb, Chief Judge.

Loeb Indus. v. Sumitomo Corp. (In re Copper Antitrust Litig.), 2000 U.S. Dist. LEXIS 18110 (W.D. Wis., Oct. 19, 2000)

Disposition: Modified in part, affirmed in part, reversed in part and remanded for further proceedings.

[**] After an examination of the briefs and the record in Nos. 01-3229 and 01-3230, we have concluded that oral argument is unnecessary. Thus, those appeals are submitted on the briefs and the record. See FED. R. APP. P. 34(a)(2).

[*] For purposes of this opinion we are using the current name of the bank, which is JPMorgan Chase & Co. That entity includes both J.P. Morgan & Co., Inc., and Morgan Guaranty Trust Co. of New York.

Core Terms

copper, cathode, Scrap, Dealers, purchasers, prices, damages, district court, defendants', duplicate, antitrust, Brick, indirect, raw material, premium, hedging, futures market, manipulation, contracts, summary judgment, producers, factors, cash market, speculative, conspiracy, refined, manufacturer, integrated, inflated, injuries

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN1[] **Summary Judgment, Burdens of Proof**

Fed. R. Civ. P. 12(b) requires that if the district court wishes to consider material outside the pleadings in ruling on a motion to dismiss, it must treat the motion as one for summary judgment and provide each party notice and an opportunity to submit affidavits or other additional forms of proof. This requirement of a reasonable opportunity to respond is mandatory, not discretionary.

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

HN2[] **Harmless & Invited Errors, Harmless Error Rule**

28 U.S.C.S. § 2111 directs appellate courts to apply the harmless error rule to anything that does not affect the substantial rights of the parties.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Standards of Review, De Novo Review**

The appellate court reviews a ruling on summary judgment by drawing all disputed or potentially disputed factual inferences in favor of the plaintiffs and deciding de novo whether the defendants were entitled to judgment on the law.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

HN4[] **Class Actions, Certification of Classes**

According to the United States Court of Appeals for the Seventh Circuit, a court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN5[] **Justiciability, Case & Controversy Requirements**

While the Clayton Act permits civil suits by any person who shall be injured in his business or property, *15 U.S.C.S. § 4*, courts have long acknowledged that not every person, however tangentially injured by an antitrust violator, may recover treble damages. Numerous doctrines have arisen to clarify the circumstances under which a particular person may recover from an antitrust violator. At times these doctrines are rather incautiously lumped together under the umbrella term of "antitrust standing." However, the United States Supreme Court has generally been careful to limit the actual question of standing to the simple inquiry of whether a plaintiff has suffered a redressable injury in fact, entitling the federal courts to hear such a "case or controversy" under U.S. Const. art. III.

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

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

HN6[] **Standing, Sherman Act**

The Sherman Act has additional rules beyond U.S. Const. art. III requirements for determining whether the plaintiff is the proper party to bring a private antitrust action. For example, the injury must be an "antitrust injury" caused by anti-competitive behavior as opposed to mere economic loss. Two other limitations on which parties may bring suit for antitrust violations are the proximate cause requirements of AGC, and the direct purchaser rule of Illinois Brick.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

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

HN7[] **Purchasers, Direct Purchasers**

Illinois Brick holds that the direct purchaser from the alleged antitrust violator(s) is the one with the right of action; those further removed from the illegal arrangement may not (under the federal antitrust laws, at least) bring their own actions.

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

HN8[] **Private Actions, Standing**

Different injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus differently situated plaintiffs might be able to raise claims. The United States Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other.

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

HN9[] **Private Actions, Standing**

In the context of a market manipulation scheme, damages inflicted on the physical commodity market are not derivative of injuries in the futures market. The harms incurred in the physical market during a market manipulation are not secondary consequences arising from an injury to a third party. Instead, they form a separate and compensable injury.

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

HN10[] **Private Actions, Standing**

The antitrust laws create a system that, to the extent possible, permits recovery in rough proportion to the actual harm a defendant's unlawful conduct causes in the market without complex damage apportionment. This scheme at times favors plaintiffs and at times defendants, but it never operates entirely to preclude market recovery for an injury.

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

HN11[] **Private Actions, Remedies**

In an antitrust context, a court is required to examine through a case-by-case analysis the link between a plaintiff's harm and a defendant's wrongdoing. The court is to consider a number of factors in this analysis, notably (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment.

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

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] **Private Actions, Remedies**

In meeting the AGC direct injury factors on a claim of market manipulation, whether or not the plaintiffs were in some sense original purchasers alone is not enough to establish that their injury flowed directly from the defendants' market manipulations. An injury is still indirect if a plaintiff fails to establish a chain of causation between the harm it has suffered and the defendant's wrongful acts. The directness inquiry further focuses on the presence of more immediate victims of an antitrust violation in a better position to maintain a treble damages action. The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

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

HN13[] **Private Actions, Remedies**

The court must prevent the duplicate recovery of antitrust injuries wherever possible.

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

HN14[] **Private Actions, Remedies**

While it might be possible for economists to factor out each considerations in a complex damage apportionment for all prior sales involving a subject product in an antitrust analysis, the United States Supreme Court has decreed a simpler solution: simply restrict the right to recover to those who are more directly affected by the defendants' actions.

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

HN15[] **Private Actions, Remedies**

In the context of an antitrust suit, directness of injury relates to the question whether there exists a chain of causation between a defendant's action and a plaintiff's injury or (in contrast) if the connection is based instead only on somewhat vaguely defined links.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN16[] **Summary Judgment, Entitlement as Matter of Law**

On review of a summary judgment it is the appellate court's duty to evaluate the evidence in the record.

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

HN17[] **Private Actions, Remedies**

Case law has never required that the cash and futures prices be identical to support recovery in a market manipulation antitrust case.

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

HN18[] **Private Actions, Remedies**

In the context of a market manipulation antitrust case, an injury is where it depends upon a complicated series of market interactions, including the actions and pricing decisions of refiners, fabricators, dealers, speculators, and consumers of copper. Conjectural theories of injury and attenuated economic causality are enough to render an injury indirect.

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

HN19[] **Private Actions, Remedies**

In a market manipulation antitrust suit, a party cannot recover when others more directly injured are better able to state a claim.

Torts > ... > Types of Damages > Compensatory Damages > Measurements

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN20[] **Compensatory Damages, Measurements**

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty it would be a perversion of fundamental principles of justice to deny all relief to the injured person.

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

HN21[] **Private Actions, Remedies**

The mere fact that each individual transaction relevant to an antitrust scheme must be examined on a case-by-case basis to assess damages does not thereby render those damages speculative.

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

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

HN22[] **Private Actions, Standing**

A cash market participant injured by a party's illegal actions in the futures market may, in some instances, sue that party under the federal antitrust laws. The controlling factors in this inquiry are those set out in AGC.

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

HN23[] **Private Actions, Remedies**

Recovery in an antitrust action should not be denied simply because a plaintiff may not receive damages as high as it would like.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN24[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The civil Racketeering and Corrupt Organizations Act was modeled after the Clayton Act. To satisfy its requirement of proximate causation, plaintiffs under these provisions must allege a relation between their injury and the defendants' violation that is neither indirect nor remote.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits

HN25[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23(c)(4)(A)*.

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

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN26[] **Estoppel, Collateral Estoppel**

To prove that issue preclusion applies, the defendant must establish that (1) the plaintiff was fully represented in the prior litigation, (2) the issues to be precluded are identical to those in the prior litigation, (3) the issues were actually litigated and decided on the merits, and (4) resolution of the issue was necessary to the judgment.

Counsel: For LOEB INDUSTRIES, INCORPORATED, LOS ANGELES SCRAP IRON & METAL CORPORATION, METAL PROP COMPANY, INCORPORATED, Plaintiffs - Appellants (00-3979): Ben Barnow, BARNOW &

GOLDBERG, Chicago, IL USA. David H. Weinstein, WEINSTEIN, KITCHENOFF, SCARLATO & GOLDMAN, Philadelphia, PA USA.

For SUMITOMO CORPORATION, Defendant - Appellee: David R. Cross, QUARLES & BRADY, Milwaukee, WI USA.

For GLOBAL MINERALS AND METALS CORPORATION, Defendant - Appellee: H Peter Haveles, Jr., Bruce Birenboim, CADWALADER, WICKERSHAM & TAFT, New York, NY USA.

For LOEB INSUSTRIES, INCORPORATED, Plaintiff - Appellant (01-1148): David H. Weinstein, WEINSTEIN, KITCHENOFF, SCARLATO & GOLDMAN, Philadelphia, PA USA.

For AMERICAN ANTITRUST INSTITUTE, AMERICAN ANTITRUST INSTITUTE, Amicus Curiae (00-3979, 01-1148): Albert A. Foer, AMERICAN ANTITTUST INSTITUTE, Washington, DC.

For VIACOM, INCORPORATED, EMERSON, ELECTRIC COMPANY, GENERAL ELECTRIC, Amicus Curiae (00-3979, 01-1148): John D. Bray, Washington, DC. William R. Steinmetz, REINHART, BOERNER, VAN DEUREN, NORRIS & RIESELBACH, Milwaukee, WI USA.

For LOS ANGELES SCRAP IRON & METAL CORPORATION, METAL PREP COMPANY, Plaintiff - Appellant (01-1148): David H. Weinstein, WEINSTEIN, KITCHENOFF, SCARLATO & GOLDMAN, Philadelphia, PA USA.

For J.P MORGAN & COMPANY, INCORPORATED, MORGAN GUARENTY TRUST COMPANY OF NEW YORK, Defendants - Appellees (01-1148): James H. R. Windels, DAVIS, POLK & WARDWELL, New York, NY USA.

For OEAN VIEW CAPITAL, INCORPORATED, Plaintiff - Appellant (01-3229): Sanford P. Dumain, MILBERG, WEISS, BERSHAD, HYNES & LERACH, New York, NY USA.

For SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION, Defendants - Appellees (01-3229): Celia Goldwag Barenholtz, JRONISH, LIEB, WEINER & HELLMAN, New York, NY USA.

For GLOBAL MINERALS AND METALS CORPORATION, DAVID L. CAMPBELL, Defendants - Appellees (01-3229): H. Peter Haveles, Jr., CALWALADER, WICKERSHAM & TAFT, New York, NY USA.

For CREDIT LYONNAIS ROUSE, Defendant - Appellee (01-3229): Steven Wolowitz, MAYER, BROWN, ROWE & MAW, New York, NY.

For OCEAN VIEW CAPITAL INCORPORATED, Plaintiff - Appellant (01-3230): Sanford P. Dumain, MILBERG, WEISS, BERSHAD, HYNES & LERACH, New York, NY USA.

For J.P. MORGAN & COMPANY, INCORPORATED, MORGAN GURANTY TRUST COMPANY OF NEW YORK, Defendants - Appellees (01-3230): Sarah Stasford, DAIVS, POLK & WARDELL, New York, NY USA.

For VIACOM, INCORPORATED, EMERSON ELECTRIC COMPANY, Plaintiffs - Appellants (01-3485): Regiinald R. Smith, Houston, TX.

For GLOBAL MINERALS AND METALS CORPORATION, Defendant - Appellee (01-3485): H. Peter Haveles, Jr., CADWALADER, WICJERSHAM & TAFT, New York, NY USA.

For CREDIT LYONNAIS ROUSE, LIMITED, Defendant - Appellee (01-3485): Steven Wolowitz, MAYER, BROWN, ROWE & MAW, New York, NY.

Judges: Before CUDAHY, ROVNER, and DIANE P. WOOD, Circuit Judges.

Opinion by: DIANE P. WOOD

Opinion

[*474] DIANE P. WOOD, *Circuit Judge*. These cases, which we have consolidated for purposes of this opinion, all arise out of an alleged conspiracy in the 1990s to fix the price of copper futures at artificially high levels on the international exchange markets. This market manipulation necessarily and directly inflated the price of the products purchased by the plaintiffs, buyers of copper cathode, copper rod, and scrap copper, who have sued for violations of the Sherman Act, RICO, and various **[*475]** state laws. The district court dismissed the claims of each of the plaintiffs either on the ground that their claims were barred by the indirect purchaser rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, or on the ground that their injuries were too remote and speculative under *Associated General Contractors of Cal. Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* **[**2]** (*AGC)*. We find that *Illinois Brick* presents no obstacle to any of the plaintiffs' claims but that the claims of the scrap copper dealers are precluded under *AGC*. On the other hand, we conclude that the purchasers of copper cathode and rod have suffered a direct and independent injury and are the best situated participants in the physical copper market to bring a lawsuit. We therefore affirm in part, reverse in part, and remand in part for further proceedings.

I

A. The Parties

The production of copper entails a complicated four-step process. First, copper producers extract ore from a copper mine and crush or mill it into a gravel-like substance known as concentrate. Second, smelters separate out the nonferrous metals in the concentrate, producing one meter square plates of anode, which are approximately 90% copper. Next, the anode is refined electrolytically to create sheets of cathode. Finally, the cathode is fed into a furnace at a mill and melted into rod or wire. In the course of manufacturing cathode and rod, scrap copper is also produced, and it too can be sold into the market.

The plaintiffs in these actions are large companies occupying various positions **[**3]** along the copper production chain. The plaintiffs in No. 01-3485, Viacom, Incorporated (a successor to Westinghouse Electric Corporation) and Emerson Electric Company, turn copper cathode into wire for resale to merchants. Each purchased hundreds of millions of pounds of cathode during the relevant time period from integrated producers, who smelt and refine copper from their own mines into cathode.

Ocean View Capital is the plaintiff in Nos. 01-3229 and 01-3230. Until it went out of business in 1996, it was a large Rhode Island-based manufacturer of copper wire and cable. Unlike Viacom and Emerson, Ocean View normally did not purchase cathode; instead, it bought copper that had already been transformed into rod. Some of this rod was manufactured by integrated producers. Ocean View also contracted frequently with semi-fabricators, which own and operate rod mills but do not own mines, concentrators, smelters, or refineries. Instead, semi-fabricators typically purchase cathode from producers or copper traders and fabricate the cathode into rod. On some occasions, Ocean View varied this process by entering into tolling agreements with its semi-fabricators under which it purchased its **[**4]** own cathode from producers or traders and then paid the semi-fabricator to convert it into usable rod.

The plaintiffs in *Loeb Industries v. Sumitomo*, Nos. 00-3979 and 01-1148, are three scrap metal dealers (to whom we refer as the "Scrap Dealers"). Each purchases only scrap copper; none buys either cathode or rod. The scrap is purchased from a variety of sources, including integrated producers and wire manufacturers, and then repackaged and resold.

B. The Copper Market

Despite the fact that copper is sold in a variety of physical forms, the summary judgment record (viewed in the light most **[*476]** favorable to the plaintiffs) indicates that the pricing of copper is consistent throughout the industry. Like many other commodities, copper is traded on commodities exchanges through warrants and futures contracts. Most copper futures are traded on either the London Metals Exchange (LME) or the Commodities Exchange Division of the New York Mercantile Exchange (known familiarly as the "Comex"). When futures contracts mature, they must either be closed out by an offsetting trade or satisfied by deliveries of the underlying physical goods. If a futures trader is short, she must satisfy **[**5]** her obligation under the futures contract by immediately delivering physical copper cathode to an LME or Comex warehouse; if a trader is long, she may similarly call in physical copper cathode from a warehouse. Because of this, the price of physical copper, including cathode, rod, and scrap copper, is directly linked to the LME and Comex price for copper futures, and dealers in all forms of physical copper quote prices based on rigid formulas related to copper cathode futures.

While sales between six plaintiffs and numerous other copper industry participants are involved, we will illustrate this linkage by discussing only the relationship between one of the plaintiffs, Viacom, and the largest integrated producer, Asarco. Viacom entered into yearly supply contracts with Asarco, copies of which are included in the record. In these contracts, the price Viacom paid Asarco for cathode was made up of two components. First, the base price was set by "the arithmetic average of the COMEX first position settlements for high-grade copper during the calendar month of scheduled shipment." From 1990 to 1996, this price fluctuated from about 75 [cent] /lb to over $ 1.40/lb. Added to the base price **[**6]** was a "cathode premium" that was set on a monthly or quarterly basis. Asarco's premium fluctuated over the relevant time period from 2.75 [cent] /lb to 3.5 [cent] /lb. The record also indicates that when the base price of copper increased, the premium tended to increase as well.

Viacom bought over half a billion pounds of cathode from Asarco. Asarco manufactured most of this cathode, but some had been purchased for resale from other merchants to make up for production shortfalls. Because records of these purchases were not kept, it is impossible to tell whether any particular pound of cathode sold to Viacom was manufactured by Asarco or merely purchased for resale. The defendants concede, however, that some of the cathode in question was being sold into the market for the first time. While there is some dispute as to the exact numbers, taking the evidence in the light most favorable to Viacom, Asarco sold it 510 million pounds of cathode over the relevant period. During this same time frame, Asarco refined 6.4 billion pounds of cathode and purchased 153 million pounds from third parties. Therefore, even if one assumed that every scrap of Asarco's previously sold cathode was shipped **[**7]** to Viacom (instead of to one of its many other customers), Viacom still purchased 357 million pounds of never-before-purchased cathode. Viacom seeks damages in this suit only for cathode that was sold to it for the first time by its integrated producers.

Asarco also purchased raw materials, such as concentrate and anode, to supplement its own production and keep its smelters and refineries running at full capacity. At least 27 million pounds of the cathode Asarco shipped to Viacom consisted entirely of Asarco raw materials, but the rest may well contain some percentage of previously purchased materials. While raw materials are often priced in reference to Comex prices, only cathode is actually traded on the exchange. Raw material prices also incorporate significant and **[*477]** widely varying discounts based on both the cost of converting the materials into cathode and current refining and smelting capacity. Furthermore, the defendants' experts testified that while the prices of raw materials "may be indirectly affected by the manipulations," a squeeze or corner on cathode could not directly harm the purchasers of pre-cathode raw materials.

The pricing of rod and scrap are similar except **[**8]** that each contains further premiums and discounts off the cathode futures price to reflect a variety of additional costs. Rod pricing contains an additional rod or shaping premium. Scrap copper prices are affected by not only the price of cathode but also freight costs, sizing, sorting, packaging, and purity requirements.

Some of Viacom's suppliers and customers engaged in strategic hedging by purchasing "put" options on the futures markets. A put option holder has the right, but not the obligation, to sell a futures contract at an established "strike" price. If the market price is higher than the strike price (because, for example, the price has been artificially raised), the holder's option will expire and its only cost will be the price of the option. Asarco purchased put options to hedge its output, but it did not hedge against specific transactions, by, for example, purchasing a futures contract for each sale made to Viacom. Its hedging activities were also limited to a fraction of its supply. One of Viacom's suppliers, Kennecott, did not hedge at all, and Viacom itself never hedged its copper purchases.

C. The Conspiracy

Defendant Sumitomo Corporation is a Japanese trading **[**9]** corporation that attempted to fix and maintain the price of copper at artificially high levels from September 1993 to June 1996, all with an eye to enriching itself in its capacity as a seller of physical copper. Through a series of transactions with defendant Global Minerals and Metals Corporation, a copper merchant, it hoarded vast supplies of physical copper for the purpose of restricting supply, and it entered into paper transactions in order to show a false increased demand for the metal. In particular, Sumitomo established sham long-term contracts that purportedly required it to purchase vast quantities of copper from Global on a monthly basis over a period of three years. These sham contracts enabled Sumitomo publicly to justify its accumulation of excessive copper forward positions as a hedge. By June 1995, Sumitomo held approximately ten percent of the entire long position in Comex copper futures.

At that time, Sumitomo began to call in shorts to raise copper demand to inflated levels and to reap the profits from its sales. When these contracts came due, short futures traders were forced to cover their positions by acquiring physical copper at inflated prices, because no **[**10]** new copper was entering the warehouses thanks to Sumitomo's actions. These manipulations caused the price of primary copper to rise more than 50% over a two-year period. In June 1996, the scheme was uncovered, and the trading price for copper dropped by a third almost over-night. The prices of physical copper cathode, rod, and scrap crashed comparably.

In 1998, the United States Commodities and Futures Trading Commission (CFTC) determined that Sumitomo had violated the Commodity Exchange Act by raising and fixing the price of copper futures and reached a settlement with the company that required it to pay a $ 150 million fine. That finding has spawned a number of antitrust suits against the defendants, including class action lawsuits on behalf of those who traded copper futures and on behalf of certain purchasers of primary **[*478]** copper. Sumitomo settled its suit with the futures traders for approximately $ 134 million. The defendants have also settled a California state court class action brought under various state antitrust laws. Many of the plaintiffs' sellers, including Asarco, participated in the lawsuit and received 0.15 cents per dollar of copper purchased.

II. Proceedings in [11] the District Court**

These lawsuits were all consolidated in the Western District of Wisconsin by the Judicial Panel on Multidistrict Litigation. The defendants include not only Sumitomo and Global, but also alleged co-conspirators Credit Lyonnais Rouse, Ltd. (CLR), and J.P. Morgan and Morgan Guaranty Trust (which have since merged to form JPMorgan Chase & Co. and to whom we refer collectively as JPMorgan Chase). The plaintiffs in each case sought damages for the allegedly inflated overcharge in the price of the copper products they had purchased, which was caused by Sumitomo's actions. The Scrap Dealers also sought certification of a class under *FED. R. CIV. P. 23* consisting of all metals dealers who purchased any form of physical copper in commercial quantities between 1994 and 1996. The defendants moved to dismiss each of the actions.

The district court first denied the motion to dismiss Ocean View's complaint on May 9, 2000. *In re Copper Antitrust Litig., 98 F. Supp. 2d 1039 (W.D. Wis. 2000)*. The district court found that if the facts alleged in the complaint were true, Ocean View was a proper party to sue under the principles espoused by this court in *Sanner v. Board of Trade, 62 F.3d 918 (7th Cir. 1995)*. **[**12]** The court also denied a motion to dismiss Viacom's complaint on similar grounds. It allowed both cases to proceed, but limited discovery to the issue of standing.

The court next examined the claim of the Scrap Dealers. It denied their motion for class certification, fundamentally because it concluded that the proposed named plaintiffs could not sue, either for their own injuries or for those of others similarly situated, because they fell within the ban on indirect purchaser suits established by *Illinois Brick, 431 U.S. at 720*. The court decided in addition that the proposed class would be unmanageable, because it would be impossible to ascertain class membership. It then turned to the defendants' 12(b)(6) motion to dismiss. The court found that the Scrap Dealers' bare-bones allegations were sufficient to state a claim, but that in light of deposition testimony and other facts adduced during litigation of the *class certification* question, it would nonetheless grant the motion based once again on the perceived *Illinois Brick* flaw. The court did not, in so ruling, follow the command of *Rule 12(b)(6)* to convert the motion to dismiss into a motion for summary **[**13]** judgment under Rule 56, despite its reliance on matters outside the complaint. The court also dismissed the Scrap Dealers' RICO allegations on the same grounds.

Soon thereafter the district court granted JPMorgan Chase's motion to dismiss all claims that the Scrap Dealers had brought against it on the ground that the plaintiffs were subject to offensive issue preclusion on the pivotal question of their status as indirect purchasers.

After discovery closed in the remaining cases, the defendants filed for summary judgment. On July 23, 2001, the district court granted summary judgment to all of the defendants on Ocean View's claims, finding that Ocean View had no right to sue under the antitrust laws both because it was an indirect purchaser (*Illinois Brick*) and because its injuries were too remote (*AGC)*.

[*479] A month later, the district court granted summary judgment to Global and CLR on Viacom's claim. In contrast to its conclusions in *Loeb* and *Ocean View*, the court here rejected the argument that the claim was barred by *Illinois Brick*. Instead, it applied the factors set forth in *AGC* and determined that a manipulation of the futures market would have effects too **[**14]** "subtle and complex" to warrant recovery for these cathode purchasers. The district court primarily relied on the following factors: (1) the huge number of exchange-based pricing formulas available on Comex; (2) the various premiums and discounts available in the industry; (3) potential duplication of recovery due to purchases of cathode and raw materials by the integrated producers who sold to Viacom; (4) potential duplication of recovery due to hedging; and (5) the complexity of the damages calculation. For similar reasons, the district court also granted summary judgment to the defendants on Viacom's RICO claims. With the federal claims gone, it finally dismissed Viacom's state law claims without prejudice.

III. Use of *Rule 12(b)(6)*

Before turning to the important antitrust issues underlying all of these appeals, we must deal with an issue of federal civil procedure unique to the appeal of the Scrap Dealers. They argue that the district court committed reversible error by relying on outside materials in evaluating the motion to dismiss without giving them notice and an opportunity to submit additional materials. As they correctly point out, ***HN1***[] *Rule 12(b)* requires that if the **[**15]** district court wishes to consider material outside the pleadings in ruling on a motion to dismiss, it must treat the motion as one for summary judgment and provide each party notice and an opportunity to submit affidavits or other additional forms of proof. *Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 684 (7th Cir. 1994)*. This requirement of a reasonable opportunity to respond is mandatory, not discretionary. *Edward Gray Corp. v. National Union Fire Ins. Co., 94 F.3d 363, 366 (7th Cir. 1996)*.

In this case, the district court stated that, considering only the bare pleadings, it would find that the Scrap Dealers had stated a claim. Notwithstanding this conclusion, relying on the materials and affidavits produced for the earlier class certification hearing, it instead granted the defendants' motion dismissing the case. We agree with the Scrap Dealers that this was error, and that the district court should have given them notice of its intentions and an opportunity to respond and produce additional facts going beyond whatever might have been appropriate for class certification purposes.

The question, however, is what the consequence **[**16]** of this error should be. The Scrap Dealers assume that reversal should be automatic, but this position overlooks the command of ***HN2***[] *28 U.S.C. § 2111*, which directs appellate courts to apply the harmless error rule to anything that does not affect the "substantial rights of the parties." We are not aware of any case that holds that the command of *Rule 12(b)(6)* to convert a motion to dismiss into a summary judgment motion is somehow exempt from *§ 2111*. The question for us is therefore whether the district court's error affected the Scrap Dealers' substantial rights.

To answer that question, we must consider whether the Scrap Dealers have shown us any evidence raising a question of material fact that they would have submitted to the district court had they been given proper notice of the *de facto* conversion. *Burick v. Edward Rose & Sons, 18 F.3d 514, 516 (7th Cir. 1994)*. If **[*480]** there are no potential disputed material issues of fact, then the court's reliance on materials outside the pleadings is not by itself ground for reversal despite the failure to follow appropriate procedures. *Ribando v. United Airlines, Inc., 200 F.3d 507, 510 (7th Cir. 1999)*. **[**17]** Here, the dispute over whether the Scrap Dealers were proper plaintiffs to sue under the antitrust laws was a hard-fought issue in the class certification hearings, and the Scrap Dealers devoted substantial portions of both their reply brief and supplemental brief to the issue. Furthermore, the district court provided an after-the-fact opportunity to the Scrap Dealers to bring additional materials to its attention in the subsequent litigation against JPMorgan Chase. See *Edward Gray Corp., 94 F.3d at 366* (reversing where plaintiff had no opportunity to submit materials that did create a factual dispute). In light of these facts, we are confident that the Scrap Dealers had a full opportunity to bring all material factual disputes to the court's attention. Therefore, we will review dismissal of all of these actions, as ***HN3***[] we would any other ruling on summary judgment, drawing all disputed or potentially disputed factual inferences in favor of the plaintiffs and deciding *de novo* whether the defendants were entitled to judgment on the law. *Simmons v. Chicago Bd. of Educ., 289 F.3d 488, 491 (7th Cir. 2002)*.

The Scrap Dealers also contend as a threshold **[**18]** matter that the district court's reliance on materials submitted for the class certification hearing to rule against them on summary judgment violates the dictates of *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*. This over-reads *Eisen*, in our opinion. *Eisen* merely indicates that ***HN4***[] a court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits. *Id. at 177-78*; see also *Szabo v. Bridgeport Mach., Inc., 249 F.3d 672, 677 (7th Cir. 2001)*. It says nothing about whether courts may use evidence produced at a prior class certification hearing for other purposes, including for a decision on summary judgment. We see no reason why these affidavits should be treated any differently from other parts of the record which may be considered in later rulings. See *Kochlacs v. Local Bd. No. 92, 476 F.2d 557, 558 n. 1 (7th Cir. 1973)*. We may therefore rely on the materials and affidavits submitted at the class certification hearing in determining whether the district court's decision to grant the defendants' motion in the Scrap Dealers' **[**19]** action was correct.

IV. *Illinois Brick*

HN5[] While the Clayton Act permits civil suits by "any person who shall be injured in his business or property," *15 U.S.C. § 4*, courts have long acknowledged that not every person, however tangentially injured by an antitrust violator, may recover treble damages. *Blue Shield of Va. v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. Numerous doctrines have arisen to clarify the circumstances under which a particular person may recover from an antitrust violator. At times these doctrines are rather incautiously lumped together under the umbrella term of "antitrust standing." However, the Supreme Court has generally been careful to limit the actual question of standing to the simple inquiry of whether a plaintiff has suffered a redressable injury in fact, entitling the federal courts to hear such a "case or controversy" under Article III. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*. There is no dispute that the plaintiffs in these cases have been injured by paying an inflated price for copper; their Article III **[**20]** standing is **[*481]** therefore secure. The difficult question is statutory, because ***HN6***[] the Sherman Act has additional rules for determining "whether the plaintiff is the proper party to bring a private antitrust action." *AGC, 459 U.S. at 535 n. 31*. For example, the injury must be an "antitrust injury" caused by anti-competitive behavior as opposed to mere economic loss. *Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-89, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Two other limitations on which parties may bring suit for antitrust violations are central here: the proximate cause requirements of *AGC, 459 U.S. at 544-45*, and the direct purchaser rule of *Illinois Brick, 431 U.S. at 729-30*.

HN7[] *Illinois Brick* holds that the direct purchaser from the alleged antitrust violator(s) is the one with the right of action; those further removed from the illegal arrangement may not (under the federal antitrust laws, at least) bring their own actions. *431 U.S. at 729*. In *Illinois Brick* itself, the defendants were companies who sold bricks to masonry contractors at allegedly inflated prices. The contractors in turn **[**21]** allegedly "passed on" those overcharges to the plaintiffs who purchased their constructed buildings. *Id. at 726*. In an earlier decision, *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, the Supreme Court had decided that defendants could not escape liability on the ground that the plaintiff had passed on the anticompetitive overcharge. By parity of reasoning, the Court decided in *Illinois Brick* that the persons authorized to sue under the antitrust laws in this type of case were the direct purchasers. Hence, the contractors were permitted to sue and recover in full for the price inflation, including any "pass-on."

Illinois Brick does not stand for the proposition, as the defendants would seem to have it, that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell (or from whom it does not purchase). Such a rule would eliminate in one fell swoop all competitor suits based on exclusionary practices - a step that some antitrust theorists have urged, but a step that the Supreme Court has never taken. To the contrary, the Court has made it clear that **[**22]** it does not read *Illinois Brick* so broadly. For instance, the plaintiff in *McCready*, who purchased the defendant's health services from her employer, alleged that a conspiracy between the defendant and psychiatrists increased her costs for visiting a psychologist. *457 U.S. at 468-70*. The defendant contended that after *Illinois Brick* only the employer who purchased the health plan should be permitted to sue, but the Court disagreed. It held that the chain-of-distribution inquiry in *Illinois Brick* was meant only to preclude duplicate recovery. While the employer might have suffered some economic injury (through, for example, paying higher wages to attract skilled workers in order to compensate for the illegally inferior benefits), its harm was distinct from the plaintiff's injury, her own out-of-pocket payments for psychological services. *Id. at 475*.

While it is not identical to this case, *McCready* is helpful insofar as it recognizes that ***HN8***[] different injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus that differently situated plaintiffs might be able to raise claims. The injuries suffered by the copper **[**23]** traders who purchased inflated futures contracts from the defendants are distinct from any harm inflicted on Viacom when it paid inflated cash prices for cathode, or on Ocean View, to the extent it purchased **[*482]** copper rod from integrated producers. Other cases also demonstrate that the Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other. *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)* (plastic conduit manufacturer suing competitor steel conduit manufacturer); *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* (university suing association that prohibited it from entering a television contract); *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)* (store suing competitor over refusal to deal).

The reason the plaintiffs' suit in *Illinois Brick* failed was not because the defendants did *not* sell to them. Rather, it was because the defendants *did* sell to a third party who (after *Hanover Shoe*) could **[**24]** recover for any injury they claimed. The same paradigm applies in all of the cases cited by the defendants: Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C. See, *e.g., Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 207, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)* (public utilities but not residential customers to whom they sell may sue natural gas companies); *In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997)* (drug wholesalers but not retail pharmacies to whom they sell may recover from manufacturers); *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 852-54 (3d Cir. 1996)* (attorneys may recover overcharges for copies, but the clients to whom they offer services may not); *In re Beef Indus. Antitrust Litig., 710 F.2d 216, 218 (5th Cir. 1983)* (packers who sell to grocers may recover for their unlawful conduct but feeders who sell to packers may not).

Here, in contrast, the plaintiffs are not indirect purchasers along a supply chain. As far as the plaintiffs' claims **[**25]** are concerned, Global, CLR, and Sumitomo did not sell cathode to integrated producers who in turn sold to any of the plaintiffs. Instead, the alleged conspiracy operated in the separate but related futures market, through which it sought directly to manipulate the price of copper the plaintiffs were buying. (It is true that Sumitomo Corporation made some sales of cathode, primarily overseas, to reap the benefit of its illegal futures market scheme. None of the plaintiffs, however, is seeking recovery on the basis of any of these cash market sales; all rest solely on the manipulation of sales of futures contracts. *Sanner v. Board of Trade, 62 F.3d 918, 929 (7th Cir. 1995)*, discussed below, recognizes such a theory, and we see no reason why the mere existence of separate independent physical transactions should in any way change the analysis.)

The defendants repeatedly urge that the availability of recovery for copper futures traders who bought and sold from the defendants in that market should bar recovery for any plaintiff in the cash market. But this kind of an absolutist approach is ruled out by *Sanner*, which recognized at least one situation in which the futures **[**26]** market and physical market must be evaluated separately. The serious question here is whether these plaintiffs have presented another such instance.

In *Sanner*, a group of soybean farmers sued the Chicago Board of Trade alleging that the Board conspired with several individuals artificially to lower the price of soybean futures. The farmers suffered damages when they were forced to sell their soybeans into the cash market at correspondingly low prices. *Id. at 921*. The district court granted a motion to **[*483]** dismiss, finding as a matter of law that the farmers' injuries were indirect because the farmers did not participate in the futures market, that the causal chain between the cash and futures prices was too attenuated, and that damages were too speculative. *Id. at 926*.

This court reversed the dismissal. On the assumption (given the procedural posture of the case) that the farmers' allegations about the relation between the cash and futures markets were true, and that those market prices "tended to move in lockstep," we determined that the farmers had suffered sufficiently direct injuries from the conspiracy to proceed with their case. *Id. at 929-30*. **[**27]** We rejected the proposition that "participants in the futures market were more directly injured," so as to preclude recovery by farmers in the cash market and denied the defendants' claim that we should assume at the motion to dismiss stage that damages would be too speculative. *Id. at 930*. From the perspective of *Illinois Brick*, the *Sanner* court expressly found that ***HN9***[] in the context of a market manipulation scheme, damages inflicted on the physical commodity market were not derivative of injuries in the futures market. Unlike *Illinois Brick*, the harms incurred in the physical market during a market manipulation are not "secondary consequences arising from an injury to a third party." *Id. at 929*. Instead, they form a separate and compensable injury.

The defendants' reading of *Illinois Brick* is inconsistent with *Sanner*. Their claims to the contrary, there is no indication in *Sanner* that the plaintiff soybean farmers were in privity with the Board of Trade, and as a factual matter the assertion is surely wrong. The Board and its members did not sell soybeans to the farmers; like the defendants here they dealt solely with futures **[**28]** contracts. If *Illinois Brick* bars all recovery here, it should have barred recovery in *Sanner* and should also bar recovery in group boycott and other restraint of trade settings.

To put it another way, *Hanover Shoe, Illinois Brick*, and *McCready* make plain that ***HN10***[] the antitrust laws create a system that, to the extent possible, permits recovery in rough proportion to the actual harm a defendant's unlawful conduct causes in the market without complex damage apportionment. This scheme at times favors plaintiffs (*Hanover Shoe*) and at times defendants (*Illinois Brick)*, but it never operates entirely to preclude market recovery for an injury. Applying those principles and the decision in *Sanner* to this case, we conclude that the evidence viewed favorably to the plaintiffs shows that damage from the defendants' conduct was felt in two separate markets: the futures market and the physical copper market. [***] **[*484]** We have identified those who may recover in the futures market and must now turn to the more difficult question of establishing the proper plaintiff in the physical market. The defendants' answer (nobody) is not supported by *Illinois Brick* - or economics or **[**29]** fairness for that matter. Instead, we must be guided in our inquiry by the analytical framework and factors set out in *AGC*.

[**30] V. *Associated General Contractors*

HN11[] *AGC* requires a court to examine through a case-by-case analysis the link between a plaintiff's harm and a defendant's wrongdoing. *459 U.S. at 535-36*. We are to consider a number of factors in this analysis, notably (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of

[***] The fact that the defendants were hoping to profit in the physical market, ultimately, through their manipulation of the separate futures market, also has implications for their arguments related to the so-called "umbrella standing" theory. The defendants object to the possibility that they might be held responsible for higher copper prices throughout the physical market, rather than just for the sales they made. If this were an ordinary cartel case, in which cartel members A and B sell to customers X and Y, and then non-cartel member firm C makes sales at or near the enhanced cartel price to customer Z, the question arises whether A and B are liable to Z for the overcharges it paid. See generally, ABA Section of ***Antitrust Law***, 1 Antitrust Developments (Fourth) at 778-79 & n. 128 (1997) (collecting cases on umbrella standing). Here, however, we have a conspiracy to rig prices for the entire physical market, accomplished through manipulation of the Comex futures market. Another possible analogy might be to rigging product standards, which affects everyone who tries to participate in a particular product market. In the latter case, the defendants who manipulated the standards cannot be heard to complain that they should be immune from damages for a product they did not sell. We leave this issue open for further exploration at the district court level, now that we have clarified how the direct purchaser rule and the remoteness doctrine of *AGC* apply here.

injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. *Id. at 537-45*; *Sanner, 62 F.3d at 927*. The defendants concede only the second factor: they admit that each of the plaintiffs has adduced evidence sufficient to survive summary judgment that they intended artificially to inflate the price of both copper futures and physical copper in order to reap millions of dollars in profits. They contest each of the other points.

The first and third factors are discussed only cursorily by the defendants and can be dealt with adequately in the course of our analysis of the remaining three. For example, the defendants claim **[**31]** that there is no causal connection between their actions and any of the plaintiffs' harms because the plaintiffs' injuries are indirect (the fourth factor), and they argue that Congress had no intention of redressing this sort of injury because it is indirect and speculative (the fifth factor). We therefore devote our attention to the other three factors, considering in the case of each plaintiff whether its injury was indirect and unpredictable, risked duplicate recovery, and would lead to speculative and complex damage apportionment. We begin with the claims of the Scrap Dealers.

A. Scrap Dealers (*Loeb*, Nos. 00-3979, 01-1148)

The Scrap Dealers face problems with all three of the contested *AGC* factors. ***HN12***[] First, whether or not they were in some sense original purchasers of physical copper, that fact alone is not enough to establish that their injury flowed directly from the defendants' market manipulations. An injury is still indirect if a plaintiff fails to establish a chain of causation between the harm it has suffered and the defendant's wrongful acts. *AGC, 459 U.S. at 541*. The directness inquiry further focuses on the presence of more immediate victims **[**32]** of an antitrust violation in a better position to maintain a treble damages action. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party …to perform the office of a private attorney general." *Id. at 542*.

There are numerous other parties who have suffered more direct injuries at the hands of the defendants than the Scrap Dealers suing here. Among them (though as we explain below not limited to them) are the Comex copper futures traders who **[*485]** have already filed and settled their claims with the defendants. But even in the physical copper market itself, the Scrap Dealers are quintessential examples of indirect victims of antitrust injury. Although the copper distribution chain is exceedingly complex, even in the simplest possible version, an integrated producer such as Asarco will refine copper into cathode and sell it to a manufacturer, such as Viacom, Emerson, or Ocean View. The manufacturer will in turn transform the cathode into some product using copper and sell it down to the retail level. In the **[**33]** process, it may generate unused scrap copper, at which point the Scrap Dealers finally appear on the scene to buy the scrap. It is for these last purchases that the plaintiffs seek to recover damages. But distributors and manufacturers have already entered into monetary transactions involving this same copper, and indeed we are faced in this very case with suits filed by some of those manufacturers. It is apparent that these companies at the least have suffered more direct injuries than the Scrap Dealer plaintiffs. This stands in marked contrast to *Sanner*, where the soybean farmers were clearly the most directly injured participants in the cash market because they were the only cash sellers of soybeans. *Sanner, 62 F.3d at 927*.

The speculative nature of the damages the Scrap Dealers have suffered also supports our conclusion that they cannot maintain this action. See *459 U.S. at 542-43* (denying a claim that rested on an "abstract conception or speculative measure of harm"). The Scrap Dealers' economic experts have stated that they can tie a rise in the price of copper futures directly to price increases for physical copper through econometric analysis. Defendants **[**34]** argue to the contrary that a host of other factors are also at play, destroying the closeness of any link. Even accepting the Scrap Dealers' position on this point, as we must at this stage of the litigation, it is difficult to know whether they have suffered any economic loss at all as a result of the defendants' actions. After all, the Scrap Dealers, middlemen who resell their scrap copper soon after they purchase it, are alleging that the defendants' market manipulations caused the price of copper to increase steadily from 1994 to 1996. Therefore, on most or all the sales the Scrap Dealers made in that time frame, which they contend are inflexibly linked to prevailing Comex prices, they should have made a slight profit because of Sumitomo's actions. Only when the price of copper plummeted in June 1996 would the Scrap Dealers have taken a bath in the resale market. And depending on how much copper the Scrap Dealers had on hand as compared to the number of transactions they made as the price of copper was increasing, it is possible that some of them may have suffered no true economic loss at all. In short, the exact nature of the damages they have suffered is speculative.

The Scrap **[**35]** Dealers attempt to counter this problem by arguing that damages can be set simply by computing the difference between the price of copper that should have prevailed on a given day absent Sumitomo's manipulations and the actual price for every copper transaction. This assertion, however, plunges the Scrap Dealers headlong into conflict with the sixth *AGC* factor, the problems of duplicate damage recovery and complex damage apportionment. The Scrap Dealers argue that they - and all other commercial purchasers of physical copper - should be permitted to recover damages equal to three times the overcharge caused by Sumitomo's scheme for every single sale of copper in the mid-1990s. But this proposition ignores the fact that the same piece of physical copper may be resold many times in a given year as it is refined, distributed, turned into **[*486]** scrap, sold between scrap dealers, re-refined, and sold for scrap again. As mentioned above, every time a scrap dealer resold scrap copper during the two years at issue, it recouped the vast majority of its losses. Since defendants are not permitted to mount any sort of cost recovery defense along these lines, see *Hanover Shoe, 392 U.S. at 491-94*, **[**36]** this would cause the Scrap Dealers to receive a damages award far in excess of any economic loss the defendants caused them. While *Sanner* permitted farmers to recover their soybean losses, it did not let millers, wholesalers, or retailers of soybeans also assert claims. It would be a significant extension of *Sanner* to allow these plaintiffs to sue, and it is one we decline to make.

The Scrap Dealers repeatedly argue that there are no duplicate damages in this case because their pricing decisions are based exclusively on Comex prices rather than a pass-on of historical costs. We fail to see why this fact should lead us to ignore the Supreme Court's ***HN13***[] command to prevent the duplicate recovery of antitrust injuries wherever possible. *AGC, 459 U.S. at 544*; *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 396 (7th Cir. 1993)*. The Scrap Dealers' contention that absent a pass-on of historical costs their injuries are "separate and distinct" defies economic reality. If a scrap dealer purchased a ton of copper when the Comex price was artificially inflated by $ 400, and the price subsequently rose another $ 200 prior to resale, **[**37]** it has reaped a $ 200 gain, not a $ 400 loss. The Scrap Dealers' own witnesses admitted that there is no pass-on only "if the current Comex price has moved in an adverse direction." Yet the evidence shows that Sumitomo's actions caused the Comex price to rise throughout the period at issue in this case, making us skeptical that the Scrap Dealers have suffered any real loss at all.

The fact that the Scrap Dealers here are further down the chain of copper users than others also will increase the economic complexity of apportioning damages. Even the marketing manager of Loeb admitted that such factors as "freight costs, the sizing, sorting, packaging, purity requirements, length of time it took to get paid, [and] the risk of getting paid" all factored into Loeb's pricing decisions. ***HN14***[] While it might be possible for economists to factor out each of these considerations for all prior sales involving copper, the Supreme Court has decreed a simpler solution: simply restrict the right to recover to those who are more directly affected by the defendants' actions. *UtiliCorp, 497 U.S. at 208-11* (noting policy rationales for denying recovery even to those plaintiffs whose damages **[**38]** could be easily calculated). This description applies fully to the plaintiffs here. Because the Scrap Dealers have suffered an indirect injury causing them at best speculative damages that would lead to a strong possibility of duplicative recovery, we agree with the district court that they may not pursue their claims.

B. *Viacom* and *Emerson* (No. 01-3485)

1.

Many of the successful arguments from *Loeb* are echoed by the defendants in the *Viacom* action, but after a careful review of the record we find that the facts of the latter case compel a different result. The defendants' first argument for denying recovery to Viacom and Emerson (to whom we will refer as "Viacom" except when distinctions between the two companies are important) is that Viacom has shown no evidence of direct and predictable harm stemming from the defendants' conduct. As we stated earlier, ***HN15***[] directness **[*487]** relates to the question whether there exists a chain of causation between a defendant's action and a plaintiff's injury or (in contrast) if the connection is based instead only on "somewhat vaguely defined links." *AGC, 459 U.S. at 540*. Global and CLR, the only defendants remaining **[**39]** in the *Viacom* action after Sumitomo's settlement, begin their attack by pointing out that the prices of copper cathode on the LME and Comex often diverged. We fail to see why this matters. Sumitomo purchased futures on Comex to drive up the price on that particular exchange artificially, and the prices Viacom paid for copper were directly based on Comex prices. The fact that Sumitomo also bought and sold futures on the LME and may have caused additional harms to physical copper purchasers who based their decisions on LME prices has no impact on Viacom's ability to recover under the *AGC* factors.

Next, the defendants rely on the fact that Viacom's purchases included not only a price linked to Comex but "a variety of discounts or premiums that, in response to changes in supply and demand, varied over time and among suppliers." The defendants' experts have opined that, through adjustments of premiums in response to supply and demand factors, the actual impact on the physical copper market of their illegal futures market activities is likely to be indirect and unpredictable.

While all of this might be so as a theoretical matter, ***HN16***[] on summary judgment it is our duty to evaluate the **[**40]** evidence in the record that Viacom presented. And that evidence paints a starkly different picture. Viacom has introduced into the record both its contracts and its suppliers' published premiums. After a careful review of these materials, we are convinced that Viacom has established direct injury. In its contracts, Viacom purchased all but a *de minimis* amount of copper through the two-part formula we described earlier, consisting of (1) a base price equal to the Comex first position copper settlement price, and (2) a cathode premium, negotiated on a monthly or quarterly basis. Over the six years at issue here, the settlement price fluctuated from about 75 [cent] to $ 1.40 per pound. During the same years, the premium ranged from 2.75 to 3.50 [cent] /lb. (Viacom does not seek recovery based on changes in premium prices; the complaint is based only on those caused by variations in the base price.)

The district court ruled that the base price and cathode premium were "inseparable." After a careful review of the record in the light most favorable to the plaintiffs, we are unable to agree with this characterization. All of the contracts specify that the payment price is determined **[**41]** by adding these two separately described components, and the values of both numbers throughout the relevant time period should be available through discovery. The district court also seems to have thought that the premium could in some cases be a discount off the Comex price. There is no evidence to support this; to the contrary, all of the evidence, including defendants' counsels' concession at oral argument, indicates that the premium was always a positive number. While Viacom appears to have been awarded volume and cash payment discounts in some instances, there is no indication that these discounts were tied to market conditions, and the defendants do not focus on such discounts in their briefs. Furthermore, the cathode premium was a small fraction of the Comex price. In fact, the evidence shows that as the Comex price increased, the premium also increased. Thus, there is no possibility that the two components "offset" or that the premium somehow compensated for the defendants' manipulated **[*488]** price inflation. (Even if, counterfactually, the Comex price had for example risen by 65 [cent] and, to compensate, the base price dropped a penny, this could at best represent a mitigation **[**42]** of damages. But this would not make the injury any less direct.) The district court's conclusion on this point, which relied mainly on the testimony of an expert who had not even looked at Viacom's contracts, is both factually mistaken and fails to take the evidence in the light most favorable to Viacom. The presence of a small cathode premium does not negate the fact that the prices of cathode and cathode futures "tend to move in lockstep." Instead, the price reference in Viacom's contracts supports just such lockstep linkage. Our ***HN17***[] case law has never required that the cash and futures prices be identical to support recovery. It is only necessary that the relationship be direct, as it is here. See *Sanner, 62 F.3d at 929*.

Furthermore, the experts note that Comex quotes 24 different exchange prices at any given time and that the defendants' actions could have affected each of those prices differently. Accepting the truth of this statement, we do not see why it compels a finding that Viacom's injury is indirect. According to the record evidence, out of this menu of prices, Viacom used just one (the monthly settlement price) as the basis for all but a minuscule number **[**43]** of its contract purchases, and Emerson used only two. While acknowledging this, the defendants contend that other cathode purchasers could have used different or widely varying systems. Perhaps they did, and if so perhaps they should be found to be improper plaintiffs under the antitrust laws, though that is an issue for another day. But this fact does not weaken the direct causal chain between the defendants' actions and these particular plaintiffs' harm and is no more reason to deny Viacom and Emerson recovery than the fact that some purchasers might have bought cathode at prices not tied to those on either Comex or the LME.

Similarly, we reject the defendants' argument that because a number of Viacom's contracts contained clauses permitting the parties to renegotiate the base price if they believed that Comex prices did not accurately reflect market conditions, Viacom's injuries are somehow remote and indirect. It is undisputed that, because of the success of the defendants' conspiracy, Viacom and its integrated suppliers were never aware of the artificial Comex inflation and so never took advantage of this clause. Instead, Viacom based all of the purchases for which it seeks recovery **[**44]** directly on Comex.

We also believe that, contrary to the defendants' contentions, our holding on this point is entirely consistent with the Second Circuit's decision in *Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 13-14 (2d Cir. 1980)*. There, the plaintiff, a refiner of scrap copper, alleged that the defendant-integrated producers had conspired to keep the price of refined copper low and that this conspiracy injured it by artificially raising the price of scrap. *Id. at 12*. The court found ***HN18***[] the injury indirect because it "depended upon a complicated series of market interactions," including the actions and pricing decisions of refiners, fabricators, dealers, speculators, and consumers of copper. *Id. at 13*. Such "conjectural theories of injury and attenuated economic causality" were enough to render Reading's injury indirect. *Id. at 14*.

Other than the fact that both *Reading* and the present case involve price-fixing conspiracies in the physical copper market, we find little similarity between them. The injury here does not depend on the speculative actions of innumerable market decision makers. **[**45]** It flows instead directly **[*489]** from the contracts between Viacom and its suppliers. It is this contractual linkage, absent in *Reading*, that prevents other market variables from miring a trier of fact here in "intricate efforts to recreate the possible permutations in the causes and effects of a price change." *Id*.

In sum, Viacom's contracts and the other record evidence establish a direct relation between the defendants' illegal scheme and Viacom's harm. The contract price it paid its suppliers for copper was directly and explicitly based on the Comex monthly settlement price, and therefore the defendants' manipulations directly and predictably had an impact on that price. *Amarel v. Connell, 102 F.3d 1494, 1512 (9th Cir. 1997)* (injury direct where price of milled rice directly affected price of paddy rice); *Sanner, 62 F.3d at 929*. Any variations in the cathode premium moved in the same direction as the manipulation and could not have limited or mitigated this harm. For these reasons, Viacom has established the directness element of *AGC*.

2.

We turn next to the district court's other major reason for granting the defendants summary judgment: **[**46]** its belief that opening the door to Viacom's suit would inevitably lead to either duplicate recovery or complex damage apportionment. See *AGC, 459 U.S. at 544*. The court cited at least three manifestations of this problem, all involving Viacom's integrated suppliers, such as Asarco. First, it believed that Viacom's claim would duplicate Asarco's because Asarco could assert claims for its raw material purchases from third parties, and those raw material prices are tied to Comex. Second, because Asarco purchased some cathode from third parties, both it and Viacom would be permitted to recover and duplicate each other's damages. Third, Viacom's claim would duplicate Asarco's because Asarco hedged by purchasing put options on Comex. In addition to those three points, the court noted that Asarco has recovered damages in a California state court class action, and it thought that this too should preclude Viacom from recovering.

We begin with the defendants' claim that Asarco's purchase of raw materials, such as ore, concentrate, blister, and anode, all of which it transformed into cathode, should bar recovery. This does not follow. Practically every product is created through **[**47]** the use of some kind of raw materials, but that fact does not prevent the direct purchaser of the finished product from suing its manufacturer under the antitrust laws, as long as the direct purchaser is not trying to attack a price-fixing arrangement at the raw materials level. The defendants' own experts testified that while raw material prices "may be indirectly affected" by price manipulations, a squeeze or corner on cathode - the only copper product traded on Comex and the LME - would not directly harm purchasers of these raw materials.

Instead, raw material prices vary widely and contain various discounts off the Comex price to account for such factors as the expected cost of conversion into cathode, which in turn varies based on supply, demand, and current refining and smelting capacity. We agree with the broad proposition that ***HN19***[] a party cannot recover when others more directly injured are better able to state a claim. *AGC, 459 U.S. at 544-45*. Indeed, we have just applied this very principle to deny recovery to the Scrap Dealers, who are farther down the chain of resale, even though scrap prices too are tied to Comex. For parallel reasons, raw materials purchasers **[**48]** are also ill-suited to bring an antitrust claim. Permitting both raw materials purchasers **[*490]** and cathode purchasers in the same line of distribution to recover would lead to duplicate damages in violation of the *Illinois Brick* rule. The solution to this problem, however, is not to deny a right to recover to everyone. Such a draconian rule would give a green light to antitrust scofflaws to conspire to fix prices in a particular market and would create incentives to engage in antitrust conspiracies in markets with complicated distribution structures. Instead, the proper course is to recognize only the best of the several potential plaintiffs who otherwise satisfy the requirements for bringing suit under the antitrust laws. Because raw materials prices will vary in comparison to Comex prices much more than will the price of physical cathode, physical cathode purchasers such as Viacom are better situated than raw materials purchasers to pursue a claim in the physical market. This logically implies that raw materials purchasers up the chain from cathode sales could not satisfy *AGC*, just as we found to be the case for the downstream Scrap Dealers. In between, however, lies the physical **[**49]** market transaction at the heart of the defendants' scheme - the purchase of cathode. There are no better parties than these purchasers to pursue a claim, and it is therefore they who are proper plaintiffs.

More bite lies in the argument that recovery should be denied because some of the cathode Asarco sold Viacom was purchased before, although this claim is not as strong as it might at first appear. As the district court noted, some if not most of the cathode Viacom purchased had never before been purchased in cathode form. Asarco sold Viacom 510 million pounds of cathode between 1990 and 1996. During that time frame, Asarco refined 6.4 billion pounds of cathode and purchased 153 million pounds from third parties, about 2.3% of its output. Because copper is fungible, one cannot tell whether any given Viacom purchase of cathode consisted of cathode refined by Asarco or previously purchased product.

We do not believe the mere existence of third-party cathode presents such a risk of duplicate recovery as to justify the extreme step of denying recovery altogether. Had the Board of Trade in *Sanner* produced evidence that farmers on some rare occasions bought soybeans from neighboring **[**50]** farms and then resold them along with the soybeans they grew themselves, that would not have provided a reason to deny recovery entirely. Similarly, if Viacom can prove at trial that 97.7% of all copper Asarco sold it was cathode it had refined itself, then Viacom should be permitted to recover 97.7% of its proved damages from cathode purchases. *Cf. Paper Sys., Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002)* (carving out indirect purchases while still leaving open possibility of recovery for direct purchases). The physical copper market is complicated, but not so complicated that one cannot estimate to a reasonable degree of accuracy the amount of damage a party has sustained. It is certainly acceptable through expert economic testimony to make a reasonable estimation of actual damages through probability and inferences. See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 124, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. ***HN20***[] "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty it would be a perversion of fundamental principles of justice to deny all relief to the **[**51]** injured person." *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*. While we are not permitted to make *complex* damage apportionments in antitrust cases, *AGC, 459 U.S. at 544*, **[*491]** nothing about these calculations is inordinately complex. One need only know two pieces of information: the amount of cathode purchased by Viacom and the amount of cathode purchased and sold by those who sold cathode to Viacom. From there, reasonable estimates of damages are the order of the day. Because this estimation is not overly complex and will not lead to duplicate damages, it provides a sufficient basis at this stage for the case to proceed to the merits.

The defendants' next major attack rests on hedging. Commodities exchanges function in part to protect participants in a physical market by shifting some of the risk (and damage) caused by fluctuations in price to participants in the futures market. Extending this principle, Global and CLR claim that through an extremely complicated set of economic interactions between the cash and futures markets, the damages experienced in the physical cathode market **[**52]** will be duplicated in their entirety by damages suffered in the futures market. Therefore, only futures traders, and not cash market participants, should be permitted to recover.

The hedging theories advocated by the defendants are based on economic theory, with no specific application of that theory here that would correlate sales in the cash market and sales in the futures market. Notably, Viacom's individual purchases from its suppliers were not hedged. Neither Viacom nor Asarco purchased a futures contract as a hedge every time they exchanged copper. Had they done so, then perhaps one might be able to "match" each physical market transaction to a futures contract sale and argue that the opportunity for a trader to recover the overcharge in a federal lawsuit should preclude recovery for the overcharged physical market participant. Emerson's supplier, Phelps Dodge, did hedge some of its sales to Emerson. On remand, the district court should explore further whether these hedging transactions would lead to some degree of duplicate recovery and a corresponding need to reduce damages. Nevertheless, since our review of the record indicates that not all of Phelps Dodge's sales were hedged, **[**53]** we conclude that Emerson is an appropriate plaintiff for the same reasons as Viacom.

In any event, the kind of futures matching the defendants' postulate does not reflect the way that most hedging works in the copper futures market. Asarco did not buy futures. Instead, it purchased put options. Put options are strategic hedges designed to protect against a general risk of declining cathode prices. With a put option, Asarco had the right, but not the obligation, to sell a futures contract if the price fell below a certain "strike" price. See *United States v. Catalfo, 64 F.3d 1070, 1072 (7th Cir. 1995)*. But as the defendants were artificially inflating the price of cathode throughout the period at issue here, the price never would have fallen below the strike price. Therefore, no sale ever would have gone forward and the only damages Asarco would have suffered from the conspiracy would have been the cost of the put option, or, more properly, the amount by which the price of the put option changed because the price of copper was artificially high.

The defendants and their experts have made no attempt to correlate the damages Asarco could theoretically recover on the **[**54]** futures market for its put options to the specific damages sought here by Viacom, and the relationship is far from intuitively obvious. Instead, the experts trace the potential for hedging by numerous parties upstream and downstream from Viacom and contend that because so many participants in the copper industry use so many different forms of hedging there will be **[*492]** "inevitable" duplication between the cash and futures markets.

This sort of potential duplication bears no resemblance to the duplication rejected in *Illinois Brick* and *AGC, 459 U.S. at 544*, nor do we think that it independently provides a reason to deny recovery to Viacom. In *Illinois Brick*, any "pass-on" of damages would (because of *Hanover Shoe*) already be taken into account in its entirety in the recovery to another potential party, the direct purchaser. *431 U.S. at 737-38*. This simply is not the case here. Asarco strategically hedged only about half its output. The defendants claim that potential hedging by those parties to whom Viacom sold and from whom Asarco purchased raw materials is also relevant, but this cannot be so under *Sanner*. There we held that injuries incurred **[**55]** in futures market purchases not linked to any particular cash market purchases did not "duplicate" and were not more "direct" than the cash market injuries. *62 F.3d at 929-30*. Because there are two separate markets, each with compensable injuries, the opportunity for recovery in one market does nothing to alleviate the harm in the other. For similar reasons, the fact that Comex futures traders have received money in a now-settled lawsuit says nothing about the ability of Viacom or other similarly situated plaintiffs in the cash market to recover.

Finally, the defendants note that Asarco and three of the manufacturers' other suppliers have recovered in a lawsuit brought in California state court. This lawsuit was brought pursuant to California law, which permits suit by indirect purchasers. *Union Carbide Corp. v. Superior Ct., 36 Cal. 3d 15, 679 P.2d 14, 16, 201 Cal. Rptr. 580 (Cal. 1984)*. However, the supposed "duplication" here comes from different bodies in our federal system seeking to remedy separate harms. It presents no risk of duplicate recovery for the same injury under the same law and is thus no bar to the plaintiffs' recovery. See *Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989)* **[**56]** (upholding award of both federal antitrust and state tort damages); *California v. ARC Am. Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)* (permitting states to require offenders to pay both state damages to indirect purchasers and federal treble damages to direct purchasers). If the resolution of the state court action poses a problem at all to these plaintiffs, it would be in the nature of claim or issue preclusion. See *Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996)*; *Marrese v. American Acad. of Orthopaedic Surgeons, 470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985)*. It is possible that the defendants have waived their right to assert any such defense; it is not mentioned in their briefs before this court. Accordingly, we express no opinion at this time on the merits of any preclusion argument.

In sum, of all participants in the physical market, Viacom and other first purchasers of cathode are the only plaintiffs possibly situated to recover damages against the defendants for the anti-competitive harms they have inflicted on the physical market for copper cathode. **[**57]** Faced with the option of permitting a clear, non-speculative harm to the cash market to go unremedied or of allowing the plaintiffs' suit to go forward, we elect the latter. As narrowed to first purchases, there is no danger of duplication of recovery, and so, under *AGC* and *Sanner*, the claim should proceed to trial.

3.

The final broad claim of the defendants is that recovery of damages in this case simply would be too speculative **[*493]** and complex to warrant allowing this suit to proceed. *Cf. AGC, 459 U.S. at 542.* Based on the evidence adduced by Viacom, however, we disagree. The main complication will come from attempting to discern how much of the Comex price of copper at a given time represented an overcharge due to the defendants' manipulation and how much stemmed from normal economic forces. This difficulty, however, occurs in every price-fixing case. It is no different from the task of gauging the damages recoverable by Comex futures traders, whom defendants have conceded to be proper plaintiffs. Through discovery, economic experts can evaluate the impact of the defendants' illegal actions on the futures market and come to reasoned conclusions. *Cf.* **[**58]** *Sanner, 62 F.3d at 930* (rejecting claim that damages analysis in a market manipulation is "beyond the ken of the federal courts"). At that point, recovery could be calculated by reviewing all of Viacom's contracts (assuming they are similar to the ones already in the record) and assessing damages based on the already computed overcharge. Since the only other factors involved in setting the price of Viacom's cathode are items which have no relation to the Comex price, such as freight charges and cash payment discounts, and the cathode premium, for which Viacom does not seek to recover, there should be no problems as a theoretical matter with making these calculations. ***HN21***[] The mere fact that each individual transaction relevant to an antitrust scheme must be examined on a case-by-case basis to assess damages does not thereby render those damages speculative. *American Ad Mgmt., Inc. v. General Tel. Co. of Cal., 190 F.3d 1051, 1059 (9th Cir. 1999)*.

We fully recognize that perfecting such economic analysis, tracking every pound of cathode refined or purchased by Viacom's suppliers, and locating every cathode contract Viacom entered into over a six-year span **[**59]** will not be easy. But complex litigation is hardly new for the federal courts, whether it is in the field of antitrust, environmental clean-ups, pension law, or accounting frauds. The key here is that the damages are not inherently speculative in the sense that *AGC* used that term. See *459 U.S. at 542*. Nor, as in *Illinois Brick* or *Hanover Shoe*, is a party asking a jury or the district court to perform some form of econometric analysis to deduce whether all, some, or none of an overcharge was passed on down a chain of distribution. *Illinois Brick, 431 U.S. at 727*. Instead, one need only determine through available records what percentage of cathode bought by Viacom represents first purchases. This is not speculative or complex, only time-consuming, and we are confident that the parties and their counsel are up to the task.

The defendants' entire case theory, apparent not only here but also through their discussion of duplication and hedging, seems to be the troubling one because their scheme was *so* evil, went undetected for *so* long, and caused *so* much economic loss throughout the cash market, that we should simply give them a pass **[**60]** from the antitrust laws. This is not now and never has been the law. Since the days of *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379, 71 L. Ed. 684, 47 S. Ct. 400 (1927)*, it has been established that in complicated antitrust cases plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages. While we fully agree that we should not use the massiveness of defendants' conspiracy as an excuse to punish them unduly (by, for example, permitting the Scrap Dealers in *Loeb* to recover for harms that would duplicate those of Viacom), the sensible solution is to let one - but only one - level of purchasers **[*494]** in the physical copper market recover. Based on all the evidence available on summary judgment, the best plaintiff in this market is the first purchaser of copper cathode, and Viacom and Emerson are prototypical examples of such plaintiffs. The district court erred in dismissing the case at this stage, and we must therefore reverse its judgment.

C. *Ocean View* (Nos. 01-3229, 01-3230)

We turn to the final plaintiff, Ocean View. We have already rejected the defendants' principal argument for **[**61]** affirming summary judgment in this case, that the action is barred by the *Illinois Brick* direct purchaser rule. For the same reasons discussed in connection with Viacom's action, there is no party along a chain of distribution between Ocean View and any of the defendants who can recover for an alleged overcharge. Therefore, *Illinois Brick* is inapplicable. Instead, this case is controlled by the basic premise of *Sanner, 62 F.3d at 929-30*, which holds that ***HN22***[] a cash market participant injured by a party's illegal actions in the futures market may, in some instances, sue that party under the federal antitrust laws. The controlling factors in this inquiry are those set out in *AGC, 459 U.S. at 537-45*. The defendants allege that under an analysis of these factors, Ocean View's claim should still be precluded, while Ocean View contends that it should be entitled to recover for every copper rod it has ever purchased, or, in the alternative, that it may recover at least for those instances where it was the first purchaser of copper in cathode form.

As with the Scrap Dealers, we must reject Ocean View's proposition that it can recover for rod manufactured **[**62]** from cathode purchased by others, such as its semi-fabricators. Such an injury would be indirect because the semifabricator would serve as a more immediate victim of the antitrust violation intended to affect the cash and futures markets for cathode. *AGC, 459 U.S. at 541-42*; *supra at 22-23*. Semi-fabricators who purchased cathode would stand in shoes similar to those of Viacom, purchasing large quantities of cathode to reshape and sell as rod or wire. Because they are well-situated to bring any claim for inflation in the physical market, there is no need for Ocean View, as a more remote party, to step in "to vindicate the public interest in antitrust enforcement." *AGC, 459 U.S. at 542*.

Additionally, granting recovery to both a semi-fabricator for its cathode purchase and Ocean View for its purchase of that same cathode reshaped as rod would lead to either duplicate recovery or complex damage apportionment in violation of the principles underlying *AGC. 459 U.S. at 544*. We have already rejected the claim that the copper market should not be subject to a ban on duplicate recovery because copper pricing decisions are based on Comex **[**63]** and not a "pass on" of historical costs, *supra at 24-25*. To avoid such duplicate recovery one must either attempt to apportion damages along a chain of distribution, forbidden by *AGC*, or deny the right to sue to all but one plaintiff along the chain of distribution.

The best-situated plaintiff to recover is the first purchaser of copper cathode, the specific commodity the defendants targeted in their futures market conspiracy. For such a plaintiff, it is possible both to avoid duplicate recovery problems and at the same time to ensure that antitrust harm perpetrated in the cash market will not go unremedied. Based upon on our review of the record, we are satisfied that in at least some cases Ocean View did purchase cathode refined by integrated producers. The existence of such purchases **[*495]** is enough to get Ocean View in the door; ***HN23***[] recovery should not be denied simply because a plaintiff may not receive damages as high as it would like. The quantity of such sales, and thus the eventual damages Ocean View might get if it manages to prove the rest of its case, can await further discovery. Like Viacom, Ocean View will have the burden of ascertaining what percentage of the cathode **[**64]** sold by these producers was refined by them and not purchased from third parties. If, as defendants fear, many of these records are lost, that fact will come out in discovery, and they may move for a missing evidence instruction or perhaps even summary judgment on the merits.

We have already rejected most of the other claims the defendants make for denying Ocean View recovery, including the proposition that the integrated producers' purchase of copper raw materials should somehow render them improper plaintiffs, *supra at 31*, and the claim that hedging on the copper futures markets by some physical market participants renders the injury indirect or duplicative, *supra at 34-36*. Finally, we have found that the damages claimed are not too speculative or complex, *supra at 37-38*.

At this point we can think of only one possible distinction between Ocean View and Viacom that deserves further comment. That is the fact that while Viacom purchased cathode, Ocean View bought cathode that had been tolled into rod. The parties do not focus on this distinction much in their briefs, and the defendants concede that there is no physical difference between cathode and rod other than the **[**65]** product's shape. Based upon our review of the contracts in the record, the price Ocean View paid its integrated producers for rod appears to be identical to that paid by Viacom for cathode except for the existence of an additional rod premium. We assume, since the defendants do not contend otherwise, that like the cathode premium, the rod premium is a small fraction of the total price paid and tends to increase as the Comex price increases, so that it does not in some way offset the Comex inflation or render the injury indirect. In that case, the similarities between cathode and rod are close enough that, in instances where the same integrated producer refines raw materials into cathode and then shapes it into rod, Ocean View, as the first purchaser after the materials are formed into cathode, can state a claim, regardless of whether that copper is then in the form of cathode or rod. *Cf. In re Sugar Indus. Antitrust Litig., 579 F.2d 13, 17-18 (3d Cir. 1978)* (finding no distinction for *AGC* purposes between price-fixed sugar and candy incorporating that price-fixed sugar sold into the market for the first time).

VI.

In addition to their points under *Illinois* **[**66]** *Brick* and *AGC*, the various plaintiffs make arguments specific to their own cases. Most of these involve procedural issues. We consider these points in turn, on an issue-by-issue basis.

A. RICO and State Law Claims

We begin once again with the *Loeb* action. Our determination that the *AGC* factors prevent the Scrap Dealers from pursuing their antitrust claims disposes of their remaining claims against Sumitomo and Global for violations of RICO and state law. It is also dispositive of all claims against JPMorgan Chase.

The district court dismissed the Scrap Dealers' RICO claims on the ground that the *AGC* factors apply equally to RICO. The Scrap Dealers, however, argue that even if their antitrust claim fails, their RICO case should proceed. This claim **[*496]** lacks merit. ***HN24***[] Civil RICO was modeled after the Clayton Act. *Holmes v. Security Investor Protection Corp., 503 U.S. 258, 267-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. To satisfy its requirement of proximate causation, the Scrap Dealers must allege a relation between their injury and the defendants' violation that is neither indirect nor remote. *International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 825 (7th Cir. 1999)* **[**67]** (applying *AGC* factors to a proximate causation analysis). Since we have already determined that the Scrap Dealers' injury is too indirect and remote under *AGC* for antitrust purposes, we conclude that the relation is similarly too remote for RICO purposes.

The Scrap Dealers also assert that the district court erred in finding that they had abandoned their state law claims. On this point, they appear to be correct. There is certainly no evidence in the record that the Scrap Dealers voluntarily dismissed or failed to pursue their various state law claims. The defendants argue that these claims were abandoned when the Scrap Dealers attempted to certify a class for the federal antitrust claims but not for the state claims. But no inference of abandonment should flow from a limited request for a class action; to the contrary, ***HN25***[] *FED. R. CIV. P. 23(c)(4)(A)* specifically recognizes that "an action may be brought or maintained as a class action with respect to particular issues." It would be entirely consistent with the rule to seek certification on issues governed by federal law, while declining to do so for more particularized state law issues. Nevertheless, the fact remains that we **[**68]** have dismissed all of the Scrap Dealers' federal claims against Sumitomo and Global. Since the Scrap Dealers have asserted no independent basis for federal subject matter jurisdiction, it is entirely appropriate to dismiss the state law claims, though without prejudice. See *28 U.S.C. § 1367(c)(3)*; *Oates v. Discovery Zone, 116 F.3d 1161, 1173 n. 12 (7th Cir. 1997)*.

B. Issue Preclusion: JPMorgan Chase

The district court dismissed the Scrap Dealers' claims against JPMorgan Chase on issue preclusion grounds. ***HN26***[] To prove that issue preclusion applies, the defendant must establish that (1) the plaintiff was fully represented in the prior litigation, (2) the issues to be precluded are identical to those in the prior litigation, (3) the issues were actually litigated and decided on the merits, and (4) resolution of the issue was necessary to the judgment. *People Who Care v. Rockford Bd. of Educ., 68 F.3d 172, 178 (7th Cir. 1995)*. The Scrap Dealers' claims against JPMorgan Chase arise from an alleged conspiracy between JPMorgan Chase and Sumitomo in which JPMorgan Chase's metals desk somehow furthered the conspiracy through its **[**69]** own copper purchases on the LME. The issue the defendants sought to preclude, that of the Scrap Dealers' ability to recover as a proper plaintiff under the antitrust laws, was actually litigated and decided on the merits in their suit against Sumitomo. That is enough to bind the Scrap Dealers, who have now had their day in court, with respect to JPMorgan Chase as well.

The Scrap Dealers argue, however, that their day in court was flawed, because they did not have an opportunity to litigate these issues fully before the district court. Their only support for this contention is the fact that the district court turned Sumitomo's motion to dismiss into a summary judgment motion without notice to them. As we have already noted, this action by the district court, while in error, did not prejudice the Scrap Dealers. The antitrust issues were fully litigated by counsel, albeit at the class certification stage. Besides **[*497]** this, the district court gave the Scrap Dealers an opportunity for a hearing prior to dismissing the JPMorgan Chase claims at which they were invited to bring forth any additional arguments that would call into question the district court's prior grant of judgment to the defendants. **[**70]** The Scrap Dealers produced no new evidence at that time that would call into question the factual basis for that determination. Therefore, we affirm the district court's decision to dismiss all claims brought by the Scrap Dealers against JPMorgan Chase on issue preclusion grounds.

C. Statement of Claim Against CLR

CLR advances one final argument in support of the judgment in both *Viacom* and *Ocean View*, which applies only to itself and not to its co-defendants. The district court stated in the *Viacom* action that, while it would not "address the issue in any detail," it believed that Viacom had made an inadequate showing that CLR's activities in any way affected the prices Viacom paid for copper. CLR urges this as an alternate ground for affirmance.

The procedural history of this argument is complex and seems to have engendered a great deal of enmity between the parties. The parties filed cross-motions for summary judgment on the standing question in the *Viacom* action. In its lengthy joint motion with Global, CLR never argued that its role in the conspiracy was too attenuated to have directly affected the Comex price. The issue was first raised in CLR's response **[**71]** to Viacom's cross-motion. Viacom, in reply, pointed to evidence in the record that addressed this new argument. The district court struck these submissions as untimely. This, however, was in error. Viacom had no obligation to produce specific evidence of CLR's role to survive CLR's motion for summary judgment since the issue was never raised by CLR at that stage. *Aviles v. Cornell Forge Co., 183 F.3d 598, 604-05 (7th Cir. 1999)*. Because CLR raised this argument in an untimely manner, the district court should not have considered it as a ground for summary judgment without giving Viacom "notice and a fair opportunity to present arguments and evidence in response." *Id*. By striking the materials Viacom submitted, the district court denied just that opportunity. Of course, since we are remanding this case on other grounds, the issue may resurface again after further discovery. At that point, considering all evidence in the record, the district court may properly evaluate - after considering all record evidence - whether either Viacom or Ocean View has presented enough to connect CLR to any violation of the antitrust laws. For the foregoing reasons, we also deny CLR's **[**72]** motion to strike.

D. Aiding and Abetting: JPMorgan Chase

Another minor issue crops up only in *Ocean View*, but it too can be disposed of easily. JPMorgan Chase asserts that the district court incorrectly denied its motion to dismiss on the ground that the complaint failed to state a claim against it because it only aided and abetted the conspiracy between Sumitomo and Global. But Ocean View is not attempting to state an "aiding and abetting" case. Its allegation is that JPMorgan Chase was a participant in the conspiracy to manipulate the copper market. To state such a claim, Ocean View need only prove that JPMorgan Chase knew Sumitomo intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint. 7 Phillip E. Areeda, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application*, P 1474a (1986); *Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 470, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. A broad reading of **[*498]** the complaint alleges this and more. It states that JPMorgan Chase, aware that Sumitomo was manipulating futures prices, provided services and loans at well above-market prices to finance and **[**73]** hide Sumitomo's activities. JPMorgan Chase also allegedly stonewalled and lied to regulators and otherwise helped Sumitomo in an attempt to avoid investigations, all the while profiting handsomely on its deal. Of course, after merits discovery, it may come to pass that Ocean View lacks the evidence to establish any of these claims. But accepting the allegations as true, it is entitled to proceed.

E. Reinstatement of Claims

Only a few brief housekeeping matters remain. In both *Viacom* and *Ocean View*, the district court also granted the defendants summary judgment on their RICO and fraud claims because RICO contains rules similar to the Clayton Act for identifying proper plaintiffs. *International Bhd. of Teamsters, 196 F.3d at 825*. Having found that the plaintiffs here may pursue their antitrust claims, the RICO claims must be reinstated as well. The same goes for the state law claims. They were dismissed without prejudice in *Viacom* only because all federal claims had dropped out of the case. Finally, in *Ocean View*, the district court dismissed Ocean View's claim under Rhode Island state law on the ground that Rhode Island law imposed standing **[**74]** requirements similar to those of federal law. Expressing no opinion on the merits of that determination, we note that since we have found that Ocean View may proceed on at least some of its claims under federal law, the dismissal of the Rhode Island claim on similar grounds must be reconsidered.

VII.

To summarize, we MODIFY the dismissal of the state law claims in No. 00-3979 to reflect that this dismissal was without prejudice. In all other respects we AFFIRM the judgment of the district court. We also AFFIRM the judgment in No. 01-1148. On the other hand, we find that Viacom, Emerson, and Ocean View are not indirect purchasers under *Illinois Brick*, and their injury is direct, predictable, and unlikely to produce duplicate recovery or speculative damages. Therefore, in Nos. 01-3229, 01-3230, and 01-3485, we REVERSE the judgment of the district court and REMAND for further proceedings.

Concur by: CUDAHY

Concur

CUDAHY, *Circuit Judge*, concurring in Nos. 00-3979 and 01-1148 and concurring in the judgments in Nos. 01-3485, 01-3229 and 01-3230. I join in the outcomes reached by the majority in the several cases, but I write separately to question the appropriateness of finding a **[**75]** "lockstep" relationship between the copper futures and cash markets in the analysis of the claims of Viacom, Emerson and Ocean View.

The analysis and outcome in *Sanner* (which relied on the allegations of a complaint, not a summary judgment record) were based on the thesis that the futures market and the cash market tended to move in "lockstep." Thus, the relationship of futures prices of soybeans on the Chicago Board of Trade and the cash price of soybeans to be realized by farmers could be assumed to be simple, direct and absolutely predictable. "The futures market and the cash market for soybeans are …'so closely related' that the distinction between them is of no consequence to antitrust standing analysis." *62 F.3d at 929*. Based on the complaint, there could be no question that a given manipulation of the futures market produced a precisely proportionate consequence in the cash market.

[*499] This is hardly the case with the Comex and the market for physical copper. Even though the majority attempts to minimize the departures from a fully direct relationship between the futures and the physicals market (and takes issue with the more critical analysis of these relationships **[**76]** by the district court), under either view "lockstep" becomes more a slogan than a fact. And, of course, it was the existence of a "lockstep" relation that apparently excused *Sanner* from the strictures of *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)* and squared it with *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. The existence, in the case before us, of a negotiable premium (or discount) as part of the price is enough in itself to remove this relationship from the "lockstep" category. And, if the language of *Kansas v. Utilicorp United, Inc., 497 U.S. 199, 216, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)* about the undesirability of exceptions to *Illinois Brick* were to be applied here, the outcome might be in doubt.

With respect to the possibility of duplicative recovery, *Sanner* is also quite distinguishable. There the plaintiff-farmers produced the commodity, bought none of it and there was no trade in any precursor raw material. Here the plaintiff-manufacturers bought from integrated **[**77]** producers, which purchased from others substantial quantities of copper cathode and pre-cathode copper raw material (the price of which also tended to follow the copper futures market).

I believe, therefore, that the case before us, although it seeks to apply *Sanner's* principle, may be a major step beyond *Sanner*. The outcome, however, may be justified insofar as there is sufficient evidence that the defendants engaged in massive physical cathode transactions and intended to manipulate physical prices as well as futures prices and thus to injure purchasers such as the plaintiffs. *See Sanner, 62 F.3d at 929* ("even if we were to assume …that there is a distinction between markets that is relevant to antitrust standing, the farmers here have alleged that one of the CBOT's objectives in adopting the Resolution was to prompt a price decline in the cash market for soybeans.").

End of Document

Sanderson v. Brugman

United States District Court for the Southern District of Indiana, Indianapolis Division

September 20, 2002, Decided

CAUSE NO. IP00-0459-C-H/ K

Reporter
2002 U.S. Dist. LEXIS 19212 *; 2002-2 Trade Cas. (CCH) P73,862

CHARLES H. SANDERSON, Plaintiff, v. HELMUT H. BRUGMAN, SURTECH CORP., INDIANA SOFT WATER SERVICES, INC. d/ b/ a CULLIGAN, and CULLIGAN INTERNATIONAL COMPANY, Defendants.

Notice: **[*1]** NOT FOR PUBLICATION

Subsequent History: Summary judgment granted by, Judgment entered by *Sanderson v. Ind. Soft Water Servs., 2004 U.S. Dist. LEXIS 15671 (S.D. Ind., July 23, 2004)*

Prior History: *Sanderson v. Brugman, 2001 U.S. Dist. LEXIS 8309 (S.D. Ind., May 29, 2001)*

Disposition: Claims dismissed with prejudice. Stay of discovery vacated.

Core Terms

magnetic, allegations, Lanham Act, misleading, antitrust, survive, false statement, advertising, conspiracy, defamation, tortious interference, water treatment, statute of limitations, investigations, competitor, promotion, contends, two-year, effects, studies

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Remedies

HN1[] False Designation of Origin, Elements of False Designation of Origin

Section 43(a) of the Lanham Act provides a civil remedy against a person who, on or in connection with any goods or services, uses in commerce any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which, in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities. *15 U.S.C.S. § 1125(a)(1)(B)*.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Borrowing Statutes

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > Borrowing Statutes

Governments > Legislation > Statute of Limitations > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN2[] Statute of Limitations, Borrowing Statutes

The Lanham Act does not have its own statute of limitations but borrows the most analogous state law limitation.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] Pleadings, Rule Application & Interpretation

In modern civil pleading, it is not necessary to plead every element of a cause of action to avoid dismissal.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] Defenses, Demurrers & Objections, Motions to Dismiss

Mere allegations of a conspiracy are insufficient to withstand a motion to dismiss.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN5[] Concerted Action, Civil Conspiracy

Under Indiana law there is no independent tort of civil conspiracy.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN6[] Business Torts, Fraud & Misrepresentation

A claim of fraud in Indiana requires showing that a plaintiff relied on a misrepresentation to her detriment.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Public Enforcement, State Civil Actions**

Indiana courts use federal decisions to interpret state antitrust statutes.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN8[] **Intentional Interference, Elements**

A valid and enforceable contract is an essential element of a tortious interference with contract claim. Although the details of the contract need not be pled, a contract must at least be identified.

Governments > Legislation > Statutory Remedies & Rights

Torts > ... > Proof > Violations of Law > Criminal & Penal Legislation

HN9[] **Legislation, Statutory Remedies & Rights**

Ind. Code § 34-24-3-1 (replacing Ind. Code § 34-4-30-1) provides a civil remedy for a person who suffers a pecuniary loss as a result of a violation of numerous criminal statutes, including *Ind. Code § 35-43-5-3*.

Counsel: For Plaintiff: Robert Hendren, Attorney at Law, Indianapolis, IN.

Donald C Biggs, Sommer Barnard Ackerson Pc, Norman T Funk, Hill Fulwider McDowell Funk & Matthews, Indianapolis, IN.

Judges: DAVID F. HAMILTON, JUDGE, United States District Court, Southern District of Indiana.

Opinion by: DAVID F. HAMILTON

Opinion

ENTRY ON DEFENDANTS' MOTIONS TO DISMISS THIRD AMENDED COMPLAINT

Plaintiff Charles H. Sanderson sells and promotes the use of magnetic systems to remove lime scale from water without using the chemicals that are used in competing systems. Sanderson contends that he has been the victim of a decades-long conspiracy of persons interested **[*2]** in the chemical systems to spread false information disparaging his magnetic systems.

The court previously dismissed plaintiff's Second Amended Complaint, including his federal Sherman Act antitrust claims, but granted leave to replead his Lanham Act claims so as to specify the allegedly false statements in advertising. *Sanderson v. Brugman, 2001 U.S. Dist. LEXIS 8309, 2001 WL 699876* (S.D. Ind. May 29, 2001). Plaintiff sought reconsideration, which was denied, and he eventually filed a Third Amended Complaint. Defendants then filed a new motion to dismiss that complaint, as well, for failure to state a claim upon which relief can be granted. As explained below, the Culligan defendants' motion is granted in part and denied in part, and the motion of defendants Brugman and Surtech is granted in its entirety. At this stage of the case, plaintiff is not entitled to any further opportunity to replead the dismissed claims, so the dismissed claims are dismissed with prejudice.

I. *The Culligan Defendants' Motion*

In relevant part, ***HN1***[] Section 43(a) of the Lanham Act provides a civil remedy against a person "who, on or in connection with any goods or services, … uses in commerce … any false **[*3]** designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities …." *15 U.S.C. § 1125(a)(1)(B)*. This provision has often been used by companies to challenge competitors' factual assertions in their advertising. See generally *Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883 (7th Cir. 2000)*, *modified, 209 F.3d 1032 (7th Cir. 2000)* (reversing preliminary injunction). In this case, plaintiff Sanderson has attempted to assert such false advertising claims against competitors who manufacture and distribute chemical-based systems for removing lime scale from water.

Defendants Indiana Soft Water Services, Inc. and Culligan International Company (together, "Culligan") are the subjects of more specific allegations in Paragraph 27 of the Third Amended Complaint, in which Sanderson alleges:

> 1. Improper use of various studies and reports derogatory to magnetic water treatment and devices, **[*4]** including studies commissioned by the Water Quality Association and conducted at Purdue University, and the South Dakota School of Mines, such use including interstate and international publication and sale of these studies, while knowing that the conclusions contained therein was false, or acting with reckless disregard of the truth or accuracy of the conclusions reached in these studies. In particular the following studies and documents have been published by these Defendants and their Co-conspirators:
>
> > 1. Distribution by Culligan, International, by and through its agent or licensee, Culligan Water Company of San Diego, Cal. on November 1, 1999 of an article from Water Conditioning and Purification dated July, 1998, with the heading "Do Magnetic and Electromagnetic Water Conditioners Work" and containing the following false or misleading statements:
> >
> > 1. The article generally discounts the validity of both magnetic water treatment and its proponents, and in particular attributes to magnetic water conditioning corrosive effects. This is false and misleading, particularly in light of the knowledge of Culligan International of installations and research demonstrating the positive **[*5]** effects of magnetic water treatment.
>
> 2. Publication by Matthew M. Brennan, of Culligan International, of a letter to the editor of *Water Conditioning and Purification,* January, 1996, containing the following false statements:
>
> > 1. stating that "NSF" has concluded a study of magnetic water treatment, when no such study has been conducted by NSF (The National Sanitation Foundation).
> > 2. stating that "… (magnetic) technology is absolutely worthless." This statement is false.
> > 3. stating that magnetic water treatment equipment is "… a piece of junk."
> > 4. stating that "For the past 30 years, independent scientific data has failed to validate this technological application or product validity of magnetic water conditioning." This statement is false.
>
> 3. Distribution by Culligan, International, by and through its agent or licensee, Jack Boetcher, in Austin Texas on January 7-9, 2000 of a publication with the heading "IS THIS THE TYPE OF STUFF YOU WANT FOR YOUR HOME?" and containing the following false or misleading statements:
>
> > 1. "Magnets, catalytics prohibited from Future Annual WQA trade show." This statement is false and misleading.
> >
> > 2. "WQA knows **[*6]** of no generally recognized scientific or technical evidence which proves that magnetic, electromagnetic, or catalytic devices [solely] to treat water have any measurable physical or chemical effect of water quality. In fact, such evidence as WQA is aware of supports the position that these devices have no measurable physical or chemical effect on water quality." This statement is false and misleading." This statement is false and misleading. [sic]
>
> 3. In addition to the written statements, the aforesaid Culligan dealer made the following false statements verbally:
>
> > 1. "You'll be very sorry if you buy those magnets, because they never work."

2. "Right now, magnetic water treatments systems are under investigation and will soon be taken off the market."
3. "Those magnet companies are "fly-by-night" operations that don't honor their guarantees or warranties."

The January 1996 allegations in Paragraph 27(1)(2) must be dismissed based on the statute of limitations. ***HN2***[] The Lanham Act does not have its own statute of limitations but borrows the most analogous state law limitation. Culligan argues that in Indiana the closest analog is the two-year limit for **[*7]** injury to persons or character or property, or for statutory penalties in *Ind. Code § 34-11-2-4*. *Sanderson v. Spectrum Labs, Inc., 227 F. Supp. 2d 1001*, No. 1:99CV371, slip op. at 15 (N.D. Ind. Jan. 12, 2000), *aff'd mem., 248 F.3d 1159 (7th Cir. 2000)*; see also *Ashland Oil, Inc. v. Arnett, 656 F. Supp. 950 (N.D. Ind. 1987)* (stating principle and applying two-year limit for statutory penalties to federal civil RICO claims). Sanderson has not disputed the point. The court agrees that the Lanham Act claim based on the 1996 allegations is barred. Sanderson's Lanham Act claim is most similar to a claim for defamation (commercial slander), which would be subject to the two-year Indiana statute of limitations. *E.g., Burks v. Rushmore, 534 N.E.2d 1101, 1102-04 (Ind. 1989)* (two-year statute of limitations on defamation claims generally begins to run when harm could have reasonably been ascertained with due diligence).

The allegations in Paragraphs 27(1)(1) and 27(1)(3) concerning allegedly false statements in November 1999 and January 2000 deal with matters within the two-year statute of limitations. In addition, Sanderson has responded to the court's earlier **[*8]** ruling by complying with *Rule 9(b)*: he has stated who said what, when, and where that was allegedly false. See *Hemenway v. Peabody Coal Co., 159 F.3d 255, 261 (7th Cir. 1998)*.

Culligan argues that claims based on these allegations should be dismissed because Sanderson has failed to allege that the statements amounted to "commercial advertising or promotion" within the meaning of Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)(1)(B)*. See, *e.g., Garland Co. v. Ecology Roof Systems Corp., 895 F. Supp. 274, 276 (D. Kan. 1995)* ("advertising and promotion" is limited to "broad, public dissemination of information," beyond isolated communication "to a single potential customer"). The court believes that dismissal on that basis would slice too finely the more general and liberal pleading requirements of Rule 8. ***HN3***[] In modern civil pleading, it is not necessary to plead every element of a cause of action to avoid dismissal. See *Hemenway v. Peabody Coal Co., 159 F.3d at 261* (district erred by dismissing fraud claim for failure to plead reliance; complaints "need not spell out every element of a legal theory"). In addition, **[*9]** the broad allegations of Paragraphs 64 and 65 of the Third Amended Complaint about false statements in advertising and promotion apply to these specific allegations and thus fill in the gap argued by Culligan. [1]

Culligan also questions whether it can be held responsible for statements attributed to its agents or licensees. The short answer is yes, at least at the pleading stage. Sanderson ultimately will need to come forward with evidence that would allow a reasonable jury to find that Culligan was legally responsible for the statements, **[*10]** if they are otherwise actionable. The pleading is adequate on this point.

Accordingly, Culligan's motion to dismiss is denied with respect to the Lanham Act claims based on the alleged statements in November 1999 and January 2000 set forth in Paragraphs 27(1)(1) and 27(1)(3) of the Third Amended Complaint. Sanderson's other federal claims against Culligan, however, are dismissed with prejudice for reasons the court has set forth above and in its previous decision.

II. *Defendants Brugman and Surtech's Motion to Dismiss*

In response to the court's insistence on specifics, Sanderson has identified one statement by defendant Brugman in a report entitled "Non-Chemical Water Treatment Devices: State of the Non-Art," published in October 24, 1998. The allegedly false statement was that "independent investigations of these devices have found them to produce no

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[1] The court expresses no views on whether the oral statements alleged in Paragraph 27(1)(3) are actionable in themselves. See *Medical Graphics Corp. v. SensorMedics Corp., 872 F. Supp. 643, 650 (D. Minn. 1994)* (plaintiff unlikely to prevail on claims based on alleged oral statements to one customer); *American Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc., 820 F. Supp. 1072, 1077-78 (N.D. Ill. 1993)* (dismissing claim based on single letter).

significant effect in preventing or correcting corrosion and scale formation." Third Am. Cplt. P 38. Brugman cited an "ASHRAE" policy statement. Sanderson alleges the statement is false in two respects: "First, there are independent investigations which have demonstrated that magnetics can produce positive effects, known to **[*11]** this Defendant. Second, Defendant cites the 1995 ASHRAE Handbook in a 1998 publication. ASHRAE amended this language in subsequent versions." *Id.*

Sanderson is not saying that Brugman's statement is literally false. He does not contend that *no* "independent investigations" have reached the conclusion described by Brugman. Instead, Sanderson is saying that independent investigations have produced mixed results. Some have found that magnetic devices have no significant effects and others have found that magnetic devices can produce positive effects. Brugman chose to report the conclusions of those investigations favorable to his business, and to ignore the others, according to the allegations. Similarly, the court sees no significance in the fact that Brugman made a statement that was in fact supported by the ASHRAE Handbook in 1995, though a later edition had modified the report in unspecified ways. The relevant point is that, even according to the complaint, Brugman's supposedly false assertion was in fact supported by the ASHRAE Handbook in 1995. Under those circumstances, Brugman's statement cannot support a Lanham Act claim on the theory that it is false or misleading. See **[*12]** *Mead Johnson & Co. v. Abbott Labs., 201 F.3d at 886-87*; *modified, 209 F.3d at 1034*. [2]

III. *State Law Claims*

Sanderson has attempted to assert claims **[*13]** under numerous tort theories under state law. As explained below, his claims against Brugman and Surtech do not survive dismissal, but a few claims survive against Culligan.

Conspiracy: Sanderson's complaint is laced with the label "conspiracy," but his conclusory labels add nothing to his overall case. See, *e.g.*, *Ryan v. Immaculate Queen Center, 188 F.3d 857, 859-60 (7th Cir. 1999)* (affirming dismissal of conclusory allegation of conspiracy); *House v. Belford, 956 F.2d 711, 721 (7th Cir. 1992)* ***HN4***[] ("mere allegations of a conspiracy are insufficient to withstand a motion to dismiss."). Also, ***HN5***[] under Indiana law there is no independent tort of civil conspiracy. *Sims v. Beamer, 757 N.E.2d 1021, 1026 (Ind. App. 2001)*; *Huntington Mortgage Co. v. DeBrota, 703 N.E.2d 160, 168 (Ind. App. 1998)*. To the extent that Sanderson might be deemed to be asserting claims for conspiracy, such claims are dismissed.

Fraud: Sanderson contends he has alleged fraud, but he has not identified any allegedly false statements of fact that any defendant made to him, and upon which he reasonably relied. He has failed to state a claim for fraud. **[*14]** See *Hardee's of Maumelle, Arkansas, Inc. v. Hardee's Food Systems, Inc., 31 F.3d 573, 579-80 (7th Cir. 1994)* ***HN6***[] (claim of fraud in Indiana requires showing that plaintiff relied on misrepresentation to her detriment); *Lawyers Title Ins. Corp. v. Pokraka, 595 N.E.2d 244, 249 (Ind. 1992)* (elements of fraud include a misrepresentation of fact that was "rightfully relied upon by the complaining party"). [3]

State ***Antitrust Law****:* Sanderson contends he has alleged violations of Indiana ***antitrust law***. The court **[*15]** has already dismissed his federal antitrust claims. Indiana courts have not identified any difference between federal and state ***antitrust law*** that would support different treatment of the state claims. See *Bi-Rite Oil v. Indiana Farm*

[2] Compare practices in legal brief-writing, in which an advocate may cite favorable authority and ignore unfavorable authority, at least if the unfavorable authority is not from the applicable controlling jurisdiction. See Indiana Rules of Prof'l Conduct R. 3.3(a)(3) (requiring disclosure of directly adverse and controlling legal authority if known to lawyer and not disclosed by opposing counsel). (Whether it is advisable to cite non-controlling but adverse authority is a matter of professional judgment rather than rule.) And regarding the change from the 1995 ASHRAE Handbook, one might consider the parallel problem with a brief that cites overruled or out-of-date authority. For example, plaintiff's brief cites repealed versions of statutes regarding civil remedies for victims of crimes, though the error was harmless.

[3] As noted above, the Seventh Circuit wrote in *Hemenway v. Peabody Coal Co., 159 F.3d 255, 261 (7th Cir. 1998)*, that the district court had erred by dismissing a fraud claim based on the plaintiff's failure to plead reliance. In Sanderson's case, however, it is clear that he is not claiming that his commercial foes' allegedly false statements fooled him; he is claiming they deceived prospective customers. Indiana's common law of fraud does not reach such claims.

Bureau Co-op. Ass'n, 720 F. Supp. 1363, 1378 (S.D. Ind. 1989), *aff'd,* 908 F.2d 200 (7th Cir. 1990) (granting defendant summary judgment on federal and state antitrust claims on the same grounds); Agmax, Inc. v. Countrymark Co-op., Inc., 795 F. Supp. 888, 892 (S.D. Ind. 1992) (denying preliminary injunction); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982) (because Indiana antitrust statute was modeled after Sherman Act, plaintiff who lacked standing under federal law also lacked standing under state law); City of Auburn v. Mavis, 468 N.E.2d 584, 585 (Ind. App. 1984) ***HN7***[] (Indiana courts use federal decisions to interpret state antitrust statutes; federal "antitrust injury" requirement applied to state law claim). Sanderson has failed to state a claim for an Indiana antitrust violation.

Tortious Interference with Contract Sanderson contends he has **[*16]** alleged tortious interference with contract, but he has not identified any actual contract allegedly interfered with by the defendants. ***HN8***[] A valid and enforceable contract is an essential element of such a claim. *E.g.,* Levee v. Beeching, 729 N.E.2d 215, 221 (Ind. App. 2000). Although the details of the contract need not be pled, see Cook v. Winfrey, 141 F.3d 322, 327-28 (7th Cir. 1998) (citing Federal Civil Form 5), a contract must at least be identified. Sanderson has failed to state a claim for tortious interference with contract.

Tortious Interference with Prospective Business Relationships: Sanderson also contends he has alleged tortious interference with prospective business relationships. Defendants contend that there is no viable allegation that they took unlawful action, which is an essential element of the tort under Indiana law. See, *e.g.,* Levee v. Beeching, 729 N.E.2d at 222; Economation, Inc. v. Automated Conveyor Systems, Inc., 694 F. Supp. 553, 556-57 (S.D. Ind. 1988). This claim survives dismissal against Culligan. Sanderson has alleged unlawful conduct by Culligan, though the claim is limited to the **[*17]** same allegations of false statements in November 1999 and January 2000 that survived dismissal on the Lanham Act claims. The claim does not survive against Brugman and Surtech because there is no viable allegation that they took any unlawful action.

Defamation: Sanderson also claims that he has stated claims for libel, slander, and product defamation. It is simpler and no less accurate to refer to all three as defamation. Sanderson's defamation claim survives dismissal against Culligan, again limited to the allegations of false statements in November 1999 and January 2000 that survived dismissal on the Lanham Act claims. The claim does not survive dismissal against Brugman and Surtech because Sanderson has not identified any false defamatory statement by them.

Criminal Fraud: Sanderson also claims he has alleged criminal mischief and deception in violation of Ind. Code § 35-43-5-3, which prohibits various types of fraud and deception in commercial transactions. Sanderson seeks treble damage under ***HN9***[] Ind. Code § 34-24-3-1 (replacing Ind. Code § 34-4-30-1), which provides a civil remedy for a person who "suffers a pecuniary loss as a result of a violation" of numerous criminal **[*18]** statutes, including Ind. Code § 35-43-5-3.

Sanderson was not the target of any alleged fraud, however. He has not identified any instance in which the Indiana courts have allowed a company to sue a commercial competitor sue for treble damages under this statute on the theory that the competitor used deception to secure a sale from a customer. Recognizing such a claim would seem to stretch the civil remedy statute well beyond its purpose and to open the door to a broad vista of new commercial litigation between competitors. Without much clearer signals that the Indiana legislature intended such results, the court finds that Sanderson has failed to state a claim for relief under Ind. Code § 34-24-3-1.

Conclusion

Accordingly, all claims against defendants Brugman and Surtech Corporation are hereby dismissed with prejudice. Sanderson's claims against defendants Indiana Soft Water Services, Inc. and Culligan International Company are dismissed with prejudice, except for his claims for violations of the Lanham Act based on the allegations in Paragraphs 27(1)(1) and 27(1)(3) of the Third Amended Complaint, and claims of defamation and tortious interference with prospective business **[*19]** relationships arising from the same instances. The stay of discovery previously entered is hereby vacated, and discovery may proceed with respect to the surviving claims. No separate judgment on the dismissed claims shall be entered at this time.

So ordered.

Date: September 20, 2002

DAVID F. HAMILTON, JUDGE

United States District Court

Southern District of Indiana

Dresses for Less, Inc. v. CIT Group/Commercial Servs.

United States District Court for the Southern District of New York

September 30, 2002, Decided ; September 30, 2002, Filed

No. 01 Civ. 2669 (WHP)

Reporter

2002 U.S. Dist. LEXIS 18338 *; 2002-2 Trade Cas. (CCH) P73,828

DRESSES FOR LESS, INC., DFL MANAGEMENT INC., THE DFL APPAREL GROUP, an unincorporated association, ALLISON CHE' FASHIONS, INC., BICCI STUDIO LTD., GARDEN CITY DRESSES FOR LESS, INC., DONALD WEINER and BARBARA WEINER, individually and derivatively as a shareholder of STELLA N. BISHOP FASHION CORP., and I.S.B. FASHIONS CORP., Plaintiffs, - against - CIT GROUP/COMMERCIAL SERVICES, INC. and THE UPTOWN CREDIT GROUP, INC., Defendants.

Disposition: **[*1]** Defendant CIT's motion to dismiss granted in part and denied in part. Defendant UCG's motion to dismiss denied.

Core Terms

factors, antitrust, manufacturer, percent, motion to dismiss, garment, vendors, plaintiffs', competitors, conspiracy, credit check, good faith, customers, purchases, domestic, amended complaint, price fixing, anticompetitive, shareholder, monopoly power, monopolization, prices, relevant market, anti trust law, sales, Sherman Act, allegations, conspiring, boycott, entity

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court typically must accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiff's favor. A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

There are no heightened pleading requirements for antitrust cases. Dismissal of an antitrust case prior to giving a plaintiff ample opportunity for discovery is granted very sparingly. However, it is improper to assume that a plaintiff can prove facts that it has not alleged or that defendants have violated the antitrust laws in ways that have not been alleged.

Antitrust & Trade Law > Sherman Act > Claims

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Claims**

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, prohibits all combinations and conspiracies that unreasonably restrain trade among the states. To establish a *§ 1* violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Practices Governed by Per Se Rule, Boycotts**

Per se illegal conduct is that which is so egregious as to constitute a violation of law without the necessity of showing an effect on competition. Among conduct falling within the per se rule are price fixing, territorial market division and certain group boycotts involving concerted refusals to deal. Only conduct that is manifestly anticompetitive is designated as per se illegal.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Remedies, Damages**

Conduct that does not fall within the per se rule is subject to the rule of reason analysis. Application of this doctrine requires a plaintiff to prove not mere injury to plaintiff as a competitor but antitrust injury, that is actual damage to competition within the relevant market. The injury to a relevant market requirement assures that the Sherman Act, *15 U.S.C.S. § 1 et seq.*, protects competition as a whole in the relevant market, and not the individual competitors within that market, so that a plaintiff may succeed only when the loss he asserts derives from activities that have a competition-reducing effect.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN6[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

A plaintiff that fails to plead an actual injury to competition may nonetheless show antitrust injury by showing that the defendant possesses market power sufficient to inhibit competition on a market-wide basis. Such power is defined as the power to raise prices significantly above the competitive level without losing all of one's business.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Conduct considered illegal per se is invoked only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN8[] Antitrust & Trade Law, Sherman Act

An anti-trust plaintiff must do more than allege the existence of a conspiracy; it must allege some facts in support of the claim. A bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN9[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

An inference of a horizontal price-fixing agreement could be drawn in the absence of direct "smoking gun" evidence when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices. Information exchange is an example of a facilitating practice that can help support an inference of a price fixing agreement.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

Even if an alleged scheme is economically implausible, an anti-trust conspiracy may nevertheless be proven by strong direct or strong circumstantial evidence, although the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] Clayton Act, Claims

See *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

An antitrust plaintiff must not only allege cognizable harm to itself, but an adverse effect on competition market wide. An "antitrust injury" is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violations or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would likely cause.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN13[] Regulated Practices, Price Fixing & Restraints of Trade

To state an antitrust injury, a plaintiff must demonstrate that defendants' conduct has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Even when a per se violation of the antitrust laws occurs, a plaintiff is still required to demonstrate antitrust injury as an element of a successful claim.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN14[] Regulated Practices, Price Fixing & Restraints of Trade

The antitrust injury requirement ensures that the harm claimed by a plaintiff corresponds to the rationale for finding a violation of the antitrust laws and it prevents losses that stem from competition from supporting suits by private plaintiffs. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **International Aspects, Commerce With Foreign Nations**

A horizontal price fixing conspiracy is a per se unreasonable restraint of trade. Under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

Extending interest free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN17[] **Monopolies & Monopolization, Attempts to Monopolize**

Section 2 of the Sherman Act, *15 U.S.C.S. § 1, et seq.*, prohibits persons from combining or conspiring to monopolize trade or commerce among the several States. *15 U.S.C.S. § 2*. To state a claim under *§ 2*, a plaintiff must plead two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is defined as the power to control prices in the relevant market or to exclude competitors.

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

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

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

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

A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.

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

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

HN19[] **Relevant Market, Product Market Definition**

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, an alleged antitrust product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes; a plaintiff must demonstrate analysis of the interchangeability of use or the cross-elasticity of demand, and the analysis must be plausible. Cases in which dismissal on the pleadings is appropriate generally involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure to attempt a plausible explanation as to why a market should be limited in a particular way.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN20[] **Antitrust & Trade Law, Sherman Act**

Possession of monopoly power does not violate *§ 2* of the Sherman Act, *15 U.S.C.S. § 1 et seq.* Plaintiffs must demonstrate that defendants abused their market power in either its acquisition or maintenance. A *§ 2* monopolization claim requires an allegation that defendants willfully acquired or maintained monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

To demonstrate attempted monopolization, plaintiffs must prove that defendant engaged in predatory or anticompetitive conduct with a specific intent to monopolize and a dangerous possibility of achieving monopoly power. Anticompetitive conduct is the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor. Both monopolization and attempted monopolization claims require anticompetitive behavior by the defendant.

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

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > General Overview

HN22[] **Regulated Practices, Market Definition**

The mere fact that a merger eliminates competition between the firms concerned is not a sufficient basis for illegality.

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

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN23[] **Private Actions, Remedies**

Mere derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute an antitrust injury sufficient to confer antitrust standing. It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing. That prerequisite necessitates that the injured party be a participant in the same market as the alleged malefactors.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN24[] **Private Actions, Standing**

An association may assert the rights of its members under the doctrine of associational standing. To bring suit on behalf of its membership, the organization must demonstrate that (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

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

Civil Procedure > Remedies > Damages > Monetary Damages

HN25[] **Private Actions, Standing**

An organization lacks standing to sue in antitrust for money damages on behalf of its members if the damages are not common to the entire membership, nor shared by all in equal degree, so that the fact and extent of injury requires individualized proof.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN26[] Monopolies & Monopolization, Attempts to Monopolize

The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, prescribes that every contract, agreement, arrangement or combination whereby a monopoly is or may be established or maintained, or whereby competition may be restrained is illegal. The Donnelly Act was closely patterned after the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and has been narrowly construed to encompass only those causes of action falling within the Sherman Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN27[] Public Enforcement, State Civil Actions

Under New York law, every contract contains an implied covenant of good faith and fair dealing. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN28[] Public Enforcement, State Civil Actions

To state a claim for aiding and abetting a breach of fiduciary duty under New York law, plaintiffs must allege (1) a breach by a fiduciary of obligations to another, and (2) that the defendant knowingly induced or participated in the breach. Under New York Law, a fiduciary relationship exists from the assumption of control and responsibility, and is founded upon trust reposed by one party in integrity and fidelity of another. A fiduciary relationship exists when one party is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Fiduciary relationships can arise when a party trusts or relies on another or where confidence is based on prior business dealings. Claims alleging the existence of a fiduciary duty are usually not subject to dismissal in a *Fed. R. Civ. P. 12(b)(6)* motion.

Counsel: For Plaintiffs: Alexander H. Schmidt, Esq., Wolf Haldenstein Adler Freeman & Herz LLP, New York, New York.

For CIT Group/Commercial Services, Inc., Defendant: Robert A. Atkins, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York.

For CIT Group/Commercial Services, Inc., Defendant: Bernard Beitel, Esq., Otterbourg, Steindler, Houston & Rosen, P.C., New York, New York.

For The Uptown Credit Group, Inc., Defendant: Harlan M. Lazarus, Esq., Larazus & Lazarus, P.C., New York, New York.

Judges: WILLIAM H. PAULEY III, U.S.D.J.

Opinion by: WILLIAM H. PAULEY III

Opinion

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs are garment manufacturers and related entities or their principals. Defendant CIT Group/Commercial Services, Inc. ("CIT") is the largest domestic factor for the garment industry.

Plaintiffs assert that CIT and its predecessors conspired with other factoring companies **[*2]** to deny credit to certain garment manufacturers. Plaintiffs claim that the factors illegally boycotted their businesses and unlawfully fixed prices in violation of the Sherman Antitrust Act, *15 U.S.C. § 1* ("*Section 1*"). Plaintiffs further allege that CIT, by merging with or acquiring its competitors, obtained monopoly power in the garment factoring industry, in violation of the Sherman Antitrust Act, *15 U.S.C. § 2* ("*Section 2*"). Plaintiffs also assert common law claims for breach of contractual good faith and fair dealing and breach of fiduciary duty.

Defendants move to dismiss the amended complaint pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*. For the following reasons, defendants' motion is granted in part and denied in part.

Background

Factoring is a business relationship in which companies known as "factors" purchase at a discount other businesses' rights to collect accounts receivable. The discount usually ranges from approximately 0.5 to 0.9 percent of the accounts. The factor then collects the accounts receivable. (Am. Compl. PP 38-39.)

Without the ability to quickly convert accounts receivable into cash through **[*3]** factoring, a factor's clients could be exposed to a liquidity crunch that would threaten their businesses. When a factor purchases an account receivable, it assumes the risk of collecting the receivable. (Am. Compl. P 39.) However, a factor assumes that credit risk only after it has checked whether its customer is selling to a creditworthy purchaser. (Am. Compl. PP 39, 42.) Moreover, factors like CIT may refuse to credit check a client's purchaser for any reason, even if that customer is creditworthy. (Am. Compl. P 41.) Because a manufacturer usually cannot afford to risk sales that are not acceptable to the factor, the factor's credit check decision often determines whether a sale is made. (Am. Compl P 39.)

In the garment industry, a factor's clients may include the "piece goods" vendors that manufacture raw materials such as fabric, buttons, trim and other accessories, or garment manufacturers who purchase materials from piece good vendors. (Am. Compl. P 41; Transcript from Oral Argument dated Nov. 16, 2001 ("Tr."), at 3.) Thus, when a factor's clients include both a piece goods vendor and a garment manufacturer who purchases from the piece goods vendor, the factor faces credit **[*4]** checking a purchaser who is also its own client. (Am. Compl. P 41.)

Accepting the allegations in the amended complaint as true, the facts are as follows. Plaintiffs Allison Che' Fashions, Inc., Bicci Studio Ltd. ("Bicci"), and I.S.B. Fashions Corp. ("ISB"), Stella N. Bishop Fashion Corp. ("Stella Bishop") are defunct clothing manufacturers. (Am. Compl. PP 12-15.) They grossed sales of $ 30,206,570, 48,492,233, and 53,800,273 for the fiscal years ending June 1998, 1999, and 2000 respectively. (Am. Compl. P 16.) Each manufacturer used CIT, or its predecessor Congress Talcott Corporation ("Congress"), as their factor for some period between 1996 and 2000. (Am. Compl. PP 12-15, 24.) Dresses For Less, Inc. ("Dresses For Less") is a garment manufacturer that was denied credit by CIT. (Am. Compl. P 18, 245) (collectively, Bicci Studio, ISB, Stella Bishop, and Dresses for Less are referred to as the "DFL Apparel companies"). Dresses For Less guaranteed some of the DFL Apparel companies' debts to CIT. (Am. Compl. P 18.)

Plaintiff DFL Management Inc. operated the DFL Apparel companies. (Am. Compl. P 10.) Plaintiff DFL Apparel Group is an unincorporated business association comprised of the **[*5]** DFL Apparel companies, and previously included other manufacturers who are not parties to this litigation. (Am. Compl. P 11.) Plaintiffs Donald and Barbara Weiner are principals of the DFL Apparel companies and their related entities and also personally guaranteed several of the DFL Apparel companies' debts to CIT. The Weiners have lost approximately $ 2,600,000 in personal assets as a result of defaults. (Am. Compl. 17.) Barbara Weiner owns fifty percent of ISB and forty-five percent of Stella Bishop. (Am. Compl. PP 14-15.)

Plaintiff Garden City Dresses For Less ("GC Dresses For Less") leased property to DFL Apparel companies and lost more than $ 750,000 in annual rental income as a consequence of their defaults. (Am. Compl. P 19.)

CIT emerged as a dominant domestic factor after merging with its former competitors Congress and Heller Financial, Inc. in 1999 and 2000 respectively. (Am. Compl. P 28.) Those acquisitions caused CIT's market share in the factored retail garment industry to grow from nineteen to forty-one percent and its share of piece goods factoring to rise from fifty to ninety percent. (Am. Compl. PP 27, 60.) CIT factored approximately $ 26 billion of the entire domestic **[*6]** garment manufacturing industry. (Am. Compl. P 26.) CIT's largest competitor factors twenty-two percent of the market. (Am. Compl. P 26.)

Plaintiffs allege that CIT and several other factors formed an illegal cartel in 1924 and to this day operate as the single entity, currently known as defendant Uptown Credit Group, Inc. ("UCG"). (Am. Compl. PP 25, 44.) Factors comprising the UCG include GMAC Commercial Credit LLC ("GMAC"), HSBC Business Credit (USA) Inc. ("HSBC"), the Receivable Capital Management Division of Sun Trust Banks, Inc. ("SunTrust"), Rosenthal & Rosenthal, Inc. ("Rosenthal"), Capital Factors, Inc. ("Capital"), Finova Capital Corp. ("Finova") and Sterling Factors Corp. ("Sterling") (Am. Compl. PP 30-37.)

The UCG members account for approximately 80 to 85 percent of domestic garment manufacturer factoring. (Am. Compl. P 37.) Through acquisitions made between 1999 and 2001, including Finova, GMAC became the second largest factor in the industry with $ 14 billion in receivables purchased annually or twenty-two percent of the garment manufacturer factoring industry. (Am. Compl. P 30.) Finova previously factored $ 800 million, or 1.2 percent of the domestic garment manufacturing **[*7]** market. (Am. Compl. P 35.)

HSBC factors approximately $ 7 billion in annual receivables, or eleven percent of the industry. (Am. Compl. P 31.) Rosenthal controls 2.4 percent of the domestic garment manufacturing market with $ 1.5 billion in annual receivables. (Am. Compl. P 33.) Capital factors $ 800 million, or 1.2 percent, of the domestic garment manufacturing industry. (Am. Compl. P 34.) In recent years, Sterling also captured $ 800 million, or 1.2 percent, of the domestic garment manufacturer factoring industry. (Am. Compl. P 36.)

Plaintiffs allege that the other factors have agreed with CIT that they will not credit check customers that CIT has refused to credit check even though they contracted to assume those customers' credit risks in factoring agreements. (Am. Compl. PP 42, 54.) Plaintiffs also contend that CIT has refused to credit check customers due to its dislike of management or other reasons that are not related to their customers' creditworthiness. (Am. Compl. P 41.)

Once CIT refuses to credit check a sale from a piece goods vendor to a garment manufacturer, it stops checking every proposed sale to that manufacturer by any piece goods vendor. (Am. Comp. PP 43, 49.) **[*8]** A manufacturer's inability to make credit purchases from a piece goods vendor will increase its costs, inhibit cash flow, and can within weeks disable the manufacturer's ability to fill existing orders from retailers. (Am. Compl. PP 44, 53, 61.) Moreover, because CIT controls ninety percent of domestically factored piece goods vendors, other factors quickly realize that a manufacturer who is not being credit checked by CIT cannot obtain enough credit to purchase the materials it requires. (Am. Compl. PP 43, 61, 62.) Realizing that economic urgency, the other factors will quickly follow CIT's lead and refuse to check credit. (Am. Compl. PP 61, 62, 63.) In addition, through its dominance in the garment manufacturing market via control over the piece goods vendors, CIT can also discourage garment manufacturers from purchasing from specific piece goods vendors. (Am. Compl. P 63.)

Plaintiffs allege that over the past two decades, CIT and its fellow factors conducted two highly secretive meetings every week. (Am. Compl. P 44.) The first meeting, known as the "Uptown meeting" is conducted every Wednesday by conspiring factors' account officers; the second, known as the "credit manager's **[*9]** meeting," is conducted every Thursday by the factors' credit managers. (Am. Comp. P 46.) At those meetings, the factors share not only publicly available information about their clients' creditworthiness, but also highly confidential information about their clients, including whether and why they have stopped credit checking a particular client. (Am. Compl. P 48, 51.) Thus, the factors' collective decision not to credit check a certain manufacturer assures that none of them will incur a credit risk for a customer who might be creditworthy but potentially faces insolvency due to one factor's decision to deny further credit for any reason. (Am. Compl. P 50.)

Beginning in February 1997, Kenwin Shops Incorporated ("Kenwin"), a company controlled by Donald Weiner, was defending a civil action by the Bank of Louisiana ("BOL") in the Eastern District of Louisiana. See *In re:* *Bank of Louisiana/Kenwin Shops, Inc., 1998 U.S. Dist. LEXIS 11680*, at *2, No. 97 Civ. 1193 (MDL) (E.D. La. July 27, 1998). That action resulted from Kenwin's failure to make payments to BOL in accord with their regular course of dealing. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *3. "Kenwin was collecting and holding money **[*10]** paid by customers of Kenwin that was due to BOL under the Contract Agreement between them." *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *3. In the course of that litigation, D & A Funding Corporation, another company controlled by Donald Weiner, asserted that it had priority to the monies owed to BOL.

Both parties filed motions for injunctive relief. In support of an application for a continuance on the motions, counsel for Kenwin represented that the claimed funds were sequestered precluding any harm to BOL. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *3. After several months, the parties entered settlement discussions with the aid of the court to resolve their motions for injunctive relief. The parties stipulated that each would post a bond and thereafter voluntarily dismiss the motions. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *6. In October 1997, Kenwin filed for Chapter 11 bankruptcy without informing BOL. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *6. On November 3, 1997, Kenwin offered a draft bond to BOL, but eleven days later, Kenwin's counsel informed BOL that it would not file it. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *7. At that time, the court first learned **[*11]** of Kenwin's bankruptcy petition. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *8.

The court conducted a hearing regarding Weiner's apparent "material misrepresentations and omissions" regarding the sequestered funds and the timing of Kenwin's bankruptcy. *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *9. On July 27, 1998, the court sanctioned Donald Weiner after finding his testimony to be "disingenuous, obviously evasive and obfuscatory" and his memory to be "transparently convenient." *Bank of Louisiana, 1998 U.S. Dist. LEXIS 11680*, at *9.

The *Bank of Louisiana* decision, however, had no adverse impact on the creditworthiness of the DFL Apparel companies. (Am. Compl. P 57.) By late 1998, the DFL Apparel companies were generating net sales of approximately $ 10 million per month. (Am. Compl. P 56.) As of September 1998, DFL Apparel companies had never been denied credit. (Am. Compl. P 56.) Nevertheless, CIT ceased approving credit to each DFL Apparel company shortly after the issuance of the *Bank of Louisiana* opinion and advised its co-conspirator factors of its decision. (Am. Compl. P 57.) Each of the co-conspirator factors stopped credit checking DFL Apparel companies the next day. **[*12]** (Am. Compl. P 57.) Although CIT eventually continued to extend credit, the DFL Apparel companies suffered millions of dollars in lost sales in the interim. (Am. Compl. P 57.)

In addition to colluding with the other factors, plaintiffs further allege that CIT engaged in bad faith conduct throughout their relationship that damaged the manufacturing plaintiffs. Plaintiffs contend that starting in 1996, Donald Weiner advised CIT and numerous piece goods vendors orally and in writing that, as a condition to the guaranties of Donald Weiner, Barbara Weiner and Dresses for Less, no DFL Apparel company purchase order should be honored unless it bore his signature. (Am. Compl. P 69.) Despite expressly acknowledging that requirement in writing, CIT approved millions of dollars of sales to the DFL Apparel companies by CIT's factored piece goods vendors that were not supported by signed purchase orders. (Am. Compl. P 69.) As a result, the DFL Apparel companies suffered millions of dollars in losses and incurred millions in debt to CIT. (Am. Compl. P 69.)

Moreover, although CIT had separate factoring agreements with each DFL Apparel company, CIT treated them as if they were one company by penalizing **[*13]** every member when one company was delinquent on its payments. Thus, a DFL Apparel company with no credit or payment problems might nevertheless have its credit reduced or refused. (Am. Compl. P 70.) By treating the DFL Apparel Group as a single entity instead of several companies, CIT applied one "collective credit limit" to the entire group. Thus, if the group limit had been exceeded, CIT directed all DFL Apparel members to reduce their sales volumes and denied credit for piece goods purchases by DFL Apparel companies with remaining credit under their individual factoring agreements. (Am. Compl. P 71.)

At some time in 2000, CIT orchestrated a boycott where the factors ceased authorizing piece goods vendors to sell goods to Dresses For Less and DFL Apparel companies. (Am. Compl. P 73.) Between September 30, 2000 and January 31, 2001, the DFL Apparel companies went out of business. (Am. Compl. P 73.)

Plaintiffs also assert that before those failures, CIT compelled certain DFL Apparel companies to accept substantial "overadvances of credit" that bore higher interest charges than normal advances. (Am Compl. P 72.) Normally, a DFL Apparel company could obtain credit advances of up to **[*14]** 80 to 90 percent of the sales that it assigned to CIT. However, CIT had the discretion to extend overadvances for as much as 95 to 100 percent of assigned sales. (Am. Compl. P 72.) CIT regularly refused to approve credit for piece goods purchases by solvent DFL Apparel companies unless a fiscally unstable DFL company accepted an overadvance with a higher than normal interest rate and then applied the extra funds to debts it owed to piece goods vendors factored by CIT. (Am. Compl. P 72.) As a result, the weaker DFL company could not purchase the piece goods and would face losing millions in sales or borrowing more at increased interest charges. (Am. Compl. P 72.)

Lastly, plaintiffs allege that CIT prolonged the failure of the DFL Apparel companies for several months in order to extract additional interest. (Am. Compl. P 75.) In June 2000, Donald Weiner discovered that CIT had approved several piece goods vendors' sales to DFL Apparel companies without first obtaining purchase orders signed by him. Concerned about his and other guarantors' exposure arising from the DFL Apparel companies' debts to CIT, Donald Weiner advised CIT that he was closing the DFL Apparel companies. (Am. Compl. **[*15]** P 75.) At that time, the DFL Apparel companies' inventories and accounts receivable exceeded their debts by 50 percent. (Am. Compl. P 75.) After receiving CIT's assurances that it would continue to finance and support the DFL Apparel companies, Weiner continued the businesses. (Am. Compl. P 75.) As a result, CIT received interest payments throughout 2000. Nevertheless, CIT stopped checking the DFL Apparel companies' credit causing them to fail. (Am. Compl. P 76.)

Discussion

I. *Motion to Dismiss Standards*

HN1[] On a motion to dismiss pursuant to *Rule 12(b)(6)*, a court typically must accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiff's favor. *Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998)*. A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995)*.

HN2[] There are no heightened pleading requirements for antitrust cases. *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)*. **[*16]** Further, dismissals of antitrust cases "prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Todd, 275 F.3d at 198* (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976))*. However, it is improper "'to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.'" *Todd, 275 F.3d at 198* (citing *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))*.

II. *Section One Violations*

Plaintiffs allege that CIT conspired with other factors to boycott credit checks of plaintiff companies in violation of Section One, and that their boycott resulted in the price fixing of piece goods also in violation of Section One. (Am. Compl. PP 80, 86, 87.)

HN3[] Section One prohibits all combinations and conspiracies that unreasonably restrain trade among the states. *15 U.S.C. § 1*. To establish a Section One violation, a plaintiff **[*17]** must produce evidence sufficient to show: "(1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the rule of reason." *Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 273 (2d Cir. 2001)*; *see also* *Tops Mkts., Inc, v. Quality Mkts., Inc., 142 F.3d 90, 96 (2d Cir. 1998)*.

HN4[] *Per se* illegal conduct is that which is so egregious as to constitute a violation of law without the necessity of showing an effect on competition. *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133-34, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*; *Bogan v. Hodgkins, 166 F.3d 509, 513*. Among conduct falling within the *per se* rule are price fixing, territorial market division and certain group boycotts involving concerted refusals to deal. *NYNEX Corp., 525 U.S. at 133*; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 542-43 (2d Cir. 1993)*. Only conduct that is "manifestly anticompetitive" is designated as per se illegal. Most cases **[*18]** do not fall within the *per se* category. *Bogan, 166 F.3d at 514*; *see also* *CDC Techs., Inc. v. IDEXX Laboratories, Inc., 186 F.3d 74, 79 (2d Cir. 1999)* (only a "handful" of practices are per se illegal); *National Camp Assoc., Inc. v. Am. Camping Assoc., Inc., 2000 U.S. Dist. LEXIS 18194*, No. 99 Civ. 11853 (DLC), 2000 WL 1844764, at *5 (S.D.N.Y. Dec. 15, 2000) (noting Supreme Court's refusal to extend the class of agreements to which a per se analysis applies).

HN5[] Conduct that does not fall within the *per se* rule is subject to the rule of reason analysis. Application of this doctrine requires a plaintiff to prove not mere injury to plaintiff as a competitor but antitrust injury, i.e., actual damage to competition within the relevant market. *Capital Imaging, 996 F.2d at 542-43*. The injury to a relevant market requirement assures that the Sherman Act protects competition as a whole in the relevant market, and "not the individual competitors within that market, so that a plaintiff may succeed only when the loss he asserts derives from activities that have a 'competition-reducing'" effect. *Tops Mkts., Inc., 142 F.3d at 96* (citing **[*19]** *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990))*.

HN6[] A plaintiff that fails to plead an actual injury to competition may nonetheless show antitrust injury by showing that the defendant possesses "market power" sufficient to inhibit competition on a market-wide basis. Such power is defined as the power to "raise prices significantly above the competitive level without losing all of one's business." *CDC Technologies*, 186 F.3d at 81 (quoting *Capital Imaging, 996 F.2d at 546*); *see also* *Primetime 24 Joint Venture v. Nat. Broad. Co., Inc., 219 F.3d 92, 103-04 (2d Cir. 2000)*.

III. *Group Boycott*

Plaintiffs allege group boycott conduct as *per se* and rule of reason violations. (Am. Comp. PP 80, 86); *see* *AD/SAT v. Associated Press, 181 F.3d 216, 232 (2d Cir. 1999)* (*Section 1* group boycotting claim may be alleged as either a *per se* or rule of reason violation); *accord* *Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999)*. [1] CIT contends that plaintiffs have not adequately pleaded a boycotting claim because the amended complaint **[*20]** fails to allege facts to support an inference of an agreement among the factors or that plaintiffs suffered an antitrust injury.

[*21] 1. *Existence of an Agreement*

CIT asserts that plaintiffs' conclusory allegations regarding a boycotting agreement among the several factors to cut off plaintiffs' credit are inadequate as a matter of law. (CIT's Mem. in Supp. at 6-7.) CIT further contends that inferring such an agreement would be nonsensical because it contradicts CIT's economic interests. (CIT's Mem. in Supp. at 9.)

HN8[] "The plaintiff must do more than allege the existence of a conspiracy -- it must allege some facts in support of the claim." *Floors-N-More, Inc. v. Freight Liquidators, 142 F. Supp. 2d 496, 501 (S.D.N.Y. 2001)*; *see also* *Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)* ("[A] bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal."); *Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988)* (dismissing complaint which alleged that the defendants "conspired and contracted with [each other] . . . to restrain trade").

Here, plaintiffs allege that CIT and the other factors collectively decided whether to deny credit **[*22]** to a particular manufacturer. Plaintiffs contend that the factors' agreement regarding credit checks is evidenced by the factors' biweekly meetings and by the factors' unanimity in refusing to check the DFL Apparel companies' credit between September 2000 and January 2001. (Pls.' Mem. in Opp. at 5.)

Viewing the amended complaint liberally, plaintiffs have alleged sufficient facts to assert that the conspiring factors' conduct was not simply parallel but was the product of collusion. *See* *Todd, 275 F.3d at 198* (citations omitted) (finding that ***HN9***[] an inference of a horizontal price-fixing agreement could be drawn in the absence of direct "smoking gun" evidence "when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices. Information exchange is an example of a facilitating practice that can help support an inference of a price fixing agreement").

CIT further argues that the existence of an agreement among the factors cannot be inferred because plaintiffs' theory lacks any economic rationality. (CIT's Mem. in Supp. at 8.) Without great detail, plaintiffs allege that defendants' conspiracy **[*23]** sought to minimize their costs, stabilize prices, preserve market shares, and maintain monopoly power. (Am. Compl. P 47.) While, CIT acknowledges that refusing to check a purchaser can limit its own exposure, it argues that encouraging other factors also to deny credit to the DFL Apparel companies would only hasten their insolvencies preventing their continued payments to CIT. (CIT's Mem. in Supp. at 8.) Thus, CIT

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[1] Although defendants have not argued that the alleged conspiracy cannot be considered illegal *per se*, plaintiffs contended at oral argument that any boycott of credit is *per se* illegal. (Tr. at 13.) However, this Court notes that not all horizontal group boycotts are *per se* illegal. *See* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*; *Bogan, 166 F.3d at 514*. "The scope of the *per se* rule against group boycotts is a recognized source of confusion in ***antitrust law***." *Bogan, 166 F.3d at 514* (citation omitted). Moreover, the agreement alleged here does not reflect "the classic model of a group boycott -- that is, a 'concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level.'" *Bogan, 166 F.3d at 514* (citing *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1178 (D.C. Cir. 1978))*; *see also* *Capital Imaging, 996 F.2d 537, 542 (2d Cir. 1993)* ***HN7***[] ("Conduct considered illegal *per se* is invoked only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination.").

maintains that it lacks any incentive to collude with the other factors because the alleged conspiracy hurts its economic interests. (CIT's Mem. in Supp. at 8.)

HN10[] Even if the scheme alleged was economically implausible, a conspiracy may nevertheless be proven "by strong direct or strong circumstantial evidence, [although] the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)* (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*.

Moreover, plaintiffs have proposed a reasonable economic motive for the conspiracy. Plaintiffs contend that by "weeding out" **[*24]** creditworthy albeit financially weaker companies, at the "slightest inkling" of their insolvency, CIT assured that it would recover fully by collecting from the guarantors. (Pls.' Mem. in Opp. at 7.) Plaintiffs further allege that the agreement to reduce credit risk stabilizes prices and the competing factors' market shares. (Am. Compl. P 64.) Whether any of these motives can be established and are served by the alleged conspiracy are factual questions.

2. *Antitrust Injury*

Section 4 of the Clayton Act provides that **HN11**[] "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue." *15 U.S.C. § 15(a)*. Despite this broad language, plaintiffs must nevertheless demonstrate that they have suffered an "antitrust injury," and that they are otherwise proper plaintiffs to bring the action at issue. *Todd, 275 F.3d at 213* **HN12**[] ("An antitrust plaintiff must not only allege cognizable harm to itself, but an adverse effect on competition market wide.") (citing *Elecs. Communications Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 242 (2d Cir. 1997))*; *see also* *Volvo No. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988)*. **[*25]**

An "antitrust injury" is an

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violations or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would likely cause.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); *see also* *Intellective v. Massachusetts Mut. Life Ins. Co., 190 F. Supp. 2d 600, 609 (S.D.N.Y. 2002)*.

HN13[] To state an antitrust injury, a plaintiff must demonstrate that defendants' conduct "has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging, 996 F.2d at 543*; *see also* *Brunswick Corp., 429 U.S. at 488* ("The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'") (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. **[*26]** Even when a *per se* violation of the antitrust laws occurs, a plaintiff is still required to demonstrate antitrust injury as an element of a successful claim. *See* *Atlantic Richfield Co., 495 U.S. at 341-45 (1990)* ("Insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored."). As the Supreme Court explained, **HN14**[] the antitrust injury requirement:

> ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs . . . . The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Atl. Richfield Co., 495 U.S. at 345.

CIT argues that the amended complaint lacks any factual allegations of anticompetitive behavior to support its "vague and conclusory" claims of "horizontal and vertical anticompetitive impacts." (CIT's Mem. in Supp. at 12.) However, the gravamen of **[*27]** plaintiffs' amended complaint is that CIT and the other factors agreed that once

CIT refused to credit check a manufacturer, the other factors would refuse to check that manufacturer's credit as well. By participating in the alleged conspiracy, CIT's co-conspirators protected their own market shares. (Am. Compl. P 47.) Moreover, if a co-conspirator abandoned the conspiracy and financed a garment manufacturer that CIT refused to credit check, CIT could nevertheless cripple that garment manufacturer through its alleged control of the piece goods vendors' purchases. (Am. Compl. P 63.) Thus, plaintiffs contend that CIT forged an agreement with its competitors that restricted the supply of factoring to garment manufacturers. That allegation sufficiently pleads injury to the garment manufacturing market. *Primetime 24 Joint Venture*, 219 F.3d at 102 (plaintiff "clearly alleged injury" to competition where it pleading that competitors had eliminated "potential price competition," restricted output, and diminished the quality of service to customers).

IV. *Price Fixing*

CIT argues that plaintiffs' claim of price fixing is inadequate because it lacks any allegation that **[*28]** the factors ever discussed, much less agreed on, any prices or terms for their factoring services. (CIT's Mem. in Supp. at 11.) Plaintiffs respond that the conduct alleged in their boycotting claim resulted in illegal price-fixing *per se*. (Pls.' Mem. in Opp. at 11.)

HN15[] A horizontal price fixing conspiracy is a *per se* unreasonable restraint of trade. *See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811* ("Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

While the alleged conspiracy in this case was the product of a horizontal agreement, it was not a price fixing agreement. Plaintiffs argue that the factors' denial of credit is analogous to the facts of *Catalano v. Target Sales, Inc., 446 U.S. 643, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)*. In *Catalano*, beer wholesalers agreed not to extend credit to any retailers and to sell their product only when they received payment in advance or on delivery. *Catalano, 446 U.S. at 644*. **[*29]** The Court held that

> it is virtually self-evident that ***HN16***[] extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing.

Catalano, 446 U.S. at 648. However, unlike *Catalano*, plaintiffs do not allege that CIT and its co-conspirators terminated the practice of providing credits to their customers. Instead, plaintiffs claim that defendants singled out the DFL Apparel companies in denying their credit.

Moreover, the amended complaint states that the factors entered the agreement to assure that "none of conspiring factors [would] incur a credit risk for a customer that appears to be worthy of credit but whose ability to remain in business is [threatened] by a competing factor's decision to deny credit." (Am Compl. P 54.) From that allegation, plaintiffs add in conclusory fashion that **[*30]** the denial of credit also served to stabilize the factors' prices due to the uniform reduction of credit risk. However, at no time do they state how the market-wide denial of credit to specific companies affected market prices. In addition, as noted by CIT, there is no allegation that the factors ever discussed "any prices or terms for their factoring services - *e.g.*, interest rates, payment terms, credit limits or any aspects of the 'price' of the services." (CIT's Mem. in Supp. at 11.)

Plaintiffs' amended complaint fails to allege facts to state a claim for price fixing. Accordingly, plaintiffs' price fixing claim is dismissed.

V. *Monopolization*

HN17[] *Section 2* of the Sherman Act prohibits persons from combining or conspiring to monopolize trade or commerce among the several States . . . ." *15 U.S.C. § 2*; *see also AD/SAT, 181 F.3d at 232*. To state a claim under *Section 2*, a plaintiff must plead two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic **[*31]** accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Monopoly power is defined "as the power to control prices in the relevant market or to exclude competitors." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, n. 20, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). CIT argues that plaintiffs have failed to allege a relevant product market or that CIT abused its monopoly power. [2]

1. *Relevant Market*

HN18[] "A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed." Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co., 2001 U.S. Dist. LEXIS 18831, No. 00 Civ. 5663 (MBM), 2001 WL 1468168 (S.D.N.Y. Nov. 19, 2001) (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)). **[*32]** Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market. Todd, 275 F.3d at 199; *see also* Hayden Publ'g Co. v. Cox Broad. Corp., 730 F.2d 64, 70 n.8 (2d Cir. 1984) ("The conclusion that genuine issues of material fact preclude a finding as to [the] relevant market as a matter of law is not unexpected. It frequently has been observed that 'a pronouncement as to market definition is not one of law, but of fact . . . .'").

"**HN19**[] To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." Todd, 275 F.3d at 199 (internal citations omitted); *accord* Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 86 (2d Cir. 2000); *see also* Yellow Page Solutions, 2001 U.S. Dist. LEXIS 18831, 2001 WL 1468168, at *12. "Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit **[*33]** a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way." Todd, 275 F.3d at 199.

Here, the relevant markets alleged are factoring in the domestic garment manufacturing industry and factoring in the domestic piece goods industry. (Am. Compl. P 65.) Moreover, plaintiffs distinguish factoring from other forms of credit financing on the ground that factors "bear any and all losses stemming from [their] customers' insolvency or other financial inability to pay for goods that are sold and shipped by the client." (Am. Compl. P 39.) Whether that market definition is appropriate for plaintiffs' antitrust claim is a fact-intensive inquiry that cannot be resolved at this juncture.

2. *Abuse of Monopoly Power*

HN20[] Possession of monopoly power does not violate Section 2 of the Sherman Act. Plaintiffs must demonstrate that defendants abused their market power in either its acquisition or maintenance. Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979) ("defendant **[*34]** must refrain from conduct directed at smothering competition."); *see also* Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 376-77 (7th Cit. 1986) (Posner, J.). A Section 2 monopolization claim requires an allegation that defendants willfully acquired or maintained monopoly power, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992); *see also* Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1322 (7th Cir. 1999) (citing United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)) (monopolization by improper methods usually involves repelling or intimidating new entrants into a market through predatory pricing). **HN21**[] To demonstrate attempted monopolization, plaintiffs must prove that defendant engaged in predatory or anticompetitive conduct with a specific intent to monopolize and a dangerous possibility of achieving monopoly power. Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884

[2] CIT also alleged that plaintiffs Section 2 claims should be dismissed because they failed to allege an antitrust injury. As discussed above, plaintiffs have sufficiently pleaded an antitrust injury at this stage.

(1993). **[*35]** Anticompetitive conduct is "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." Covad Comms. Co. v. BellSouth Corp., 299 F.3d 1272, 2002 WL 1777009 (11th Cir. 2002). Both monopolization and attempted monopolization claims require anticompetitive behavior by the defendant. Invamed Inc. v. Barr Labs., Inc., 22 F. Supp. 2d 210, 218 (S.D.N.Y. 1998).

CIT contends that plaintiffs allege no abuse of market power because their one allegation, "that [CIT] decided to stop credit checking the manufacturing plaintiffs," was not anticompetitive conduct. (CIT's Mem. in Supp. at 17.) However, CIT construes plaintiffs' claim too narrowly.

Plaintiffs assert that CIT increased its market share of domestic piece goods manufacturing to 90 percent through the acquisition of several competitors, giving it a "near stranglehold on garment manufacturers" because its unilateral decisions equate to "blacklisting a manufacturer among factors." (Pls.' Mem. in Supp. at 15-16.) Thus, plaintiffs adequately plead CIT's market power in the piece goods factoring market. Moore U.S.A., Inc. v. Standard Register Co., 139 F. Supp. 2d 348, 364 (W.D.N.Y. 2001) **[*36]** (alleging market share that SRC alleges in this action: 65 percent) (citing Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980)).

Plaintiffs further contend that CIT engaged in anticompetitive behavior through its aggressive mergers. However, ***HN22***[] "the mere fact that a merger eliminates competition between the firms concerned has never been a sufficient basis for illegality." IV Phillip E. Areeda et al., ***Antitrust Law*** P 901a (1998) (hereinafter "Areeda"); *see also* Irving Scher, *Antitrust Adviser* § 3.61 at 3-167 (4th ed. 2001) (horizontal mergers are much more likely to be procompetitive than anticompetitive.). "Competing firms typically merge for reasons entirely unrelated to effects on marketwide output or price - for example, to achieve economies of scale or integration, to put inefficiently run assets into the hands of superior management, to resolve management succession for an individually owned enterprise, or for tax or other reasons." Areeda P 901a. Plaintiffs also assert that CIT's alleged illegal boycotts constitute anticompetitive behavior to plead a monopolization claim.

As stated above, plaintiffs allege that through **[*37]** its control of the piece goods market, CIT influenced other factors to deny credit checks, and therefore financing, to garment manufacturers that could have been financed under normal market conditions. Thus, CIT, through its control of piece goods factoring, discouraged other factors from their participation in factoring for the garment industry. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940) (Sections 1 and 2 "overlap" in the sense that a monopoly under section 2 is a "species of restraint" under section 1.). That contention sufficiently alleges anticompetitive conduct to support plaintiffs' Section 2 claim. Accordingly, CIT's motion to dismiss plaintiffs' Section 2 monopolization claim is denied.

VI. *Standing*

1. *Antitrust Claims*

CIT moves to dismiss plaintiffs Donald and Barbara Weiner, Dresses for Less, Inc., Garden City Dresses for Less, Inc., and DFL Management for lack of standing because their injuries are "merely derivative" and do not constitute an antitrust injury. (CIT's Mem. in Supp. at 19.) As stated above, an antitrust plaintiff's injury must be the kind of injury at which **[*38]** the antitrust laws were directed. Brunswick Corp., 429 U.S. at 489. Thus, ***HN23***[] "merely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing." G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766 (2d Cir. 1994) (citing Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987)). "It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing." G.K.A. Beverage Corp., 55 F.3d at 766-67 (8th Cir. 1992) (denying antitrust standing where sole shareholder's injury stemmed from failure of corporation)); *accord* Lovett v. Gen. Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992) (dismissing car dealership owner's antitrust claims because he was not the target of anticompetitive conduct but rather suffered a consequential injury). This prerequisite necessitates that the injured party be a participant in the same **[*39]** market as the alleged malefactors. Automated Salvage Transport, Inc. v. Wheelabrator Env't Sys., Inc., 155 F.3d 59, 78 (2d

Cir. 1998) (quoting Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 (9th Cir.1985); *see also* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 989 (9th Cir 2000) ("Antitrust injury requires that the 'injured party be a participant in the same market as the alleged malefactors.'"); Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 539, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (denying antitrust standing to party that was "neither a consumer nor a competitor in the market in which trade was restrained").

The DFL Apparel companies participate in the factoring market as consumers and therefore, their injury is a direct consequence of the alleged antitrust violations. However, the injuries suffered by Donald and Barbara Weiner, Garden City Dresses for Less, Inc., and DFL Management as a result of the alleged antitrust violations are entirely derivative of the direct antitrust injury suffered by the DFL Apparel companies. Accordingly, CIT's **[*40]** motion to dismiss the antitrust claims asserted by Donald and Barbara Weiner, Dresses for Less, Inc., Garden City Dresses for Less, Inc., and DFL Management for lack of standing is granted.

2. *Shareholder Derivative Claims*

CIT contends that Barbara Weiner's derivative shareholder claims asserted on behalf of ISB and Stella Bishop should be dismissed because she has failed to allege the reason that she did not secure initiation of those claims with the boards of those companies. (CIT's Mem. in Supp. at 19.)

The amended complaint states that Barbara Weiner owns a 50 percent stake in ISB and a 45 percent of Stella Bishop. (Am. Compl. PP 20, 22.) Plaintiffs allege that ISB's other 50 percent shareholder refused to consent to this lawsuit, and that Stella Bishop's other 45 percent [3] shareholder "would plainly never consent [to this action]" because he and the Weiners are involved in several bitter lawsuits. (Am. Compl. P 23.) In addition, Stella Bishop's other 45 percent shareholder owns companies that are currently being factored by CIT. (Am. Compl. P 24.)

[*41] When a shareholder brings a derivative lawsuit, her complaint must set forth either the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort. *See* Fed. R. Civ. Proc. 23.1; Business Corporation Law § 626(c). "Where the directors and controlling shareholders are antagonistic, adversely interested, or involved in the transaction attracted, a demand on them is presumptively futile and need not be made. Cathedral Estates v. Taft Realty Corp., 228 F.2d 85, 88 (2d Cir. 1955); *see also* Galef v. Alexander, 615 F.2d 51 (2d Cir. 1980); General Elec. Co. v. Bucyrus-Erie Co., 563 F. Supp. 970, 974 (S.D.N.Y. 1983).

The amended complaint's allegations regarding ISB's other shareholder's refusal to consent and the animosity between Stella Bishop's major shareholders sufficiently plead that demand would be futile. Accordingly, CIT's motion to dismiss the shareholder derivative claims is denied.

3. *DFL Apparel Group*

CIT asserts that the DFL Apparel Group has no standing to sue on behalf of the companies it represents. ***HN24***[] An association may assert the rights of its members **[*42]** under the doctrine of associational standing. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343-45, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977); *accord* Irish Lesbian and Gay Org. v. Giuliani, 143 F.3d 638, 649 (2d Cir. 1998). To bring suit on behalf of its membership, the organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt, 432 U.S. at 343; *see* Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 596 (2d Cir. 1993) (applying *Hunt* test).

HN25[] An organization lacks standing to sue for money damages on behalf of its members if the damages "are not common to the entire membership, nor shared by all in equal degree," so that "the fact and extent of injury require[s] individualized proof." Warth v. Seldin, 422 U.S. 490, 515-16, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975); *accord* Sun City Taxpayers' Ass'n v. Citizens Utils. Co., 45 F.3d 58, 61 (2d Cir. 1995). **[*43]**

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[3] The remaining 10 percent of Stella Bishop is owned by a third shareholder. Any dissenting shareholder of Stella Bishop could block a corporate action because its by-laws require unanimous shareholder consent for corporate actions. (Am. Compl. P 22.)

DFL Apparel fails the third prong of the *Hunt* test. Recovery in this case would require individualized proof by each of the companies affected by CIT's alleged anticompetitive behavior. Accordingly, CIT's motion to dismiss DFL Apparel as a plaintiff is granted.

VII. *State Law Claims*

1. *Donnelly Act Claims*

CIT moves to dismiss plaintiffs' Donnelly Act claims on the same grounds that it moved to dismiss the Sherman Act claims. ***HN26***[] The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, prescribes that "every contract, agreement, arrangement or combination whereby a monopoly . . . is or may be established or maintained, or whereby competition . . . may be restrained" is illegal. *N.Y. Gen. Bus. Law § 340(1)*. "The Act was closely patterned after the Sherman Act and has been narrowly construed to encompass only those causes of action falling within the Sherman Act." *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp., 224 F. Supp. 2d 657, 2002 WL 31010490*, at *14 (S.D.N.Y. 2002) (citing *State v. Mobil Oil Corp., 38 N.Y.2d 460, 381 N.Y.S.2d 426, 427, 344 N.E.2d 357 (1976)*); *accord* *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton, 997 F. Supp. 340 (E.D.N.Y. 1998)* **[*44]** (finding Donnelly Act is modeled after the Sherman Antitrust Act and is generally interpreted in accordance with federal precedent); *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335, 525 N.Y.S.2d 816, 820, 520 N.E.2d 535 (1988)* (Donnelly Act was modeled on the Sherman Act and is to be construed in accord with it). Thus, CIT's motion to dismiss the Donnelly Act claims is granted in part and denied in part in accord with this Court's rulings set forth above.

2. *Contractual Good Faith and Fair Dealing*

Plaintiffs contend that CIT breached its duty of good faith when it deliberately inflated the DFL Apparel companies' debts by authorizing piece goods vendors to ship unordered merchandise to those companies. (Am. Compl. P 69.) Plaintiffs further contend that CIT breached its duty of good faith when it refused to credit check one DFL Apparel company because a separate DFL Apparel company was in arrears (Am. Compl. P 70); enforced a combined credit limit for the DFL Apparel companies instead of a separate limit for each company (Am. Compl. P 71); coerced the DFL Apparel companies to accept excessive advances on its credit bearing higher interest charges and fees (Am. **[*45]** Compl. P 72); orchestrated the group boycotts that cut off the DFL Apparel companies' credit (Am. Compl. P 73); and induced the DFL Apparel companies to stay in business after June 2000 by falsely promising that it would continue to finance the companies (Am. Compl. PP 74-75).

HN27[] Under New York law, every contract contains an implied covenant of good faith and fair dealing. *Gelder Med. Group v. Webber, 41 N.Y.2d 680, 684, 394 N.Y.S.2d 867, 363 N.E.2d 573 (1977)*; *see also* Restatement (Second) of Contracts P 205 comment a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party . . . .").

With respect to plaintiffs' claim regarding the precondition of Donald Weiner's signature on purchase orders, factual issues exist including whether Weiner and CIT had a guarantee agreement giving rise to an obligation of good faith dealing and whether his signature was a condition of that agreement. At this stage, however, plaintiffs have sufficiently alleged breach of good faith dealing with respect to the unauthorized shipments approved by CIT. Accordingly, **[*46]** CIT's motion to dismiss the good faith and fair dealing claims of the amended complaint is denied.

With respect to the remainder of the good faith claims, however, those allegations concern CIT's extension or refusal of credit to DFL Apparel companies. The factoring agreements ran between CIT and a piece goods vendor. Thus, the lack of contractual privity between CIT and the DFL Apparel companies precludes any good faith claim. In addition, plaintiffs further concede that CIT's agreements with the piece goods vendors permitted them to refuse credit checks for any reason or no reason at all. Thus, plaintiffs cannot claim that CIT failed to perform those contracts in good faith.

3. *Breach of Fiduciary Duty*

Plaintiffs argue that CIT breached a fiduciary duty when it advised Donald Weiner that it would continue to extend him credit and failed to do so. (Pls. Mem. in Opp. at 23.) ***HN28***[] To state a claim for aiding and abetting a breach of fiduciary duty under New York law, plaintiffs must allege (1) a breach by a fiduciary of obligations to another, and (2) that the defendant knowingly induced or participated in the breach. *Wight v. Bankamerica Corp., 219 F.3d 79, 91 (2d Cir. 2000)*. **[*47]** The existence of a fiduciary duty is often "a fact-specific inquiry reserved for a jury." *Official Comm. of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Securities Corp., 2002 U.S. Dist. LEXIS 3747*, *No. 00 Civ. 8688 (WHP), 2002 WL 362794*, *9 (S.D.N.Y. Mar. 6, 2002). Under New York Law, "'a fiduciary relationship exists from the assumption of control and responsibility, and is founded upon trust reposed by one party in integrity and fidelity of another.'" *Deleu v. Scaife, 775 F. Supp. 712, 715 (S.D.N.Y. 1991)* (quoting *Beneficial Commercial Corp. v. Murray Glick Datsun, Inc., 601 F. Supp. 770, 772 (S.D.N.Y.1985))*; *see also* *Restatement (Second) of Torts § 874 cmt. a* (1977) (fiduciary relationship exists "when one [party] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation"). Moreover, fiduciary relationships can arise when a party "trusts or relies on another or where confidence is based on prior business dealings." *Olshansky v. Sutton, 2001 U.S. Dist. LEXIS 945*, *No. 00 Civ. 3539 (LAP), 2001 WL 99857*, at *5 (S.D.N.Y. Feb. 6, 2001). Claims alleging the existence of a fiduciary duty are usually **[*48]** not subject to dismissal in a 12(b)(6) motion. *Olshansky, 2001 U.S. Dist. LEXIS 945, 2001 WL 99857*, at *5.

Given the factually intensive nature of a fiduciary duty inquiry, CIT's opposition to plaintiffs' fiduciary claim is better addressed on summary judgment. Accordingly, CIT's motion to dismiss the breach of fiduciary duty claim is denied.

VIII. *Uptown Credit Group's Motion To Dismiss*

In the amended complaint's first, second and fourth causes of action, plaintiffs allege that UCG violated *Section 1* of the Sherman act and the Donnelly Act by participating in the agreement to deny credit to the DFL Apparel companies.

In addition to joining CIT's 12(b) motions, UCG moves to dismiss those causes of action on the ground that plaintiffs have not sufficiently alleged facts that tie UCG to the factoring conspiracy. (UCG's Mem. in Supp. at 5-6.) Plaintiffs allege that CIT combined with its co-conspirators to act as a cartel under the auspices of the UCG. (Am. Compl. PP 4-5.) Through the UCG, the conspirators assured that the DFL Apparel companies would not be extended credit on purchases from piece goods vendors. (Am. Compl. P 48.) Those allegations adequately allege that UCG participated **[*49]** in the antitrust violations. *See* *15 U.S.C. § 1* (liable persons may include associations); *Hydrolevel Corp. v. Am. Soc. of Mech. Eng'rs, Inc., 635 F.2d 118, 126 (2d Cir. 1980)* ("It is difficult to see how a trade association should be treated any differently than a business competitor, especially when it is the association's standing and influence that makes the conspiracy effective and possible. In a variety of contexts, [associations] are obligated to take suitable precautions to avoid antitrust violations."); *Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118*, *155 (S.D.N.Y. 1972) (an association found liable "as an independent legal entity"). Accordingly, UCG's motion to dismiss the amended complaint is denied.

Conclusion

For the reasons set forth above, CIT's motion to dismiss the first cause of action is granted with respect to plaintiffs' price fixing claim and denied with respect to the boycotting claim. CIT's motions to dismiss the second, third, fourth, fifth, and sixth causes of action are denied. UCG's motion to dismiss is also denied.

Dated: September 30, 2002

New York, New York

[*50] SO ORDERED:

WILLIAM H. PAULEY III

U.S.D.J.

Marchon Eyewear, Inc. v. Tura LP

United States District Court for the Eastern District of New York

September 30, 2002, Decided ; October 7, 2002, Filed

98 CV 1932 (SJ)

Reporter

2002 U.S. Dist. LEXIS 19628 *; 2002-2 Trade Cas. (CCH) P73,849

MARCHON EYEWEAR, INC., and ROTHANBERG, INC., Plaintiffs, -against-TURA LP, and BRODART CO., Defendants.

Subsequent History: Related proceeding at, Motion granted by, Claim dismissed by *Marchon Eyewear, Inc. v. Clariti Eyewear, Inc., 2005 U.S. Dist. LEXIS 43901 (E.D.N.Y., Apr. 6, 2005)*

Prior History: *Marchon Eyewear, Inc. v. Tura LP, 1999 U.S. Dist. LEXIS 22993 (E.D.N.Y., Mar. 28, 1999)*

Disposition: **[*1]** Plaintiffs' motions to dismiss counterclaims GRANTED. Defendants granted leave to amend their answer.

Core Terms

counterclaim, Defendants', patent, antitrust, patent misuse, sham, frames, infringement, eyeglass, memory, metal, patent infringement, leave to amend, prospective economic advantage, anti trust law, res judicata, manufacturers, allegations, tortious interference, declaratory judgment, amended complaint, motion to dismiss, antitrust claim, quotation, Amend, challenges, interfered, parties, bad faith, anti-competitive

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In deciding a *Fed. R. Civ. P. 12(b)(6)* motion, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the plaintiff; it should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

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

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Motions to Dismiss, Failure to State Claim**

In antitrust cases, as in all federal cases, only a short plain statement of a claim for relief which gives notice to the opposing party is required of the complaint. Furthermore, in antitrust cases dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. However, allegations must be stated in terms that are neither vague nor conclusory. Conclusory allegations which merely recite the litany of antitrust will not suffice; a court may insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3[] **Sherman Act, Claims**

Section 2 of the Sherman Antitrust Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 2*. There are two elements to a *§ 2* claim: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN4[] **Clayton Act, Claims**

The Clayton Act, *15 U.S.C.S. § 12 et seq.*, permits private parties to institute actions under the federal antitrust laws.

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

HN5[] **Private Actions, Standing**

See 15 U.S.C.S. § 15.

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

HN6[] **Private Actions, Standing**

Courts have outlined three standing requirements for would-be antitrust plaintiffs. First, the plaintiff must allege conduct in violation of the antitrust laws. Second, the plaintiff must allege a relevant market product. Finally, the plaintiff must allege an "antitrust injury," that is, an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Remedies > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Burdens of Proof

HN7[] **Regulated Practices, Intellectual Property**

A plaintiff seeking damages for bad faith patent infringement must show that the injury for which it seeks to recover is the type the antitrust laws were intended to prevent and flows from that which makes defendant's acts unlawful. In a suit alleging antitrust injury based upon a bad faith prosecution theory it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which "flows" from the antitrust wrong.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

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

HN8[] **Bad Faith, Fraud & Nonuse, Bad Faith**

The United States District Court for the Eastern District of New York agrees with other courts that a claim for relief under antitrust laws may be based on the bad faith assertion of a patent against products known by the patent holder not to infringe the patent.

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

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

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

HN9[] **Relevant Market, Product Market Definition**

Without a definition of the relevant product market, there is no way to measure a company's ability to act as a monopolist.

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

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

HN10[] **Relevant Market, Product Market Definition**

A relevant market is comprised of a product market, those commodities or services that are reasonably interchangeable by consumers for the same purposes, and a geographic market, the area in which sellers of the relevant market product effectively compete. The product market is defined in relation to interchangeable goods. Commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal. Reasonable interchangeability is determined by reference to cross-elasticity of demand and similarity of purpose and clientele of each product. In general, then, the question is whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.

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

HN11[] **Regulated Practices, Market Definition**

Cross elasticity of demand refers to the change in the demand by consumers for one product as a result of a change in the price of another product.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN12[] **Amendment of Pleadings, Leave of Court**

Where the possibility exists that a defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN13[] Pleadings, Amendment of Pleadings

Fed. R. Civ. P. Rule 15(a) provides that a court should grant leave to amend freely when justice so requires.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN14[] Pleadings, Amendment of Pleadings

Although the decision whether to grant leave to amend is within the discretion of a district court, refusal to grant leave must be based on a solid ground.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN15[] Amendment of Pleadings, Leave of Court

"Futility" provides a solid ground on which to deny leave to amend. Similarly, leave to amend can properly be denied where the motion is made after an inordinate delay, no satisfactory explanation is made for the delay, and the amendment would prejudice the defendant.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN16[] Pleadings, Amendment of Pleadings

In addressing the proposed futility of an amendment, the proper inquiry is comparable to that required on a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*. With respect to claims alleged to be without merit, a court must construe the facts alleged by the party opposed to the amendment as true and view them in the light most favorable to that party.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Torts > Public Entity Liability > Immunities > Judicial Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN17[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington Doctrine allows a party to petition the government for redress of a grievance, such as a patent infringement claim, without the petitioning party being subject to antitrust claims as a result of its efforts. Borne out of *First Amendment* principles guaranteeing the right to petition the government, the doctrine thus immunizes legislative, executive, and judicial activity from antitrust liability even if the activity is designed to eliminate competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN18[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Courts recognize a limited exception to Noerr-Pennington immunity known as the "sham" exception. There is a two-part definition of "sham" litigation: First, a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under the Noerr-Pennington doctrine, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the government process--as opposed to the outcome of that process--as an anticompetitive weapon. Thus, for a suit to violate the antitrust laws it must be a sham both objectively and subjectively. Furthermore, even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. This two-step inquiry applies to determining whether a single action constitutes sham petitioning.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Governments > Legislation > Effect & Operation > Prospective Operation

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN19[] **Noerr-Pennington Doctrine, Sham Exception**

In cases in which the defendant is accused of bringing a whole series of legal proceedings, the test to determine whether the "sham" exception to Noerr-Pennington immunity applies is not "retrospective" but "prospective": Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for the purposes of harassment? It is immaterial that some of the claims might, as a matter of chance, have merit. Rather, the relevant issue is whether the legal challenges are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN20[] **Misuse of Rights, Patent Misuse Defense**

Patent misuse is generally a defense to patent infringement, which if proven, renders the patent unenforceable until purged.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN21[] **Bad Faith, Fraud & Nonuse, Bad Faith**

The elements of a claim of patent misuse include a patentee's impermissible use of its patent to broaden the physical or temporal scope of its patent with an anti-competitive effect. Furthermore, patent misuse requires bad faith and some improper purpose.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN22[] **Misuse of Rights, Patent Misuse Defense**

A party that did not raise the issue of patent misuse in one action may raise that issue in another action based on a separate assertion of infringement, whether as a defense against the claim of infringement or in a request for declaratory relief.

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

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN23[] **Intentional Interference, Elements**

To state a valid claim under New York law, a plaintiff must allege that the defendant interfered with business or economic relations between the plaintiff and a third party, either (1) with the sole purpose of harming the plaintiff; or (2) by dishonest, unfair, or improper means. The defendant must interfere with the business relationship directly; that is, the defendant must direct some activities towards the third party and convince the third party not to enter into a business relationship with the plaintiff.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN24[] **Preclusion of Judgments, Res Judicata**

It is well settled that the doctrine of res judicata, or claim preclusion, serves to bar litigation of any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated. To prove that a claim is precluded under this doctrine, a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the parties or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been raised in the prior action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN25[] **Preclusion of Judgments, Res Judicata**

For purposes of a res judicata analysis, whether a claim that was raised in a previous action or could have been raised therein depends in part on whether the same transaction or connected series of transactions is at issue, and whether the same evidence is needed to support both claims. To ascertain whether two actions spring from the same "transaction" or "claim," a court looks to whether the underlying facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. As this "same transaction" test indicates, the "could have been" language of the third requirement is somewhat misleading. The question is not whether the applicable procedural rules permitted assertion of the first proceeding; rather, the question is whether the claim was sufficiently related to the claims that were asserted in the first proceeding that it should have been asserted in that proceeding. This analysis entails, in part, consideration as to whether new facts necessary to the second suit were available to the plaintiff at the time the first suit was filed.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN26[] **Preclusion of Judgments, Res Judicata**

With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved essentially the same course of wrongful conduct is not decisive; nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues. A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first. If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion.

Counsel: Edgar H. Haug, Esq., John R. Lane, Esq., James Kevin Stronski, Esq., FROMMER, LAWRENCE & HANG, LLP, New York, New York, for Plaintiffs/ Counterdefendants.

Mark S. Levinson, Esq., George A. Borden, Esq., WILLIAMS & CONNOLLY, Washington, D.C., for Plaintiffs/ Counterdefendants.

David L Harris, Esq., Stephen R. Buckingham, Esq., LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN, Roseland, New Jersey, for Defendants/ Counterclaimants.

Andrew J. Vance, Esq., FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP, Washington, D.C., for Defendants/ Counterclaimants.

Judges: Sterling Johnson, Jr., U.S.D.J.

Opinion by: Sterling Johnson, Jr.

Opinion

MEMORANDUM & ORDER

JOHNSON, District Judge:

Plaintiffs, Marchon Eyewear, Inc. ("Marchon") and Rothanberg, Inc. ("Rothanberg") (collectively, "Plaintiffs"), **[*2]** bring this action against Defendants, Tura LP ("Tura") and Brodart Company ("Brodart") (collectively, "Defendants"), alleging infringement of U.S. Patent No. 4,896,955, entitled "Eyeglass Frame Including Shape-Memory Elements" (the " '955 patent"). Defendants have filed three counterclaims: (1) sham litigation in violation of Section Two of the Sherman Antitrust Act ("Section Two"); (2) tortious interference of prospective economic advantage; and (3) a request for a declaratory judgment of patent misuse. Presently before the Court is Plaintiffs' Motion to Dismiss Defendants' Counterclaims pursuant to *Fed. R. Civ. P. 12(b)(6)*.

BACKGROUND

On January 30, 1990, the '955 patent duly and legally issued and was assigned to CVI/ Beta Ventures Inc. ("Beta"). On September 6, 1995, Beta assigned the '955 patent to Marchon. Marchon then granted an exclusive license under the '955 patent to Rothanberg, which purchases, imports, distributes and sells eyeglass frames containing nickel-titanium shape memory alloy components under the supervision, management and control of Marchon. Under this agreement, Rothanberg has eyeglass frames containing nickel-titanium shape memory alloy components in **[*3]** the state of New York and throughout the United States.

In order to fully understand Defendants' counterclaims, it is necessary to explain the history of litigation between the parties concerning the '955 patent. The '955 patent (as well as a second patent) was the subject of a prior jury trial involving, among others, the same parties that are involved in the instant action. CVI/Beta Ventures, Inc. v. Tura LP ("Tura I"),*905 F. Supp. 1171 (E.D.N.Y. 1995)*, *rev'd in part, vacated in part, 112 F.3d 1146 (Fed. Cir. 1997)*, *cert. denied, 522 U.S. 1109, 140 L. Ed. 2d 105, 118 S. Ct. 1039 (1998)*. In Plaintiffs' previous action against Tura and Brodart for patent infringement, Defendants asserted affirmative defenses and counterclaims challenging the validity of the '955 patent on a number of grounds, and alleging patent misuse and violations of ***antitrust law***. [1] The jury rejected all of Defendants' challenges to validity and found that the patent had not been proven invalid or unenforceable, that Tura had infringed the patent but did not do so willingly, and that Brodart had induced Tura's infringement. *Tura I, 905 F. Supp. at 1203-05*. Defendants subsequently **[*4]** moved for judgment as a matter of law or, in the alternative, for a new trial. This Court denied those motions, entered a judgment consistent with the jury verdict, and ordered an injunction against Defendants. Tura and Brodart appealed, contending that the trial court had erred in its patent claim construction and erroneously instructed the jury. They did not, however, raise any issues of patent validity on appeal. *CVI/Beta Ventures v. Tura LP, 112 F.3d at 1149 n.2*.

The Court of Appeals for the Federal Circuit narrowed the '955 patent's claim construction, and found that under the altered claim construction there was no proof of infringement. *112 F.3d at 1158-60*. It reversed the judgment of infringement, and remanded the matter to this Court for further proceedings in connection with the patent misuse

[1] See Plaintiffs' Memorandum, Ex. 3 (jury verdict in Tura I).

and antitrust counterclaims. *Id. at 1162*. Following this decision, the Federal Circuit issued **[*5]** an order suspending the injunction against Defendants that this Court had imposed in November 1995.

In the present lawsuit, Plaintiffs allege that Defendants have distributed and sold new eyeglass frame models that infringe the '955 patent. Defendants counterclaim that Plaintiffs are engaged in sham litigation and that they are tortiously interfering with Defendants' prospective economic advantage, and request that the Court grant a declaratory judgment of patent misuse against Plaintiffs.

Defendants allege that despite the ultimate outcome of Tura I, in which the Federal Circuit found that Marchon failed to prove that the memory metal frames sold by Tura infringed '955 patent, Plaintiffs have continued to threaten all potential manufacturers or suppliers of memory metal eyeglass frames with patent infringement litigation and "otherwise intimidate such manufacturers and suppliers." (Answer and Counterclaims to Amend. Compl. at P 77). Defendants allege that, given the interpretation placed on the '955 patent in Tura I, there is no reasonable basis for Plaintiffs to assert a second time that Tura's memory metal eyeglass frames infringe the '955 patent.

Plaintiffs claim that **[*6]** before instituting the current action of patent infringement, they tested Defendants' new Turaflex models to determine whether they infringed 'the '955 patent and found that they did. Defendants counter that Plaintiffs have not produced any evidence substantiating their belief that the models infringe the patent. Thus, Defendants conclude, Plaintiffs have "engaged in a pattern of baseless suits against Tura designed to burden Tura with expensive litigation, with the intended anti-competitive purpose of hindering Tura in its ability to compete against Marchon in the memory metal eyeglass frame market." (Answer to Amend. Compl. at P 79).

Defendants also claim that Plaintiffs intentionally interfered with their business relations with a number of Japanese and other foreign manufacturers and exporters of memory metal eyeglass frames, such as Nakanishi Optical ("Nakanishi"), by intimidating, coercing, and/ or otherwise chilling their willingness to supply Defendants with memory metal eyeglass frames. Defendants claim, on information and belief, that one of the means through which Plaintiffs have interfered with their foreign business relationships has been through threats of patent infringement **[*7]** litigation against such manufacturers and exporters. Defendants allege that as a result of these threats, their ability to obtain memory metal eyeglass frames for resale in the United States has been damaged.

Such threats to foreign manufacturers are particularly harmful in this instance, Defendants reason, because the '955 patent relates to memory metal eyeglass frames, a highly technological product that is very difficult to manufacture. Only a limited number of Japanese companies have ever had the ability to manufacture them in any substantial quantity. According to Defendants, they have never been able to find any United States manufacturer to supply memory metal eyeglass frames.

PROCEDURAL HISTORY

Plaintiffs filed their original Complaint in this matter in early 1998. Defendants filed their original Answer and Counterclaim on April 7, 1998. Defendants' response contained none of the counterclaims presently before the Court. On April 28, 1998, pursuant to *Fed. R. Civ. P. 15(a)*, Defendants amended their counterclaims, without leave of this Court, but prior to Plaintiffs filing of responsive pleadings to Defendants' original counterclaim. This Amended Answer and Counterclaims **[*8]** added six new counterclaims.

Subsequently, Plaintiffs moved to strike Defendants' affirmative defense relating to the validity of the patent at issue, and moved to dismiss Defendants' request for declaratory judgment of patent invalidity. On March 28, 1999, this Court struck from Defendants' Amended Answer and Counterclaims the affirmative defense that the '955 patent is invalid and dismissed with prejudice Defendants' counterclaim seeking declaratory judgment that the '955 patent is invalid. *Marchon Eyewear, Inc. v. Tura LP, 1999 U.S. Dist. LEXIS 22993 (E.D.N.Y. March 28, 1999)*. Furthermore, the Court directed Defendants to serve and file a second Amended Answer and Counterclaims conforming with its order.

On April 19, 1998, Defendants filed a Second Amended Answer and Counterclaims. Thereafter, Plaintiffs filed a motion for judgment on the pleadings to dismiss certain of Defendants' counterclaims, including the three presently before the Court. While this motion was pending before this Court, Plaintiffs requested leave to amend their Complaint to add new claims of patent infringement. In June 2000, this Court approved a Stipulation and Order granting Plaintiffs **[*9]** leave to file an amended complaint. Pursuant to that Order, Plaintiffs filed their first Amended Complaint on June 21, 2000, and on July 13, 2000, Defendants filed their Answer and Counterclaims to the Amended Complaint. Thus, presently before the Court are three counterclaims: (1) sham litigation in violation of Section Two of the Sherman Antitrust Act; (2) tortious interference of prospective economic advantage; and (3) a request for a declaratory judgment of patent misuse.

DISCUSSION

I Standard of Review

HN1[] In deciding a *Rule 12(b)(6)* motion, "a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the [plaintiff]; it should not dismiss the complaint 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994)* (citations omitted). "The issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Op. 2d 474 (1974).* **[*10]**

HN2[] In antitrust cases, as in all federal cases, only a "short plain statement of a claim for relief which gives notice to the opposing party" is required of the complaint. See *Intellective, Inc. v. Massachusetts Mutual Life Insurances Co., 190 F. Supp. 2d 600, 607 (S.D.N.Y. 2002)*. Furthermore, the Supreme Court has warned that in antitrust cases "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Id. (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974))*. However, allegations must be stated in terms that are neither vague nor conclusory. *Mover's & Warehousemen's Ass'n. of Greater New York v. Long Island Moving et. al., 1999 U.S. Dist. LEXIS 20667 at *10 (E.D.N.Y. Dec. 27, 1999)*. Conclusory allegations which "merely recite the litany of antitrust will not suffice"; the Court may insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed. Id. (quotations omitted).

II Sham Litigation Antitrust Claim

HN3[] Section Two makes it unlawful to "monopolize, or attempt to monopolize, or combine **[*11]** or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations ..." *15 U.S.C. § 2*. There are two elements to a Section Two claim: "1) the possession of monopoly power in the relevant market, and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

Defendants base their antitrust claim on the theory of sham litigation, claiming that Plaintiffs are using the judicial system, and this Court in particular, as an indirect means of curbing Defendants' ability to compete against them. Specifically, Defendants allege that, in light of the outcome in Tura I, the instant infringement action by Plaintiffs against Defendants is "sham litigation," borne of anti-competitive and unlawful purposes, and asserted in violation of the antitrust laws. Plaintiffs **[*12]** respond that Defedants (1) do not have standing to bring such a claim; (2) have failed to state an antitrust violation under the Sherman Antitrust Act; and (3) that, in any event, their conduct is immune from such antitrust challenges under the Noerr-Pennington doctrine.

A Antitrust Standing

Before assessing whether Defendants have properly alleged the necessary elements of a Section Two sham litigation claim, this Court must first determine whether Defendants have standing to bring a counterclaim under Section Two. ***HN4***[] The Clayton Act, *15 U.S.C. §§ 12 et seq.*, permits private parties to institute actions under the federal antitrust laws. See *15 U.S.C. § 15* ***HN5***[] ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States …, and shall recover threefold the damages by him sustained.").

"Although these laws specify that 'any person' may sue, the ***HN6***[] courts have outlined three standing requirements for would-be antitrust plaintiffs." *Intellective, Inc. 190 F. Supp. 2d at 607*. First, the plaintiff must allege **[*13]** conduct in violation of the antitrust laws. Id.; see also *Int'l Audiotext Network, Inc. v. American Tel & Tel. Co., 893 F. Supp. 1207, 1211 (S.D.N.Y. 1994)*, *aff'd*, *62 F.3d 69 (2d Cir. 1995)*. Second, the plaintiff must allege a relevant market product. Id. Finally, the plaintiff must allege an "antitrust injury," that is, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Intellective Inc., 190 F. Supp. 2d at 607* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. Plaintiffs contend that Defendants do not have antitrust standing because they have failed to allege either an antitrust injury or a relevant product market.

B. Antitrust Injury

Plaintiffs first argue that Defendants have not alleged an antitrust injury. Specifically, Plaintiffs claim that although Defendants have alleged injury to themselves, they have not alleged an injury to competition generally, as is required to assert an antitrust claim.

In the patent field, the recoverability of damages by victims **[*14]** of bad faith patent infringement suits was first established in the Handgards I and Handgards II cases, *Handgards Inc., v. Ethicon, Inc., 601 F.2d 986 (9th Cir.)*, *cert. denied, 444 U.S. 1025, 62 L. Ed. 2d 659, 100 S. Ct. 688, 100 S. Ct. 689 (1980)*, *on remand*, *552 F. Supp. 820 (N.D. Cal.)*, *aff'd*, *743 F.2d 1282 (9th Cir.)*, *cert denied, 469 U.S. 1190, 83 L. Ed. 2d 968, 105 S. Ct. 963 (1985)*. There, the Ninth Circuit explicitly held that pleading the costs of defending such suits alleges a cognizable antitrust injury:

> ***HN7***[] Plaintiff must show that the injury for which it seeks to recover is "the type the antitrust laws were intended to prevent" and "flows from that which makes defendant's acts unlawful." In a suit alleging antitrust injury based upon a bad faith prosecution theory it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which "flows" from the antitrust wrong. *Handgards I, 601 F.2d at 997*.

This reasoning has been followed by various courts. See *Bio-Technology Gen. Corp. v. Genentech Inc., 886 F. Supp. 377, 380 (S.D.N.Y. 1995)* ("In **[*15]** a suit alleging antitrust injury based upon a bad faith prosecution theory it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which flows from the antitrust wrong."); *CVD Inc. v. Raytheon Co., 769 F.2d 842, 857 (1st Cir. 1985)*; *Kearney & Trecker Corp. v. Cincinnati Milacron, Inc. 562 F.2d 365, 368 (6th Cir. 1977)*. ***HN8***[] This Court agrees that a claim for relief under antitrust laws may be based on the bad faith assertion of a patent against products known by the patent holder not to infringe the patent. Here, Defendants allege that Plaintiffs have filed the present patent infringement action against them for anti-competitive reasons. Although Defendants do not specifically allege that their injury arises from the costs of defending against the present suit, as the Court in Handgards I noted, "it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which 'flows' from the antitrust wrong." *601 F.2d at 997*. Accepting the allegations contained in the counterclaim as true, this Court finds that the costs incurred by Defendants in defending against this **[*16]** action constitute a cognizable injury to establish standing under the Sherman Antitrust Act.

C. Relevant Market Product

In order to have antitrust standing, Defendants must also identify the relevant product market which Plaintiffs' antitrust activities are alleged to have affected. ***HN9***[] "Without a definition of the relevant product market, there is no way to measure a company's ability to act as a monopolist." *United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2d Cir. 1995)*.

HN10[] "A relevant market is comprised of a product market, those commodities or services that are reasonably interchangeable by consumers for the same purposes, and a geographic market, the area in which sellers of the relevant market product effectively compete." *Smith & Johnson, Inc. v. Hedaya Home Fashions Inc., 1996 U.S. Dist. LEXIS 19023 at *17 (S.D.N.Y. December 24, 1996)* (quoting *Sunshine Cellular v. Vanguard Cellular Sys., Inc., 810 F. Supp. 486, 493 (S.D.N.Y. 1992))*. The product market is defined in relation to interchangeable goods. Id. "Commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce, **[*17]** ' monopolization of which may be illegal." Id. (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*. Reasonable interchangeability is determined by reference to cross-elasticity of demand and similarity of purpose and clientele of each product. [2] Id. "In general, then, the question is whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 868 (W.D.N.Y. 1994)*.

Plaintiffs argue that Defendants have failed to adequately allege either the relevant product market or the relevant geographical market, claiming that Defendants make only **[*18]** passing and conclusory reference to the memory metal eyeglass frame market, and nowhere identify the geographic market. Defendants admit that in their Answer to Plaintiffs' Amended Complaint they omitted the Second Count of their previously filed Second Amended Answer and Counterclaim, which alleged a conspiracy to monopolize and/ or restrain trade under Section One and Two of the Sherman Act. In paragraph 62 of that submission to the Court, Defendants pled the following:

> Marchon has willfully acquired (or attempted to acquire with a dangerous probability of success) monopoly power in that it controls over 90% of the substantial interstate commerce in memory metal eyeglass frames in the United States.

In this previous pleading, Defendants incorporated by reference paragraph 62 (originally pled within its Section One claim) into its Section Two sham litigation claim. In the current pleading however, Defendants intentionally drop their Section One conspiracy claim and through oversight inadvertently fail to restate paragraph 62 in the sham litigation claim.

Thus, this Court must determine whether Defendants' failure to allege paragraph 62 in their Answer to the Amended Complaint **[*19]** is fatal to their Section Two sham litigation claim. Defendants request leave to amend their counterclaim to cure the deficiency. The Second Circuit has held that, ***HN12***[] "Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course." *Oliver Schools, Inc. v. Foley, 930 F.2d 248, 253 (2d Cir. 1991)*. ***HN13***[] *Rule 15(a) of the Federal Rules of Civil Procedure* provides that the court should grant leave to amend freely when justice so requires. ***HN14***[] "Although the decision whether to grant leave to amend is within the discretion of the district court, refusal to grant leave must be based on a solid ground." Id.

The Second Circuit has held that ***HN15***[] "futility" provides a solid ground on which to deny leave to amend. *Marchi v. Board of Coop. Educ. Servs. of Albany, 173 F.3d 469, 478 (2d Cir.)*, *cert. denied, 528 U.S. 869, 145 L. Ed. 2d 143, 120 S. Ct. 169 (1999)*. Similarly, leave to amend can properly be denied "where the motion is made after an inordinate delay, no satisfactory explanation is made for the delay, and the amendment would prejudice **[*20]** the defendant." *MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 157 F.3d 956, 962 (2d Cir. 1998)* (quotation omitted)).

Here, although there has been some delay between Defendants' Second Amended Answer and their current request to amend, Defendants offer a reasonable explanation for their request and a credible, though unimpressive, excuse for the delay. Furthermore, there is no prejudice to Plaintiffs as they have notice of Defendants' allegations of relevant product market and relevant geographic market through prior pleadings. Thus, this Court is inclined to grant Defendants leave to amend their Answer for the limited purpose of curing the omission. Before doing so however, this Court must address whether the amendment would be futile.

D. Merit of the Sham Litigation Counterclaim

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[2] ***HN11***[] "Cross elasticity of demand refers to the change in the demand by consumers for one product as a result of a change in the price of another product." *Smith & Johnson, Inc., 1996 U.S. Dist. LEXIS 19023 at *18*.

HN16[] In addressing the proposed futility of an amendment, the proper inquiry is comparable to that required on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which this Court has discussed more fully above. Rotblut v. 333 E. 66th Street Corp., 1996 U.S. Dist. LEXIS 15082, at *3, 4 (S.D.N.Y. October 11, 1996). With respect to claims alleged to be without merit, **[*21]** the court must construe the facts alleged by the party opposed to the amendment as true and view them in the light most favorable to that party. Id.; see Middle Atlantic Utils. Co. v. S.M.W. Dev. Corp., 392 F.2d 380, 386-87 (2d Cir. 1968).

Plaintiffs argue that even if Defendants sufficiently plead a violation of Section Two, they are immune from liability under the Noerr-Pennington Doctrine. If this is so, then leave to amend would be futile, thus precluding this Court from granting Defendants' request. HN17[] The Noerr-Pennington Doctrine allows a party to petition the government for redress of a grievance, such as a patent infringement claim, without the petitioning party being subject to antitrust claims as a result of its efforts. See Moore U.S.A. Inc. v. Standard Register Co., 139 F. Supp. 2d 348, 358 (W.D.N.Y. 2001). Borne out of First Amendment principles guaranteeing the right to petition the government, the doctrine thus immunizes legislative, executive and judicial activity from antitrust liability even if the activity is designed to eliminate competition. Mover's & Warehousemen's Ass'n of Greater New York, Inc. v. Long Island Moving & Storage Ass'n, 1999 U.S. Dist. LEXIS 20667, **[*22]** at *18 (E.D.N.Y. December 16, 1999).

HN18[] Court have, however, recognized a limited exception to Noerr-Pennington immunity known as the "sham" exception. Id.; see Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). In Professional Real Estate Investors Inc., the Supreme Court explained how the exception applies to court proceedings. In doing so, the Court outlined a two-part definition of "sham" litigation:

> First, the lawsuit much be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor through the use [of] the government **[*23]** process--as opposed to the outcome of that process--as an anticompetitive weapon." 508 U.S. at 60 (citations omitted).

Thus, for a suit to violate the antitrust laws it must be a sham *both* objectively and subjectively. Furthermore, the Supreme Court has instructed lower courts to remember, "even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 59-60. This two-step inquiry applies to determining "whether a single action constitutes sham petitioning." Primetime 24 Joint Venture v. National Broad. Co., Inc., 219 F.3d 92, 101 (2d Cir. 2000) (quotation omitted). Here, however, Plaintiffs are accused of bringing a series of legal proceedings for anti-competitive purposes. HN19[] In cases in which the "defendant is accused of bringing a whole series of legal proceedings," the test is not "retrospective" but "prospective": "Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for the purposes of harassment?" Id. The Second Circuit **[*24]** has noted that "it is immaterial that some of the claims might, 'as a matter of chance,' have merit." Id. (quotation omitted). Rather, "the relevant issue is whether the legal challenges 'are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.'" Id. (quotation omitted).

Try as Defendants may, their attempt to classify Plaintiffs' acts, whatever the motivation behind them, as "a whole series of legal proceedings" or a "pattern of baseless, repetitive claims," Professional Real Estate Investors, 508 U.S. at 58 (citation omitted), does not stand up to scrutiny. In the sham litigation counterclaim, Defendants cite only two lawsuits, Tura I and the current action, not a "series" or "pattern" of them. See Amarel v. Connell, 102 F.3d 1494, 1519 (9th Cir. 1996). Although this Court does not attempt to define here the number of legal proceedings needed to allege a "series" or "pattern" of litigation, it distinguishes this case from PrimeTime 24 Joint Venture, 219 F.3d at 101, the seminal Second Circuit case in this arena, in which the Court refused **[*25]** to dismiss an antitrust claim in which the defendants had submitted "simultaneous and voluminous challenges ... without regard to whether the challenges had merit," and where "appellees coordinated their efforts to submit huge volumes of challenges simultaneously." The conduct in the present case simply does not rise to the level deemed by the Second Circuit to be "automatic petitioning … without regard to and regardless of the merits of said petitions … that if proven, would be sufficient to overcome the [Counterclaim Defendant's] Noerr-Pennington defense." Id. (quoting *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 811 (9th Cir. 1994))*.

Because Defendants cannot assert a claim of sham litigation, this Court will not grant Defendants leave to amend the sham litigation counterclaim, as it would be futile. For the forgoing reasons, Defendants' counterclaim of sham litigation is dismissed.

II. Patent Misuse

Defendants also seek a declaratory judgment pursuant to *28 U.S.C. § 2201* that Marchon's patent is unenforceable on the grounds of "patent misuse." Specifically, Defendants claim that **[*26]** (1) "Marchon has misused the '112 and '955 patents by threatening to sue and suing Tura for patent infringement, while knowing that the memory metal eyeglass frames sold by Tura did not infringe those patents," and that (2) Marchon "misused the '112 and '955 patents by requiring Nakanishi to refrain from selling memory metal eyeglass frames that do not infringe the '112 and '955 patents to others as a condition to Marchon continuing to do business with Nakanishi." (Answer and Counterclaims to Amend. Compl. at P 85, 86). Plaintiffs argue that Defendants' counterclaim should be dismissed on the ground that "patent misuse" can only be asserted as an affirmative defense and may not be asserted by way of an independent claim seeking declaratory judgment.

HN20[] Patent misuse is generally a defense to patent infringement, which if proven, renders the patent unenforceable until purged. See *Aktiebolag v. Kremers Urban Dev. Co., 2001 U.S. Dist. LEXIS 23879, at *2 (S.D.N.Y. October 31, 2001)*. ***HN21***[] The elements of a claim of patent misuse include a patentee's impermissible use of its patent to broaden the physical or temporal scope of its patent with an anti-competitive effect. Id. **[*27]** Furthermore, patent misuse requires bad faith and some improper purpose. Id.; *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc., 45 F.3d 1550, 1558 (Fed. Cir. 1995)* ("The bringing of a lawsuit to enforce legal rights does not of itself constitute … patent misuse; there must be bad faith and improper purpose in bringing the suit, in implementation of an illegal restraint of trade.").

The Federal Circuit has yet to squarely address whether a defense of "patent misuse" may be asserted by way of a declaratory judgment action rather than asserted as an affirmative defense. In *Glitsch Inc. v. Koch Eng'g Co. Inc., 216 F.3d 1382, 1386 (Fed. Cir. 2000)*, however, the Federal Circuit noted that the Supreme Court's decision, *Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 88 L. Ed. 376, 64 S. Ct. 268, 1944 Dec. Comm'r Pat. 641 (1944)*, "makes clear that ***HN22***[] a party that did not raise the issue of patent misuse in one action may raise that issue in another action based on a separate assertion of infringement, whether as a defense against the claim of infringement or in a request for declaratory relief." Though dicta, the Federal Circuit's statement resonates **[*28]** with this Court. The Second Circuit has also spoken, albeit indirectly, on the issue. In *Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc., 233 F.3d 697 (2d Cir. 2000)*, the Court of Appeals barred a plaintiff's complaint on the ground that its antitrust claims were compulsory counterclaims that had to be raised in a previous patent infringement suit. In rendering its decision, the court distinguished counterclaims based on patent invalidity from those based on patent misuse, thus implicitly recognizing that a counterclaim for patent misuse is a valid action. *Id. at 703-04* ("On the other hand, counterclaims related to *misuse* and other more economically oriented antitrust claims would seem generally to be distinct in nature and substance from patent validity and infringement issues."). Other Courts have similarly refused to dismiss claims of patent misuse, or acknowledged that patent misuse may be brought as an action for declaratory judgment. See *Affymetrix, Inc. v. PE Corp. (NY) Competitive Techs., Inc., 219 F. Supp. 2d 390, 397 (S.D.N.Y. 2002)* (denying defendants' motion to dismiss plaintiff's patent **[*29]** misuse claim); *Kremers Urban Dev. Co., 2001 U.S. Dist. LEXIS 23879, at *3, *4* (allegations sufficient to state a claim of patent misuse); *Bayer AG v. Housey Pharms. Inc., 169 F. Supp. 2d 328, 331 (D. Del. 2001)* (plaintiffs sufficiently stated a claim of patent misuse); *Components, Inc. v. Western Elec. Co., 318 F. Supp. 959, 966 (D. Me. 1970)* ("The most cursory research discloses numerous cases in which a declaration of unenforceability because of misuse has been sought and determined without comment or objection."); cf. *Moore, U.S.A. Inc., 139 F. Supp. 2d at 348* ("[Counterclaimant] can state a patent misuse claim to the extent that it alleges that [counterdefendants] have engaged in sham litigation."). Thus, Plaintiffs' motion to dismiss Defendants' patent misuse counterclaim is denied.

III. Tortious Interference of Prospective Economic Advantage

Defendants also bring a counterclaim alleging that Plaintiffs have tortiously interfered with their prospective economic advantage. ***HN23***[] To state a valid claim under New York law, a plaintiff must allege that the defendant "interfered with business or economic relations **[*30]** between the plaintiff and a third party, either (1) with the sole purpose of harming the plaintiff; or (2) by dishonest, unfair or improper means." *IntelliSec v. Firecom, Inc., 2001 U.S. Dist. LEXIS 2619, at *21 (E.D.N.Y. February 1, 2001)* (citation omitted). "The defendant must interfere with the business relationship directly; that is, the defendant must direct some activities towards the third party and convince the third party not to enter into a business relationship with the plaintiff." Id. (citation omitted).

In the instant case, Plaintiffs do not claim that Defendants have failed to allege the elements required to assert a claim of tortious interference of prospective economic advantage, but rather, that the claim is barred under the doctrine of res judicata by this Court's decision in Tura I. Specifically, Plaintiffs claim that although Defendants did not set forth a separate counterclaim alleging tortious interference in Tura I, their current claim is based upon the same underlying facts asserted in Tura I. For example, Defendants now allege that Plaintiffs have tortiously interfered with their prospective economic advantage by "intimidating **[*31]** [and] coercing" Nakanishi not to "supply Tura with memory metal eyeglass frames." (Answer and Counterclaims to Amend. Compl. at P 85). Plaintiffs argue that this assertion is virtually identical to Defendants' Second counterclaim in Tura I, in which they asserted that Plaintiffs and others "coerced Nakanishi into selling memory metal frames to Marchon, exclusively and not to Tura … whether or not such frames infringe the suit patents and whether or not the suit patents are invalid." (Tura *I, Amend.* Counterclaims and Third Party Compl. at P 25). Plaintiffs also argue that Tura's current allegation that it has been "damaged in its ability to obtain memory metal eyeglass frames for resale into the United States" by Plaintiffs' actions merely builds upon Defendants' Second Counterclaim in Tura I. (Answer and Counterclaims to Amend. Compl. at P 88).

HN24[] It is well settled that the doctrine of res judicata, or claim preclusion, serves to bar "litigation of any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated." *Irish Lesbian and Gay Org. v. Giuliani, 143 F.3d 638 (2d Cir. 1998).* **[*32]** To prove that a claim is precluded under this doctrine, "a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been raised in the prior action." *Pike v. Freeman, 266 F.3d 78, 91 (2d Cir. 2001)* (quotation omitted). In the instant case, it is undisputed that Tura I resulted in a final judgment on the merits between the same parties involved here. Therefore, the only issue is whether Defendants raised or could have raised their claim in Tura I.

HN25[] Whether a claim that was raised in the previous action or could have been raised therein "depends in part on whether the same transaction or connected series of transactions is at issue, and whether the same evidence is needed to support both claims." Id. (quoting *Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 (2d Cir. 1997)* (internal alterations and quotation marks omitted). "To ascertain whether two actions spring from the same 'transaction' or 'claim,' [the Court looks] to whether the underlying **[*33]** facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" Id. (quoting *Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 (2d Cir. 1997)*. As this "same transaction" test indicates, the "could have been" language of the third requirement is somewhat misleading. Id. The question is not whether the applicable procedural rules *permitted* assertion of the first proceeding; rather, the question is whether the claim was sufficiently related to the claims that were asserted in the first proceeding that it *should have been* asserted in that proceeding. Id.; see *Kane v. Magna Mixer Co., 71 F.3d 555, 560 (6th Cir. 1995)* (stating that one of the elements of res judicata is "an issue in the subsequent action which was litigated or which should have been litigated in the prior action."). This analysis entails, in part, consideration as to whether new facts necessary to the second suit were available to the plaintiff at the time the first suit was filed. The Second Circuit has noted: **[*34]**

HN26[]

> With respect to the determination of whether a second suit is barred by *res judicata,* the fact that both suits involved essentially the same course of wrongful conduct is not decisive; nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues. A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first.
>
> If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion. *Interoceanica Corp., 107 F.3d at 91* (quotation omitted); see *Computer Assoc. Int'l, Inc. v. Altai, Inc., 126 F.3d 365, 369 (2d Cir. 1997)* ("Without a demonstration that the conduct complained of in the [second] action occurred prior to the initiation of the [first] action, res judicata is simply inapplicable."); see also *SEC v. First Jersey Sec., 101 F.3d 1450, 1464 (2d Cir. 1996)* **[*35]** (finding no res judicata bar to suit based on fraudulent acts that occurred after filing of prior suit, even though acts were part of the same pattern that formed basis of the first suit)).

Here, any claim of tortious interference of prospective economic advantage that is based upon Plaintiffs' conduct before Tura I is barred by res judicata, as Defendants had the opportunity to litigate such claims in Tura I. However, a claim based on Plaintiffs' alleged actions subsequent to this Court's decision in Tura I, though bearing tangentially on issues referenced in Tura I, is not based on the same underlying facts adjudicated in Tura I. The question before the court, then, is whether Defendants' current claim is based upon facts that could have been raised in Tura I or is based on newer facts, not in existence at the time of Tura I. Defendants assert in their opposition papers that their counterclaim is based upon Plaintiffs' alleged recent tortious interference with their prospective suppliers. However, it is not clear from the pleadings that this is the case. In their counterclaim, Defendants allege, in pertinent part, that, "Marchon has intentionally interfered **[*36]** with Tura's business relations ... through threats of patent infringement litigation against manufacturers and exporters." (Answer and Counterclaims to Amend. Compl. at PP 85, 86). It is impossible to discern from Defendants' allegations what temporal limitations, if any, they place on the claim. To the extent that the counterclaim is based on activity occurring subsequent to Tura I, this Court finds that the claim is not barred by res judicata. However, this Court hesitates to construe Defendants' pleading in such a fashion that the Counterclaim will survive the doctrine of res judicata. Thus, per Defendants' request, this Court grants leave to amend the counterclaim in a fashion that will both guide the Court and the opposing party as to the time frame of the alleged conduct at issue.

CONCLUSION

For the reasons set forth herein, this Court GRANTS Plaintiffs' motion to dismiss Defendants' counterclaim of sham litigation, DENIES Plaintiffs' motion to dismiss Defendants' counterclaim requesting a declaration of patent misuse, and GRANTS Defendants leave to amend their Answer to the Amended Complaint for the limited purpose of clarifying the temporal reach of the tortious **[*37]** interference of prospective economic advantage counterclaim.

IT IS HEREBY ORDERED that Defendants' Amended Answer to Plaintiffs' Amended Complaint is due on or before October 18, 2002. This decision to allow leave to amend is without prejudice to the Plaintiffs' right to move to dismiss this portion of the amended complaint following service of the new pleading.

SO ORDERED.

Sterling Johnson, Jr.

Brooklyn, New York

Dated: September 30, 2002

U.S.D.J.

Spradlin v. Lakestates Workplace Solutions, Inc. (In re Spradlin)

United States District Court for the Eastern District of Michigan, Southern Division

October 3, 2002, Decided

Case No. 02-CV-71237

Reporter

284 B.R. 830 *; 2002 U.S. Dist. LEXIS 19672 **

IN RE: ROBERT CECIL SPRADLIN, SR., Debtor. ROBERT C. SPRADLIN, Plaintiff/ Appellee, v. LAKESTATES WORKPLACE SOLUTIONS INC., et al., Defendants/ Appellants,

Prior History: In re Spradlin, 98-20611 (Mar. 18, 2002, Bankr. E.D. Mich., SPECTOR 2002 Bankr. LEXIS 599.

Disposition: **[**1]** AFFIRMED IN PART AND REVERSED IN PART.

Core Terms

bankruptcy court, Parties, non-competition, good will, dealerships, office furniture, transferred, damages

LexisNexis® Headnotes

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN1[] **Standards of Review, Clear Error Review**

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

See Mich. Comp. Laws § 445.772.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Courts > Common Law

HN3[] Public Enforcement, State Civil Actions

Under Michigan common law, the enforceability of noncompetition agreements depends on their reasonableness.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] Public Enforcement, State Civil Actions

Under Michigan common law, the test for reasonableness of a non-competition agreement is as follows: if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specifically injurious to the public, the restraint will be held valid.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Public Enforcement, State Civil Actions

In considering the enforceability of a covenant not to compete under Michigan ***antitrust law***, good will may be an important component of a transfer or sale of a business and is relevant to the issue of reasonableness.

Contracts Law > Contract Interpretation > General Overview

Securities Law > Blue Sky Laws > Online Transactions

HN6[] Contracts Law, Contract Interpretation

Good will may be defined as the privilege, granted by the seller of a business to the purchaser, of trading as his recognized successor; the possession of a ready-formed "connexion" of customers, considered as an element in the saleable value of a business, additional to the value of the plant, stock-in-trade, book-debts, and the like.

Counsel: For Lakestates Workplace Solutions: Ronald Longhofer, Honigman, Miller, Schwartz, & Cohn, Detroit, MI.

For Robert Spradlin: Andrew Zack, Munro & Zack, PLLC, Troy, MI.

Judges: AVERN COHN, UNITED STATES DISTRICT JUDGE.

Opinion by: COHN

Opinion

[*831] *MEMORANDUM AND ORDER*

I. Introduction

This is a bankruptcy appeal in an adversary proceeding with a long procedural history. The case began when the debtor, Robert C. Spradlin (Spradlin) sued defendants Lakestates Workplace Solutions, Inc, (Lakestates), Steelcase, Inc., (Steelcase), Steelcase Financial Services, Inc. (SFSI), [1] and the Holland Group, L.L.C., d/ b/ a Workplace Integrators' (Holland) in Oakland County Circuit Court seeking to invalidate a non-competition agreement (NCA) between Spradlin and the Steelcase Parties.

When Spradlin later filed for bankruptcy, the Steelcase Parties **[**2]** removed Spradlin's state court case to federal court, where it was later transferred to the bankruptcy court. The Steelcase Parties then filed a counterclaim seeking a declaration that (1) Spradlin's obligations under the NCA are not dischargeable in bankruptcy (Count I), and (2) that Spradlin unlawfully converted several items of property belonging to or serving as collateral for a debt owed to SFSI (Count II). The Steelcase Parties' counterclaim became an adversary proceeding in Spradlin's bankruptcy case.

Presently before the Court is the Steelcase Parties' appeal [2] from the bankruptcy **[*832]** court's March 18, 2002 Opinion Regarding Validity of Noncompetition Agreement, following cross motions for summary judgment filed by Spradlin and the Steelcase Parties. The bankruptcy court held that (1) Lakestates, Steelcase, and SFSI lack standing to seek damages based on Spradlin's breach of the NCA, (2) Holland (the only party with standing) has failed to show that it was harmed by Spradlin's admitted violations of the non-competition agreement, and (3) the NCA itself is unenforceable as a matter of law because the NCA did not expressly include the sale or transfer of goodwill.

[3]** For the reasons which follow, the decision of the bankruptcy court is AFFIRMED IN PART AND REVERSED IN PART. The procedural steps, which includes the withdrawal of the order of reference to the bankruptcy court, is the subject of a separate order.

II. Background

The bankruptcy court's opinion of March 18, 2002 set forth the relevant facts, which the Court adopts as its own, repeated as follows:

> Robert C. Spradlin was the sole or controlling shareholder in two companies, Contract Interiors, Inc. and Contract Interiors of Ohio, Inc. [the CI companies]
> These companies operated in Michigan and Ohio as dealerships of office furniture manufactured by Steelcase, Inc.
> The dealerships defaulted on various obligations held by SFSI.
> Under the terms of the foregoing agreement, Spradlin and the [CI companies] surrendered to SFSI assets securing the unpaid obligations and SFSI accepted the collateral in satisfaction of those obligations.
> By way of separate agreement, SFSI was to convey to Lakestates the assets acquired from Spradlin and the dealerships.

---

[1] Lakestates, Steelcase, Inc. and SFSI will be collectively referred to as the Steelcase Parties. Holland will be referred to separately.

[2] There have been several appeals from the bankruptcy court in this case. In one appeal, the Steelcase Parties appealed from the denial of a motion for a preliminary injunction to enjoin Spradlin from violating the NCA. The Court affirmed the bankruptcy court. *See* Order dated January 5, 2000. The second appeal was Spradlin's appeal from the bankruptcy court's determination that Michigan law exempts only one of Spradlin's Individual Retirement Accounts, which the parties settled prior to a decision by the Court. The third appeal followed the bankruptcy court's findings and fact and conclusions of law on counts I and II of the Steelcase Parties' counter claim. As to Count I, the bankruptcy court found that the NCA was a dischargeable debt. As to Count II, the bankruptcy court found that Spradlin unlawfully converted a 1993 Ford Dump Truck, a laptop computer, and a set of four first-row Red Wings season tickets, and therefore these debts were not dischargeable. The Bankruptcy Court also found that a 1994 Jet Ski trailer, a 1994 Chrysler Wagon, a 1995 Pontiac Bonneville, a 1994 Dodge Viper, an expensive red amber vase, and certain checks were not unlawfully converted and therefore dischargeable debts. The Court affirmed the bankruptcy court on both counts. *See* Memorandum and Order dated January 5, 2001.

> On October 28, 1996, the parties signed a "Non-Competition Agreement"
>
> Pursuant to the NCA, Spradlin and the dealerships agreed **[**4]** that they would "not compete, directly or indirectly, in any manner with Lakestates in any part of [Michigan or Ohio] in the office and commerical furniture businesses.
> The agreement not to compete was to run for a period of five years, commencing from the date the NCA was executed.
>
> The following consideration was to be paid by the Steelcase Parties in exchange for the covenants set forth in the NCA (i) $ 900,000 and $ 100,000 to the dealerships and Spradlin, respectively, upon execution of the NCA; and (ii) **[*833]** $ 500,000 to the dealerships on October 28, 2001 [the date the NCA expired].
> In June of 1997, Lakestates' interest in the NCA, along with other Lakestates assets, was purchased by [Holland]
> On March 13, 1998, Spradlin filed a petition for relief under title 11 of the United States Code. The case is currently pending under chapter 7 of the Bankruptcy Code.
>
> The Steelcase Parties and Holland (collectively, the "Creditors") filed a proof of claim based in part upon breach of the NCA. Spradlin, against whom the Creditors have a pending action seeking denial of discharge pursuant to various provisions under *11 U.S.C. § 727(a)*, objected to allowance of **[**5]** the claim .... Each side has filed a motion for partial summary judgment based solely on the breach-of-contract issue ....

III. Standard of Review

This Court has jurisdiction to hear the appeal pursuant to *28 U.S.C. § 158*. ***HN1***[] The Bankruptcy Court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo.* *In re Baker & Getty Financial Serv., Inc., 106 F.3d 1255, 1259 (6th Cir. 1997)*; *In re Arnold, 908 F.2d 52 (6th Cir. 1990)*; *In re Gibson Group, 66 F.3d 1436 (6th Cir. 1995)*.

IV. Analysis

A. Standing

The bankruptcy court held that only Holland has standing to enforce the NCA because Lakestates assigned its interests in the NCA to Holland and thus lacks standing. The bankruptcy court also found that SFSI and Steelcase lacked standing because even though they were parties to the SSA and paid Spradlin $ 100,000.00, they lacked standing because the non-competition agreement precludes competition only with Lakestates.

On appeal, the Steelcase Parties admit that "the issue of standing is largely academic because it is undisputed that [Holland] has standing to enforce the **[**6]** NCA." Steelcase Parties' brief on appeal at p. 36 n.38. Spradlin argues that the bankruptcy court did not err because the plain language of the NCA states that the right to recover damages for breach of the NCA vests only with Holland.

Spradlin's argument is well-taken. Paragraph 1A of the NCA state that "the CI Parties [Spradlin and the CI companies] shall not compete, directly or indirectly, in any manner with the Company ...." The Company is defined in the NCA as Lakestates, which later sold its assets to Holland. Moreover, paragraph 6, entitled "Binding Effect and Benefits" states that "This Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against ... the successor and assigns of the Company [Lakestates]. Nothing in this Agreement, express or implied, is intended to confer upon any other person any rights or remedies under or by reason of this Agreement except as expressly stated in this Agreement." Paragraph 7, entitled "Amendments and Waivers," states "This Agreement may be amended, modified, superseded, or canceled, and any terms of this Agreement may be waived, only by a written instrument signed by the CI Parties and the Company [Lakestates] **[**7]** and approved by the Company's Board of Directors. The failure of the Company at any time to require performance of any provision of this Agreement shall not affect the right of the Company at a later time to enforce that or any other provision ...." The bankruptcy court correctly interpreted these provisions as "indicating quite clearly that this right [to **[*834]** recover damages should Spradlin violate the NCA] vested solely in Lakestates." bankruptcy opinion at p. 5. Because it is undisputed that Lakestates assigned all of its rights under the NCA to Holland, the bankruptcy court did not err in holding that Holland is the only party with standing to enforce the NCA.

B. Enforceability of the NCA

1. Michigan Law

As to whether the NCA is enforceable, the bankruptcy court correctly began with an examination of Michigan's Antitrust Reform Act (MARA), *M.C.L. § 445.771, et seq.* *Section 445.772* states that ***HN2***[] "[a] contract ... between 2 or more person in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." [3] The bankruptcy court also correctly found that non-competition agreements, such as the NCA at issue here, are within the scope of MARA. The bankruptcy **[**8]** court was also correct in finding that MARA prohibits only *unreasonable* trade restraints. *See* bankruptcy opinion at p. 9.

The bankruptcy court, however, agreed with Spradlin's argument [4] that the NCA was not enforceable because goodwill was not among the assets acquired by the SSA. [5] **[**11]** This is where the Court's agreement with the bankruptcy court ends. The starting point in this analysis is Michigan ***antitrust law*** [6] and non-competition agreements as viewed as an unlawful restraint on trade. An excellent overview of the subject is found in the Michigan Court of Appeals' recent decision in *Bristol Window and Door, Inc. v. Hoogenstyn, 250 Mich. App. 478, 650 N.W.2d 670 (2002)* where the court of appeals detailed the history of Michigan law in this area and concluded that the rule of law in Michigan with respect to non-competition agreements is as follows:

> **Our review of the history** **[**9]** of restraint of trade law in Michigan makes clear, the common law in Michigan contemplated the enforceability of noncompetition agreements that qualified as reasonable. ***Hubbard, supra* at 19; *Cardiology Associates of Southwestern Michigan, PC v. Zencka, 155 Mich. App. 632, 636, 400 N.W.2d 606 (1985)*.** The Legislature's enactment of former *M.C.L. § 445.761* altered the common-law rule from 1905 until 1985, when the MARA replaced it. ***Cardiology Associates, supra at 636-637, 400 N.W.2d 606*.** The Legislature's repeal of and decision not to reenact former *M.C.L. § 445.761*, which was in derogation of the common law, clearly demonstrates **[*835]** the Legislature's intent to revive the common-law rule set forth in ***Hubbard, supra* at 19, that *HN3*[] the enforceability of noncompetition agreements depends on their reasonableness.** *People v. Reeves, 448 Mich. 1, 8, 528 N.W.2d 160 (1995)*, superseded by statute on other grounds as recognized in *People v. Nowack, 462 Mich. 392, 400-401, 614 N.W.2d 78 (2000)* (explaining that "the repeal of a statute revives the common-law rule as it was before the statute was enacted"). **[**10]**
>
> ....

Bristol, 250 Mich. App. at 494-95 (emphasis added). The Court accepts the Michigan Court of Appeals' decision as the controlling rule of law in Michigan in the absence of any Michigan Supreme Court decision to the contrary.

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[3] This section, known as section 2 of MARA was derived from section 2 of the Uniform State Antitrust Act.

[4] Spradlin also argued that the NCA was not enforceable under a so-called "Negative-Inference Theory," under which Spradlin argued that under MARA, all non-competition agreements other than those between an employer and an employee are invalid. The bankruptcy court rejected this argument, and Spradlin does not raise it on appeal.

[5] The bankruptcy court based its determination that no good will from Spradlin and the CI companies was given as part of the transfer of assets to the Steelcase Parties on the deposition testimony of William Geiger, who managed the CI companies for Steelcase and was a negotiator for SFSI in the SSA, and who stated that in his opinion, the Steelcase Parties did not purchase any good will as part of the SSA and NCA. Even assuming that the bankruptcy court was correct in holding that the failure to include good will dooms the NCA, this is scanty evidence. Also noteworthy is Spradlin's statement that there was no good will left in the CI companies at the time the SSA was executed because Steelcase had "looted" the CI companies.

[6] The parties agree that Michigan law applies. The NCA states as much. *See* P 11.

Thus, the test for whether or not a non-competition agreement is enforceable is reasonableness. *Hubbard v. Miller, 27 Mich. 15 (1873)*, a case cited by the bankruptcy court, set forth this very rule, as noted by the Michigan Court of Appeals in *Bristol.* A fair reading of *Hubbard,* however, does not support the bankruptcy court's view that a non-competition agreement made in connection with a sale or transfer of a business must also include the sale or transfer of goodwill in order to meet a threshold standard of reasonableness. *Hubbard* does not mention good will specifically as a requirement for enforceability of a non-competition agreement. In fact, *Hubbard* frames ***HN4***[] the test for reasonableness as follows:

> But if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, **[**12]** for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specifically injurious to the public, the restraint will be held valid.

Hubbard, 27 Mich. at 19. The bankruptcy court did not apply this test in determining whether the NCA is enforceable.

To be sure ***HN5***[] good will may be an important component of a transfer or sale of a business and is, as the bankruptcy court noted, "relevant to the issue of reasonableness." The Steelcase Parties do not dispute this. However, the bankruptcy court went too far in holding that it is an absolute prerequisite to enforcement of a non-competition agreement. The bankruptcy court apparently became so caught up with the presence of good will that it failed to apply "the rule of reason" to test the enforceability of the NCA.

The bankruptcy court's discussion of good will really relates more to the issue of whether there was adequate consideration given for the NCA, which could be a factor in determining whether the NCA itself is reasonable. Indeed, that it was the bankruptcy court appears to be saying at pages 20-22 of its opinion.

Overall, the Court finds the **[**13]** bankruptcy court erred in its decision regarding of the enforceability of the NCA by not applying the common law rule of reasonableness as set forth in *Hubbard.* Having made this determination, the Court will then address whether the NCA is enforceable under Michigan law, [7] *i.e.* whether the NCA is reasonable.

[*836] 2. Application

Applying the rule of reasonableness, the Court finds the NCA is enforceable as a matter of law despite Spradlin's arguments to the contrary. First, it is limited in geographic scope, namely to Michigan and Ohio. It is reasonable as to subject **[**14]** matter-it only limits Spradlin from engaging in the office furniture business; it does not deny him the ability to engage in other businesses. It is reasonable as to duration-five years. It is also reasonable given the circumstances of the parties relationship-it was executed in connection with the transfer of Spradlin's businesses, the CI companies, to the Steelcase Parties and as such was entered into to protect the assets that the Steelcase Parties acquired from Spradlin by prohibiting him from competing with them.

3. Good Will

Although the bankruptcy court found that no good will was transferred relying on the testimony of Geiger, the Court is hard-pressed to conclude that good will was at least implicit in the transfer. ***HN6***[] Good will has been defined as "the privilege, granted by the seller of a business to the purchaser, of trading as his recognized successor; the possession of a ready-formed 'connexion' of customers, considered as an element in the saleable value of a business, additional to the value of the plant, stock-in-trade, book-debts, etc." Oxford English Dictionary, on-line

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[7] The Court's decision to analyze whether the NCA is reasonable under Michigan law logically follows from the contemporaneous order withdrawing the order of reference to the bankruptcy court. As indicated at the hearing on August 28, 2002, the Court desires to proceed expediently with this case. Moreover, the parties' papers addressed the issue of whether the NCA is reasonable and the Court is satisfied with the parties' presentation of the issue.

edition, available at www.oed.com. Here, Spradlin transferred the assets of the CI companies to **[**15]** the Steelcase Parties under the Surrender and Settlement Agreement, and although the parties did not explicitly state that the good will of the CI companies was also being transferred, it is difficult to see how good will was also not transferred. The Steelcase Parties essentially obtaining Spradlin's office furniture business and then, though Holland, began to engage in the office furniture business with those same assets. Although Spradlin says that his businesses were no longer operating at the time of the Surrender and Settlement Agreement, that does not mean that there was no good will to give. Even if no longer operating, the CI companies still retained the intangible elements of good will such as its network of customers. Good will had to have been part of the transfer because otherwise, as noted at the hearing, the $ 100,000 given to Spradlin personally for his promise not to compete in the office furniture business would have been a mere gratuity.

C. Damages

The bankruptcy court also held that the Steelcase Parties were not entitled to the return of the $ 100,000.00 paid to Spradlin upon execution of the NCA because Holland did not offer any evidence of its damages. The **[**16]** issues of what damages Holland incurred as a result of Spradlin's alleged breach and whether Spradlin must return only the $ 100,000.00 are premature.

SO ORDERED.

/s/

AVERN COHN

UNITED STATES DISTRICT JUDGE

Dated: October 3, 2002

Detroit, Michigan

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Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1

United States Court of Appeals for the Fifth Circuit

October 9, 2002, Decided

No. 01-30171

Reporter
309 F.3d 836 *; 2002 U.S. App. LEXIS 21103 **; 2002-2 Trade Cas. (CCH) P73,830

SURGICAL CARE CENTER OF HAMMOND, L.C., doing business as St. Luke's Surgicenter, Plaintiff-Appellant, versus HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, doing business as North Oaks Medical Center; QUORUM HEALTH RESOURCES, INC., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Louisiana. 97-CV-1840-D. A J McNamara, Chief Judge.

Disposition: Affirmed.

Core Terms

district court, outpatient, monopolize, inpatient, Sherman Act, geographic, surgery, market power, Monopolies, surgical, conspiracy claim, discretionary, antitrust, immunity, amend, unfair trade practice, relevant market, monopoly power, managed care, probability, leveraging, predatory, prevail

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN1[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Defenses

HN3[] Sherman Act, Claims

To prevail on its attempted monopolization claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a claimant has to prove (1) that the defendant has engaged in predatory or exclusionary conduct with (2) a specific intent to monopolize the relevant market and (3) a dangerous probability of achieving monopoly power.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Healthcare Law > Managed Healthcare > General Overview

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

HN4[] Standards of Review, Clearly Erroneous Review

An appellate court reviews legal questions de novo but will set aside a district court's findings of fact only if clearly erroneous. *Fed. R. Civ. P. 52(a)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] Monopolies & Monopolization, Actual Monopolization

Any theory of monopolistic leveraging first depends on proof that a defendant possesses market power in a relevant market, power that it then extends into a plaintiff's market. This inquiry, in turn, requires a clear definition of the relevant geographic market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN6[] **Market Definition, Relevant Market**

To establish § 2 of the Sherman Act, 15 U.S.C.S. § 2, violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market. Critically, evidence must be offered demonstrating not just where consumers currently purchase the product, but where consumers could turn for alternative products or sources of the product if a competitor raises prices. The possibilities for substitution must be considered.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN7[] **Monopolies & Monopolization, Actual Monopolization**

In the context of a geographic market in monopolization claims, the United States Court of Appeals for the Eighth Circuit has emphasized that a hospital's trade area is not necessarily the relevant geographic market for purposes of antitrust analysis because geographic market evidence must take into account where consumers could practicably go, not on where they actually go.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN8[] **Standards of Review, Abuse of Discretion**

Although the question whether to grant leave to amend a complaint is reviewed for an abuse of discretion, a district court must have a substantial reason to deny a request for leave to amend.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN9[] **Sherman Act, Claims**

To show that a hospital's tying of inpatient care to outpatient surgical care violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a competitor must prove that (1) the hospital has appreciable economic power in the market for inpatient care (the tying market), and (2) the tying arrangement affects a substantial volume of commerce in the market for outpatient surgical care (the tied market). Consequently, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN10[] **State & Territorial Governments, Claims By & Against**

See *La. Rev. Stat. Ann. § 9:2798.1(B)*.

Governments > State & Territorial Governments > Claims By & Against

HN11[] **State & Territorial Governments, Claims By & Against**

See *La. Rev. Stat. Ann. § 9:2798.1(C)(1)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN12[] **Monopolies & Monopolization, Actual Monopolization**

See *La. Rev. Stat. Ann. § 51:123*.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN13[] **Trade Practices & Unfair Competition, State Regulation**

Louisiana Unfair Trade Practices Act (LUTPA) prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce. *La. Rev. Stat. Ann. § 51:1405*. A business practice is considered "unfair" if it offends established public policy and is unethical, oppressive, unscrupulous, or substantially injurious. A business practice is "deceptive" for purposes of LUTPA when it amounts to fraud, deceit or misrepresentation.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN14[] **Regulated Practices, Trade Practices & Unfair Competition**

Louisiana Unfair Trade Practices Act does not prohibit the exercise of permissible business judgment. The statute does not forbid a business to do what everyone knows a business must do: make money. Businesses in Louisiana are still free to pursue profit, even at the expense of competitors, so long as the means used are not egregious.

Counsel: For SURGICAL CARE CENTER OF HAMMOND LC, Plaintiff - Appellant: Murphy J Foster, III, Jeanne C Comeaux, Breazeale, Sachse & Wilson, Baton Rouge, LA.

For HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, QUORUN HEALTH RESOURCES INC, Defendants - Appellees: Harry Joseph Philips, Jr, Gerald L Walter, Jr, Taylor, Porter, Brooks & Phillips, Baton Rouge, LA. Daniel M Mulholland, III, Horty Springer & Mattern, Pittsburgh, PA.

NEW YORK STATE ASSOCIATION OF AMBULATORY SURGERY CENTERS INC, Amicus Curiae: William George Kopit, Epstein, Becker & Green, Washington, DC.

Judges: Before KING, Chief Judge, JONES and DENNIS, Circuit Judges.

Opinion by: EDITH H. JONES

Opinion

[*838] EDITH H. JONES, Circuit Judge:

Surgical Care Center contends that North Oaks Medical Center, a public hospital, has violated the Sherman Antitrust Act and Louisiana statutes governing monopolies and unfair trade practices. The district court conducted a bench trial and entered judgment for North Oaks. We find neither clear error in the fact findings nor any errors of law on the issues tried by the court. Accordingly, the judgment of the district court is AFFIRMED.

I. BACKGROUND

Surgical Care Center of Hammond is a limited liability company doing business as St. Luke's Surgicenter, an outpatient surgery clinic that opened in 1996 in Hammond, Louisiana. The Hospital Service District No. 1 of Tangipahoa Parish is a political subdivision of the State of Louisiana that operates North Oaks Medical Center, the largest hospital in the Hammond area. North Oaks offers a full range of inpatient and outpatient services, including outpatient surgery. Quorum Health Resources, Inc. manages the North Oaks facilities.

[2]** St. Luke's brought this action against North Oaks and Quorum, alleging that their trade practices violated the Sherman Act, *15 U.S.C. §§ 1-2*; the Louisiana Monopolies Act, *LA. REV. STAT. ANN. § 51:123*; and the Louisiana Unfair Trade Practice and Consumer Protection Act, *LA. REV. STAT. ANN. § 51:1405*.

St. Luke's contends that North Oaks is attempting to monopolize the outpatient surgery market by exploiting its market power over inpatient care and, more specifically, by pressuring managed care companies to use North Oaks exclusively for both inpatient and outpatient care. [1] According to St. Luke's, these exclusive agreements and the

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[1] The "exclusive" contracts entitled HMO's or Preferred Provider organizations (PPO's) to up to a 25% discount of billed charges if the provider designated North Oaks as the sole provider of certain medical services, including outpatient surgery, within a designated geographic area.

"tying" of inpatient and outpatient care are violations of both federal and state antitrust laws. St. Luke's also alleges that North Oaks refused to sign a patient transfer agreement with St. Luke's, refused to sign a blood type and cross match agreement, refused to lend medical equipment to St. Luke's, and engaged in various unfair employment practices.

[3]** After the issue of "state action immunity" was resolved, [2] the district court tried the case and entered judgment for the defendants on all claims. The district court concluded, first, that St. Luke's did not prove attempted monopolization of outpatient surgery under *§ 2* of the Sherman Act. [3] According to the district court, St. **[*839]** Luke's evidence established neither predatory conduct by North Oaks nor a dangerous probability that North Oaks would achieve monopoly power in the outpatient surgery market. Second, the district court ruled that St. Luke's could not prevail on its conspiracy claim under *§ 2* of the Sherman Act because North Oaks and Quorum (*qua* principal and agent) are incapable of conspiring with one another to violate antitrust laws. Finally, the district court ruled that North Oaks was entitled to "discretionary act immunity" shielding it from liability under both the Louisiana Monopolies Act and the Louisiana Unfair Trade Practices Act. The district court did not address St. Luke's claims under *§ 1* of the Sherman Act [4] because, prior to trial, the court ruled that St. Luke's complaint had not included *§ 1* claims and then denied St. Luke's request to amend its **[**4]** complaint. St. Luke's now appeals.

II. DISCUSSION

A. Attempted Monopolization

HN3[] To prevail on its attempted monopolization claim under *§ 2*, St. Luke's had to prove (1) that North Oaks **[**5]** engaged in predatory or exclusionary conduct with (2) a specific intent to monopolize the relevant outpatient surgery market and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890- 91, 506 U.S. 447, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. The district court found, first, that the business practices of which St. Luke's complained all had a legitimate business justification and thus could not be deemed predatory or exclusionary under *Taylor Publishing Co. v. Jostens, Inc., 216 F.3d 465, 474-76 (5th Cir. 2000)*. Alternatively, the district court ruled that St. Luke's had not shown a dangerous probability that North Oaks would achieve monopoly power in the outpatient surgery market. ***HN4***[] We review legal questions *de novo* but will set aside the district court's findings of fact only if clearly erroneous. *FED. R. CIV. P. 52(a)*.

We need address only the third element: the probability of achieving monopoly power. St. Luke's bases its attempted monopolization claim on North Oaks's contracts with managed care providers. Essentially, if a managed care provider agreed to use North Oaks for outpatient surgical **[**6]** services, then North Oaks would offer substantial discounts on prices for inpatient care. St. Luke's alleged that North Oaks, by entering into these exclusive agreements, "used or leveraged its dominant market power in the inpatient hospital services market in an attempt to gain similar market power . . . in the outpatient surgical services market." This court has not ruled on monopolistic leveraging as a distinct *§ 2* offense, and we do not do so here. See *Eleven Line, Inc. v. North Texas State Soccer Assoc., Inc., 213 F.3d 198, 206 n.16 (5th Cir. 2000)*; 3 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P

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[2] See Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. *Dist. No. 1 of Tangipahoa Parish, 171 F.3d 231, 232 (5th Cir. 1999)*(en banc) (holding that the Louisiana legislature "did not make sufficiently clear an intent . . . to insulate its creature of state government from the constraints of the Sherman Antitrust Act. . . .").

[3] ***HN1***[] *Section 2* of the Sherman Act makes it unlawful for any person or firm to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*.

[4] ***HN2***[] *Section 1* of the Sherman Act provides that "Every contract . . . or conspiracy, in restraint of trade or commerce among the several states" is illegal. *15 U.S.C. § 1*.

652 (2d ed. & 2002 Supp.). But like the district court, we find that St. Luke's claim of monopolistic leveraging fails on its own terms.

The district court noted that ***HN5***[] any theory of monopolistic leveraging first depends on proof that the defendant possesses market power in a relevant market, power that it then extends into the plaintiff's market. This inquiry, in turn, requires a clear definition of the relevant geographic market. See, e.g., *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516 (5th Cir. 1982)*. As we have held,

> ***HN6***[] To establish **[**7]** *Section 2* violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant **[*840]** market. . . . Critically, evidence must be offered demonstrating not just where consumers currently purchase the product, but where consumers could turn for alternative products or sources of the product if a competitor raises prices. The possibilities for substitution must be considered.

Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, 123 F.3d 301, 311 (5th Cir. 1997)(citations omitted). In a similar case, the ***HN7***[] Eighth Circuit emphasized that a hospital's "trade area is not necessarily the relevant geographic market for purposes of antitrust analysis" because geographic market evidence must take into account "where consumers could practicably go, not on where they actually go." *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 662 (8th Cir. 2000)*(internal quotation marks omitted).

Nevertheless, St. Luke's expert did not attempt to identify the hospitals or clinics that may be deemed competitors of North Oaks. He relied solely on what he defined as North Oaks's service area to compose the geographic market. **[**8]** Absent a showing of where people could practicably go for inpatient services, St. Luke's failed to meet its burden of presenting sufficient evidence to define the relevant geographic market. Without a proper market definition, St. Luke's could not establish the predicate of a monopolistic leveraging claim, i.e., market power in the market for inpatient hospital services, and thus could not show a dangerous probability that North Oaks would gain monopoly power in the outpatient surgery market. The district court, after carefully analyzing the reports presented by experts for both St. Luke's and North Oaks, found that St. Luke's had not adduced sufficient evidence to delineate the relevant geographic market.

St. Luke's counters that a detailed analysis of the relevant geographic market is not necessary under *Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. To prevail on this argument, St. Luke's would have to persuade this court that, even with Indiana Federation is applicable to cases involving vertical restraints, the district court clearly erred when it did not find "actual, sustained adverse effects **[**9]** on competition." *Id., 476 U.S. at 461, 106 S. Ct. at 2019*. St. Luke's has failed to do this.

We hold that the district court did not err in dismissing St. Luke's claims of attempted monopolization because St. Luke's failed to meet its burden of presenting sufficient evidence to define the geographic market. [5]

[10]** B. Conspiracy to Monopolize

St. Luke's contends that North Oaks and Quorum (the company that manages North Oaks) conspired to monopolize the outpatient surgical market. See *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Centers, Inc. 200 F.3d 307, 316 (5th Cir. 2000)*(listing the elements of a conspiracy claim under *§ 2*).

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[5] The district court alternatively ruled that even if one were to accept St. Luke's definition of the outpatient surgery market as limited to North Oaks's service area, St. Luke's still had failed to show a dangerous probability of North Oaks' achieving monopoly power. The district court emphasized that (1) North Oaks' 42-44% share of the outpatient surgery market (as narrowly defined by St. Luke's) was not dominant; (2) St. Luke's expert opined that there are "few if any classic barriers to entry into the ambulatory surgical services market"; (3) St. Luke's obtained 24.7% of the outpatient surgery market in its first full year of operations, even though North Oaks already had entered into exclusive agreements with several managed care companies; and (4) St. Luke's expert admitted that North Oaks would have only a "very limited ability" to raise prices above the competitive level if St. Luke's went out of business.

[*841] The district court dismissed the conspiracy claim because "as a matter of law, a corporation and its agent [i.e., North Oaks and Quorum] are incapable of conspiring with one another to violate the antitrust laws." This general rule is correct, and none of the recognized exceptions applies to this case. See, e.g., *Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1135-37 (3d Cir. 1995)*. [6] The district court did not err in dismissing St. Luke's conspiracy claim under *§ 2* of the Sherman Act.

[11]** C. Tying and Exclusive Contracts

St. Luke's alleged in its complaint that North Oaks had illegally "tied" its outpatient services to inpatient services by entering into exclusive dealing contracts with managed care providers, in violation of both *§ 1* and *§ 2* of the Sherman Act.

Nevertheless, not long before the trial began, the district court indicated that the only issues properly presented in the complaint were St. Luke's Sherman Act *§ 2* and state law claims. St. Luke's disagreed with the court's characterization of the complaint and sought to amend the complaint. The district court denied St. Luke's motion and wrote that the proposed amendment "was more than a mere attempt to *clarify* the original and First Amended Complaints. Rather, it was clearly *adding* a *Section 1* Sherman Act claim, and thus expanding the nature of the case." ***HN8***[] Although the question whether to grant leave to amend a complaint is reviewed for an abuse of discretion, a district court "must have a 'substantial reason' to deny a request for leave to amend." *Lyn-Lea Travel Corp. v. American Airlines, 283 F.3d 282, 286 (5th Cir. 2002)*. Because the factual allegations supporting the *§ 1* **[**12]** claims were described in the complaint and, furthermore, the complaint specifically referred to *§ 1* of the Sherman Act, the district court abused its discretion in not allowing St. Luke's to amend its complaint.

The question that next arises is whether to remand the case for a trial on the *§ 1* claims. [7] We conclude that remand is unwarranted. Even if St. Luke's had been allowed to amend its complaint, St. Luke's could not have prevailed because its *§ 1* claims share certain elements with the *§ 2* claims, and St. Luke's failed to present evidence as to those common elements.

[13]** ***HN9***[] To show that North Oaks's tying of inpatient care to outpatient surgical care violates *§ 1* of the Sherman Act, St. Luke's must prove that (1) North Oaks has "appreciable economic power" in the market for inpatient care (the tying market), and (2) the tying arrangement "affects a substantial volume of commerce" in the market for outpatient surgical care (the tied market). *Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 2079, 119 L. Ed. 2d 265 (1992)*. Consequently, "any inquiry into the validity of a tying arrangement must focus on the market or markets in which **[*842]** the two products are sold, for that is where the anticompetitive forcing has its impact." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18, 104 S. Ct. 1551, 1561, 80 L. Ed. 2d 2 (1984)*. We need not remand the case for consideration of the tying claims because St. Luke's failure sufficiently to define the relevant geographic market for the tying product -- inpatient services -- also proves fatal to its tying claim under *§ 1*.

The exclusive dealing allegations fail for the same reason. To show that North Oaks's contracts with managed care companies **[**14]** constitute an unreasonable restraint on trade in violation of *§ 1*, St. Luke's had to prove that North Oaks engaged in concerted action that produced anticompetitive effects *in the relevant markets*, yet the

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[6] St. Luke's appears to concede this point in its brief, noting that the rule articulated by the district court "generally applies to St. Luke's Sherman Act claims . . . [but] has no application to St. Luke's allegations based on Louisiana's monopoly laws." The state law claims will be discussed below.

[7] St. Luke's argued in its brief to this court that remand was unnecessary because the record contained ample evidence of a *§ 1* violation. St. Luke's suggested that remand would be appropriate only if evidence as to any element of a *§ 1* violation was not allowed or was otherwise not presented at trial. At oral argument, though, St. Luke's counsel requested remand and stated that relevant *§ 1* evidence was either not presented or not admitted at trial. We will not permit an off-the-cuff statement to contradict the considered admission in St. Luke's brief.

market power of North Oaks in the tying market for inpatient health care simply was not established. See *Stewart Glass, 200 F.3d at 312*.

In sum, the district court's error in not allowing St. Luke's *§ 1* claims to be tried was harmless in light of St. Luke's failure properly to define the relevant market, and thereby prove North Oaks's market power.

D. Louisiana Law

The district court dismissed St. Luke's claims under both the Louisiana Monopolies Act and the Louisiana Unfair Trade Practices Act on the grounds that North Oaks, as part of a state-created hospital district, is entitled to "discretionary act immunity": ***HN10***[] "Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance of . . . their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." *LA. REV. STAT. ANN. § 9:2798.1(B)*. Because Louisiana hospital districts have the legal authority **[**15]** to enter into contracts to sell hospital health services, and because St. Luke's state-law claims were based on those acts, the district court ruled that North Oaks and its agent Quorum are entitled to immunity under state law.

St. Luke's points out, however, that ***HN11***[] public entities are not entitled to discretionary act immunity when the challenged acts "are not reasonably related to a governmental objective for which the policy-making or discretionary power exists." *LA. REV. STAT. ANN. § 9:2798.1(C)(1)*. The legislature's objectives in conferring authority on the hospital districts were, in the district court's words, to allow hospital districts "to compete effectively and equally in the market for health care services" and to cooperate with other firms to provide health care services to residents of the district. North Oak's business practices, according to St. Luke's, are not reasonably related to either of these objectives.

We need not reach the question of discretionary act immunity because St. Luke's state law claims necessarily fail for other reasons.

HN12[] The Louisiana Monopolies Act provides that "No person shall monopolize, or attempt to monopolize, or combine with any other person **[**16]** to monopolize any part of the trade or commerce within this state." *LA. REV. STAT. ANN. § 51:123*. Assuming *arguendo* that the Louisiana Monopolies Act applies to cases involving interstate commerce, [8] St. Luke's claims **[*843]** under the Louisiana Monopolies Act fail for the same reasons as its claims under *§ 2* of the Sherman Act. Specifically, St. Luke's could not show attempted monopolization because it failed to define the relevant geographic market and, moreover, the district court did not err in finding no evidence of predatory conduct or of entry barriers. St. Luke's could not prevail on its state law conspiracy claim because the failure to define the market precludes any finding of a substantial, anticompetitive effect in the relevant market.

[17]** We turn now to St. Luke's claims under the ***HN13***[] Louisiana Unfair Trade Practices Act (LUTPA), which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." *LA. REV. STAT. ANN. § 51:1405*. A business practice is considered "unfair" if it offends established public policy and is unethical, oppressive, unscrupulous, or substantially injurious. *Jefferson v. Chevron U.S.A. Inc., 713 So. 2d 785, 792-93 (La. 1998)*. A business practice is "deceptive" for purposes of LUTPA when it amounts to fraud, deceit or misrepresentation. Id.

As this court has pointed out, ***HN14***[] LUTPA does not prohibit "the exercise of permissible business judgment." *Turner v. Purina Mills, Inc., 989 F.2d 1419, 1422 (5th Cir. 1993)*("The statute does not forbid a business to do what everyone knows a business must do: make money. Businesses in Louisiana are still free to pursue profit, even at the expense of competitors, so long as the means used are not egregious."). In this case, the district court found (when analyzing the "predatory conduct" element of the conspiracy claim) that each of the complained-of acts had a

[8] The parties agree that this case involves interstate commerce, and there is a plausible argument that the Louisiana Monopolies Act applies only to wholly intrastate restraints on trade. *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc., 271 F.3d 186, 189 (5th Cir. 2001)*(noting that the question is unresolved); *Free v. Abbott Labs., Inc., 164 F.3d 270, 276 (5th Cir. 1999)*(certifying question to Louisiana Supreme Court), *certified question denied by*, ***739 So. 2d 216 (La. 1999)***.

permissible business justification. St. **[**18]** Luke's has not articulated why the district court's findings were clearly erroneous.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in dismissing the plaintiff's antitrust claims. The judgment is

AFFIRMED.

Livingston Downs Racing Ass'n v. Jefferson Downs Corp.

United States District Court for the Middle District of Louisiana

October 24, 2002, Decided ; October 25, 2002, Filed, Docket Entered

CIVIL ACTION No. 96-3430-D-M1 CONSOLIDATED WITH CIVIL ACTION No. 97-18-D-M1

Reporter
257 F. Supp. 2d 819 *; 2002 U.S. Dist. LEXIS 25180 **; 2003-1 Trade Cas. (CCH) P73,946

LIVINGSTON DOWNS RACING ASSOCIATION, INC. VERSUS JEFFERSON DOWNS CORPORATION, ET AL.; UNITED NATIONAL INSURANCE CORPORATION, ET AL. VERSUS JEFFERSON DOWNS CORPORATION, ET AL.

Subsequent History: Motion to strike granted by, Claim dismissed by *United Nat'l Ins. Corp. v. Jefferson Downs Corp., 2003 U.S. Dist. LEXIS 22587 (M.D. La., Dec. 12, 2003)*

Prior History: *Livingston Downs Racing Ass'n v. Jefferson Downs Corp., 192 F. Supp. 2d 519, 2001 U.S. Dist. LEXIS 13156 (M.D. La., 2001)*

Disposition: **[**1]** Defendants' Motions for Summary Judgment granted in part and denied in part. Defendants' Motion for Partial Summary Judgment on issue of damages denied without prejudice. Defendants' Motions in limine denied.

Core Terms

conspiracy, Grounds, racing commission, antitrust, Sherman Act, conspire, horse racing, racetrack, monopolize, damages, mail fraud, parlors, courts, ownership, Gambling, alleges, deceive, summary judgment, campaign, lawsuit, mail, motions, non-moving, documents, plurality, parties, racing, cases, summary judgment motion, scheme to defraud

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN1[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeering Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. § 1964(c)* allows parties injured by violations of RICO to recover damages.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Discovery, Methods of Discovery**

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

HN3[] **Burdens of Proof, Movant Persuasion & Proof**

In the summary judgment context, when the burden at trial rests on the non-moving party, the moving party need only demonstrate that the record lacks sufficient evidentiary support for the non-moving party's case. The moving party may do this by showing that the evidence is insufficient to prove the existence of one or more elements essential to the non-moving party's case.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Summary Judgment, Burdens of Proof**

Although the court considers the evidence in the light most favorable to the non-moving party, the non-moving party may not merely rest on allegations set forth in the pleadings. Instead, the non-moving party must show that there is a genuine issue for trial. Conclusory allegations and unsubstantiated assertions will not satisfy the non-moving party's burden. If, once the non-moving party has been given the opportunity to raise a genuine factual issue, no reasonable juror could find for the non-moving party, summary judgment will be granted for the moving party.

Contracts Law > Statute of Frauds > Requirements > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN5[] **Statute of Frauds, Requirements**

The word "defraud" in the mail and wire fraud statutes, *18 U.S.C.S. §§ 1341* and *1343*, still signifies the deprivation of something of value by trick, deceit, chicane, or overreaching.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN6[] Fraud Against the Government, Mail Fraud

One cannot commit fraud by fooling one person to receive something of value from another.

Civil Rights Law > ... > Section 1983 Actions > Elements > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

HN7[] Section 1983 Actions, Elements

To sustain a mail fraud claim, a plaintiff must allege and prove (1) a scheme or artifice to defraud and (2) execution of that scheme by use of interstate mails. To be a scheme to defraud, the object must be deprivation of a property interest.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN8[] Monopolies & Monopolization, Actual Monopolization

An antitrust conspiracy under § 1 (15 U.S.C.S. § 1) of the Sherman Act requires that two persons act in concert. Regarding the importance of plurality for a § 1 claim, the Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by § 2 (15 U.S.C.S. § 2) of the Sherman Act alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination or conspiracy" between separate entities. It does not reach conduct that is "wholly unilateral."

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

The case law that has grown up around *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act establishes certain rules for individuating antitrust conspirators so that formal distinctions do not disguise actual unity. Individuation of conspirators turns on an inquiry into who controls the action and whether there is a unity of interests. A wholly owned subsidiary of a corporation cannot conspire with its parent corporation. Two subsidiaries wholly owned by the same parent corporation cannot conspire with their parent or with each other. The officers, directors, employees, representatives, and agents of a corporation cannot conspire with their corporate employer. Two corporations that are wholly owned by the same group of individuals cannot conspire with each other. It is also established as a matter of law that petitioned government actors cannot be antitrust co-conspirators.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN10[] **Antitrust & Trade Law, Sherman Act**

A conspiracy between the owners and their corporations is precluded unless the owners were acting in their own, rather than in the corporation's, interest. Two corporations with the same set of owners cannot conspire under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

There can be no *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act conspiracy between one corporation and another corporation that it legally controls.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

Where two people together are controlling the affairs of separate corporations those corporations cannot conspire under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

In the context of the control test under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, it does not seem relevant to ask, in the individual setting, whether the individual owner can force a merger between the two (or three) corporations.

Instead, what is important is whether the individual can control the policies of both (or all) corporations. If so, then there can be no conspiracy between (or among) the corporations.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

Whether an antitrust conspiracy is possible does not require a factual determination. It is not necessary to conduct a factual inquiry to determine whether a parent and a subsidiary over which the parent has legal control can conspire in violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. A parent and a wholly-owned subsidiary are considered the "same entity" for antitrust purposes because the parent has the power to exercise full control over its subsidiary. For the same reasons, a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] Antitrust & Trade Law, Sherman Act

In order properly to allege that an employee or agent of a corporation has entered a conspiracy with other employees or the corporation, a plaintiff must allege that the employee or agent was acting outside of her normal employment capacity.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Agency Relationships > General Overview

HN16[] Antitrust & Trade Law, Sherman Act

For the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains.

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Antitrust & Trade Law, Sherman Act

To be an antitrust co-conspirator, a defendant must have consciously adopted the antitrust scheme.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

Both the Noerr-Pennington doctrine and the Parker doctrine exempt from antitrust liability any conspiracy between a private actor and a government actor unreasonably to restrain trade on the ground that the Sherman Act should not be interpreted--and was not intended--to extend to acts of petitioning the government. The Noerr-Pennington doctrine and the Parker doctrine are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the State's acts of governing, and the latter the citizens' participation in government. It does not matter that the government and the private business interest entered an agreement that would result in a restraint of trade, even if that agreement, between private actors, would constitute an antitrust conspiracy. Moreover, it does not matter that the agreement is corrupt.

Antitrust & Trade Law > Clayton Act > Penalties

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

HN19[] **Clayton Act, Penalties**

Section 1 (*15 U.S.C.S. § 1*) of the Sherman Act criminalizes every contract, combination or conspiracy, in restraint of trade or commerce. *Section 15* (*15 U.S.C.S. § 15*) of the Sherman Act allows parties injured by antitrust criminal violations to recover damages.

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

To establish an attempt to monopolize claim, the plaintiff must prove that the defendant or defendants (1) had the specific intent to monopolize, (2) took overt acts in furtherance of a scheme to monopolize, and (3) had a dangerous probability of success. A conspiracy to monopolize claim requires that the plaintiff show (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce. Hence, the burden under either theory of liability under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act is much greater than the burden under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN22[] **Scope, Exemptions**

The Noerr-Pennington and Parker immunity doctrines apply to both *§§ 1* and *2* (*15 U.S.C.S. §§ 1*, *2*) of the Sherman Act. There is no distinction among the sections of the Sherman Act when these doctrines are implicated.

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Antitrust & Trade Law, Sherman Act**

As under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, a *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act conspiracy claim requires a plurality of actors. In fact, the same unity of interest analysis that applies to a *§ 1* conspiracy applies to a *§ 2* conspiracy claim as well.

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

HN24[] **Private Actions, Remedies**

The standard of proof of the quantum of damages is less taxing than that for the fact of damages. A jury may determine the amount of damages using a just and reasonable estimate based on relevant data. Evidence may include probable and inferential as well as direct and positive proof, and need only avoid speculation or guesswork.

Counsel: For LIVINGSTON DOWNS RACING ASSOCIATION, INC., plaintiff (96-CV-3430): Provino C. Mosca, Mosca & Mosca, New Orleans, LA.

For LIVINGSTON DOWNS RACING ASSOCIATION, INC., plaintiff (96-CV-3430): David T. Ralston, Jr., Steven C. Lambert, Roderick B. Williams, Ransome Law Firm, Darlene Sansone Ransome, J. Marvin Montgomery, Baton Rouge, LA.

For UNITED NATIONAL INSURANCE CO, ASSICURAZIONI GENERALI, S.P.A., plaintiffs (97-CV-18): Gustave A. Fritchie, III, Irwin, Fritchie, Urquhart & Moore, L.L.C., New Orleans, LA.

For JEFFERSON DOWNS CORPORATION, defendant (96-CV-3430): Vance A. Gibbs, Charles S. McCowan, Jr., Bradley Charles Myers, Shannan Sweeney Rieger, Troy J. Charpentier, James P. Dore', Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, Baton Rouge, LA.

For UNITED NATIONAL INSURANCE CO, ASSICURAZIONI GENERALI, S.P.A., consolidated plaintiffs (97-CV-18): Gustave A. Fritchie, III, Irwin, Fritchie, Urquhart & Moore, L.L.C., New Orleans, LA.

Judges: JAMES J. BRADY, DISTRICT JUDGE, MIDDLE DISTRICT OF LOUISIANA.

Opinion by: JAMES J. BRADY

Opinion

[*820] **RULING & ORDER**

This matter is before the Court on motions for summary judgment filed **[**3]** by Jefferson Downs Corporation (doc. 635), The Committee to Control Gambling (doc. 629), Marie Krantz (doc. 618), Larry Bankston (doc. 650), Peter Henry (doc. 632), and George Boudreaux (doc. 626). Each request for summary judgment asserts several bases, many of them now irrelevant. Pending also is a motion for partial summary judgment on the issue of damages (doc. 665) and several motions *in limine* (docs. 622, 624, 658, and 660) filed by Fair Grounds, Finish Line, Bryan Krantz, Marie Krantz, the committee to Control Gambling, Peter Henry, and George Boudreaux. The Court considers whether the plaintiff, Livingston Downs Racing Association, Inc. has sufficiently supported its claims under (1) *§ 1964(c)* of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and (2) *§ 1* of the Sherman Act. Finding that the supporting evidence is insufficient for the action to survive summary judgment, the Court grants the **[*821]** motions of all these defendants with respect to all claims under RICO and *§ 1* of the Sherman Act. Since the Court determines that Livingston Downs may have stated a claim under *§ 2* of the Sherman Act, this ruling does not terminate the case entirely. Consequently, **[**4]** the other motions remain. The Court denies the motion for partial summary judgment and the motions *in limine,* though the remaining defendants may urge these motions again once the *§ 2* claims, if any, have been developed.

FACTUAL BACKGROUND

This case involves an alleged sweeping plan, implicating all the original defendants, to keep Livingston Downs out of the market for live horse racing and off-track betting ("OTB") in a portion of southeastern Louisiana. Livingston Downs alleges that Defendants proposed to effectuate their plan by tying it up in layers of government process. The Court presented the full details of the alleged scheme in its ruling of August 13, 2001 (doc. 557). [1] The Court adopts that version for the purpose of addressing these motions. Some additional facts are, however, needed for a complete disposition.

A. The Claims

[1] Published as ***Livingston Downs Racing Ass'n v. Jefferson Downs, Corp.,*** *192 F. Supp. 2d 519 (M.D. La. 2001)*.

A brief overview **[**5]** of the plan will provide some context. Live horse racing and OTB are heavily regulated markets in Louisiana, with very few government-approved participants. Marie and Bryan Krantz ("the Krantzes") are two of these participants. Until October of 1992, the Krantzes operated Jefferson Downs racetrack in Jefferson Parish, Louisiana. Sometime in 1990, they purchased a controlling interest in the Fair Grounds racetrack, which operates within one hundred miles of Jefferson Downs. These two racetracks were, at all relevant times, the only two in the area. The Krantzes also own Finish Line Management which itself operated OTB parlors associated with Jefferson Downs. Later, these parlors transferred to Fair Grounds when the Krantzes closed Jefferson Downs.

When Jefferson Downs stopped holding races, Al Ransome, owner of Livingston Downs saw a business opportunity. Because these gambling enterprises are highly regulated, to make a go of his proposed new racetrack in Livingston Parish, Ransome had to obtain the approval of the Louisiana State Racing Commission as well as the voters of Livingston Parish.

Allegedly, the Krantzes saw in the regulatory process their own business opportunity, namely **[**6]** to delay and perhaps frustrate a possible competitor by playing fast and loose with the procedures and institutions of the regulatory process. Livingston Downs claims that the Krantzes engaged in the following anticompetitive behavior: (1) they aggressively lobbied the state legislature and racing commission for favorable actions; (2) they attempted to delay the licensing process with the racing commission; (3) they filed frivolous lawsuits through corporations within their control and other straw-plaintiffs, without regard to the merits of their claims; and (4) they ran, via a freshly-minted alter-ego, an aggressive ad campaign aimed at convincing voters to reject new live horse racing operation. These endeavors, Livingston Downs claims, imposed costs in the form of legal fees and also ultimately succeeded in frustrating Livingston Downs' entry into the market, which caused it to lose expected profits.

[*822] B. The Parties

Any full understanding of this case requires a cast of characters. When Livingston Downs originally filed suit in this Court, it named seventeen defendants. [2] **[**8]** They are:

(1) Jefferson Downs Corporation;
(2) Fair Grounds Corporation;

(3) Finish Line **[**7]** Management Corporation;
(4) The Committee to Control Gambling, Inc.;
(5) Bryan Krantz;
(6) Marie Krantz;
(7) Karen Thomas;
(8) Terence Lee Odom;
(9) Peter Henry;
(10) George Boudreaux;
(11) Larry Bankston;
(12) Oscar Tolmas;
(13) Albert Stall;
(14) Payton Covington;

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[2] The vast number of named defendants and their very different relationships to each other and the complained of actions presents the Court with the possibility of unintended ambiguity. To minimize that possibility the Court adopts the following conventions for referring to the members of the defendant group and subgroups of it. Where it is possible to distinguish among the original defendants by referring to them individually or in easily denominated groups, the opinion will do so. When it is preferable to refer to groups of the defendants collectively, the following conventions will apply. When the word "defendant" is capitalized, it refers to all the persons and corporations who remained parties to the case before this ruling. Hence, "Defendants" refers to Jefferson Downs, Fair Grounds, Finish Line, Bryan Krantz, Marie Krantz, the Committee to Control Gambling, Peter Henry, George Boudreaux, and Larry Bankston. Where "defendants" is not capitalized, the word will refer to some other subgroup of the original defendants. The surrounding text will always provide the necessary context to tell precisely what subset of the original defendant group is intended.

(15) Melinda Tucker;
(16) Ben Thomas; and
(17) W.C. Littleton.

Livingston Downs retains claims against nine of these original defendants. Livingston Downs agreed to dismiss Oscar Tolmas, Albert Stall, Payton Covington, Melinda Tucker, Ben Thomas, and W.C. Littleton pursuant to a settlement. [3] The Court dismissed them on November 21, 1996 (doc. 50). Livingston Downs submitted a motion to dismiss Karen Thomas and Terrence Lee Odom on August 18, 1998 (doc. 249). The Court dismissed these defendants on October 22, 1998 (doc. 277). Remaining in the action are Bryan and Marie Krantz, four incorporated entities that they control in some degree, two people--Peter Henry and George Boudreaux--whom the Krantzes employed at the relevant times through three of these corporations, and Larry Bankston, attorney for the Krantzes and their corporations. Further introductions are in order.

[*823] **[**9]** *1. The Plaintiff: Livingston Downs* Racing Association

Livingston Downs Racing Association ("Livingston Downs") is a Louisiana corporation domiciled in the Parish of Livingston, Louisiana. In October of 1992, it began the process required to open a racetrack featuring live horse racing and to provide OTB parlors, which according to Louisiana statute may only be owned and operated by interests that also operate a horse racing establishment. [4] The horse racing business is tightly regulated by the State of Louisiana. Livingston Downs had the opportunity to open the track only because defendant corporation Jefferson Downs had decided to close its racetrack. Livingston Downs had to obtain a permit to operate a racetrack, gain a transfer of the license once held by Jefferson Downs to operate OTB parlors from the Racing Commission, and obtain the approval of the voters in Livingston Parish. Upon commencing to navigate these regulatory obstacles, Livingston Downs faced immediate resistance that it now attributes to the machinations of the Krantzes and their agents.

[10]** 2. *Jefferson Downs Corporation*

Jefferson Downs Corporation ("Jefferson Downs") is a Louisiana Corporation domiciled in Jefferson Parish, Louisiana. Until October, 1992, Jefferson Downs operated a racetrack that featured live horse racing. The racetrack was also called Jefferson Downs. In addition, Jefferson Downs housed several OTB parlors associated with its racetrack operations. In October, 1992, Jefferson Downs decided to close its racetrack. Because Louisiana state law limits the number of tracks that may operate within a region, this closure gave Livingston Downs the opportunity to open its own racetrack. Livingston Downs claims that Jefferson Downs, through its ownership, has been involved in the plan to keep Livingston Downs out of the market for live horse racing and OTB parlors throughout the relevant period. Jefferson Downs, among other parties, filed suit against the Louisiana State Racing Commission to

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[3] These dismissed defendants were all state actors. All but Melinda Tucker were members of the Louisiana State Racing Commission. Melinda Tucker worked as an Assistant Attorney General for the Louisiana Attorney General's Office. The settlement required the Louisiana State Racing Commission to grant Livingston Downs a license to operate its planned racetrack so long as Livingston Downs managed to obtain appropriate financial backing. Ultimately, the Commission refused the license because of a flaw with the financing. Livingston Downs sued to force the Commission to grant the license, but lost on appeal. ***Jefferson Downs Corp., Inc. v. Louisiana State Racing Commission,*** *751 So. 2d 465 (La.App. 4th Cir. 2000)*, *cert. denied,* ***531 U.S. 1011, 121 S. Ct. 565, 148 L. Ed. 2d 485 (2000)***, *rehearing denied* ***531 U.S. 1133, 121 S. Ct. 898, 148 L. Ed. 2d 804 (2001)***. This Court refused Livingston Downs' motion to bring these defendants back into this suit based on the alleged violation of their settlement. Doc. 428.

[4] *LA. REV. STAT. § 4:211, et seq.* The statute actually limits ownership and operation of OTB parlors in Louisiana to racetracks licensed before June 30, 1987. *LA. REV. STAT. § 4:211(5)*. Under that law, Livingston Downs could not obtain the OTB license once held by Jefferson Downs. Livingston Downs challenged that law on equal protection grounds in an independent lawsuit and ultimately lost on appeal. ***Livingston Downs Racing Ass'n v. State,*** *705 So. 2d 149 (La. 1997)*.

annul the license granted to Livingston Downs on December 10, 1992. [5] The reason for Jefferson Downs' continued interest is that its owners also control the only racetrack that was operating in the area at the time.

[11]** 3. *Finish Line Management Corporation*

Finish Line Management Corporation ("Finish Line") is a Louisiana Corporation conducting business in Orleans, Jefferson, St. Charles, St. Tammany, and Terrebonne Parishes. Finish Line Management at one time operated the OTB parlors associated with Jefferson Downs. After Jefferson Downs closed, Finish Line entered an agreement to continue operating those parlors for Fair Grounds Corporation. According to Livingston Downs, Finish Line, through its ownership, was involved in the plan to keep Livingston Downs out of the market for live horse racing and OTB parlors throughout the relevant period.

[*824] 4. *Fair Grounds Corporation*

Fair Grounds Corporation ("Fair Grounds") is a Louisiana corporation doing business in New Orleans. At the time of these events, Fair Grounds operated a racetrack that featured live horse racing. It also operated OTB parlors associated with its racetrack. Because Fair Grounds and Jefferson Downs operated within one hundred miles of each other, they were subject to a regulation that restricted them from holding racing on the same days. Because of this restriction, Fair Grounds held live horse racing only in the Fall and **[**12]** Winter while Jefferson Downs did so only in the Spring and Summer. After Jefferson Downs closed, Fair Grounds sought to acquire the license formerly held by Jefferson Downs to operate its OTB parlors. Livingston Downs claims that Fair Grounds, through its controlling owners, at all times participated in the plan to keep Livingston Downs out of the market for live horse racing and OTB parlors. Specifically, Fair Grounds acted, with Jefferson Downs, as a plaintiff in the action filed to declare the racing license a nullity. [6] It also filed a motion to quash subpoenas with the Racing Commission. Fair Grounds also intervened in Livingston Downs' lawsuit which sought to declare unconstitutional the statute which limited people who could operate OTB parlors. [7]

[13]** 5. *The Committee to Control Gambling*

The Committee to Control Gambling ("CCG") is a Louisiana corporation doing business in Baton Rouge, Louisiana. It was incorporated in early January of 1993, just a matter of days before the January 16 election which posed the question whether to approve the presence of live horse racing in their parish to the voters of Livingston Parish. Peter Henry appears as the President on the documents of incorporation and George Boudreaux appears as the Secretary-Treasurer. Immediately after incorporating, CCG began an aggressive--and some would say disingenuous--media campaign which sought to convince voters to reject the horse racing referendum. Livingston Downs complains that the campaign involved misrepresentations and that it was part of the scheme to frustrate or delay Livingston Downs' entry into the live horse racing and OTB parlor markets. By an earlier ruling, this Court held that whatever the provenance of Livingston Downs' claims, the activities of CCG were protected by the *Noerr-Pennington* doctrine and that CCG's campaigning could not be the basis for antitrust liability. ***Livingston Downs Racing Ass'n,*** *192 F. Supp. 2d 519, 531-32 (M.D. La. 2001)*. **[**14]**

6. *Peter Henry*

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[5] ***Jefferson Downs Corp., et al. v. Louisiana State Racing Comm'n,*** Suit No. 92-20961, Div. G, Civil District Court for the Parish of Orleans. Ultimately, the Louisiana Court of Appeals for the 4th Circuit upheld the licensing.

[6] ***Jefferson Downs Corp., et al. v. Louisiana State Racing Comm'n,*** Suit No. 92-20961, Div. G, Civil District Court for the Parish of Orleans.

[7] Suit # 399,563, 19th Judicial District Court. Livingston Downs ultimately lost this suit on appeal, as mentioned previously. ***Livingston Downs Racing Ass'n v. State,*** *705 So. 2d 149 (La. 1997)*.

Peter Henry is the President of CCG. He was also a long-time employee of Jefferson Downs and, after Jefferson Downs closed, Finish Line. **Depo. of Peter Henry** at 13-14. For both companies, Henry served in a maintenance position. ***Id.*** Of his job, he said, "I'm in a position that anyone that's in the office can give me orders. I don't question it. I just follow through." ***Id.*** at 18. When Henry heard talk about CCG he volunteered to Bryan Krantz to help. ***Id.*** at 24. Later two company people asked him to be the President. ***Id.*** at 25. He signed two documents, but otherwise had no CCG duties. ***Id.*** at 39. These claims by Henry are uncontested.

[*825] 7. *George Boudreaux*

George Boudreaux is the Secretary-Treasurer of CCG. He was also, at the relevant times, an employee of Fair Grounds. When he was in high school he worked weekends for Jefferson Downs. **Depo. of George Boudreaux** at 8. When he graduated in 1991 at age 19, he got a job at Fair Grounds, where he worked at an entry level job in marketing earning $ 200-250 a week. ***Id.*** at 8-10. Later he transferred to a job working for the Assistant Director of Operations **[**15]** at Fair Grounds. ***Id.*** at 10. Asked about his qualifications to act as secretary-treasurer for a corporation, he said he was young, "looking at this place being my future, holding on to a dream--that's what it was about." ***Id.*** at 29. He signed the incorporation documents to protect his employer. ***Id.*** He performed no other related duties. ***Id.*** at 44. These claims by Boudreaux are uncontested.

8. *Karen Thomas*

Karen Thomas was, at the relevant times, an employee in Larry Bankston's law office and a resident of Livingston Parish. After the Louisiana State Racing Commission granted Livingston Downs a racing permit, Jefferson Downs and Fair Grounds, among others, sued in Orleans Parish to annul it. After the Livingston Parish Police Jury added a proposition which would allow horse racing in Livingston Parish, the same defendants (as plaintiffs) amended their petition to force a stay of the referendum. In response, Al Ransome, President and Chairman of the Board of Livingston Downs, filed suit in Livingston Parish seeking a writ of mandamus directing the Secretary of State to hold the election. [8] **[**17]** Karen Thomas agreed to file an intervention in that **[**16]** suit. On January 11, 1993, after the trial court issued its writ of mandamus in favor of Livingston Downs, Thomas filed a notice of suspensive appeal and sought an emergency writ. The court of appeals denied the writ. The next day, Thomas took an emergency writ to the Louisiana Supreme Court, which that court also denied. That mandamus suit continued, despite the fact that the racetrack proposition passed on January 16, 1993, until it was dismissed as moot by the Louisiana First Circuit Court of Appeals on October 13, 1995. On January 4, 1993, Karen Thomas filed another suit as plaintiff seeking to enjoin the Secretary of State from conducting the same election. [9] Livingston Downs claims that Karen Thomas was a straw-plaintiff, enlisted by her employer on behalf of the Krantzes. Her participation was necessary in order to give the Krantzes standing to object to the referendum in Livingston Parish. It is admitted that the Krantzes not only paid for this litigation through Fair Grounds but that their lawyer, Larry Bankston, performed the legal work. Thomas claims to have had nothing to do with the litigation short of signing on as the plaintiff.

9. *Terrence Lee Odom*

Terrence Lee Odom was, at the relevant times, the spouse of Tina Simoneaux Odom, another employee of Larry Bankston's law firm. On February 25, 1993, Odom--who had standing as a resident of Livingston Parish--filed a petition to nullify the January 16, 1996 election. [10] **[**18]** Meanwhile, **[*826]** Livingston Downs, seeking to obtain a hearing with the Louisiana State Racing Commission for the purpose of obtaining a license to conduct specific race dates, filed a petition for a writ of mandamus in the district court for the Parish of Orleans. [11] On April 22, 1993, Odom filed a petition to intervene. Odom, unlike the Krantzes, had standing in the matter. The trial court granted the

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[8] ***Ransome v. Secretary of State for the State of Louisiana,*** Suit No. 67,710, 21st Judicial District Court, Parish of Livingston.

[9] ***Thomas v. Secretary of State of Louisiana,*** Suit No. 67,728, Division B, 21st Judicial District Court, Parish of Livingston.

[10] ***Odom v. Livingston Parish Police Jury,*** Suit No. 68,130, Division C, 21 st Judicial District Court, Parish of Livingston.

[11] Suit No. 93-6366, Division F, Civil District Court for the Parish of Orleans.

mandamus. It is admitted that the Krantzes paid the legal bills in this litigation and that Larry Bankston and his law firm performed the legal work. No one contests that Odom was a straw-plaintiff.

10. Larry Bankston

Larry Bankston was, at the relevant times, a member of the Louisiana State Senate. He was also the attorney for Bryan Krantz, Marie Krantz, Jefferson Downs, Finish Line, Fair Grounds, the Committee to Control Gambling, Karen Thomas, and Terrence Odom. Livingston Downs alleges misconduct by Bankston that extends to his activities as a senator and as an attorney in all the lawsuits of which Livingston Downs complains. Livingston Downs also alleges that Bankston, at the behest of the Krantzes, formed and operated the Committee to Control Gambling. This Court granted summary judgment on all claims arising out of Bankston's activities as a legislator. **Ruling of June 18, 2001** (doc. 611). Livingston Downs maintains that Bankston's activities as the Krantzes' attorney were instrumental to the scheme to delay or frustrate its business enterprise.

11. *Bryan & Marie Krantz*

Bryan and Marie Krantz have at least a controlling interest in each of the above corporations. They admit that they owned **[**19]** 100% of both Jefferson Downs and Finish Line. **Def. Ans. to Complaint PP** 23, 27 (doc. 70). It is uncontested that they exercise voting control over Fair Grounds. The Fair Grounds Annual Report of 1993 reveals that Marie and Bryan Krantz obtained 72.27% of Fair Grounds' common stock in 1990. It also reveals that they sold that stock on October 1, 1993 to the John G. Masoni Trust. The sale created a voting trust that gave Marie Krantz voting control over those shares until 2008. Marie Krantz was Chairman of the Board and Treasurer of Fair Grounds in 1993. Bryan Krantz was its President. According to Marie Krantz's deposition testimony, Bryan Krantz controlled Fair Grounds' business and operations. It is also apparent that the Krantzes controlled the Committee to Control Gambling. Though CCG incorporated in January of 1993, it had no assets until it received contributions. Among other donations, CCG received money from Continental Advertising, Village Row Partnership, and Fair Grounds. Marie Krantz admitted that she lent $ 10,000 to Continental Advertising, which is wholly owned by the Krantzes, and another $ 10,000 to Village Row. **Depo. of Marie Krantz,** transcript of tape **[**20]** 1, at 146. Both these sums were paid to CCG. ***Id.*** at 147. Fair Grounds itself donated $ 10,572 to CCG. According to Marie Krantz, Bryan Krantz decided that Fair Grounds and Continental should make their contributions, **Depo. of Marie Krantz,** transcript of tape 2 at 35, and Marie Krantz personally authorized the Fair Grounds contribution, **Depo. of Marie Krantz,** transcript of tape 1 at 147. Livingston Downs alleges that much, if not all, of the money CCG used to run its advertising campaign originated with the Krantzes. The defendants do not contest it.

[*827] Nor was their control over CCG limited to its financing. The incorporation documents list Peter Henry as CCG's President and George Boudreaux as its Secretary-Treasurer. Henry and Boudreaux were, in 1993, low-level employees of Finish Line and Fair Grounds, respectively. Though both these men understood the object of CCG's election campaign, neither knew anything about its operation. George Boudreaux testified that "CCG, to me, is a committee to--looks out for what was going on. We were trying to hold on to what racing was all about, that maybe there might not be no more other--trying to keep the racing stabilized. **[**21]** " **Depo. of George Boudreaux** at 24. Beyond that limited understanding, Boudreaux had nearly no knowledge of the workings of CCG. He did not know how CCG meant to achieve its goal. ***Id.*** He had no duties related to CCG; he signed the incorporation documents and then had no contact with its operations. ***Id.*** at 32, 44. Boudreaux once asked Bryan Krantz what was happening with the organization and Krantz replied that "it's being handled by the attorneys." ***Id.*** at 33. In fact, Boudreaux thinks wrongly that the CCG campaign was successful and that the voters rejected the Livingston Downs racetrack. ***Id.*** at 44. None of these claims is contested by any party. There is no evidence that George Boudreaux knew anything about any of the other events of which Livingston Downs complains.

Peter Henry was similarly in the dark. He knew that CCG would campaign to stop Livingston Downs from taking over the OTB parlors once operated by Jefferson Downs. **Depo. of Peter Henry** at 28. When he heard rumors about CCG, he volunteered to help Bryan Krantz in any way he could. In his deposition, Henry evinced some knowledge of CCG's purpose:

> Q: And why would **[**22]** that help Bryan Krantz? For you to participate in CCG?

A: Well, it was part of my job. The rumors I heard was that the OTBs were in--trying to be taken over.
Q: That Livingston Downs was trying to take over--
A: Right.
Q: --the OTBs?

Id. at 24. Later, two men working for the company approached Henry and asked him to be its president. ***Id.*** at 25. Despite his title, however, Henry did nothing except sign two documents. ***Id.*** at 39. He does not know whether CCG remains active. ***Id.*** at 27. He never saw CCG's publications. ***Id.*** at 28. He does not know whether they prevailed in the referendum. ***Id.*** at 37. When presented at his deposition with one of CCG's brochures, he said it favored horse racing in Livingston Parish. ***Id.*** All of these propositions are uncontroverted. There is no evidence that Henry knew anything about any of the other activities of which Livingston Downs complains.

Marie Krantz, in fact, admits that CCG was under the Krantzes' control. In her deposition, she states that "[CCG] was a vehicle in which we could attempt to have some influence on the results of that election, and that's why I did **[**23]** it." **Depo. of Marie Krantz,** transcript of tape 2 at 33. Livingston Downs does not contest the claim that the Krantzes controlled CCG. It is, in fact, one of their primary contentions.

12. *The Louisiana State Racing Commission Members*

On December 10, 1992, the Louisiana State Racing Commission granted a racing permit to Livingston Downs. Livingston Downs complains of all other interactions with the Commission. The Racing Commission later withdrew the permit. It alleges **[*828]** that the Commission, through former defendants Oscar Tolmas, Albert Stall, Payton Covington, Ben Thomas, and W.C. Littleton, conspired with the Krantzes to delay the opening of Livingston Downs. All of these defendants have been dismissed pursuant to the settlement discussed above. The order dismissing these defendants did not dismiss any of Livingston Downs' claims. Consequently, Livingston Downs' allegations of conspiracy among the Krantzes, these Commission members, and Melinda Tucker continue to be relevant at this stage of the action. The Commission members themselves, however, cannot be liable for the alleged conspiracy.

13. *Melinda Tucker*

Melinda Tucker was, at the relevant time, an Assistant **[**24]** Attorney General for Louisiana who acted as legal advisor to the Louisiana State Racing Commission. Livingston Downs complains of her complicity in the delay tactics of the Commission. Livingston Downs also claims that she handled legal matters for the Racing Commission and sought to delay their resolution. She also has been dismissed from the action pursuant to the same settlement that released the Commission members.

PROCEDURAL BACKGROUND

Originally, Livingston Downs sought redress under *42 U.S.C. §§ 1983*, *1985*, and *1986*, and under *15 U.S.C. § 15* for violations of *15 U.S.C. § 1*. The original complaint (doc. 1) also claims that the defendants attempted to monopolize the relevant markets in horse racing and OTB parlors. After dismissal of the government defendants, the Court dismissed the civil rights actions for lack of a government actor. Subsequently, Livingston Downs added claims under ***HN1***[] the Racketeering Influenced and Corrupt Organization Act ("RICO"), *18 U.S.C. § 1964(c)*, which allows parties injured by violations of RICO to recover damages.

In addition to the party dismissals described **[**25]** above, the Court has also rejected certain other claims. Livingston Downs cannot proceed against Larry Bankston in his capacity as a Louisiana State Senator. **Ruling of June 18, 2001** (doc. 611). Moreover, Livingston Downs cannot base its antitrust claims on any of the following: (1) the campaign activities of CCG; (2) attempts to influence the executive activities of the Louisiana State Racing Commission; (3) lobbying by any defendant of the state legislature or the racing commission; (4) or any lawsuit in which the Defendants prevailed. ***Livingston Downs Racing Ass'n v. Jefferson Downs Corporation,*** *192 F. Supp. 2d 519 (M.D. La. 2001)*. Finally, Livingston Downs cannot recover lost profits as damages under RICO. ***Id.***

The Court is now faced with the question whether Livingston Downs has properly stated its claims under the theories of recovery it has put forward and if so, whether it has presented sufficient evidence to survive summary judgment. Of most importance to this set of motions are the following three questions: (1) Has Livingston Downs alleged a scheme to defraud under the mail and wire fraud statutes?; [12] (2) Has Livingston Downs supported **[**26]** the claim that there is a plurality of parties to the Krantz conspiracies, as required under *§ 1* of the Sherman Act?; and (3) Has Livingston Downs alleged a violation of *§ 2* of the Sherman Act?

SUMMARY JUDGMENT STANDARD

HN2[] Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, **[*829]** admissions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. ***Celotex Corp. v. Catrett,*** *477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN3***[] When the burden at trial rests on the non-moving party, as it does here, the moving party need only demonstrate that the record lacks sufficient evidentiary support for the non-moving party's case. **[**27]** ***Id.*** The moving party may do this by showing that the evidence is insufficient to prove the existence of one or more elements essential to the non-moving party's case. ***Id.***

HN4[] Although this Court considers the evidence in the light most favorable to the non-moving party, the non-moving party may not merely rest on allegations set forth in the pleadings. Instead, the non-moving party must show that there is a genuine issue for trial. ***Anderson v. Liberty Lobby, Inc.,*** *477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Conclusory allegations and unsubstantiated assertions will not satisfy the non-moving party's burden. ***Grimes v. Tex. Dep't of Mental Health,*** *102 F.3d 137, 139-40 (5th Cir. 1996)*. If, once the non-moving party has been given the opportunity to raise a genuine factual issue, no reasonable juror could find for the non-moving party, summary judgment will be granted for the moving party. ***Celotex,*** *477 U.S. at 322*; ***see also, FED. RULE CIV. P.*** *56(c)*.

ANALYSIS

I. RICO Claims

The Livingston Downs civil RICO claims focus on numerous alleged violations of the mail and wire **[**28]** fraud statutes. As this Court wrote in its ruling of September 23, 2002 (doc. 711), the basis for Livingston Downs' claim for damages under the civil RICO statute pieces together as follows:

> First, Plaintiff claims that Fair Grounds conceived a "scheme or artifice to defraud." That scheme or artifice, apparently, was the larger plan to tie up Plaintiff and its business plans by initiating a string of baseless lawsuits and other petitioning activities whose goal was delay, not success on the merits. Fair Grounds violated *§ 1341*, Plaintiff claims, by using the wires and mails to carry out that larger plan. So, for example, Plaintiff claims that Fair Grounds sent an initial pleading in a suit brought by Terrence Lee Odom (as a straw-plaintiff) on September 13, 1993 to Joseph R. Martin, Paul H. Benoist, Angie R. LaPlace, Rodney N. Erdey, and the 21st Judicial District Court Clerk. **Pltff's Rico Case Stmnt,** Exhibit 1. Plaintiff alleges forty separate uses of the wires and mails that are related to the execution of the Odom and Thomas lawsuits alone. Each of these could constitute an independent count of mail or wire fraud if there was an overarching scheme to defraud and if **[**29]** court filings are not protected from being the basis of a mail fraud charge. Presumably, the assertion is that they used the postal service to effect each of these mailings. So, Plaintiff argues, Fair Grounds repeatedly violated *§ 1341* and *§ 1343* by using interstate communications systems to advance their scheme. These violations are included under § 1961(1) as racketeering activities. The multiple instances qualify them as a pattern of racketeering activities under § 1961(5), since forty is greater than two. Fair Grounds, Plaintiff claims, conducted their business in part through this pattern of racketeering activities, since the entire plan sought to

[12] The mail and wire fraud statutes are two of many criminal statutes that may serve as predicate violations under the RICO statute. Without at least two predicate violations--two acts of racketeering--there can be no RICO violation.

> advance the Fair Grounds business interests. Consequently, they violated § 1962(c), at least. Finally, Plaintiff alleges a cause of action under *§ 1964(c)* as a party injured by reason of Fair Grounds' § 1962(c) violation. Plaintiff also alleges that Fair **[*830]** Grounds conspired to violate the substantive subsections of § 1962 and consequently violated § 1962(d) as well.

Ruling & Order at 9-10 (doc. 711). [13] Consequently, the nub of Livingston Downs' RICO complaint is that these Defendants entered a scheme to defraud **[**30]** which they facilitated by using interstate means of communication. If this particular complaint is to survive summary judgment, Plaintiff must, in the first instance, be capable of sustaining the claim that Defendants' scheme was a scheme to defraud.

This Court follows the Eleventh Circuit decision *United States v. Pendergraft,* [14] in concluding that Livingston Downs has not made allegations necessary to establish a mail fraud violation. In *Pendergraft,* the Eleventh Circuit reversed the mail fraud convictions **[**31]** of two men who filed false affidavits in court as part of a scheme to obtain a settlement in their lawsuit against a county government. The defendants meant to indicate to the government their willingness to lie to the court and thereby to impose pressure to avoid a court battle. The county government knew that the affidavits were false, but the court did not. The Eleventh Circuit reversed the convictions for mail fraud, holding that there was no scheme to defraud because the defendants did not have an intent to deceive. The court noted that ***HN5***[] the word "defraud" in the mail and wire fraud statutes "still signifies 'the deprivation of something of value by trick, deceit, chicane, or overreaching.'" ***United States v. Pendergraft,*** *297 F.3d 1198, 1208* (quoting ***Hammerschmidt v. United States,*** *265 U.S. 182, 188, 44 S. Ct. 511, 68 L. Ed. 2d 968 (1924))*. The Eleventh Circuit found that the defendants did not have the requisite intent to deceive the county because they knew that the county would not be fooled by their affidavits:

> In support of their suit against Marion County, Pendergraft and Spielvogel authored affidavits that falsely accused Cretul of making **[**32]** threats. Such falsity might have deceived some, but it could not deceive Marion County. Cretul, after all, was the Chairman of the Marion County Board of Commissioners, and Pendergraft and Spielvogel were aware of Cretul's position. They knew that Cretul would deny making these threats, and they knew that their affidavits would not trick Cretul into admitting otherwise. If they knew that they could not deceive Marion County, then they could not have had an intent to deceive. [...] Since there was no intent to deceive, there was no scheme to defraud.

297 F.3d at 1209. Though defendants clearly sought to use deceit of the court to advance their chances of depriving the county of its property, their deceit did not amount to fraud because it was not directed at the County.

The situation is similar in this case. None of the Defendants sought to deceive Livingston Downs. As in *Pendergraft,* if the Defendants sought to deceive anyone, it was the courts **[**33]** and other government actors. Defendants allegedly presented the courts, the voters, and the Racing Commission with misleading information and baseless claims in the hope that they would be fooled into depriving Livingston Downs of the necessary legal backing to **[*831]** open their business or, at the very least, be fooled into delaying its entry into the market. Livingston Downs does not allege and presents no evidence that Defendants at any point sought to deceive it. Without that intent to deceive, there can be no mail fraud violation.

The import of the Eleventh Circuit's ruling is that ***HN6***[] one cannot commit fraud by fooling one person to receive something of value from another. There are independent torts that form the basis for such causes of action. Livingston Downs could have brought suit against the defendants for malicious prosecution, for example. There is no reason to expand the scope of mail and wire fraud statutes to include attempts to obtain a third party's property

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[13] In the September 23 ruling, the Court referred to all the Defendants collectively as "Fair Grounds," following defendants' lead, because it was not important for the purpose of that ruling--as it is for this one--to distinguish among them. It bears noting, as well, that Livingston Downs also claims that the Defendants violated § 1962(a) and (b) and conspired to violate these substantive subsections. The discussion above mentions only the subsection (c) violation solely to simplify the narrative.

[14] *297 F.3d 1198 (11th Cir. 2002)*.

by deceiving the courts (or other government actors), especially when independent causes of action exist to serve the same end. [15]

[34]** It is unavailing to argue that *§ 1964(c)* of the RICO statute allows recovery for people who are incidentally injured by RICO violations because the Court finds that there was no mail fraud in the first place. It is true that some courts, including the Fifth Circuit, have allowed individuals who were not the target of the underlying RICO violations to survive motions to dismiss on their claims to recover for damages caused by the fraud. ***See*** ***Procter & Gamble Co. v. Amway Corp.,*** *242 F.3d 539, 564-65 (5th Cir. 2001)*; ***Summit Properties, Inc. v. Hoechst Celanese Corp.,*** *214 F.3d 556 (5th Cir. 2000)*, *cert. denied, 531 U.S. 1132, 121 S. Ct. 896, 148 L. Ed. 2d 802 (2001)*; ***Shaw v. Rolex Watch, U.S.A.,*** *726 F. Supp. 969, 973 (S.D.N.Y. 1989)*. The procedural posture of these cases is of the utmost importance. In all the named cases, the courts were faced with or reviewing motions to dismiss for failure to state a claim under Rule 12(b)(6). In each case, the plaintiff claimed that the defendant had committed fraud against a third party and that the plaintiff had been hurt by that fraud. Normally, in such a situation, **[**35]** the courts require for recovery under *§ 1964(c)* that the plaintiff allege that she herself relied on the misrepresentation that forms the basis of the fraud. ***See*** ***Summit Properties,*** *214 F.3d at 561*. *Summit Properties* held that in some instances it is possible to make out the proximate cause element of a *§ 1964(c)* claim without showing reliance, so long as all "the other elements of proximate cause are present." ***Id.*** So, *Summit Properties* recognized some reason to hold "open the possibility that a plaintiff company may not need to show reliance when a competitor lured the plaintiff's customers away by a fraud directed at the plaintiff's customers." ***Id.*** (discussing *Procter & Gamble*). Though the proposed facts are suggestively similar, there is an important difference: In the *Summit Properties* setting, the court assumed that there was an underlying RICO violation to begin with. The **[*832]** Fifth Circuit wrote, "thus, if P&G's customers relied on *the fraudulent rumor* in making decisions to boycott P&G products, this reliance suffices to show proximate causation." ***Id.*** (emphasis supplied). Similarly, in *Shaw v. Rolex Watch,* **[**36]** the Southern District of New York held that "[a] plaintiff who is injured *as a proximate result of fraud* should be able to recover regardless of whether he or a third party is the one deceived." ***Shaw,*** *726 F. Supp. at 973* (emphasis supplied). Both these statements assume that the plaintiffs' allegations of fraud are true and conclude that it does not matter for stating a civil RICO claim for damages proximately caused by the fraud that the plaintiff did not rely on the misrepresentation.

This Court's holding in the instant case is different. The question here is not whether Livingston Downs has properly alleged that its damages were proximately caused by the defendants' acts. This Court held in its August 13, 2001 ruling that there was a triable question of fact whether defendants' actions proximately caused Livingston Downs to incur legal fees. The question now presented is whether Livingston Downs has successfully alleged the specifics of the underlying mail fraud violation. The cited cases do not touch this issue. It is not clear why the courts in those cases did not require the plaintiffs to allege fraud with particularity as is required under **[**37]** *Federal Rule of Civil Procedure 9(b)*, but it is clear and this Court holds that Livingston Downs has not sufficiently supported the claim that any of the defendants committed mail fraud.

Livingston Downs could rely on the above discussed theory of liability if it could prove that the defendants committed mail fraud against the courts. Then it would be able to claim that it was injured by the courts' reliance on the defendants' misrepresentations to the courts and other government agencies. Unfortunately for Livingston Downs, this option is not available either. ***HN7***[] To sustain a mail fraud claim, a plaintiff must allege and prove (1) a scheme or artifice to defraud and (2) execution of that scheme by use of interstate mails. To be a scheme to

[15] An independent problem with Livingston Downs' mail fraud theory of liability is that Livingston Downs would have to establish that it was deprived of a property interest to substantiate its claim. To be guilty of mail fraud, the defrauder must have an intent to use deceit for the purpose of divesting another person of a property interest. Seemingly, Livingston Downs' complaint is that the Krantzes connived to deprive it of state licenses and of the voter approval required to use those licenses. Interestingly, in another case which involved Larry Bankston and Louisiana gambling licenses, the Supreme Court held that a license in the hands of the state is not property for the purpose of the mail fraud statute. ***See*** ***Cleveland v. United States,*** *531 U.S. 12, 20, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)* (holding that the mail fraud statute "does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not 'property' in the government regulator's hands."). This Court does not rule on this alternate ground because the parties have never focused on the issue.

defraud, the object must be deprivation of a property interest. Livingston Downs alleges that the Defendants set out to deprive it of its property. It nowhere alleges that the Defendants sought to deprive the government of a property interest--even an intangible property interest. In essence, Livingston Down's claim is that the Defendants sought to fool the government into depriving Livingston Downs of its property. While such an action may be some independent **[**38]** tort under state law, it is not mail fraud, even if it did cause Livingston Downs some concrete damage.

The Court notes that many other courts have rejected the notion that filing litigation documents can serve as the basis of a RICO violation. Several courts have rejected the theory that legal filings may constitute mail fraud. ***See*** ***Daddona v. Gaudio,*** *156 F. Supp. 2d 153, 162-64 (D.Conn. 2000)*; ***Auburn Med. Ctr, Inc. v. Andrus,*** *9 F. Supp. 2d 1291, 1300 (M.D. Ala. 1998)*; ***Von Bulow v. Von Bulow,*** *657 F. Supp. 1134, 1142-46 (S.D.N.Y. 1987)*. Other courts have refused to treat filing or the threat of filing legal documents as extortion under the Hobbs Act (another RICO predicate). ***See*** ***I.S. Joseph Co. v. J. Lauritzen A/S,*** *751 F.2d 265, 266-67 (8th Cir 1984)*(stating that threats to sue are not extortion under the Hobbs Act); ***G.I. Holdings, Inc. v. Baron & Budd,*** *179 F. Supp. 2d 233, 255* (same). The first set of cases refuses to apply the mail fraud statute, not because its application is inapt, but because doing so would frustrate other policies. So, for example, in *Auburn* **[**39]** *Medical,* the court thought that the mail fraud claim was merely an "artfully **[*833]** pled" malicious prosecution claim. It refused to apply the mail fraud statute while also refusing to hold that the statute's language did not apply. The second set of cases refuses to interpret extortion to include threats to sue. All these cases note the possible conflict between allowing such suits and the principle that citizens should be able freely to petition their government. While the former cases base their rulings on policy considerations, the latter find statutory grounds for avoiding the policy question.

This Court follows the latter approach. Insofar as these cases interpret the Hobbs Act, they are irrelevant. Their approach, however, is instructive. The Court shares the worries regarding the *First Amendment* right to petition that all these courts mention, but does not reach that issue because the central holding is that the actions of the Defendants, however culpable, do not constitute fraud against Livingston Downs. Defendants did not have the intent to deceive Livingston Downs. Consequently, there was never a scheme to defraud and the mailings did not constitute mail fraud violations. There **[**40]** is, as a result, no RICO violation. The motions for summary judgment on the RICO claims filed by all Defendants are, therefore, granted.

II. Sherman Act Claims

A. *Section 1*

The essential core of Livingston Downs' claims is stated very nicely in one of its submissions to this Court. It wrote that "the defendants have again tried to hide behind the corporate identities they created and control." **Memo Supporting Motion to Compel Discovery** at 18. Here is the gravamen of Plaintiff's *§ 1* antitrust claims: The Krantzes engaged in an anticompetitive conspiracy by acting through the corporations they owned and controlled, their employees, and their agents. While the Court agrees that this conduct may have been a conspiracy in the colloquial sense, it cannot be a conspiracy in the sense meant by *§ 1* of the Sherman Act. ***HN8***[] A *§ 1* antitrust conspiracy requires that two persons act in concert. ***See*** ***Copperweld Corp. v. Independence Tube Corporation,*** *467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. In *Copperweld,* the Supreme Court noted the importance of plurality for a *§ 1* claim as follows:

> The Sherman Act contains a "basic distinction **[**41]** between concerted and independent action. The conduct of a single firm is governed by *§ 2* alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. […*] Section 1* of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination … or conspiracy" between separate entities. It does not reach conduct that is "wholly unilateral." […] The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.

467 U.S. at 767-68. ***HN9***[] The case law that has grown up around *§ 1* establishes certain rules for individuating antitrust conspirators so that formal distinctions do not disguise actual unity. Those rules work against Livingston Downs.

Individuation of conspirators turns on an inquiry into who controls the action and whether there is a unity of interests. A wholly **[**42]** owned subsidiary of a corporation cannot conspire with its parent corporation. ***Copperweld,*** *467 U.S. 752, 771-772,* ***[*834]*** *104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Two subsidiaries wholly owned by the same parent corporation cannot conspire with their parent or with each other. ***See, e.g.,*** ***Hood v. Tenneco Texas Life Ins. Co.,*** *739 F.2d 1012, 1015 (5th Cir. 1984)*; ***Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.,*** *833 F.2d 606, 611 (6th Cir. 1987)*. The officers, directors, employees, representatives, and agents of a corporation cannot conspire with their corporate employer. ***Nelson Radio & Supply Co. v. Motorola,*** *200 F.2d 911, 914 (5th Cir. 1952)*; ***see also,*** ***Schwimmer v. Sony Corp. of America,*** *677 F.2d 946, 953 (2d Cir. 1982)*, *cert. denied,* *459 U.S. 1007, 103 S. Ct. 362, 74 L. Ed. 2d 398*. Two corporations that are wholly owned by the same group of individuals cannot conspire with each other. ***Century Oil Tool, Inc. v. Production Specialties, Inc.,*** *737 F.2d 1316 (5th Cir. 1984)*; ***see also,*** ***Guzowski v. Hartman,*** *969 F.2d 211, 214 (6th Cir. 1992)*. **[**43]** The only remaining potential co-conspirators are the government actors. It is also established as a matter of law that petitioned government actors cannot be antitrust co-conspirators, ***Columbia v. Omni Outdoor Advertising,*** *499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, and this Court earlier foreclosed the possibility that the Defendants could be liable for an antitrust conspiracy with the government actors even if they were capable entering such a conspiracy. ***Livingston Downs,*** *192 F. Supp. 2d at 536*.

1. Jefferson Downs & Finish Line

If there is an antitrust conspiracy presented by this case, it cannot have been among Bryan Krantz, Marie Krantz, Jefferson Downs, and Finish Line; they can only have participated in a conspiracy with some other actor. That result is demanded by both *Century Oil Tool* and *Nelson Radio.* ***HN10***[] *Nelson Radio* precludes a conspiracy between the Krantzes and their corporations unless the Krantzes were acting in their own, rather than in the corporation's, interest. ***Nelson Radio,*** *200 F.2d at 914*. *Century Oil Tool* establishes that two corporations with the same set of owners **[**44]** cannot conspire under *§ 1* of the Sherman Act. ***Century Oil Tool,*** *737 F.2d at 1317*. In this case, among these three alleged actors there is unity of interests. Bryan and Marie Krantz are directors and officers of both Jefferson Downs and Finish Line, as well as 100% owners of both. The Krantzes cannot conspire with their corporations and because those corporations have identical ownership, the corporations cannot conspire with each other. For the purposes of a *§ 1* conspiracy, these three defendants are one and the same; they cannot merge through a conspiracy formerly disparate economic interests.

2. Fair Grounds

Though it is a closer case, the same result obtains for Fair Grounds. When the Supreme Court announced in *Copperweld* that a wholly-owned subsidiary cannot conspire with its parent corporation, it adverted to the following reasons:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the **[**45]** control of a single driver.

Copperweld, *467 U.S. at 771*. Though the Supreme Court specifically limited its holding to the parent-subsidiary context, later courts have relied on these reasons to extend the rule to similar situations. So, for example, the Fifth Circuit relied on this reasoning to conclude, in *Century Oil Tool,* that two companies both jointly owned by the same three men could not conspire with each other. ***Century Oil Tool,*** *737 F.2d at 1317*.

[*835] Other courts have used the same reasons to conclude that ***HN11***[] there can be no *§ 1* conspiracy between one corporation and another corporation that it legally controls. ***Direct Media Corp. v. Camden Tel. & Tel.,*** *989 F. Supp. 1211, 1217 (S.D. Ga. 1997)*; ***Rohlfing v. Manor Care, Inc.,*** *172 F.R.D. 330, 344 (N.D. Ill. 1997)*; ***Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.,*** *849 F. Supp. 702, 706-07 (N.D. Cal. 1994)*; ***Total Ben. Services, Inc. v. Group Ins. Admin., Inc.,*** *1993 U.S. Dist. LEXIS 49, 1993 WL 15671*, *1-2 (E.D. La. 1993); ***Leaco Enters., Inc. v. General Elec. Co.,*** *737 F. Supp. 605, 608-09 (D. Or. 1990)*; **[**46]** ***Novatel Communications, Inc.,*** *1986 U.S. Dist. LEXIS 16017, 1986-2 Trade Cas. (CCH) P 67, 412, at 62, 172-73 (N.D. Ga. 1986)*. These courts have established different tests for control. The court in *Novatel,* for example, held that a bare majority of ownership was sufficient. In that case, the parent owned 51% of its subsidiary. ***Novatel,*** 1986 U.S. Dist. LEXIS 16017, 1986-2 Trade Cas. (CCH) at P 62, 172-73. The court in *Direct Media* agreed. ***Direct Media,*** *989 F. Supp. at 1217*. The District Court in Oregon has taken a different approach. It held that if a parent can force a merger with the subsidiary, then they should be treated as having a unity of interests as a matter of law. So, in *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.,* [16] the court refused to find unity of interest and control when an individual alleged conspirator owned only 60% of a defendant company's stock as well as when a second company owned 75% of a third company's stock. According to that court "only corporations which are owned 100% in common, or a *de minimis* amount less than 100% are covered by the *Copperweld* rule." ***Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.,*** *677 F. Supp. 1477, 1486*. A later decision by the **[**47]** same court clarified its rule, however. In *Leaco,* the court held that the proper test for control is whether the parent company can force a merger. ***Leaco,*** *737 F. Supp. at 608-9*. In a jurisdiction where 67% ownership suffices to force a merger, the court held that 91.9% ownership by a parent of a subsidiary precludes their participation in a *§ 1* conspiracy. ***Id.*** *at 609*.

Applying the reasoning of the Fifth Circuit in *Century Oil Tool,* it is apparent that the control test should extend to circumstances in which, as here, the same individuals control two corporations. In *Century Oil Tool,* the Fifth Circuit wrote:

> Given *Copperweld,* we see no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations. A contract between them **[**48]** does not join formerly distinct economic units. In reality, they have always had "a unity of purpose or a common design."

Century Oil Tool, *737 F.2d at 1317*. If the *Copperweld* rule for inter-corporate ownership extends to individual ownership, the Court sees no reason that the question of corporate control should be treated any differently. ***HN12***[] Where two people together are controlling the affairs of separate corporations those corporations cannot conspire under *§ 1* of the Sherman Act.

Though the fact that the control test should apply to individual ownership just as it does to corporate ownership is clear, it is not clear that the same test is relevant. ***HN13***[] It does not seem relevant to ask, in the individual setting, whether the individual owner can force a merger between the two (or three) corporations. Instead, what is important is whether the individual can control the policies of both (or all) corporations. If so, then there can be no conspiracy between (or among) the corporations. **[*836]** Thus, the Court need not decide between the rules proposed for inter-corporate ownership. It is uncontested that Marie Krantz has control of 72.27% the voting stock at Fair **[**49]** Grounds. Her testimony that Bryan Krantz, as President, controls the company policy is also uncontested. Moreover, Livingston Downs has not even alleged that these corporate and individual interests are in any respect disparate. Consequently, Fair Grounds cannot be the second party to an antitrust conspiracy in this case as a matter of law. [17]

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[16] *677 F. Supp. 1477 (D. Or. 1987)*.

[17] ***HN14***[] Whether an antitrust conspiracy is possible does not require a factual determination. In *Bell Atlantic,* the court reasoned as follows:

> Under the reasoning of *Copperweld* and its progeny, it is not necessary to conduct a factual inquiry to determine whether a parent and a subsidiary over which the parent has legal control can conspire in violation of *§ 1* of the Sherman Act.

[50] 3. Peter Henry, George Boudreaux & Larry Bankston**

Similarly, Peter Henry, George Boudreaux, and Larry Bankston are incapable of conspiring with the Krantzes and the corporate entities. ***HN15***[] In order properly to allege that an employee or agent of a corporation has entered a conspiracy with other employees or the corporation, a plaintiff must allege that the employee or agent was acting outside of her normal employment capacity. ***Nelson Radio,*** *200 F.2d at 914*. Peter Henry was an employee of Jefferson Downs and later of Finish Line. George Boudreaux was an employee of Fair Grounds. Larry Bankston was engaged in the service of the Krantzes and their corporations as an attorney. These facts are uncontested. Moreover, Livingston Downs does not allege that these actors were acting in their own interests. On the contrary, Livingston Downs goes to great lengths to assert that these defendants were acting as the agents of the Krantzes and were exclusively pursuing the Krantzes' interests. [18] **[*837]** As a matter of law, then, Livingston Downs has failed properly to allege that these defendants were involved in a *§ 1* conspiracy and their claims under that section against these **[**51]** defendants must be dismissed. In addition, the evidence so far accumulated makes it clear that no reasonable juror could find that these defendants acted independently. The only evidence available suggests that these men acted to advance the interests of the Krantzes. No evidence has been presented to suggest otherwise. Consequently, even had Livingston Downs properly alleged independence, these claims should be dismissed.

[52]** Even if Peter Henry and George Boudreaux could have entered an antitrust conspiracy with the Krantzes, the *§ 1* claims against them would have to be dismissed. This Court has held that the activities of CCG cannot by themselves constitute an antitrust violation. ***Livingston Downs,*** *192 F. Supp. 2d at 531*. Consequently, the only possible argument for the liability of these two men is that they agreed to enter the larger conspiracy against Livingston Downs, and while they cannot be liable for their own acts, they can be liable for the larger conspiracy through the acts of their co-conspirators. That argument is unavailing.

HN17[] To be an antitrust co-conspirator, a defendant must have consciously adopted the antitrust scheme. ***Monsanto Co. v. Spray-Rite Serv. Corp.,*** *465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; ***Spectators' Communication Network, Inc. v. Colonial Country Club,*** *253 F.3d 215, 220 (5th Cir. 2001)*. Livingston Downs cannot substantiate this claim. There is no evidence that Boudreaux or Henry knew anything

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> *Copperweld* found that a parent and a wholly-owned subsidiary are considered the "same entity" for antitrust purposes because the parent has the power to exercise full control over its subsidiary. For the same reasons, a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade.

Bell Atlantic, *849 F. Supp. at 706*.

[18] It is irrelevant that these agents may have, in addition to the duties they owe their employers, distinct individual motivations for pursuing the same acts. What is important is that they are, in fact, pursuing the interests of their employers. So, for example, Larry Bankston may have been driven solely by a desire to run up legal fees or out of personal animus for the ownership of Livingston Downs. These facts would not matter. The only important fact is that the Krantzes or their corporations hired Bankston to perform certain duties for pay. That relationship removes Bankston from the universe of potential co-conspirators for the Krantzes. The only exception to this general rule applies when an agent seeks to advance her own interests as a marketplace actor. ***Siegel Transfer, Inc. v. Carrier Exp., Inc.,*** *54 F.3d 1125, 1136-37 (3d Cir. 1995)*("For ***HN16***[] the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains. In this way, the exception captures agreements that bring together the economic power of actors which were previously pursuing divergent interests and goals, the type of activity that *section 1* was intended to oversee."); ***Oksanen v. Page Memorial Hosp.,*** *945 F.2d 696, 705-06 (4th Cir. 1991)*(examining whether members of the staff directly benefitted from the plaintiff's elimination as a competitor, and whether the staff caused the hospital to engage in the alleged restraint); ***Pink Supply Corp. v. Hiebert, Inc.,*** *788 F.2d 1313, 1318 (8th Cir. 1986)*("We construe 'for the agent's own benefit' to mean at least an economic stake in the gain to be realized from the anticompetitive object of the conspiracy.") Henry, Boudreaux, and Bankston have no such stake. Henry and Boudreaux sought personal advantage only in job security. Larry Bankston, insofar as the evidence shows, sought only to provide the legal services requested by the Krantzes.

about the scope of the Krantzes' plan. The evidence barely supports the claim that they knew **[**53]** what the CCG portion of that plan entailed. Both signed documents and agreed to do so either out of loyalty to their employers or a sense that their jobs would be made more secure. All that this establishes is that they agreed to facilitate protected political speech. Boudreaux thought that the campaign succeeded, while Henry did not know the outcome. There is absolutely no evidence that these two knew anything about any lawsuit, lobbying, or petitioning. Therefore, even if Boudreaux and Henry could have--despite their agent status--entered the larger conspiracy, they did not.

This holding establishes an alternative ground for concluding that Peter Henry and George Boudreaux do not provide Livingston Downs the elusive second actor. Not only must the *§ 1* claim against them be dismissed, but Livingston Downs must continue its search to maintain its *§ 1* claims against any of the defendants.

4. The Committee to Control Gambling

The question who controls the Committee to Control Gambling is very different. Livingston Downs must establish that there is a plurality of actors involved in the alleged conspiracy for *§ 1* of the Sherman Act to be the appropriate vehicle for its claims. **[**54]** In the corporate ownership or agency relationship settings, unity of interest is established by degree of ownership and control or by the nature of the parties' relationship as a matter of law. Here, however, these factors are inapplicable. CCG had no assets at its incorporation. It accepted and expended contributions in order to campaign against a referendum proposition. Its corporate officers have no ownership interest in the corporation. And though those officers are employees of Krantz-controlled corporations, CCG is **[*838]** not itself an agent of the Krantzes. Consequently, in deciding whether CCG is under the control of the Krantzes and therefore incapable of entering a *§ 1* conspiracy with them, the Court faces a factual determination. It is only appropriate for the Court to resolve this factual matter if Livingston Downs has failed to show that there is a genuine question of fact whether CCG and the Krantzes (et al.) represent a plurality of interests. If no reasonable juror could conclude from the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file that CCG represents interests separate and apart from the Krantzes', then the Court may conclude that **[**55]** CCG is one with the other Krantz-controlled entities for purposes of the Sherman Act.

Despite this burden, Livingston Downs has, throughout this case, tried to establish that CCG is an alter-ego of the Krantzes. All of the evidence presented on the question indicates that Livingston Downs is correct on this point. The Defendants have not presented any contrary evidence. The Court's situation is delicate because it is Plaintiff's duty to allege and come forward with evidence that multiple parties participated in this purported conspiracy, yet Livingston Downs has dedicated itself to opposing that proposition. Consequently, Livingston Downs has failed properly to allege that CCG is a separate entity. In fact, Livingston Downs has presented enough evidence to prevail on a motion for summary judgment on the claim that CCG *is not* a separate entity for the purposes of a *§ 1* conspiracy. Deposition testimony by the CCG corporate officers--also the Krantzes' employees--and Marie Krantz indicates that these officers knew next to nothing about CCG or its operation; that Bryan Krantz had directed his attorneys to run the outfit; that Marie Krantz, Bryan Krantz, and their corporate alter-egos **[**56]** financed CCG; and that Marie Krantz regarded the operation as a way to delay Livingston Downs from entering the relevant market. There is not even a metaphysical doubt whether CCG was a tool of the Krantzes formed to convince the Livingston Parish voters to oppose the operation of a racetrack in their parish. CCG was not only controlled by the Krantzes, but operated to their specifications. Consequently, CCG could not have been the requisite second party to the alleged *§ 1* conspiracy.

5. Karen Thomas & Terrence Lee Odom

The same analysis applies to Karen Thomas and Terrence Lee Odom. The Krantzes managed to get themselves into court by soliciting straw-plaintiffs with standing to represent their interests. Once again, this version of the events is the one preferred by Livingston Downs, much to its legal detriment. Presented with the burden of raising some evidence that Karen Thomas and Terrence Lee Odom were acting independently of the Krantzes and their business interests, Livingston Downs instead argues that they were mere puppets on the hands of Larry Bankston.

Consequently, there is no evidence that these two plaintiffs brought good faith suits in their own interests against **[**57]** the provenance of the Livingston Parish referendum election. On the contrary, it is admitted that the Krantzes, through Fair Grounds, paid for that litigation. Their attorney handled it. Both straw-plaintiffs have given deposition testimony that they had no real participation in the lawsuits. No reasonable juror could find that Thomas and Odom acted independently in bringing these suits. Aside from being in fact used by the Krantzes, they may have been manipulated by Bankston into acting as plaintiffs because of their relationship to his law firm. In any event, no one even claims that they acted independently. Consequently, they too cannot have acted as the elusive second **[*839]** party to the alleged *§ 1* antitrust conspiracy with the Krantzes and their other alter-egos.

6. The Racing Commission Members

Though the members of the Louisiana State Racing Commission and the Assistant Attorney General charged with providing it legal advice were dismissed from this lawsuit, the order of dismissal limited itself to the defendants. The order of dismissal concerned only the claims against the government actors. Livingston Downs reserved its rights to prove all of its claims against the remaining **[**58]** defendants. Consequently, Livingston Downs properly may maintain that these government actors or the Racing Commission itself provide the plurality of conspirators required for a conspiracy under *§ 1* of the Sherman Act. The full importance of this fact is that it allows Livingston Downs to allege -- as it has -- that a larger conspiracy existed and that the other defendants could be held liable insofar as Livingston Downs could prove that they participated in it. Unfortunately for Livingston Downs, this Court has already ruled that the government actors and the Krantzes (et al.), whatever the nature of their relationship, did not enter an antitrust conspiracy.

The August 13, 2001 opinion ruled out the possibility that the Krantzes and the Racing Commission, including its members in their individual capacities, can be liable for together entering a *§ 1* antitrust conspiracy. This ruling is consistent with the Supreme Court's *Noerr-Pennington* doctrine, upon which the ruling was based, and with its *Parker* doctrine, upon which the Court did not rule because the government actors had previously been dismissed. ***HN18***[] Both these doctrines exempt from antitrust liability any conspiracy **[**59]** between a private actor and a government actor unreasonably to restrain trade on the ground that the Sherman Act should not be interpreted--and was not intended--to extend to acts of petitioning the government. "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the State's acts of governing, and the latter the citizens' participation in government." ***Columbia v. Omni Outdoor Advertising, Inc.,*** *499 U.S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. It does not matter that the government and the private business interest entered an agreement that would result in a restraint of trade, even if that agreement, between private actors, would constitute an antitrust conspiracy. ***Id.*** *at 376-77*. Moreover, it does not matter that the agreement is corrupt. "To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed at combating corruption in **[**60]** state and local governments." ***Id.*** *at 378-79* (quoting ***Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,*** *365 U.S. 127, 140, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961))*. In fact, under current federal law, local public officials may be--and are--prosecuted for corruption under numerous, scattered provisions of the federal code. Principally, local corruption is prosecuted under the Hobbs Act, [19] **[**61]** the Travel Act, [20] the mail and wire **[*840]** fraud statutes

[19] *18 U.S.C. § 1951*. "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years or both." *§ 1951(a)*.

[20] *18 U.S.C. § 1952*. "Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--(1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform--(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or (B) an act described in paragraph (2) shall be

as supplemented by the "intangible right" to "honest services" under *§ 1346*, [21] **[**62]** and the federal bribery [22] **[**63]** and federal program bribery statutes. [23] Prosecutors **[*841]** have worked hard to expand the scope of various of these provisions to target local political corruption, despite strong, but halting, resistance. The Sherman Act does not provide a backdoor to enforcement. It follows, therefore, from the antitrust jurisprudence of the Supreme Court, as well as from this Court's earlier ruling, that there was no antitrust conspiracy between the Krantzes and the Racing Commission or its officials.

[64]** While this Court did hold in its former ruling that various of the Defendants' petitioning activities were not exempt from the purview of the Sherman Act by virtue of the *Noerr-Pennington* doctrine, those activities were limited to Defendants' purported interference with the Racing Commission acting in its adjudicatory capacity. The ruling held that there is a question of fact whether "the machinery of [the Commission] was effectively closed to [Livingston Downs] and whether the Defendants usurped the Commission's decision-making authority." ***Livingston Downs,*** *192 F. Supp. 2d at 536*. None of the other conduct involving the Racing Commission can constitute part of a conspiracy under the antitrust laws. The question remains whether the remaining charge leaves room for claiming complicity between the Krantzes and the Commission under *§ 1* of the Sherman Act. If so, then it might be claimed

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fined under this title, imprisoned for not more than 20 years, or, and if death results shall be imprisoned for any term of years or for life." *§ 1952(a)*.

[21] *18 U.S.C. § 1346*. "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." This section answers a conflict over the scope of the mail and wire fraud statutes. The honest services doctrine developed by judicial construction specifically to address breaches of fiduciary duty including local political corruption. The Supreme Court subsequently disapproved the doctrine. ***United States v. McNally,*** *483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d. 292 (1987)*. Then Congress passed *§ 1346* to abrogate the Supreme Court decision and reinstate the honest services doctrine.

[22] *18 U.S.C. § 201*. "Whoever--(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity with intent--(A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person. […] Shall be fined under this title […] or imprisoned for not more than fifteen years, or both." *§ 201(b)*. Though *§ 201* targets federal officers, it may be used to target local officials who accept federal grant money.

[23] *18 U.S.C. § 666*. "(a) Whoever, if the circumstance described in subsection (b) of this section exists--(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--(i) is valued at $ 5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $ 5,000 or more; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $ 5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both. (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." In ***Salinas v. United States,*** *522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)*, the Supreme Court held that the prosecution need not prove that the charged briber affected the federal money.

that these two actors are the two actors required by that section for an antitrust "contract, combination, […] or conspiracy." In that case, the other defendants might be implicated to the extent that it can be proved that they took part in that conspiracy.

The Court **[**65]** finds, consistent with its earlier ruling, that the only alleged acts that might be the basis for a conspiracy charge under *§ 1* cannot support a charge of conspiracy at all, insofar as the government actors are concerned. Even if the *Parker* doctrine allows anticompetitive government acts of any sort to be considered part of a conspiracy under *§ 1*, which this Court doubts, the only charge left after the August 13, 2001 ruling is that the Krantzes used their influence over the Racing Commission members to manipulate its procedures and deny Livingston Downs normal access to its normal process. ***See Livingston Downs,** 192 F. Supp. 2d at 536*. The only question left open is "whether 'the machinery of [the Commission] was effectively closed' to LDRA and whether the Defendants usurped the Commission's decision-making authority." ***Id.*** These allegations do not implicate the Racing Commission in any form of conspiracy. It is possible that evidence of a (non-antitrust) conspiracy or even evidence of outright bribery would support the contention that the decisions of the Racing Commission were for practical purposes the decisions of the Krantzes. But the heart **[**66]** of the remaining claims is that the Krantzes and their alter egos and agents conspired among themselves to use their control over the Commission to delay and frustrate Livingston Downs' business aspirations. This claim does not assert a conspiracy *with* government actors, but a conspiracy [24] to *use* government actors.

This Court's earlier ruling did not deny summary judgment on these claims because the Court was convinced that Livingston Downs might prove a conspiracy **[*842]** between the Krantzes and the Racing Commission, but because it might prove a conspiracy among the Krantzes and other parties to use the Racing Commission to anticompetitive effect. In that ruling, the Court assumed there was a plurality of conspirators exclusive of the government actors and considered only whether the *Noerr-Pennington* doctrine exempted the various actions complained of from being the basis of antitrust liability. Having determined that the claim that the Krantzes and others **[**67]** manipulated and controlled the Racing Commission in such a way as to usurp its decision-making process could go forward, the Court rejected the motion for summary judgment but left unaddressed the question who conspired to control the Commission. Now the Court is in a position to judge that there is no plurality and that there was no antitrust conspiracy to control the Racing Commission. Instead, if anything, there was a corporate plan to control it implemented by the Krantzes and their agents.

The government actors were the final hope Livingston Downs possessed of proving that there was another party to the alleged conspiracy. In point of fact, the only people whose interests matter for antitrust purposes are the Krantzes. The Krantzes cannot conspire with the government, companies they own wholly, companies in which they have ownership control, corporations they in fact wholly control, or their agents and employees, under *§ 1* of the Sherman Act. Nor can these agents conspire with each other. Consequently, there were no other actors involved in this scheme, in the eyes of ***antitrust law***, and none of the Defendants can be held liable for engaging in a *§ 1* conspiracy, regardless how **[**68]** questionable their activities.

B. *Section 2*

Livingston Downs has only explicitly adverted to *§§ 1* and *15* of the antitrust laws as the basis for its claims. **Original Complaint** PP 221, 223. As discussed above, ***HN19***[] *§ 1* criminalizes "every contract, combination … or conspiracy, in restraint of trade or commerce." *Section 15* allows parties injured by antitrust criminal violations to recover damages. So far this litigation has been conducted as if Livingston Downs' antitrust claims fall exclusively under that rubric. ***See Livingston Downs,** 192 F. Supp. 2d at 528*. The Court now notes however, after finding that Livingston Downs has not alleged or cannot prove that there was a plurality of actors behind the alleged antitrust conspiracy, that Livingston Downs' original complaint appears to state a claim under *§ 2* of the Sherman Act.

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[24] Though not an *antitrust* conspiracy.

The original complaint in this action alleges that "The above described facts demonstrate an attempt thus far successful by the defendants to create a monoply [*sic*] in the horse racing industry within the relevant market, all in violation of federal ***antitrust law***." **Original Complaint** P 222. *Section 2* provides, **[**69]** ***HN20***[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce [...] shall be deemed guilty of a felony." *15 U.S.C. § 2*. Thus it appears that Livingston Downs intends to prove, in the alternative, a monopolization violation. If it can make out this claim and that it suffered damages therefrom, then *§ 15* would allow recovery. Given that ours is a system of notice pleading, the Court notes the apparent monopolization claim and expressly reserves judgment on the substance of that issue.

Some *§ 2* issues, however, should be disposed of at this stage. It is not clear whether by including P 222 of the complaint Livingston Downs intended only to state a claim for attempted monopolization or also a claim for conspiracy to monopolize. ***HN21***[] To establish an attempt to monopolize **[*843]** claim, Livingston Downs must prove that the defendant or defendants "(1) had the specific intent to monopolize, (2) took overt acts in furtherance of a scheme to monopolize, and (3) had a dangerous probability of success." ***North Mississippi Communications, Inc. v. Jones,*** *792 F.2d 1330, 1335 (5th Cir. 1986)*. **[**70]** A conspiracy to monopolize claim requires that Livingston Downs show "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." ***Id.*** Hence, the burden under either *§ 2* theory of liability is much greater than the burden under *§ 1*.

Despite the differences, however, two things of import to this case do not change. First, ***HN22***[] the *Noerr-Pennington* and *Parker* immunity doctrines apply to both sections. ***See*** ***Omni Outdoor,*** *499 U.S. at 383* (rejecting claims under *§§ 1* and *2* and stating that "*any* action that qualifies as state action is '*ipso facto* ... exempt from the operation of the antitrust laws'" and "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics.")(emphasis in original). There is no distinction among the sections of the Sherman Act when these doctrines are implicated. Consequently, the ruling of August 13, 2001 with respect to which activities may provide the basis of **[**71]** an antitrust claim remains effective as to any possible claims under *§ 2*. Under a *§ 2* conspiracy theory of liability, then, the government actors can no more be co-conspirators than they could under *§ 1*. Similarly, the activities of CCG and its nominal officers cannot be the basis of any *§ 2* liability.

Second, ***HN23***[] as under *§ 1*, a *§ 2* conspiracy claim requires a plurality of actors. *Surgical Care Cntr of Hammond, L.C. v. Hospital Serv. Dist. No. 1, 309 F.3d 836, 2002 WL 31255875* at *3 (5th Cir. 2002). In fact, the Fifth Circuit held in *Surgical Care Center* that the same unity of interest analysis that applies to a *§ 1* conspiracy applies to a *§ 2* conspiracy claim as well. It wrote:

> St. Luke's contends that North Oaks and Quorum (the company that manages North Oaks) conspired to monopolize the outpatient surgical market. The district court dismissed the conspiracy claim because "as a matter of law, a corporation and its agent [i.e. North Oaks and Quorum] are incapable of conspiracy with one another to violate the antitrust laws." This general rule is correct, and none of the recognized exceptions applies to this case. The district **[**72]** court did not err in dismissing St. Luke's conspiracy claim under *§ 2* of the Sherman Act.

Id. (citing ***Siegel Transfer, Inc. v. Carrier Exp., Inc.*** *54 F.3d 1125* (rejecting a *§ 1* conspiracy claim because a corporation and its agents normally have a unity of interests)). Consequently, though Livingston Downs may have stated a claim under *§ 2*, it cannot maintain a *§ 2* conspiracy claim for the reasons discussed in this ruling, and the ruling of August 13, 2001. It follows that George Boudreaux, Peter Henry, and the Committee to Control Gambling are not liable under *§ 2*. Their acts are protected under the *Noerr-Pennington* doctrine from liability under all the antitrust laws. They cannot be co-conspirators of the Krantzes and so cannot be liable for the culpable acts of those parties as co-conspirators. All claims against these defendants are dismissed.

Only Marie Krantz, Bryan Krantz, Jefferson Downs, Finish Line Management, Fair Grounds, and Larry Bankston (in his individual capacity) remain as possible defendants. Only claims for attempted monopolization **[*844]** remain against them. The Court will not now consider the substance of the *§ 2* claims **[**73]** against these defendants because the parties have not addressed them in any form.

III. Motion for Partial Summary Judgment & Motions *in Limine*

The Defendants, with the exception of Larry Bankston, request that the Court dismiss various damages claims. Livingston Downs seeks damages in the form of compensation for legal fees it incurred defending against various claims brought against it as well as for fees incurred in suits and interventions it brought in response to other actions of the Defendants. Defendants claim that they cannot be held to have caused some of these fees and that, in any event, Livingston Downs has not supplied enough evidence of their damages because their legal invoices are not itemized. The same defendants seek to exclude various kinds of evidence from the much-anticipated trial on the merits.

The Court denies all of these motions without prejudice. It is premature at this stage to reject claims of damages entirely on the basis that the Plaintiffs have not yet provided itemized billing. ***HN24***[] The standard of proof of the quantum of damages is less taxing than that for the fact of damages. ***Story Parchment Co. v. Paterson Parchment Paper Co.,*** *282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*. **[**74]** A jury may determine the amount of damages using "a just and reasonable estimate ... based on relevant data." ***Zenith Radio Corp. v. Hazeltine Research, Inc.,*** *395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Evidence may include "probable and inferential as well as direct and positive proof." ***Id.,*** and need only avoid "speculation or guesswork." ***Bigelow v. RKO Pictures,*** *327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*. Consequently, if Livingston Downs can prove that some defendants proximately caused it to incur some portion of the legal fees in each case--either by filing the suit in the first place or by intervening and multiplying the pending motions--as well as that these acts suffice for liability under *§ 2* of the Sherman Act, then they may be able to maintain their claim for damages despite imperfect proof of amount. Should the remaining defendants continue to think their arguments have merit after the parties have developed the *§ 2* claims and defenses, they may urge the motion again.

The portions of this ruling that concern the RICO and Sherman Act claims substantially reframe this case. It would be inappropriate **[**75]** to exclude evidence when the parties have not yet discussed the elements of the claims that remain in the lawsuit. Consequently, those motions too are denied. In the event that there is reason to make the same motions at a later time, the remaining defendants may do so.

CONCLUSION

For the reasons discussed above, the motions for summary judgment submitted by Jefferson Downs Corporation (doc. 635), The Committee to Control Gambling (doc. 629), Marie Krantz (doc. 618), Larry Bankston (doc. 650), Peter Henry (doc. 632), and George Boudreaux (doc. 626) are **GRANTED** with respect to all claims asserted against them under RICO. Similarly the motions for summary judgment submitted by the Committee to Control Gambling (doc. 629), Peter Henry (doc. 632), and George Boudreaux (doc. 626) are **GRANTED** with respect to all claims asserted against them under *§ 1* and *§ 2* of the Sherman Act. The motions for summary judgment submitted by Jefferson Downs (doc. 635) and Marie Krantz (doc. 618) are **GRANTED** with respect to all claims under *§ 1* of the Sherman Act, but **DENIED** with respect to any claims under **[*845]** *§ 2*. The Court notes that some defendants have not brought motions **[**76]** for summary judgment on the RICO or Sherman Act claims, or not on all these claims and that the reasons for granting the motions would apply equally to them. In the interest of economy, then, **IT IS FURTHER ORDERED** that any claims asserted against Bryan Krantz, Fair Grounds, Finish Line Management, and Larry Bankston under *§ 1* of the Sherman Act are **DISMISSED.** For the same reason, all claims against Bryan Krantz, Fair Grounds, and Finish Line Management under the civil RICO statute are **DISMISSED.** The case may proceed under the *§ 2* attempted monopolization claims against Marie Krantz, Bryan Krantz, Jefferson Downs, Finish Line Management, Fair Grounds, and Larry Bankston.

IT IS FURTHER ORDERED that the motion for partial summary judgment filed by various defendants (doc. 665) on the issue of damages is denied without prejudice. That motion may be raised at a later time if the Plaintiff fails timely to provide itemized attorney bills. It is also ordered that the motions *in limine* filed by the same defendants (docs. 622, 624, 658, and 660) are **DENIED,** though the remaining defendants may reurge those motions once the *§ 2* claims, if any, are more fully developed.

[77]** Baton Rouge, Louisiana, October 24th, 2002.

JAMES J. BRADY, DISTRICT JUDGE

MIDDLE DISTRICT OF LOUISIANA

Dickson v. Microsoft Corp.

United States Court of Appeals for the Fourth Circuit

June 5, 2002, Argued ; October 28, 2002, Decided

No. 01-2458

Reporter

309 F.3d 193 *; 2002 U.S. App. LEXIS 22466 **; 2002-2 Trade Cas. (CCH) P73,858

MARK H. DICKSON, Plaintiff-Appellant, and CAREY D. EBERT, Trustee in Bankruptcy for Gravity, Inc., Trustee-Appellant, and 403 WEST LOOP 820 N, Plaintiff, v. MICROSOFT CORPORATION; COMPAQ COMPUTER CORPORATION; DELL COMPUTER; PACKARD BELL NEC, INCORPORATED, Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by *Dickson v. Microsoft Corp., 539 U.S. 953, 123 S. Ct. 2605, 156 L. Ed. 2d 647, 2003 U.S. LEXIS 4985 (June 23, 2003)*

Prior History: [1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-00-1247-JFM).

Gravity, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 127 F. Supp. 2d 728, 2001 U.S. Dist. LEXIS 306, 2001-1 Trade Cas. (CCH) P73141 (D. Md., Jan. 12, 2001)
Gravity, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 168 F. Supp. 2d 541, 2001 U.S. Dist. LEXIS 17059 (D. Md., Sept. 28, 2001)

Disposition: AFFIRMED.

Core Terms

conspiracy, software, anticompetitive, market power, purchaser, consumers, effects, allegations, overcharge, license agreement, district court, markets, Sherman Act, antitrust, monopoly, operating system, co-conspirator, conspirators, indirect, damages, Shoe, quotation, prices, wheel, relevant market, rule of reason, market share, manufacturers, rimless, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

The United States Supreme Court defines monopoly power as the power to control prices or exclude competition. More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. As the United States Court of Appeals for the D.C. Circuit noted, merely possessing monopoly power is not itself an antitrust violation, but it is a necessary element of a *§ 2* monopolization charge.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN2[] **Monopolies & Monopolization, Actual Monopolization**

When reviewing the district court's grant of a motion to dismiss a Sherman Act complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, the appellate court must determine whether allegations covering all the elements that comprise the theory for relief have been stated as required. Moreover, the allegations must be stated in terms that are neither vague nor conclusory. Although the court will assume that the plaintiffs can prove the facts that they allege in their complaint, it is not proper to assume that the defendants have violated the antitrust laws in ways that have not been alleged.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN3[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A *§ 1* of the Sherman Act, specifically *15 U.S.C.S. § 1*, violation is legally distinct from that under *§ 2* of the Sherman Act, specifically *15 U.S.C.S. § 2*, though the two sections overlap in the sense that a monopoly under *§ 2* of the Sherman Act is a species of trade restraint under *§ 1* of the Sherman Act. The same kind of practices, therefore, may evidence violations of both.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Sherman Act, Claims**

To establish a violation of *§ 1* of the Sherman Act, specifically *15 U.S.C.S. § 1*, a plaintiff must prove the following elements: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade. If the plaintiff is able to prove a violation of *§ 1*, it then must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. These requirements apply with equal force to the plaintiff's claims for damages and injunctive relief; the only relevant distinction being that for injunctive relief, the injury itself need only be threatened.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN5[] **Monopolies & Monopolization, Conspiracy to Monopolize**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A rimless wheel antitrust conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction. According to the United States Supreme Court, a rimless wheel conspiracy is not a single, general conspiracy but instead amounts to multiple conspiracies between the common defendant and each of the other defendants.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN7[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A single criminal conspiracy generally is demonstrated by an overlap of key actors, methods, and goals.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN8[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Allegations that alleged conspirators received financial and other benefits in exchange for entering into the licensing agreements are sufficient for purposes of *Fed. R. Civ. P. 12(b)(6)* to demonstrate that a *§ 1* of the Sherman Act, specifically *15 U.S.C.S. § 1*, conspiracy was economically plausible.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN9[] **Sherman Act, Claims**

The "combination or conspiracy" element of a *15 U.S.C.S. § 1* violation is not negated by the fact that one or more of the coconspirators acted unwillingly, reluctantly, or only in response to coercion. The co-conspirators need not share the same motive or goal; it is sufficient to allege that the co-conspirators acquiesced in an illegal scheme.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN10[] **Antitrust & Trade Law, Sherman Act**

In assessing liability under *§ 1* of the Sherman Act, specifically *15 U.S.C.S. § 1*, courts generally evaluate agreements pursuant to one of three approaches: (1) per se analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those with some procompetitive justification, and (3) the full "rule of reason," for restraints whose net impact on competition is particularly difficult to determine. Where the possibility of anticompetitive effects is not obvious, the court analyzes the two licensing agreements at issue -- individually -- pursuant to the "full" rule of reason analysis.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN11[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The rule of reason analysis of restraints of trade is explained as follows: The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN12[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In the rule of reason analysis, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market. This evaluation requires a showing of "anticompetitive effect" resulting from the agreement in restraint of trade. To have an "anticompetitive effect," conduct must harm the competitive process and thereby harm consumers. Harm to one or many competitors will not suffice. The Sherman Act directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. Thus, an inquiry into the lawfulness of the restraint begins by identifying the ways in which a challenged restraint might possibly impair competition. After identifying the type of possible harm to competition alleged, the court must proceed to determine whether that harm is not only possible but likely and significant, which requires examination of market circumstances, including market power and share.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN13[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In rule of reason analysis, the plaintiff must prove that the defendant has sufficient market power to restrain competition substantially. If not, the inquiry is at an end; the practice is lawful. Virtually all courts applying the rule of reason require the plaintiff to show, at a minimum, that the defendants play a significant role in the allegedly restrained market.

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

HN14[] **Regulated Practices, Market Definition**

For antitrust purposes, market power is the power to force a purchaser to do something that he would not do in a competitive market. It has been defined as the ability of a single seller to raise price and restrict output. Market share is defined as the percentage of a market that is controlled by a firm. Market power generally is identified, in part, by examining market share.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN15[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] **Price Fixing & Restraints of Trade, Tying Arrangements**

An antitrust claim fails as a matter of law when the plaintiff would have suffered the identical loss without regard to the claimed anticompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN17[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In a criminal conspiracy, a co-conspirator is liable for all substantive offenses of his co-conspirator that are both reasonably foreseeable and in furtherance of the conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN18[] **Monopolies & Monopolization, Actual Monopolization**

In those instances where power is a prerequisite to holding an agreement to be an unreasonable restraint of trade under *§ 1* of the Sherman Act, specifically *15 U.S.C.S. § 1*, it would make no sense to hold the same agreement offensive to *§ 2* of the Sherman Act, specifically *15 U.S.C.S. § 2* without proof of power. The offense of monopolization requires a showing of "anticompetitive effect."

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN19[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S.. § 2*.

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN20[] **Motions to Dismiss, Failure to State Claim**

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, and an antitrust complaint should not be dismissed at the *Fed. R. Civ. P. 12(b)(6)* stage merely because the court doubts the plaintiff will ultimately prevail. Nevertheless, to avoid dismissal for failure to state a claim, the plaintiff must colorably state facts which, if proven, would entitle him to relief. The United States Court of Appeals for the Fourth Circuit consistently has held this to require an allegation of facts supportive of each element of the plaintiff's antitrust claim.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

The pleader may not evade *Fed. R. Civ. P. 12(b)(6)* requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust.

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] Antitrust & Trade Law, Sherman Act

To establish liability under the Sherman Act, a showing of either an anticompetitive effect or an anticompetitive purpose is necessary.

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

HN23[] Private Actions, Purchasers

Illinois Brick's indirect purchaser rule, when applicable, bars only compensatory damages relief and does not apply to injunctive relief.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Remedies > Buyer's Damages & Remedies > General Overview

HN24[] Purchasers, Direct Purchasers

Only direct purchasers from an antitrust violator can sue for damages, providing two rationales for the rule: it avoids the danger of multiple, overlapping recoveries against the original seller by direct and indirect purchasers, and it avoids the evidentiary complexities and uncertainties in determining the amount of any overcharge passed through the intermediary to the indirect purchaser. The United States Supreme Court expressly contemplated two exceptions to the indirect purchaser rule: (1) where the indirect purchaser acquired goods through a preexisting cost-plus contract and (2) where the direct purchaser is owned or controlled by its customer. Illinois Brick left unclear whether there might be exceptions for cases in which the amount of the overcharge that was passed on to a lower tier of purchasers could be determined simply and with mechanical precision, but thereafter, the Supreme Court held that even where the amount of overcharge passed on is clear, allowing indirect purchasers to pursue damages claims is inconsistent with Illinois Brick, and the Court refused to create any new exception.

Counsel: ARGUED: Michael K. Kellogg, KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C., Washington, D.C., for Appellants.

David Bruce Tulchin, SULLIVAN & CROMWELL, New York, New York; Paul M. Smith, JENNER & BLOCK, L.L.C., Washington, D.C., for Appellees.

ON BRIEF: Mark C. Hansen, Steven F. Benz, Scott K. Attaway, KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C., Washington, D.C.; R. Stephen Berry, J. Daniel Leftwich, Gregory Baruch, BERRY & LEFTWICH, Washington, D.C.; Nelson Roach, NIX, PATTERSON & ROACH, Daingerfield, Texas, for Appellants.

Daryl A. Libow, Joseph J. Matelis, SULLIVAN & CROMWELL, New York, New York; Thomas W. Burt, Richard J. Wallis, Steven J. Aeschbacher, MICROSOFT CORPORATION, Redmond, Washington; Michael F. Brockmeyer, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland; Charles B. Casper, MONTGOMERY, MCCRACKEN, WALKER & RHOADS, L.L.P., Philadelphia, Pennsylvania; Steve W. Berman, HAGENS BERMAN, L.L.P., Seattle, Washington, for Appellee Microsoft.

Susan R. Podolsky, JENNER & BLOCK, L.L.C., **[**2]** Washington, D.C.; Jerold S. Solovy, Barbara S. Steiner, JENNER & BLOCK, L.L.C., Chicago, Illinois; Samuel R. Miller, FOLGER, LEVIN & KAHN, L.L.P., San Francisco, California, for Appellee Dell; William D. Coston, Martin L. Saad, VENABLE, BAETJER, HOWARD & CIVILETTI, L.L.P., Washington, D.C., for Appellee Compaq; G. Brian Busey, MORRISON & FOERSTER, L.L.P., McLean, Virginia; Penelope A. Preovolos, MORRISON & FOERSTER, San Francisco, California, for Appellee Packard Bell.

Judges: Before WILLIAMS and GREGORY, Circuit Judges, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation. Judge Williams wrote the majority opinion, in which Senior Judge Michael joined. Judge Gregory wrote a dissenting opinion.

Opinion by: WILLIAMS

Opinion

[*198] WILLIAMS, Circuit Judge:

Mark H. Dickson and Carey D. Ebert, trustee in bankruptcy for Gravity, Inc., (collectively, Gravity) appeal the district court's dismissal under *Federal Rule of Civil Procedure 12(b)(6)* of Gravity's consumer class action claims against Microsoft Corporation and three original equipment manufacturers (OEMs) -- Compaq Computer Corporation (Compaq), Dell Computer Corporation (Dell), **[**3]** and PB Electronics, Inc. (PB) (collectively, the OEM Defendants) -- in the United States District Court for the District of Maryland. For the reasons set forth below, we affirm.

I.

In February 1999, Gravity filed this action in the United States District Court for the District of Columbia, alleging a "hub-and-spoke" conspiracy between Microsoft and the OEM Defendants to restrain **[*199]** trade, in violation of *§ 1* of the Sherman Act, and a conspiracy to maintain Microsoft's alleged monopolies [1] in the sale of operating systems, [2] word processing, and spreadsheet software, in violation of *§ 2* of the Sherman Act. [3] The proposed class action consists of two separate classes. The first class is composed of "United States purchasers, between October 20, 1993 and the present, of Microsoft Windows or MS-DOS operating software . . . installed and sold with personal computers compatible with Intel x86/Pentium architecture purchased directly from Compaq, Dell, or [PB]." (J.A. at 103.) The second class is composed of "United States purchasers, between October 20, 1993 and the present, of Microsoft word processing software and/or Microsoft spreadsheet software installed and sold with personal **[**4]** computers compatible with Intel x86/Pentium architecture purchased directly from Compaq, Dell, or [PB]." (J.A. at 103.)

[5]** Gravity alleges that the OEM Defendants and Microsoft violated the Sherman Act by entering into licensing agreements with the following anticompetitive provisions: (1) a prohibition against removing icons, folders, or Start

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[1] ***HN1***[] The Supreme Court defines monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. "More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level." *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 51 (D.C. Cir. 2001)* (citing 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 501, at 85 (1995)). As the D.C. Circuit noted, "merely possessing monopoly power is not itself an antitrust violation," but "it is a necessary element of a *[Section 2]* monopolization charge." *Id.*

[2] Operating systems function as platforms for software applications, such as word processing and spreadsheet programs.

[3] Gravity also asserted a class action claim against Microsoft individually for monopolization of case management and litigation support software, but Gravity has voluntarily dismissed this claim with prejudice.

menu entries from the Windows desktop; (2) a prohibition against modifying the initial Windows boot sequence; (3) the integration of Internet Explorer (IE), Microsoft's Internet browser software, and other application software with Microsoft's operating software; and (4) the inclusion of long-term distribution contracts, exclusive dealing distribution arrangements, and per-processor license fees. [4]

In exchange for agreeing to these provisions, the OEM Defendants allegedly **[**6]** received various benefits, including discounts on software and "greater cooperation from Microsoft in product development." *Gravity, Inc. v. Microsoft Corp., 127 F. Supp. 2d 728, 732 n.5 (D. Md. 2001)*; *see also* *United States v. Microsoft Corp., 84 F. Supp. 2d 9, 42 (D.D.C. 1999)* (stating that Compaq and several other OEMs enjoyed "early access to Windows source code"). Gravity also alleges that the agreements benefitted the OEM Defendants by allowing them to sell more computer hardware than they would have sold if the relevant software markets were competitive and by ensuring that the OEM Defendants would not be undercut by rivals offering either comparable hardware with lower-priced software or comparable hardware without software.

Gravity claims that the restrictive licensing agreements were predicated, at least in part, on the perceived threat from emerging "middleware" platforms. Gravity's theory is that middleware platforms **[*200]** feasibly could replace most operating software functions by allowing developers to write programs interfacing with middleware rather than the operating system. [5] *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 74 (D.C. Cir. 2001)*. **[**7]** The D.C. Circuit has explained the threat of middleware platforms to Microsoft's monopoly in the operating systems market as follows:

> If a consumer could have access to the applications he desired -- regardless of the operating system he uses -- simply by installing a particular browser on his computer, then he would no longer feel compelled to select Windows in order to have access to those applications; he could select an operating system other than Windows based solely upon its quality and price. In other words, the market for operating systems would be competitive.

Id. 253 F.3d at 60. Gravity also alleges that Microsoft has faced challenges from competing operating software, such as DR-DOS.

The restraints on trade in the licensing agreements allegedly have denied the class members the choice of competitive software products and have resulted in supracompetitive prices **[**8]** for Microsoft's operating system and application software. Gravity does not allege any conspiracy between Microsoft and the OEM Defendants to set the resale price of the software. Instead, it claims that overcharges were passed on to the consumers by the OEM Defendants when the consumers purchased personal computers (PCs) from the OEM Defendants.

Microsoft and the OEM Defendants moved to dismiss the First Amended Complaint (FAC). While those motions were under submission, the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the District of Maryland, where it was coordinated with approximately sixty-four other antitrust actions against Microsoft. The other antitrust actions were consolidated into a single class action. Gravity's complaint was not consolidated with these actions because it was the only complaint alleging claims against OEMs as defendants. *In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 704 & n.2 (D. Md. 2001)*.

In January 2001, the district court dismissed Gravity's FAC for failure to state a claim. Following this dismissal, Gravity moved for leave to file a Second Amended Complaint **[**9]** (SAC). In the SAC, Gravity alleged two separate vertical conspiracies between Dell and Microsoft and Compaq and Microsoft. [6] Gravity did not name PB

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[4] Per-processor license fees are royalties that Microsoft requires the OEM Defendants to pay for personal computers that are sold pursuant to the licensing agreement containing a "particular microprocessor type." *United States v. Microsoft Corp., 1995 U.S. Dist. LEXIS 20533*, CIV. A. 94-1564, 1995 WL 505998, at *2 (D.D.C. Aug. 21, 1995).

[5] Netscape Navigator and the Java programming language are examples of middleware products written for multiple operating systems.

[6] For a discussion of the distinction between a "hub-and-spoke" conspiracy and separate vertical conspiracies, see *infra* at 9-10.

as a defendant. [7] Gravity repeated its allegations of anticompetitive conduct and included a claim that Microsoft's licensing agreements "bundled or tied the distribution of Microsoft's middleware, the Internet Explorer browser, with Microsoft's Windows operating software." (J.A. at 465.) The district court denied leave to file the SAC on the ground of futility, concluding that the SAC also failed to state a claim upon which relief could be granted.

On appeal, Gravity contends that both complaints allege proper claims under *§ 1* **[*201]** and *§ 2* of the Sherman **[**10]** Act. Gravity also argues that the district court erred in applying the indirect purchaser rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, to foreclose compensatory damages. We address each argument in turn.

II.

Before turning to our consideration of Gravity's claims of error, a brief overview of the public enforcement action for injunctive relief brought by the federal government and nineteen states against Microsoft in the United States District Court for the District of Columbia is warranted. [8] *See* *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34 (D.C. Cir. 2001)*. In analyzing the *§ 2* claim against Microsoft, the D.C. Circuit upheld the district court's finding that Microsoft has monopoly power in the market for operating system software for Intelcompatible PCs with its Windows software, which has gained more than 95% market share. *See id.* *253 F.3d at 51-58*. It further affirmed the district court's finding that Microsoft had "engaged in exclusionary [or anticompetitive] conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, **[**11]** or historic accident'" for the purpose of maintaining its monopoly power in the operating systems market. *Id. 253 F.3d at 58*. In detailing Microsoft's anticompetitive conduct, the D.C. Circuit relied primarily on the same licensing agreements underlying Gravity's complaint, although it focused on Microsoft's dealings with all of the OEMs who entered into such agreements in the aggregate rather than two or three agreements in isolation. Specifically, the D.C. Circuit highlighted the prohibitions against: "(1) removing any desktop icons, folders, or 'Start' menu entries; (2) altering the initial boot sequence; and (3) otherwise altering the appearance of the Windows desktop." [9] *Id. at 61*. It affirmed the district court's conclusion that Microsoft used the restrictions in the licensing agreements to ensure the predominance of IE in the browser market, thereby gaining market share in the browser market for the purpose of maintaining Microsoft's monopoly in the operating systems market. [10] Only the third restriction was held to have been justified by Microsoft's need to protect its copyrighted work. *Id. at 63*. The D.C. Circuit held that the first two restrictions "represent uses of **[**12]** Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification" and, therefore, that Microsoft's imposition of these restrictions violated *§ 2* of the Sherman Act. *Id.* at 64.

III.

With this background in mind, we evaluate the district **[**13]** court's dismissal of Gravity's complaint. ***HN2***[] When reviewing the district court's grant of a motion to dismiss a Sherman Act complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, "we must determine whether allegations covering all the elements that comprise the theory for relief have been stated as required." **[*202]** *Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 220 (4th Cir. 1994)* (internal quotation marks omitted) (citing *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189, 98 L. Ed. 618, 74 S. Ct. 452 (1954))*; *Mun. Utils. Bd. of Albertville v. Ala. Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991)* ("A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be

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[7] Gravity did not allege a separate conspiracy between Microsoft and PB in the SAC because none of the named plaintiffs purchased a PC from PB. (Appellant's Br. at 20 n.5.)

[8] Although Gravity's complaint was filed prior to resolution of the public enforcement action, the factual predicate is similar, and on appeal, relies upon many of the D.C. Circuit's findings for general support for its propositions.

[9] For example, the licensing agreements prohibited OEMs from causing any user interface other than the Windows desktop to launch automatically and from adding icons or folders different in size or shape from those supplied by Microsoft.

[10] For a detailed discussion of the relationship between the browser and the operating systems markets and the anticompetitive effect of the license restrictions on the OEMs' ability to promote rival browsers, see *Microsoft, 253 F.3d at 59-64*.

identified."). "Moreover, the allegations must be stated in terms that are neither vague nor conclusory." *Estate Constr. Co., 14 F.3d at 220-21*. "Although we will assume that the plaintiffs can prove the facts that they allege in their complaint, 'it is not . . . proper to assume that . . . the defendants have violated the antitrust laws in ways that have not been alleged.'" *Id. at 221* **[**14]** (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))*.

At the outset, we note that although Gravity alleges violations of both *§ 1* and *§ 2*, the district court did not separately examine the sufficiency of Gravity's claims when it dismissed the FAC. The district court determined that the alleged *§ 1* and *§ 2* conspiracies were "coterminous" because they purportedly shared a common goal: maintaining Microsoft's monopolies. *Gravity*, 127 F. Supp. 2d at 730. Because the conspiracies "coalesce," reasoned the district court, the sufficiency of both allegations "must be gauged by the elements of a *section 2* claim." *Id.* "Otherwise, plaintiffs could circumvent the requirements of a conspiracy to monopolize claim, including the requirement that a defendant be shown to have acted with the specific intent to monopolize, simply by characterizing their claim as one arising under *section 1*, whose elements of proof are not as stringent." *Id.* We disagree with the district court's reasoning in this regard. ***HN3***[] A *§ 1* violation "is legally distinct from that under *§ 2* . . . though **[**15]** the two sections overlap in the sense that a monopoly under *§ 2* is a species of trade restraint under *§ 1*." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. The same kind of practices, therefore, may evidence violations of both. *See* *Md. & Va. Milk Pro. Ass'n v. United States, 362 U.S. 458, 463, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)* ("*Sections [1* and *2*] closely overlap, and the same kind of predatory practices may show violations of [both]."); E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* § 6.08, at 258 (2d ed. 1994) ("[The prohibition in *§ 2* against combinations or conspiracies] proscribes a great deal of the same behavior prohibited by *§ 1*). Thus, even if Gravity failed to allege a *§ 2* claim, it is possible that it sufficiently alleged a *§ 1* claim. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* (describing the *§ 2* standard as "the more stringent monopoly standard").

HN4[] To establish a violation of *§ 1* of the Sherman Act, [11] Gravity must **[**16]** prove the following elements: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade. *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991)* (en banc). If Gravity is able to prove a violation of *§ 1*, it then must prove the existence of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' **[*203]** acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*; *Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508 (4th Cir. 2002)*; *Oksanen, 945 F.2d at 708*; *see generally* 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** PP 360-63, at 191-227 (1995). These requirements apply with equal force to Gravity's claims for damages and injunctive relief; the only relevant distinction being that for injunctive relief, "the injury itself need only be threatened." 2 Areeda & Hovenkamp P 360b, at 193.

[17]** A.

With respect to the first element, in the FAC, Gravity alleged a single "hub-and-spoke," or "rimless wheel" conspiracy among the OEM Defendants and Microsoft. ***HN6***[] A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction. *Kotteakos v. United States, 328 U.S. 750, 755, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)* ("The pattern was that of separate spokes meeting at a common center, though we may add without the rim of the wheel to enclose the spokes." (internal quotation marks omitted)). In *Kotteakos*, the Supreme Court made clear that a rimless wheel conspiracy is not a single, general conspiracy but instead amounts to multiple conspiracies between the common defendant and each of the other defendants. *Id. at 768-69, 772*; Joseph F. McSorley, *A Portable Guide to Federal Conspiracy Law* 145

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[11] ***HN5***[] *Section 1* states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C.A. § 1 (West 1997)*.

(1996) ("While the hub may view its dealings with the spokes as part of a single agreement, a spoke may be concerned simply with his or her own actions.").

Gravity does not argue **[**18]** that it is able to meet the test for establishing a "rim" between the OEM Defendants and Microsoft. [12] **[**20]** (Appellant's Br. at 53.) Instead, it urges us to follow the Sixth Circuit, which Gravity asserts has adopted the proposition that a rimless wheel conspiracy constitutes a single, general conspiracy in the context of the Sherman Act. *See* Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 146 (6th Cir. 1972) (setting forth requirements for proving "rimless wheel" conspiracy); *see also* Impro Products, Inc. v. Herrick, 715 F.2d 1267, 1279 n.14 (8th Cir. 1983) (noting that "there is some question whether the conspiracy provisions of Sections 1 and 2 of the Sherman Act apply to a hub-and-spoke conspiracy," but declining to resolve the issue after suggesting that such a theory was appropriate). Nothing in the Supreme Court's holding in *Kotteakos*, however, suggests that such a proposition is correct or permissible. Rather, the Supreme Court was clear: a wheel without a **[*204]** rim is not a single conspiracy. [13] Kotteakos, 328 U.S. at 755. Thus, we agree with the district court that Gravity's attempt in its FAC to plead **[**19]** a single, rimless wheel conspiracy between the OEM Defendants and Microsoft must be rejected.

[21]** In an effort to cure its failure to allege a legally viable conspiracy, Gravity alleged in the SAC separate vertical conspiracies between Microsoft and Compaq and between Microsoft and Dell. Compaq and Dell argue that these allegations also are insufficient to demonstrate concerted action under § 1 because Gravity is unable, as a matter of law, to demonstrate that either shared with Microsoft "a unity of purpose or a common design and understanding." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (internal quotation marks and citation omitted). As this court recently emphasized in Virginia Vermiculite, Ltd. v. HGSI, 307 F.3d 277, 01-1850 (4th Cir. 2002), "concerted activity susceptible to sanction by section 1 is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)." Id. at *9. Gravity has sufficiently alleged that Microsoft and the OEM Defendants pooled their resources, rights, or economic power. Furthermore, **[**22]** to the extent Compaq and Dell argue that it was against their economic

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[12] ***HN7***[] A single criminal conspiracy generally is demonstrated by an "overlap of key actors, methods, and goals." United States v. Strickland, 245 F.3d 368, 385 (4th Cir. 2001) (internal quotation marks and citations omitted); *see also* United States v. Bowens, 224 F.3d 302, 308 (4th Cir. 2000) (holding that it was not error for the district court to refuse to instruct the jury on multiple conspiracies where there was evidence of common methods of operation and common participants linked by a mutual interest); United States v. Squillacote, 221 F.3d 542, 574 (4th Cir. 2000) ("A single conspiracy exists where there is one overall agreement, or one general business venture." (internal quotation marks omitted)). Because Gravity does not argue that its allegations are sufficient to demonstrate this type of overlap but instead only advocates our adopting the concept of a rimless wheel conspiracy, we need not decide whether the same test that applies to demonstrate a single criminal conspiracy would apply in the context of the Sherman Act.

[13] The dissent's confusion in applying *Kotteakos* is understandable by reference to its reliance on the Sixth and Eighth Circuits, both of which appear to have misinterpreted *Kotteakos*. *Post* at 30-31 (citing Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138 (6th Cir. 1972); Impro Prods., Inc. v. Herrick, 715 F.2d 1267, 1279 (8th Cir. 1983)). In *Elder-Beerman*, the Sixth Circuit stated that "there is much discussion in the *Kotteakos* decision indicating the possibility that such a 'rimless wheel' theory might be used in a civil case though not appropriate in a criminal case." Elder-Beerman, 459 F.2d at 147. In *Impro Products*, the Eighth Circuit compounded the Sixth Circuit's error by describing the test set forth in *Elder-Beerman* for a rimless wheel conspiracy (which is adopted by the dissent, post at 29-30) and then concluding that a rimless wheel conspiracy constitutes a single conspiracy in civil actions. Impro Prods., 715 F.2d at 1279 & n.14. Nothing in *Kotteakos* suggests, however, that the definition of a rimless wheel conspiracy turns on whether the conspiracy is civil or criminal in nature; the Sixth and the Eighth Circuits' contrary belief apparently stems from the distinction between criminal and civil actions that was drawn in *Kotteakos* for purposes of analyzing harmless error.

In any event, even if we were to further distort the clear holding set forth in *Kotteakos* by following the Sixth and Eighth Circuits in the manner suggested by the dissent, our resolution of Gravity's claims would be unaffected. Regardless of whether Gravity has alleged a single conspiracy among the OEM Defendants and Microsoft or two separate agreements, its § 1 and § 2 claims would be subject to dismissal for failure to allege facts demonstrating a significant likelihood of anticompetitive effects.

interests to enter into § 1 conspiracies with Microsoft, we note that Gravity has **HN8**[] alleged that Compaq and Dell received financial and other benefits in exchange for entering into the licensing agreements. These allegations are sufficient for purposes of Rule 12(b)(6) to demonstrate that a § 1 conspiracy was economically plausible. [14] *Cf., e.g.*, Spectators' Communication Network, Inc. v. Colonial Country **[*205]** Club, 253 F.3d 215, 220-22 (5th Cir. 2001) (analyzing relevant caselaw and concluding that a vertical conspiracy could be shown under § 1 even though it likely would be against Anheuser-Busch's economic interest to conspire to restrain competition in a market in which it was a purchaser).

[23]** Moreover, **HN9**[] "the 'combination or conspiracy' element of a section 1 violation is not negated by the fact that one or more of the coconspirators acted unwillingly, reluctantly, or only in response to coercion." MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 973 (7th Cir. 1995); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 615 (7th Cir. 1997) (noting that the wholesaler's participation would be actionable even if the jury found that they "were tools of the manufacturers -- reluctant accomplices, yet not the less liable for that."); *see also* United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978) ("The general rule [is] that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect."). The co-conspirators need not share the same motive or goal; it is sufficient to allege that the co-conspirators "acquiesced in an illegal scheme." United States v. Paramount Pictures, Inc., 334 U.S. 131, 161, 92 L. Ed. 1260, 68 S. Ct. 915 (1948); *see also* Va. Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 541 (4th Cir. 1998) **[**24]** ("It is not necessary that [Historic Green Springs, Inc.] have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects."); Duplan Corp. v. Deering Milliken Inc., 594 F.2d 979, 982 (4th Cir. 1979) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial."). Accordingly, Gravity's allegations regarding the commercial license agreements are sufficient for purposes of 12(b)(6) to set forth two separate vertical conspiracies between Microsoft and Compaq and between Microsoft and Dell.

B.

We next address whether Gravity alleged facts which, if proven true, would establish that the two conspiracies separately imposed unreasonable restraints of trade in interstate commerce. Continental Airlines, 277 F.3d at 508. **HN10**[] In assessing liability under § 1, courts generally evaluate agreements pursuant to one **[**25]** of three approaches. Id. at 508-09 ("The Supreme Court has authorized three methods of analysis: (1) per se analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those with some procompetitive justification, and (3) the full 'rule of reason,' for restraints whose net impact on competition is particularly difficult to determine."). Because the possibility of anticompetitive effects resulting from either licensing agreement is not obvious, we analyze the two licensing agreements at issue -- individually -- pursuant to the "full" rule of reason analysis. [15] *Id.*; *cf., e.g.,* **[*206]** Microsoft, 253 F.3d at 59-60 (applying full rule of reason analysis to claimed § 2 violations).

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[14] Arguably, however, these allegations are insufficient as a matter of law to demonstrate that either Compaq or Dell possessed specific intent to maintain Microsoft's alleged monopolies under § 2. *See* TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1026-27 (10th Cir. 1992) ("Because the cable operators would have no rational motive to create [a monopolistic environment], TVCN's allegations do not provide an inference of specific intent to conspire to achieve the stated goal of the conspiracy.").

[15] Justice Brandeis in Chicago Bd. of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918), explained **HN11**[] the rule of reason as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant

[26]** ***HN12***[] In the rule of reason analysis, "the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market." *Oksanen, 945 F.2d at 708*. This evaluation requires a showing of "anticompetitive effect" resulting from the agreement in restraint of trade. To have an "anticompetitive effect," conduct "must harm the competitive *process* and thereby harm consumers." *Microsoft, 253 F.3d at 58*. "Harm to one or many competitors will not suffice." *Id.* "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Id.* (internal quotation marks omitted). Thus, an inquiry into the lawfulness of the restraint begins "by identifying the ways in which a challenged restraint might possibly impair competition." 7 Areeda & Hovenkamp P 1503a, at 372. After identifying the type of possible harm to competition alleged, we must proceed "to determine whether that harm is not only possible but likely and significant," which requires "examination of market circumstances," including market power and share. 7 *id.* **[**27]** PP 1503a-1503b, at 374-77.

1.

Gravity alleges that Compaq's and Dell's agreements with Microsoft aided the maintenance of Microsoft's monopolies in PC operating system, word processing, and spreadsheet markets. Aiding the maintenance of a monopoly theoretically could harm competition by affecting price and/or output in various ways. For instance, the agreements could allow Microsoft to leverage its market power in the relevant software markets to obtain advantage in some secondary market (such as the browser market), not based upon consumer choice or efficient performance but from the mere fact of Microsoft's market power in the primary market. *See* *Microsoft, 253 F.3d at 62-66* (finding anticompetitive effects resulting from Microsoft's licensing agreements with OEMs based upon Microsoft's leveraging of monopoly power in operating system market to suppress competition in the browser market); *see generally* Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, *87 Geo. L.J. 2079, 2080, 2098 (1999)* (discussing "traditional leveraging theory" and the "Chicago school" leveraging theory and concluding that "defensive leveraging" can create the potential **[**28]** for harm to consumers by aiding in the maintenance of the primary monopoly). Similarly, with respect to the exclusive dealing components of the licensing agreements, the potential harm to consumers is that rival software firms or browsers will be foreclosed from access to consumers, denying consumers competitive choice and allowing supracompetitive pricing with respect to the software markets for which Microsoft has monopoly power. Per-processor fees also arguably could "discourage OEMs from licensing competing operating systems and/or cause OEMs to raise the price for PCs with a competing operating system to recoup the fee paid to Microsoft," theoretically resulting in increased prices for Microsoft's software **[*207]** and decreased opportunities for rival software firms to gain access to consumers. *United States v. Microsoft Corp., 159 F.R.D. 318, 323 (D.D.C. 1995)*, *rev'd on other grounds*, *312 U.S. App. D.C. 378, 56 F.3d 1448 (D.C. Cir. 1995)*; *see generally* Kenneth C. Baseman et al., *Microsoft Plays Hardball: The Use of Exclusionary Pricing and Technical Incompatibility to Maintain Power in Markets for Operating System Software*, 40 Antitrust Bull. 265, 267-68 (1995) **[**29]** (criticizing per-processor licenses).

"Theorizing about conceivable impairments of competition does not, of course, prove that any such impairment has occurred or is likely," or much less is "substantial in magnitude." [16] 7 Areeda & Hovenkamp P 1503a, at 373. Thus, we next must examine whether Gravity sufficiently has alleged the likelihood of a substantial anticompetitive harm caused by the two licensing agreements at issue (considered individually), an inquiry that requires Gravity to allege facts demonstrating "that the defendants played a significant role in the relevant market." *Oksanen, 945 F.2d at 709*; *see also* *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984)* (stating that ***HN13***[] in rule of reason analysis, the plaintiff must "prove that the defendant has sufficient market power to

facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

[16] Nor do we suggest whether any such anticompetitive effect, if shown to be likely and substantial in magnitude, would be outweighed by a procompetitive justification. *See, e.g.*, *Microsoft, 253 F.3d at 59* (noting, under traditional rule of reason analysis, if the plaintiff successfully demonstrates anticompetitive effect, then the burden shifts to the defendant to proffer a procompetitive justification for its conduct).

restrain competition substantially. . . . If not, the inquiry is at an end; the practice is lawful"); 7 Areeda & Hovenkamp P 1503b, at 376 ("Virtually all courts applying the rule of reason require the plaintiff . . . to show, at a minimum, that the defendants play a significant role in the [allegedly restrained] market.").

[30]** 2.

Gravity has provided allegations of Microsoft's market power in the relevant software markets, in the form of Microsoft's shares in these markets. [17] **[**35]** Gravity failed, however, to allege facts regarding Compaq's or Dell's market share and concedes that the PC market is "fiercely competitive" and, therefore, that neither Compaq nor Dell has power in the PC market. [18] *Gravity, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 168 F. Supp. 2d 541, 544*; **[*208]** *see also* Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 761 (7th Cir. 1996) (Easterbrook, J.) ("Computer manufacturers are vigorous rivals; prices drop daily; this is one of our economy's most competitive sectors."). Gravity further concedes that "the only thing that . . . distinguishes [Compaq and Dell] from other OEMs is the alacrity with which they acquiesced in accepting [the licensing] agreements to obtain relatively favorable prices from Microsoft for its products." *Gravity*, 168 F. Supp. 2d at 544. Given Gravity's concession that the PC market is "fiercely competitive," and in light of Microsoft's agreements with other OEMs, Gravity is unable, as a matter of law, to demonstrate that Microsoft's agreements **[**31]** with Compaq and Dell, when considered individually, are capable of causing any substantial harm to competition. For instance, without having alleged Compaq's or Dell's power or share in the PC market, Gravity is unable to demonstrate that rival software firms' access *to Compaq or Dell* was an important component of those firms' potential ability to compete in the software markets, or that Microsoft's agreements with Compaq and Dell substantially hindered the entrance or operation of these rivals in the software markets or denied them access to a significant number of consumers of software. Similarly, given the failure to allege the market power of Compaq or Dell, Gravity is unable to show that Compaq or Dell has forced, or is likely to be able to force, supracompetitive prices on consumers for undesirable software features. Consequently, assuming that Compaq and Dell each possessed an insignificant portion of the PC market and no ability to control pricing or output in the PC market (as is proper in light of Gravity's failure to allege market share or any other facts demonstrating market power), the two licensing agreements -- considered individually -- would be incapable of succeeding **[**32]** in maintaining or leveraging Microsoft's alleged monopolies, in that neither agreement could substantially reduce the usage share of, or prevent the promotion of, rival browsers, rival operating system software manufacturers, or rival applications software manufacturers. [19] *Cf., e.g.*, Continental

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[17] Gravity alleged that Microsoft "maintained a monopoly share (in the range of 90%) in the personal computer operating software market" throughout the "class periods," (J.A. at 473), and maintained a market share in the range of 80-90% in the word processing and spreadsheet software markets throughout the class period. ***HN14***[] For antitrust purposes, market power "is the power to force a purchaser to do something that he would not do in a competitive market." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (internal quotation marks omitted). "It has been defined as the ability of a single seller to raise price and restrict output." *Id.* (internal quotation marks omitted). Market share is defined as "the percentage of a market that is controlled by a firm." Black's Law Dictionary 971 (6th ed. 1991). Market power generally is identified, in part, by examining market share. *See, e.g.*, Andrew Chin, Note, *Antitrust by Chance: A Unified Theory of Horizontal Merger Doctrine*, 106 Yale L.J. 1165, 1169-72 (1997) (discussing movement away from strict reliance on calculation of market share in antitrust analysis). For purposes of Rule 12(b)(6), we consider Gravity's allegations regarding Microsoft's market share sufficient to allege Microsoft's power in the relevant software markets.

[18] Gravity contends that because the relevant markets are in software, there is no need to evaluate Compaq's or Dell's power in the PC market. Compaq's and Dell's power in the PC market is critical in the analysis, however, because both OEMs pre-install Microsoft's software on their PCs; neither operates independently in the software market. Thus, Compaq's and Dell's ability to influence competition in the relevant software markets through their separate agreements with Microsoft is dependent on their ability to influence competition in the PC market. *Cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) ***HN15***[] ("Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.").

[19] Gravity asserts that it need not show that Microsoft's agreements with Compaq and Dell were each a sole cause of any anticompetitive effects but need show only that the agreements were each a "material cause" of anticompetitive effects. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969) ("It is enough

T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19, 54, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (concluding that, although a contractual requirement **[*209]** that distributors sell Sylvania television sets from authorized locations limited competition among the distributors in the resale of Sylvania televisions ("intrabrand competition"), it ultimately *promoted competition* with other brands of television sets ("interbrand competition") and stating that the competitiveness of the interbrand market "provides a significant check on the exploitation of intrabrand market power"); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13-14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) ("we have condemned tying arrangements when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive **[**33]** market"); id. at 16 ("If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law*** . . . . We have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby."); id. at 37-38 (O'Connor, J., concurring) (evaluating tie-ins and noting that to show an adverse impact on consumers, the plaintiff generally must demonstrate two things: market power in the tying-product market and a threat that the seller will acquire market power in the tied-product market); Digital Equip. Corp., 73 F.3d at 761 (Easterbrook, J.) ("Let us ask, then, whether the inclusion of an [operating system] with one's [PC] -- 'tie-in' or not -- is a means to reduce output and create monopoly profits. Unless the seller has market power, the answer is no . . . ."); id. at 762 ("In a competitive market a pig-headed refusal to satisfy customers' preferences, or an attempt to charge for unwanted items, does not lead to monopoly prices; instead it leads to ruin as rivals step in to take the **[**34]** business."). Moreover, with respect to the exclusive dealing component of Gravity's claim, absent an allegation regarding Compaq's or Dell's power or share in the PC market, there is no basis in Gravity's complaint for concluding that either of the two licensing agreements at issue, when considered individually, are likely to foreclose a significant share of the relevant software markets. *See* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961) (holding that an exclusive contract does not violate the Clayton Act unless its probable effect is to "foreclose competition in a substantial share of the line of commerce affected"); Microsoft, 253 F.3d at 68-70 (discussing the exclusive dealing aspects of Microsoft's agreements and concluding that, even when the cumulative effect of Microsoft's agreements were considered, the agreements did not foreclose enough of the relevant browser market to constitute a § 1 violation).

[36]** The district court afforded Gravity ample opportunity to allege facts demonstrating Compaq's or Dell's power in the PC market, but Gravity refused, contending for various reasons that Compaq's and Dell's power and share in the PC market is immaterial to Compaq's and Dell's (separate) ability to influence competition in the relevant software markets. [20] On appeal, **[*210]** it continues to assert that, as a matter of law, Compaq's and Dell's power in the PC market is irrelevant to its § 1 claim because Microsoft's monopoly power, in a variety of ways, is adequate to demonstrate the likelihood of substantial anticompetitive effects. We address each argument below.

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that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."). Without an allegation of market share or market power of either Compaq or Dell, however, Gravity cannot make the latter showing. *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 487-88, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (holding that ***HN16***[] an antitrust claim fails as a matter of law when the plaintiff would have suffered the identical loss without regard to the claimed anticompetitive conduct); 2 Areeda & Hovenkamp P 363a-b, at 219-23 (noting that no material cause can be demonstrated where an independent cause fully accounts for the claimed antitrust injury).

[20] Gravity did allege that Compaq and Dell were the "largest PC makers" and were "among the largest distributors of Microsoft's products." (Appellant's Br. at 11.) The dissent relies on this as a sufficient allegation of Compaq and Dell's respective influences in the PC market. *Post* at 34. Being the "largest" in a relevant market, however, says nothing of a firm's ability to affect competition in that market. For example, Compaq and Dell each may possess only five percent of the market share, whereas many other OEMs each possess four percent of the market share, in which case, despite being the largest PC makers and software distributors, neither Compaq nor Dell would have the ability, through their separate conspiracies with Microsoft, to affect competition in the relevant software markets. *Cf., e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26, 80 L. Ed. 2d 2, 104 S. Ct. 1551 & n.43, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) (holding, as a matter of law, that thirty percent share of the relevant market is insufficient to confer market power). Accordingly, Gravity's allegations that Compaq and Dell were the largest PC makers and software distributors provide no basis whatsoever to conclude that either had sufficient share of the PC market to affect competition in the relevant software markets.

[37]** Gravity first argues that Microsoft's significant market power in the software markets is sufficient to demonstrate anticompetitive effects in those markets without regard to Compaq's or Dell's power or share in the PC market. The relevant focus of the *§ 1* inquiry, however, is the anticompetitive effects of the conspiracy qua conspiracy; therefore, the plaintiff must demonstrate that the conspiratorial agreement itself affected competition in ways that would not have obtained absent the agreement. *Spectators' Communication Network, 253 F.3d at 225* (noting that the issue is "whether the combination or conspiracy, not each individual conspirator, has the [market] power to hurt competition in the relevant market."); *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* ("The purpose of the inquiries into market definition and market power is to determine whether *an arrangement* has the potential for genuine adverse effects on competition." (emphasis added)). To be sure, one can imagine circumstances in which the allegation of one conspirators' market power is sufficient to demonstrate a likelihood of anticompetitive **[**38]** effects. For instance, assuming as true Gravity's allegations regarding Microsoft's market share in the relevant software markets, had Microsoft agreed to sell its software *only* to Compaq and Dell, such an agreement would have had the potential to harm competition in software markets, and ultimately in the PC market, irrespective of Compaq's or Dell's power or share in the PC market. No such arrangement, however, is alleged here.

Gravity next argues that the district court should have evaluated Microsoft's "exclusionary conduct both inside and outside the combinations alleged," and the potential for anticompetitive effects resulting from this conduct in the aggregate. (Appellant's Br. at 49-50.) The SAC, however, did not allege a conspiracy among Microsoft and all OEMs; it alleged discrete conspiracies between Microsoft and Compaq and Microsoft and Dell. Consequently, the district court correctly determined that it could not consider the cumulative harm of Microsoft's agreements with all OEMs but instead was required to consider -- individually -- Microsoft's agreements with Compaq and Dell to evaluate each agreement's potential for anticompetitive effects. [21]

[39]** **[*211]** Likewise, it is untrue that Compaq and Dell, as alleged coconspirators of Microsoft, are responsible for all of Microsoft's unilateral acts with other OEMs who were not members of the alleged conspiracies. As noted above, each licensing agreement must be treated as a separate conspiracy, and only acts taken in furtherance of that alleged conspiracy are appropriately considered in determining the adverse effects of the claimed restraints on trade, not acts of one conspirator taken in furtherance of other possible, distinct conspiracies. *Cf.* *United States v. Bonetti, 277 F.3d 441, 447 (4th Cir. 2002)* (noting, ***HN17***[] in a criminal conspiracy, that a co-conspirator is liable for "all substantive offenses of his co-conspirator that are both reasonably foreseeable and in furtherance of the conspiracy"); *cf. also* *United States v. Santiago, 906 F.2d 867, 872-73 (2d Cir. 1990)* (concluding that the single conspiracy test applies to determine whether coconspirator conduct is reasonably foreseeable and in furtherance of the conspiracy); *United States v. Gooden, 892 F.2d 725 (8th Cir. 1989)* (same). Indeed, to hold otherwise would be to suggest that the **[**40]** distinction between a single conspiracy and multiple conspiracies involving a common defendant is one without a difference.

Thus, we agree with the district court that for Gravity to state a viable *§ 1* claim, it was required to allege facts which, if proven true, would demonstrate that Compaq's or Dell's individual agreements with Microsoft were likely to result in an anticompetitive effect. Without alleging facts demonstrating Compaq's or Dell's power or share in the PC market, Gravity was unable to make such a showing.

Similarly, without allegations regarding the market power or share of Compaq or Dell in the PC market, Gravity is unable to show a conspiracy to monopolize under *§ 2*. [22] *See* 3A Areeda & Hovenkamp P 809, at 370 ***HN18***[] ("In

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[21] The cumulative harm of Microsoft's actions "outside" the two licensing agreements at issue has been subject to review in the public enforcement action and will be further subject to review in the consumer class actions brought against Microsoft individually and in any suits brought by OEMs against Microsoft. As noted above, *supra at 19-20*, the focus of this *§ 1* inquiry is not Microsoft's actions standing alone, but the extent to which its concerted actions with each of the two individual OEMs promoted Microsoft's monopoly power or otherwise restrained trade.

[22] ***HN19***[] *Section 2* states:

those instances where power is a prerequisite to holding an agreement to be an unreasonable restraint of trade [under *§ 1*] . . . it would make no sense to hold the same agreement offensive to *§ 2* without proof of power."). The offense of monopolization requires a showing of "anticompetitive effect." *Microsoft, 253 F.3d at 58*. Thus, a viable *§ 2* conspiracy to monopolize claim must include allegations which, if proven true, would **[**41]** establish that the agreements Compaq and Dell made with Microsoft could have had an anticompetitive effect (when considered separately). *See, e.g.*, *id.* *253 F.3d at 50* (discussing the meaning of "monopolization" within *§ 2*); *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986, 1001 (11th Cir. 1993)* (listing the likelihood of an anticompetitive effect as one of the elements of a conspiracy to monopolize under *§ 2*); *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)* ("[A*] section 1* claim and a *section 2* conspiracy to monopolize claim require the same threshold showing -- the existence of an agreement to restrain trade."). Accordingly, for the reasons set forth above regarding the inadequacies in Gravity's *§ 1* allegations, Gravity's *§ 2* claim also fails as a matter of law.

[42]** Gravity suggests that these conclusions are irreconcilably at odds with the D.C. Circuit's conclusions in the public enforcement action, contending that the D.C. Circuit implicitly recognized that Microsoft's **[*212]** licensing agreements with Compaq and Dell violated *§ 1*. This contention, however, misapprehends the nature of the D.C. Circuit's holding. Notably, the district court in the public enforcement action held that the exclusive dealing arrangements in Microsoft's licensing agreements, including its agreement with Compaq, did not violate *§ 1* under the rule of reason, concluding "that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute a *§ 1* violation." *United States v. Microsoft, 87 F. Supp. 2d 30, 53 (D.D.C. 2000)*. The only *§ 1* violation found by the district court was based upon Microsoft's alleged tying of Windows and IE, and the D.C. Circuit vacated that ruling. *Microsoft, 253 F.3d at 84-95*. Moreover, in conducting its *§ 2* analysis, the D.C. Circuit evaluated the anticompetitive effects of Microsoft's licensing agreements with *all* OEMs. Of course, as is set forth above, the analysis **[**43]** of anticompetitive effects depends on the identification of the defendants' "significant role" within the relevant market -- an inquiry that is much different when examining the cumulative harm of Microsoft's conduct than it is when examining the effects of Microsoft's individual agreements with two OEMs for which Gravity declines to provide information regarding market share or power. Thus, nothing in the public enforcement action suggests that Gravity's *§ 1* and *§ 2* claims are viable.

We recognize that ***HN20***[] "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles," *Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, and that an antitrust complaint should not be dismissed at the *Rule 12(b)(6)* stage "merely because the court doubts the plaintiff will ultimately prevail," *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 145 n.8 (4th Cir. 1990)* (internal quotation marks omitted). Nevertheless, to avoid dismissal for failure to state a claim, the plaintiff must "colorably state[] facts which, if proven, would entitle him to **[**44]** relief." *Id.* (internal quotation marks omitted). We consistently have held this to require an allegation of facts supportive of each element of the plaintiff's antitrust claim. *Estate Constr. Co., 14 F.3d at 220* (holding that "notice pleading" requires "allegations covering all the elements that comprise the theory for relief" (internal quotation marks omitted); *Mun. Utils. Bd. of Albertville, 934 F.2d at 1501* ("A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified.")). "A contrary view would be tantamount to providing antitrust litigation with an exemption from *Rule 12(b)(6)*." *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106-07 (7th Cir. 1984)*.

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

15 U.S.C.A. § 2 (West 1997).

Although Gravity alleges that Microsoft's agreements with Compaq and Dell individually produced anticompetitive effects, it does not provide any factual basis to support this allegation. [23] Moreover, Gravity has made clear that it has no intention of providing evidence regarding the market power or share of Compaq or Dell; thus, it does not seek additional discovery or factual development with respect to the issue of **[**45]** market share or power. Instead, it asks us to accept its conclusory assertion that Microsoft's agreements with Compaq and Dell, when considered individually, created a likelihood of significant anticompetitive effects in the relevant software **[*213]** markets without regard to Compaq's or Dell's market power or share in the PC market. This we cannot do. ***HN21***[] "The pleader may not evade [*Rule 12(b)(6)*] requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust." *Car Carriers, Inc., 745 F.2d at 1106* (internal quotation marks omitted). Because Gravity has failed to allege facts which, if true, would establish that the two licensing agreements at issue are unreasonable restraints on trade that caused antitrust injury to consumers, its *§ 1* and *§ 2* claims fail as a matter of law. *Cf.* *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982)* ("Since the complaint does not allege facts suggesting that [the manufacturer's] refusal to deal had any significant anti-competitive effect **[**46]** on the market, there is no rule of reason case alleged.").

This court recently concluded that the Supreme Court's holding in *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*, did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim. *See* *Iodice v. United States, 289 F.3d 270, 281 (4th Cir. 2002)* ("Even in these days of notice pleadings a complaint asserting a negligence claim must disclose that each of the elements is present in order to be sufficient." (internal citations and quotation marks omitted)); *see also* *Swierkiewicz, 122 S. Ct. at 997* (relying upon a distinction between "evidentiary **[**47]** standards" and "pleading requirements"). As the dissent recognizes, a sufficient allegation of anticompetitive effects is dependent upon Compaq's and Dell's respective abilities to affect competition in the PC market. *Post* at 35 ("If the conspiracy included only minor OEMs, then the conspiracy would presumably have no power to cause significant anticompetitive effects."). Consequently, by failing to allege Compaq's and Dell's market share or power, Gravity has failed to set forth factual allegations necessary to support the basic elements of its *§ 1* and *§ 2* claims. *See* *McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 243, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)* (noting that ***HN22***[] to establish liability under the Sherman Act, a showing of either an anticompetitive effect or an anticompetitive purpose is necessary).

IV. *Illinois Brick*

Even if we agreed with Gravity that it has alleged sufficient claims under *§ 1* and *§ 2* for purposes of *Rule 12(b)(6)*, we would affirm the district court's conclusion that Gravity is barred from seeking compensatory damages relief under the indirect purchaser rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. **[**48]** [24] A brief review of the evolution of the indirect purchaser rule is helpful to understand its application to Gravity's claims. In *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, the defendant in a Sherman Act suit, a manufacturer of machinery for making shoes, defended on the ground that the plaintiff, a shoe manufacturer that had bought the defendant's machinery, had passed on any monopoly overcharge to its own customers, the wholesale purchasers **[*214]** of its shoes, and hence had not been injured. The Supreme Court held that an antitrust defendant would not be permitted to defend against a damages suit on the ground that the plaintiff had shifted the cost of the defendant's wrongdoing to the plaintiff's customers. The Court explained the rationale for its decision as follows:

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[23] While the dissent notes as "unexceptional" the proposition that a plaintiff may not rely on a bare legal conclusion to avoid dismissal under *Rule 12(b)(6)*, it proceeds to rely solely on Gravity's bare legal conclusions to find its complaint sufficient. *Post* at 37 n.1.

[24] ***HN23***[] *Illinois Brick*'s indirect purchaser rule, when applicable, bars only compensatory damages relief and does not apply to injunctive relief. *See* *Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 111 n.6, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; *Campos v. Ticketmaster, 140 F.3d 1166, 1172 (8th Cir. 1998)*; *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856-57 (3d Cir. 1996)*.

> Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent **[**49]** the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

Id. at 493. The *Hanover Shoe* Court further explained that the plaintiff's customers "would have only a tiny stake" in enforcing the ***antitrust law***. *Id. at 494*.

In *Illinois Brick*, plaintiffs, who were indirect purchasers of concrete blocks, sought to recover damages **[**50]** on the theory that masonry contractors, who incorporated concrete blocks purchased from defendants into walls and other masonry structures, passed on the alleged overcharge for the blocks to general contractors, who incorporated the masonry structures into entire buildings, and that the general contractors in turn passed on the overcharge to plaintiffs in the bids submitted for those buildings. *Illinois Brick, 431 U.S. at 726-27*. The Court extended the *Hanover Shoe* rule and held that ***HN24***[] only direct purchasers from an antitrust violator can sue for damages, providing two rationales for the rule: it avoids the danger of multiple, "overlapping recoveries" against the original seller by direct and indirect purchasers, and it avoids the "evidentiary complexities and uncertainties" in determining the amount of any overcharge passed through the intermediary to the indirect purchaser. *Id. at 730-33*. The Supreme Court expressly contemplated two exceptions to the indirect purchaser rule: (1) where the indirect purchaser acquired goods through a preexisting cost-plus contract and (2) "where the direct purchaser is owned or controlled by its customer." *Id. at 736* & n. 16. **[**51]** *Illinois Brick* left unclear whether there might be exceptions for cases in which the amount of the overcharge that was passed on to a lower tier of purchasers could be determined simply and with mechanical precision, but thereafter, the Supreme Court held that even where the amount of overcharge passed on is clear, allowing indirect purchasers to pursue damages claims would be inconsistent with *Illinois Brick*, and the Court refused to create any new exception. *Kansas v. Utilicorp United, Inc., 497 U.S. 199, 208, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)*. Moreover, in *Utilicorp United*, the Supreme Court cautioned lower federal courts against creating new exceptions to the *Illinois Brick* rule. *Id. at 216* ("The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe ample justification exists for our stated decision not to carve out exceptions to the direct purchaser rule." (internal quotation marks omitted)).

Despite this admonition, several courts have recognized a "coconspirator exception" to *Illinois Brick*. *See, e.g.*, *Paper Sys. Inc. v. Nippon Paper Indus., 281 F.3d 629, 631-32 (7th Cir. 2002)*; **[**52]** *Lowell v. American Cyanamid Co., 177 F.3d 1228, 1231* ***[*215]*** *(11th Cir. 1999)*; *Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir. 1998)*; *In re Brand Name Prescription Drugs, 123 F.3d at 604-05*; *Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211 (9th Cir. 1984)*. Gravity asserts that these cases stand for the proposition that *Illinois Brick* is inapplicable when any conspiracy has been alleged, but we interpret these cases as standing for the more narrow proposition that *Illinois Brick* is inapplicable to a particular type of conspiracy -- price-fixing conspiracies. *Cf.* *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 854-55 (3d Cir. 1996)* (refusing to adopt a co-conspirator exception where plaintiffs have not alleged that the intermediaries immediately upstream colluded to overcharge). Were we to adopt Gravity's broader interpretation, the *Illinois Brick* rule would be inverted solely based upon artful pleading. Such a result is contrary to *Illinois Brick* itself as well as the Supreme Court's clear directive in *Utilicorp United* against crafting new exceptions to the *Illinois Brick* **[**53]** rule. Far more reasonable is the proposition that, to the extent a court were to recognize a co-conspirator exception to *Illinois Brick*, such an exception would be grounded on the damages theory underlying the alleged conspiracy. For example, the rationale for concluding that *Illinois Brick* does not apply to a price-fixing conspiracy is that no overcharge has been passed on to the consumer: When a dealer has illegally conspired with a manufacturer with respect to the price paid by a consumer, then "the consumer is the only party who has paid any overcharge." 2 Areeda & Hovenkamp P 371h, at 264. We need not resolve whether we would recognize a co-conspirator exception to *Illinois Brick*'s indirect purchaser rule for a price-fixing conspiracy because no such conspiracy has been alleged here. Instead, Gravity's compensatory damages claim is premised on an attempt to recover for Microsoft's illegal overcharge that allegedly was passed on to Gravity. Accordingly, Gravity's claim is materially indistinguishable from the claim under consideration in *Illinois Brick*, and its inclusion of a conspiracy allegation is insufficient to circumvent the *Illinois Brick* rule.

Nevertheless, **[**54]** Gravity argues that *Illinois Brick* ought not to control because the policy concerns underlying *Illinois Brick* are not implicated here. First, Gravity contends that there is no danger of duplicative recovery because the OEMs "apparently have elected not to sue Microsoft." (Appellant's Br. at 69.) The Supreme Court in *Illinois Brick*, however, "recognized that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." *Illinois Brick, 431 U.S. at 746*. Yet, the majority concluded that "on balance . . . the legislative purpose in creating a group of private attorneys general to enforce anti-trust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed part of it." *Id.* (internal quotation marks omitted).

Gravity also argues that its claims do not require the complex task of price-tracing because the consumers' damages are the difference between the "but-for" price that they would have paid for the Windows software absent the illegal conspiracy **[**55]** and the amount they actually paid for it. This argument misses the point, in that to calculate the "but-for" price, the court would be required to determine the overcharge, if any, for Microsoft's software that was passed on to consumers -- the exact analysis that *Illinois Brick* forbids.

[*216] Finally, Gravity suggests that, to the extent there is any difficulty in apportioning damages, the court could avoid this difficulty by awarding 100% of the overcharge to the consumer. Gravity does not explain, however, why consumers should be awarded a windfall. At bottom, Gravity's policy arguments are virtually identical to those raised by Justice Brennan in his *Illinois Brick* dissent. *Id. at 748-65* (Brennan, J., dissenting). Of course, they were considered and rejected by the majority in formulating the indirect purchaser rule, and we are not at liberty to reevaluate those policy choices here. Accordingly, we conclude that *Illinois Brick* bars Gravity's claims for compensatory damages for the alleged *§ 1* and *§ 2* violations.

V.

We conclude that Gravity's *§ 1* and *§ 2* claims fail as a matter of law and that, in any event, *Illinois Brick* bars Gravity's ability **[**56]** to recover compensatory damages. Thus, we affirm the judgment of the district court.

AFFIRMED

Dissent by: Gregory

Dissent

GREGORY, Circuit Judge, dissenting:

I agree with the majority, *ante* at 8, that Gravity's *§ 1* claims need not meet the more rigorous standards of *§ 2* of the Sherman Act. However, I respectfully dissent. Whether or not Gravity would succeed on the merits, it has clearly stated claims under both *§ 1* and *§ 2* of the Sherman Act.

I.

The majority makes its first error when it rejects Gravity's allegations of a single conspiracy, relying on *Kotteakos v. United States, 328 U.S. 750, 755, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)*. In *Kotteakos*, the Supreme Court rejected one articulation of a "rimless wheel" conspiracy. The conspiracy envisioned--and rejected--by *Kotteakos* states: "A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction." *Ante*, at 9. The majority says that because the *Kotteakos* Court rejected a variant of a "rimless wheel" conspiracy, **[**57]** we must too. The problem with that reasoning is that Gravity is *not* arguing that we should adopt the specific definition of conspiracy that was rejected in *Kotteakos*.

In *Kotteakos*, the underlying crime was conspiracy to obtain loans under the National Housing Act by false and fraudulent statements. The center of the conspiracy was a man named Brown, who was in the business of brokering fraudulently obtained loans for his coconspirator clients. *328 U.S. at 753*. All of the clients used Brown to obtain the loans, but each client's use of Brown's services was independent of every other client's use. *Id. Kotteakos* involved not one, but multiple conspiracies. Not only did Brown's co-conspirators have no express agreements among themselves, their participation was also in no way *dependent* on the participation of other users of Brown's services. The Court drew upon an analogy offered by the court of appeals to explain the point: "Thieves who dispose of their loot to a single receiver--a single 'fence'--do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such." *Id. at 755*. **[**58]**

In contrast to *Kotteakos*, Gravity outlined the elements of a "rimless wheel" conspiracy as follows:

[*217]

(1) that there is an overall-unlawful plan or common design in existence;

(2) that knowledge that others *must be involved* is inferable to each member because of his knowledge of the unlawful nature of the subject of the conspiracy [,] but knowledge on the part of each member of the exact scope of the operation or the number of people involved is not required; and

(3) there must be a showing of each alleged member's participation.

Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 146-47 (6th Cir. 1972) (emphasis deleted and added); *Impro Prods., Inc. v. Herrick, 715 F.2d 1267, 1279 (8th Cir. 1983)* (quoting *Elder-Beerman*). Whether we should adopt this test *in toto* I would not decide today, but I believe that this definition of a "rimless wheel" conspiracy is useful for purposes of this case, and is consistent with well-established interpretations of the Sherman Act.

The critical difference between the test Gravity urges, and the test *Kotteakos* rejected lies in the requirement "that **[**59]** knowledge that others must be involved is inferable to each member because of his knowledge *of the unlawful nature of the subject of the conspiracy*" (emphasis added). *Id*. Gravity has alleged that the nature of the conspiracy, by design and by necessity, was broader than any one agreement between Microsoft and an OEM, and that knowledge of that interdependent design was inferable to each member of the conspiracy. Regardless of whether any OEM desired the participation of other OEMs (and they conceivably might have), Gravity alleges that each OEM joined a conspiracy which it knew was, by its nature, broader than just itself and Microsoft.

These allegations are plainly sufficient to state a claim under the Sherman Act. The law has been clear that there need not be an express agreement between every conspirator in order for a single conspiracy to be formed. *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227, 83 L. Ed. 610, 59 S. Ct. 467 (1939)* ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators"); *see also* *United States v. Masonite Corp., 316 U.S. 265, 275, 86 L. Ed. 1461, 62 S. Ct. 1070, 1942 Dec. Comm'r Pat. 777 (1942)* **[**60]** ("Here, as in *Interstate Circuit*, . . . it was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."); *United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985)* (stating that plaintiff must show that each alleged conspirator "participated in the conspiracy with knowledge of the essential nature of the plan.").

In *Interstate Circuit, Inc. v. United States*, film exhibitors suggested that film distributors insert clauses into their distribution contracts requiring minimum ticket prices for certain films. The distributors accepted the suggestion nearly unanimously. The Court held that an agreement among the distributors could be inferred:

> Each [distributor] was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions . . . there was risk of a substantial loss of the business and good will of the . . . exhibitors, but that with it there was the prospect of increased profits.

306 U.S. at 222. Such is the case with the OEMs. It takes no stretch of logic to infer that the **[**61]** OEMs knew that Microsoft's plans contemplated the cooperation of other OEMs. It is the agreement to participate in this common plan that formed a single conspiracy. "Acceptance by competitors, without previous agreement, **[*218]** of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, 306 U.S. at 227*. Thus, I would find that the allegations are sufficient to state a claim.

II.

The majority next finds that Gravity has failed to allege "facts which, if proven true, would establish that the two conspiracies separately imposed unreasonable restraints of trade in interstate commerce." *Ante*, at 13. Even if I agreed that there were two conspiracies and not one alleged in this case, there is no question that Gravity's pleadings are more than adequate.

The majority requires far more from Gravity than is appropriate under notice pleading standards. Aside from a statement of jurisdiction and a demand for relief, *Federal Rule of Civil Procedure 8(a)* requires nothing more than "a short and plain statement of the **[**62]** claim showing that the pleader is entitled to relief [.]" *534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992, 997*. The elements for a claim of conspiracy to restrain trade in violation of *§ 1* of the Sherman Act are (1) concerted action that (2) unreasonably restrains trade. *Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 220 (4th Cir. 1994)*; *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 702 (4th Cir. 1991)*. According to the majority, Gravity has not adequately pled the second element, an unreasonable restraint of trade, because Gravity failed to plead the market shares of the OEMs. This is necessary, the majority says, because Gravity must prove the OEMs' individual market power in order to prove the conspiracy's market power. The conspiracy's market power, in turn, is required to prove the potential for anticompetitive effects, which is part of Gravity's burden to satisfy the "rule of reason."

The majority's pleading standard conflicts with the Supreme Court's recent pronouncement on federal pleading requirements. "Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case." *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 122 S. Ct. 992, 997, 152 L. Ed. 2d 1 (2002)*. **[**63]** "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id. 122 S. Ct. at 998*. "*Rule 8(a)*'s simplified pleading standard applies to all civil actions, with certain exceptions." *Id.* Thus, the Supreme Court has made crystal clear, just this past term, that an evidentiary standard does not determine the adequacy of a complaint. *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)*. It is inappropriate, therefore, to require plaintiffs to plead facts going to that evidentiary standard in a complaint.

While I agree that liability in this case, in all likelihood, would be determined under the "rule of reason" standard, *see, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, it seems to me that the "rule of reason" is an evidentiary standard, not a pleading requirement. Courts ordinarily have to undertake a factual inquiry before it is determined whether the "rule of reason" or *per se* rules apply. If *per se* rules apply, then **[**64]** anticompetitive effects do not matter. *See United States v. W.F. Brinkley & Son Constr. Co., Inc., 783 F.2d 1157, 1162, n.10 (4th Cir. 1986)* (noting this circuit recognizes *per se* antitrust violations and, in doing so, there is no requirement of proof of anticompetitive results). The conduct is illegal regardless of proof of effects. *Id.*

[*219] Additional specificity regarding the OEMs' market power is not necessary. While anticompetitive effect is often proven through analysis of the relevant market definition and market power, it can also be proven through *actual* anticompetitive effects. *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*; VII P. Areeda, ***Antitrust Law*** § 1511, p.429 (1986). The Supreme Court made clear that it is inappropriate to require a plaintiff to plead facts which he may not need to succeed on the merits of the claim.

Swierkiewicz, 122 S. Ct. at 997 (holding that plaintiff need not plead facts establishing a prima facie case of employment discrimination, in part because it would be "incongruous to require a plaintiff, in order to survive a motion to dismiss, **[**65]** to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered"). Gravity has pled actual anticompetitive effects. *See* Compl. PP 4, 59, 62-63, 68-69, 91-92, 95, 107, 115-117, 123-124, 150, 152, 154-156. Accordingly, the complaint should withstand a motion to dismiss.

To the extent that Gravity intends to rely on market power to demonstrate the likelihood of significant anticompetitive effects, the relevant issue is whether the *conspiracy* had market power in the software markets, not whether the defendant OEMs had market power in the PC hardware market. Gravity has adequately pled the conspiracy's market power. *See, e.g.,* Compl. P 150 ("Microsoft and these named co-conspirators have the power to control prices or exclude competition in these relevant markets and have committed overt acts in furtherance of their conspiracy to monopolize."); *id. P 152* ("[The OEMS] are Microsoft's three largest distributors in the relevant market for Microsoft operating software, and among Microsoft's very largest distributors in the relevant markets for the sale of personal computer word processing and spreadsheet **[**66]** software. As participants in these markets they have joined Microsoft in extensive licensing and other agreements with the purpose and effect of monopolizing and restraining trade in these relevant markets, and they have benefitted substantially from this common anticompetitive scheme.").

The Court finds Gravity's allegations of market power deficient, but only because it misunderstands Gravity's argument regarding market power. According to the majority, Gravity argued on appeal that Microsoft's monopoly is the only relevant factor in determining whether the conspiracy had the power to harm competition. This is not correct. Gravity has asserted that the district court was wrong to require it to plead that each OEM defendant had sufficient market power in the hardware market to cause the injury alleged, pointing out that the relevant market is software, and the relevant entity is the conspiracy (either a bilateral or single conspiracy). Appellant's Br. at 46, 48, 49; *id. at 50* ("The district court erred in assessing only Compaq's or Dell's market power rather than the market power of the combinations between each of them and Microsoft."). It is clear that Gravity understands the **[**67]** importance of the OEMs, and the pleadings, read in the light most favorable to Gravity, do not suggest otherwise. *See also* *Fed. R. Civ. P. 8(f)* ("All pleadings shall be so construed as to do substantial justice.").

Setting aside any confusion regarding Gravity's argument, the majority has identified an important issue concerning market power. While Microsoft has a monopoly in the relevant software markets, if the conspiracy included only minor OEMs, then the conspiracy would presumably have no power to cause significant anticompetitive **[*220]** effects. *See ante*, at 19 n.20. The parties dispute whether this should be treated as a liability issue or a causation issue, Appellants' Br. at 7; Appellees Compaq, Dell, and PB Electronics' Br. at 28, and the majority does not resolve the dispute, *ante* at 18 n.19. The heading under which the issue should go is ultimately irrelevant because the majority identifies only a single deficiency in Gravity's pleadings: failure to plead the defendant OEMs' market shares in the PC market. *Ante* at 22. Yet this is not enough to entitle the defendants to a dismissal.

The complaint identifies the OEMs involved, states that they are Microsoft's largest **[**68]** OEM distributors, identifies the asserted anticompetitive conduct, states that the conspiracy's anticompetitive conduct had significant anticompetitive effects, and identifies the effects. Moreover, Microsoft is an adjudicated monopolist, with clear market power in the relevant software markets, and the defendant OEMs are among the largest players in the PC hardware market. There is simply no conceivable argument from which one could conclude, based solely on a failure to plead market share, that the defendants are not on notice of the claims against them and the grounds on which they rest. *See* *Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99* ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."). The OEMs' specific market power in the PC market is, at best, a subsidiary fact.

The majority cites a number of cases involving pleading standards. *See ante* at 23-24. None of those cases, however, support the holding in this case. For example, it is true that in *Advanced Health-Care Services, Inc. v. Radford Community Hospital, 910 F.2d 139 (4th Cir. 1990)*, **[**69]** we stated that a plaintiff must "colorably state[]

facts which, if proven, would entitle him to relief." *Id. at 145 n.8*. But, in that case, we *reversed* the district court's dismissal of the complaint, acknowledging that "the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.' *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 747, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*." *Id. at 144*. Lack of specificity in the complaint was not the concern of that case. This Court never suggested that a plaintiff must plead detailed facts supporting every subsidiary factual conclusion. To the contrary, we employed a decidedly permissive standard for judging the adequacy of the complaint. In *Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994)*, we confirmed that a complaint must provide "sufficient facts so that each element of the alleged antitrust violation can be identified," *id. at 222* (internal quotation and citation omitted); but we never suggested that detailed, underlying facts are required in the **[**70]** complaint. Rather, our concern was with overly vague factual allegations and mere legal conclusions unsupported by any facts.

The full Sherman Act allegations in that case read as follows:

> Providence combined and/or conspired with the Miller & Smith defendants, Gordon V. Smith, Calloway, Connor, Jack B. Conner Associates, Inc. and others to restrain trade unreasonably in the Washington, D.C. metropolitan area by combining and/or conspiring to deprive the Pattersons of The Property, cause The Property to be sold in foreclosure at a price that would leave the Pattersons with no assets, and otherwise to drive them and Estate Construction out of the **[*221]** real estate development business in the Washington, D.C. metropolitan area. The combination and/or conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market. The objects and conduct of the combination and/or conspiracy were illegal.

14 F.3d at 221 n.15. We held that a plaintiff must "provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." *Id. at 221*. **[**71]** Gravity's claims, in contrast, are replete with all manner of detail--fifty-eight pages of detail. [1] The defendants in this case know *exactly* what conduct is alleged to have violated the antitrust laws, which is all that *Rule 8* requires. It is not for us to change the rules of civil procedure mid-stream. "A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz, 122 S. Ct. at 999*.

[72]** III.

Finally, the majority holds that the direct purchaser rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, and *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, precludes recovery. I disagree, and would join the Seventh, Ninth, and Eleventh Circuits, each of which has held that it does not. *Paper Systems, Inc. v. Nippon Paper Indus. Co., Ltd., 281 F.3d 629 (7th Cir. 2002)*; *Lowell v. American Cyanamid Co., 177 F.3d 1228, 1233 (11th Cir. 1999)* ("*Illinois Brick* simply does not apply where the complaint alleges a vertical conspiracy with no pass-on."); *In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 604 (7th Cir. 1997)* (Posner, C.J.) ("Any indirect-purchaser defense would go by the board since the [plaintiffs] would then be direct purchasers from the conspirators."); *Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1212-14 (9th Cir. 1984)*; *Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980)*; *see also* II Phillip **[**73]** E. Areeda et al., ***Antitrust Law*** P 346h, at 369 (2d ed. 2000) ("Whether one adopts a coconspirator exception or regards this situation as outside *Illinois Brick*'s domain, there is no tracing or apportionment to be done."); *cf.* *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996)*

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[1] The majority also parenthetically quotes *Mun. Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991)*: "A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified." *Ante* at 24. But the majority omits the important qualifier contained in the same paragraph: "However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Mun Utils. Bd, 934 F.2d at 1501*. Finally, *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (8th Cir. 1984)*, stands for the unexceptional and well-worn proposition that a plaintiff must at least "outline or adumbrate" a violation of the Sherman Act, instead of relying on a bare legal conclusion. *Id.*

(noting exception but declining to apply it because the upstream suppliers were not joined as defendants); *In re Beef Antitrust Litig., 600 F.2d 1148, 1163 (5th Cir. 1979)* (same); *Jewish Hosp. Ass'n v. Stewart Mech. Enters., 628 F.2d 971, 977 (6th Cir. 1980)* (noting exception but declining to apply it because vertical conspiracy allegations failed).

The decision in *Hanover Shoe* was motivated by the Court's desire to maximize deterrence by allocating the right to sue to the most efficient enforcer of ***antitrust law***. The rationale was that indirect purchasers have a comparatively small injury, and consequently less incentive to sue. *Hanover* **[*222]** *Shoe, 392 U.S. at 494*; *Illinois Brick, 431 U.S. at 745*. A passing-on defense would make litigation less effective for direct purchasers as well, given the reduction **[**74]** in recovery as well as the complexities of apportioning damages between direct and indirect purchasers. *Hanover Shoe, 392 U.S. at 493*. *Illinois Brick* is the logical corollary to *Hanover Shoe*. In *Illinois Brick*, the Court denied "passed-on" damages to indirect purchasers of a manufacturer's goods. Because of *Hanover Shoe*, failure to deny recovery for such damages would lead to duplicative recovery. *Illinois Brick, 431 U.S. at 730-31*. The two cases therefore ensure full recovery while maximizing deterrence and avoiding duplicative recovery.

Permitting plaintiffs such as Gravity to sue intermediaries that were part of a conspiracy to raise *retail* prices above a competitive level is consistent with *Hanover Shoe* and *Illinois Brick*. As Judge Easterbrook recently wrote for the Seventh Circuit: "The right to sue middlemen that joined the conspiracy is sometimes referred to as a coconspirator 'exception' to *Illinois Brick*, but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first nonconspirator in the distribution chain the right to collect 100% of the damages." *Paper Sys., 281 F.3d at 631-32*. **[**75]** This is the correct reading of *Hanover Shoe* and *Illinois Brick*. It maximizes deterrence by giving the right to sue to the plaintiff with the most incentive to sue. As for any lingering doubt over whether the conspiring intermediary is the best plaintiff, or concern regarding multiple recovery, the case law has rightly recognized the importance of joining the intermediary in the suit--a requirement which has been met in this case. *See, e.g., McCarthy, 80 F.3d at 855*; *In re Beef Antitrust Litig., 600 F.2d at 1163*; *In re Midwest Milk Monopolization Litig., 730 F.2d 528, 531 (8th Cir. 1984)*.

The majority rejects the cases that have unanimously recognized a direct purchaser's right to sue, saying that those cases dealt with price-fixing conspiracies. I think that this case presents a substantially identical situation. Gravity is not complaining about any overcharge paid by the OEMs to Microsoft. Rather, Gravity is complaining about the conspiracy's ultimate overcharge of the consumer. Gravity actually argues that the defendant OEMs received discounts on software purchased from Microsoft. In other words, Microsoft shared some of **[**76]** the monopoly profits with the OEMs. If one were to assume that Microsoft gave *all* its monopoly profits to the OEMs then there would be no pass-on. The OEMs would simply be overcharging consumers, like in a resale price maintenance scheme. How much of its monopoly profits Microsoft retained is merely a matter of how the conspirators allocated the fruits of their alleged illegality, and is not directly relevant to Gravity. The damages that Gravity is seeking to prove are the difference between the price consumers actually paid for the Windows software and the "but for" price.

Much of the difficulty in calculating the "but for" price will come from disaggregating the price of PC hardware from the Microsoft software. This difficulty, however, is not the concern of *Illinois Brick*. It can occur when there is no middleman. It would occur, for example, if Microsoft built and sold its own brand of Windows-operated PC. Mere difficulty in measuring damages is not a reason to preclude recovery. *See* *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265, 90 L. Ed. 652, 66 S. Ct. 574 (1946)* ("In cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark **[**77]** in a single product to which the defendant had contributed other **[*223]** elements of value or utility . . . this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits") (citations omitted); *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-67, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* ("It does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which has itself inflicted.") (quotation omitted).

Aside from the problem of disaggregation, calculating the "but for" price may involve determining elasticities of supply and demand--the complexity identified by *Illinois Brick*--but no more so than in any of the other cases in which middlemen conspired with manufacturers. And there will be no duplicative liability. Moreover, determining elasticities of supply and demand can complicate any attempt to measure damages--"it is not occasioned solely by the presence of intermediaries." Paper Sys., 281 F.3d at 633. The real concern of **[**78]** *Hanover Shoe* and *Illinois Brick* is the complexity of measuring the pass-on of an *actual* overcharge, and its potential negative effect on deterrence and compensation, not the mere difficulties of determining what the price would have been in a competitive market. [2] The majority's rule is essentially a free pass to any conspiracy that can make the damage it inflicts difficult to pin down. Until now, that has never been the law.

The majority reasons that adopting Gravity's argument would lead plaintiffs to plead a conspiracy that did not exist in order to evade *Illinois Brick*. Yet, there are mechanisms, primarily Rule 11, to deal with the abusive and unethical conduct of litigants and lawyers. I find troubling the **[**79]** majority's unhesitating willingness to cut off compensation to *all* injured consumers based on hypothetical abuses of liberal pleading rules. The interests of consumers are far more weighty than the majority is willing to recognize. Moreover, the concern about "artful pleading" has nothing whatsoever to do with *Illinois Brick* and *Hanover Shoe*. The direct purchaser rule is designed to *encourage* and *incentivize* private enforcement of the antitrust laws, not immunize corporate wrongdoers from having to litigate antitrust claims.

IV.

The most unfortunate aspect of this case is that, to the extent Gravity's claims have merit, consumers will be left uncompensated. Even more, raising the procedural bar for consumers' claims may further stifle technological innovation. By giving comfort to those entrenched interests that seek to protect the status quo, today's decision increases the likelihood of future anticompetitive conduct. To those who would introduce disruptive technologies, this ruling creates a strong disincentive to innovate. Without innovation, we all lose. I respectfully dissent.

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[2] To the extent that the litigation subsequently revealed true *Illinois Brick* issues, such as if the defendant OEMs switched sides and sued Microsoft, *see* Paper Sys., 281 F.3d at 632, I agree that *Illinois Brick* might then require dismissal of Gravity's claims.

A Fisherman's Best v. Rec. Fishing Alliance

United States Court of Appeals for the Fourth Circuit

April 5, 2000, Argued ; October 31, 2002, Decided

No. 99-2186

Reporter

310 F.3d 183 *; 2002 U.S. App. LEXIS 22658 **; 2003-1 Trade Cas. (CCH) P73,922; 2003 AMC 567

A FISHERMAN'S BEST, INCORPORATED; LOWCOUNTRY LOBSTERS, LIMITED; AFBOF CHARLESTON, INCORPORATED; F/V TRIPLE THREAT; F/V REBECCA PAGE; F/V JOAN MARIE; F/V PROUD MARY ELLEN, Plaintiffs-Appellants, v. RECREATIONAL FISHING ALLIANCE, Defendant-Appellee, v. WILLIAM W. ALDRET; LOUIS E. COSTA, II, MD; W. EDDIE GORDON; JAMES F. HIGHTOWER; RUTLEDGE LELAND; DAN LONG; TERRELL M. RHYE; L. J. WALLACE; CHARLESTON HARBOR PARTNERS, LLC; GULF STREAM CAPITAL ASSOCIATES, LLC; COEN COMPANY; RICHARD COEN, Defendants.

Prior History: [1]** Appeal from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, Senior District Judge. (CA-97-2227-2-11).

City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155, 2002 U.S. App. LEXIS 22657 (4th Cir. S.C., 2002)

Core Terms

longline, fishing, Maritime, vessels, immunity, antitrust, lobbying, district court, competitor, corrupt, bid, campaign, sham, improper purpose, dock, fishing vessel, sham exception, summary judgment, lobbying effort, government action, anticompetitive, recreational, conspiracy, defamation, fisheries, resources, baseless, opposing, contractual relationship, antitrust liability

LexisNexis® Headnotes

Admiralty & Maritime Law > Maritime Contracts > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Admiralty & Maritime Law, Maritime Contracts**

To succeed on a claim for a violation of the Sherman Antitrust Act, 15 U.S.C.S. § 1et seq., a plaintiff must establish that there were two persons acting in concert and that the restraint complained of constitutes an unreasonable restraint on interstate trade or commerce.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr Pennington doctrine states that horizontal competitors may join together to lobby government because antitrust violations cannot be predicated on attempts to influence the passage or enforcement of laws. The *First Amendment* shields such joint lobbying effort from antitrust liability even when the competitors are seeking governmental action that would eliminate competition or exclude competitors.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] Entitlement as Matter of Law, Appropriateness

In the consideration of a motion for summary judgment, evidence should be viewed in the light most favorable to the nonmoving party. The court must find that there is no genuine issue as to any material fact. *Fed. R. Civ. P. 56*. If no material factual disputes remain, summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial. When the record taken as whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN4[] Exemptions & Immunities, Noerr-Pennington Doctrine

The scope of Noerr-Pennington immunity depends on the source, context, and nature of the anticompetitive restraint at issue. Unethical and deceptive practices can constitute abuses of administrative or judicial process that may result in antitrust violations.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5[] Noerr-Pennington Doctrine, Sham Exception

Noerr Pennington immunity does not apply to petitions or lawsuits that are a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Under the Noerr doctrine, filing a lawsuit or seeking other government action can violate antitrust laws when it is a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6[] Noerr-Pennington Doctrine, Sham Exception

The essential element of the sham exception to Noerr Pennington immunity is an intent to injure a competitor coupled with the absence of a genuine effort to influence the government. Evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. The existence of probable cause to institute legal or administrative action precludes a finding that an antitrust defendant has engaged in sham litigation. The necessary probable cause requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN7[] Noerr-Pennington Doctrine, Sham Exception

A successful effort to influence governmental action cannot be characterized as a sham. A litigant who successfully persuades a neutral judge or jury that it is entitled to legal relief from the conduct of another based upon the law and facts cannot be sued under the sham exception to Noerr-Pennington immunity.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8[] Noerr-Pennington Doctrine, Sham Exception

Under the two-step test for sham exceptions to Noerr Pennington immunity, first, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under the second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process as opposed to the outcome of that process as an anticompetitive weapon. The two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

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

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN9[] Intentional Interference, Elements

The elements of an intentional interference with prospective contractual relations are: (1) intentional interference with a plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the plaintiff. If a defendant acts for more than one purpose his improper purpose must predominate in order to create liability. As an alternative to establishing an improper purpose the plaintiff may prove the defendant's method of interference was improper under the circumstances.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN10[] **Conspiracy, Elements**

A civil conspiracy is the combination of two or more parties joined for the purpose of injuring the plaintiff, thereby causing him special damages. To establish a concert of action a plaintiff must produce direct or circumstantial evidence from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful exercise. A conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the plaintiff. Nevertheless, lawful acts may become actionable if the object is to ruin or damage the business of another.

Torts > Intentional Torts > Defamation

Torts > ... > Defamation > Defenses > Truth

HN11[] **Intentional Torts, Defamation**

A communication is defamatory only if it is false and tends to impeach the plaintiffs reputation. Truth of the matter or substantial truth is a complete defense to a claim for defamation.

Counsel: ARGUED: William Atkins Scott, PEDERSEN & SCOTT, P.C., Charleston, South Carolina, for Appellants.

Peter G. Nistad, HOOD LAW FIRM, L.L.C., Charleston, South Carolina, for Appellee.

ON BRIEF: Robert H. Hood, HOOD LAW FIRM, L.L.C., Charleston, South Carolina, for Appellee.

Judges: Before MOTZ and KING, Circuit Judges, and John C. GODBOLD, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation. Senior Judge Godbold wrote the opinion, in which Judge Motz and Judge King joined.

Opinion by: John C. Godbold

Opinion

[*187] GODBOLD, Senior Circuit Judge:

This is a companion case to *City of Charleston, South Carolina, a municipal corporation v. A Fisherman's Best, Incorporated; AFB of Charleston, Incorporated; Ivan Miller; and the fishing vessel Tri Liner, 310 F.3d 155, 2002 U.S. App. LEXIS 22657*, No. 99-1991, pending in this court. The two cases are decided concurrently.

This case arose from sharp differences in the City of Charleston, South Carolina concerning commercial longline fishing and access to the City's new Maritime **[**2]** Center by vessels engaged in that method of fishing. [1] The City leased the Center to the Charleston County Park and Recreational Commission (PRC) for it to manage. In April 1997 PRC circulated a request for proposals from entities that might wish to operate the new Maritime Center, which had been built by the City to serve commercial fishing vessels. PRC selected the AFB group consisting of A Fisherman's Best, Incorporated; AFB of Charleston, Incorporated; and Low Country Lobsters, Limited. PRC issued a letter of intent to award a contract to AFB. AFB proposed to serve vessels engaged in longline fishing, along with other vessels. Longlining is bitterly opposed by recreational and sports fishermen and some environmental groups. A public outcry arose against selection of AFB.

[3]** Recreational Fishing Alliance (RFA) is a national non-profit organization whose stated purpose is rebuilding and preserving fisheries in the United States. It seeks to politically organize saltwater anglers and to safeguard their rights, protect jobs in the marine boat and tackle industry, and ensure the long-term sustainability of our nation's saltwater fisheries. It is aligned in principle to sports and recreational fishing and generally opposed to commercial fishing, and it seeks to end longline fishing as an acceptable method of commercial fishing.

The CHP group is composed of persons who wanted their group selected as operator of the Maritime Center, but their response to the request for proposals was rejected as untimely. There is evidence that they requested RFA to ask the mayor to accept their proposal. A mass meeting of sportsfishermen opposing use of the center by longliners took place in Charleston. RFA sent representatives to Charleston and became involved in the public controversy for two or more months. It wrote letters, contacted local officials and raised public consciousness. At a public forum held by PRC the president of RFA denounced longline fishing. PRC issued **[**4]** a letter of intent announcing **[*188]** that AFB had been selected as operator for the Maritime Center. Apparently there were discussions between the City and PRC, and arrangements between PRC and AFB were cancelled. AFB asserts that a contract had been made, but no document had been signed and the City says no agreement had been reached.

PRC circulated a second request for proposals. AFB and CHP responded and again AFB was selected. The public outcry resumed, and RFA and others, including CHP, planned a rally against longline fishing vessels and their potential use of the Center. Announcements were made by mail, newspapers, and over radio, and persons were urged to protest to the mayor against alleged use of City tax funds to bring out-of-state fishing vessels to South Carolina waters. In late July the mayor held a meeting in his office, and one or more representatives of RFA were included. The following day the mayor announced that he had come to better understand the issues, that he was changing his position, and that he would support recreational fishermen in the controversy.

The AFB group, joined by longline fishermen and their vessels, filed this suit in the United States District Court **[**5]** against RFA and CHP. Plaintiffs alleged conspiracy between RFA and CHP, restraint of trade, and interference with competition in violation of the Sherman Act, *15 U.S.C. § 1*, and § 39-3-10 of the South Carolina Code of Laws. They also alleged related state law claims of interference with a contract or a prospective contract and for defamation. [2]

PRC's second selection of AFB was terminated, and the City took over operation of the Center. An operator was selected by the City, and the Center was opened. Several months later the City adopted a resolution barring from the Center longline vessels, longline tackle, and swordfish. It then brought in South Carolina state court a suit against the AFB group, seeking a judgment **[**6]** declaring that its resolution and the operation of the Center pursuant to the resolution were constitutional and violated no federal or state law. The case was removed to the District Court for the District of South Carolina, and the court granted summary judgment to the City. That decision has been appealed to this court, and contemporaneously with the decision of the present case it is reversed for lack

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[1] A longliner uses a floating main line that may be several miles long, suspended in the water by floats, to which short lines and baited hooks are attached at intervals. It is highly regulated and federally permitted and is the dominant form of commercial fishing used by United States fishermen in the Atlantic Ocean to harvest highly migratory species such as swordfish and shark.

[2] Plaintiffs brought another suit in state court against the CHP group and the City alleging breach of contract and tort claims. When the present case was decided in the United States District Court the state suit was still pending, and we are not informed of its present status.

of federal jurisdiction. *City of Charleston, South Carolina, Mun. Corp., v. A Fisherman's Best, Inc.; AFB of Charleston, Inc., Ivan Miller and the fishing vessel Tri-Liner, 310 F.3d 155, 2002 U.S. App. LEXIS 22657*, No. 99-1991.

In the instant case claims against all defendants other than RFA were dismissed by plaintiffs. The district court granted summary judgment to RFA on all claims. It held that RFA was exempt from anti-trust liability under the *Noerr-Pennington* doctrine. *See* *Eastern R.R. President's Conference v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. With regard to intentional interference with prospective contractual relations the court, construing **[**7]** the facts favorably to plaintiffs, found that, RFA's purpose was to exercise *First Amendment* rights to petition the City government not to allow longliners at the Center, and that, if there was any interference with a contract, it was a by-product of the exercise of the *First Amendment*, and, even if there was intentional **[*189]** interference it was not done for an improper purpose. The conspiracy claim was rejected because there was no evidence that RFA had an improper purpose.

The defamation claim was based upon a statement made in ads and mail outs that the City was "bringing a big longline fishing fleet from Florida," and alleged implications that new boats would be docking at the Center, that the City was somehow subsidizing plaintiffs, and that the plaintiffs were destroying resources. The court found that the statements and implications were not defamatory. Moreover, it found that, regardless of who had the burden of proving falsity or truthfulness, the indisputable facts showed the statements and implications to be true.

I. *ANTITRUST CLAIMS*

AFB alleged a Sherman Antitrust Act violation for anticompetitive acts violating § *15 U.S.C. § 1*. ***HN1***[] To succeed AFB must **[**8]** establish that there were two persons acting in concert and that the restraint complained of constitutes an unreasonable restraint on interstate trade or commerce. *Estate Constr. Co. v. Miller & Smith Holding Co., Inc., 14 F.3d 213, 220 (4th Cir. 1994)*. AFB alleged that RFA conspired with the CHP defendants to engage in antitrust activity by opposing AFB's efforts to contract to operate the Maritime Center. As examples of RFA's unreasonable anti-competitive actions AFB alleged distribution of flyers, placing ads in newspapers, and organizing and sponsoring rallies. Plaintiffs do not contend that the City was a coconspirator.

The district court found that no party had addressed the question of whether plaintiffs had established a violation of ***antitrust law***. Rather, for purposes of summary judgment, plaintiffs had assumed that this issue was not disputed and that the question for decision was whether RFA was exempt from antitrust liability. The court proceeded accordingly [3] and held that RFA was exempt under the *NoerrPennington* doctrine. ***HN2***[] That doctrine states that horizontal competitors may join together to lobby government because antitrust violations cannot be **[**9]** predicated on attempts to influence the passage or enforcement of laws. The *First Amendment* shields such joint lobbying effort from antitrust liability even when the competitors are seeking governmental action that would eliminate competition or exclude competitors. *See* *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*. The underpinning of *Noerr* and its progeny is that Congress did not intend to subject to antitrust liability actions that had the immediate purpose of influencing legitimate governmental decision-making processes. The doctrine provides immunity to those who petition the government for redress. *Id*. The court found that RFA was not a competitor of AFB in the fishing industry and it found that RFA's actions were simply attempts to solicit governmental action to keep longline fishing vessels from using the Maritime Center and to avoid additional fishing (by out of state vessels) off the coast of Charleston. RFA's actions, therefore, were protected by *Noerr*.

[10]** The record reveals that initially the mayor of Charleston knew nothing about longline fishing or about the controversy between sportsfishermen and longliners, and he favored AFB to be the operator of the Maritime Center. In a statement on July 18, 1997 he acknowledged that he had changed his mind. He explained that he had learned of the effects of longlining on **[*190]** stocks of fish, of the interests of sportsfishermen, and of the perception of

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[3] No party has objected to this approach.

citizens that governmental efforts at managing fisheries were not successful. He spoke of his fears of possible harm to the City aquarium, which was close to the docks, and to the City's interests in tourism. He described community opinion as opposed to longliners docking at the Center and told of adverse community responses and of pressures upon him reflecting that view. Thereafter the City cancelled its lease to PRC, took over operation of the Center, and later adopted a resolution banning pelagic longline vessels of any kind from docking, landing, unloading, or processing their catch at the Maritime Center.

The court found that RFA was opposed to longline fishing in general and hoped to eliminate it, and was concerned with the possibility of **[**11]** additional fishing by out-of-state vessels in the waters off Charleston, which are a "nursery" for spawning swordfish. The court found that no evidence supported plaintiffs argument that RFA sought to have only AFB, not longliners in general, banned from the Maritime Center and no evidence that RFA was engaged in a smear campaign against AFB.

A director of RFA had written to the mayor suggesting that he support CHP's proposal and thanking him for challenging the initial selection of AFB. The court found this was not shown to be anything other than part of RFA's lobbying against longline fishing, and that from a later letter it was clear that RFA supported CHP's proposal only because it did not include longline fishing vessels.

In this court the plaintiffs contend that *Noerr* does not apply at all to this case because "the case has nothing to do with fishing, but everything to do with acquiring real estate, the maritime center." This is a mischaracterization that the record does not support. They make a related argument that *Noerr* does not apply because the City did not act as a government in leasing the Center but as a commercial enterprise. The City responded to a public **[**12]** need related to a struggling industry, and, using public funds, built a municipal facility. It found itself involved in a public controversy in the community it served concerning who would operate the facility. It addressed the problem. This is not a commercial activity that had a political impact, but a public-political firestorm in which competitive bidding was only incident. See *Allied Tube & Conduit, Corp. v. Indian Head, Inc., 486 U.S. 492, 506, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1998)*.

The district court applied proper summary judgment standards. ***HN3***[] Evidence should be viewed in the light most favorable to the nonmoving party, *Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990)*. The court must find that there is no genuine issue as to any material fact. *Fed.R.Civ.P. 56*. If no material factual disputes remain, summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. **[**13]** When the record taken as whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate. *Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991)*. Applying these principles, the court held that the *Noerr-Pennington* doctrine clearly applied because the actions of RFA were simply attempts to solicit government action to keep longline vessels from using a facility built with taxpayer dollars and to avoid additional fishing efforts off the coast (by out-of-state vessels), and that RFA was **[*191]** petitioning the government for redress and therefore was immune from antitrust liability.

II. *ALLEGED EXCEPTIONS TO* NOERR-PENNINGTON

Not every concerted effort to influence government action is immune under *Noerr-Pennington*. ***HN4***[] The scope of this immunity depends on the source, context, and nature of the anticompetitive restraint at issue. *See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*. Unethical and deceptive practices can constitute abuses of administrative or judicial process that may result in antitrust **[**14]** violations. *Id. at 500*.

AFB contends that, even if *Noerr* is generally applicable, RFA's lobbying campaign is not protected from antitrust liability because it falls under one of the exceptions to *Noerr*: (1) the sham exception; (2) that RFA acted in bad faith, misrepresented information, made improper threats, and used other coercive means intended to corrupt the political or administrative processes; and (3) that this case involved a commercial bid proposal.

A. *The Sham Exception*

HN5[] *Noerr* immunity does not apply to petitions or lawsuits that are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* (defining the sham exception). Under the *Noerr* doctrine filing a lawsuit or seeking other government action can violate antitrust laws when it is a "sham." "A classic example [of a sham] is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply **[**15]** in order to impose expense and delay." *See City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*.

HN6[] The essential element of the sham exception is intent to injure a competitor coupled with the absence of a genuine effort to influence the government. "Evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Professional Real Estate Investors v. Columbia Pictures Indus., Inc, 508 U.S. 49, 59, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*. The existence of probable cause to institute legal or administrative action precludes a finding that an antitrust defendant has engaged in sham litigation. *Id. at 62*. The necessary probable cause requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. *Id*.

RFA's lobbying effort was successful. ***HN7***[] A successful effort to influence governmental action "certainly cannot be characterized as a sham." *Professional Real Estate, 508 U.S. at 58* (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988))*. **[**16]** *See also Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556, 565 (4th Cir. 1990)* (holding that a litigant who successfully persuades "a neutral judge or jury that it is entitled to legal relief from the conduct of another based upon the law and facts" cannot be sued under the sham exception to *Noerr-Pennington*).

HN8[] A two-step test for sham exceptions was announced in *Professional Real Estate*. The Supreme Court explained:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success **[*192]** on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under the second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to inter fere directly with the business relationships of a competitor," *Noerr, supra, 365 U.S. at 144*, through the "use [of] the **[**17]** governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon." *Omni, 499 U.S. at 380*. This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability.

508 U.S. at 60-61 (brackets in original).

AFB's analysis does not satisfy the first step of the *Professional Real Estate* test. AFB did not present sufficient evidence to show that RFA's attempt to change the City's longlining policy for the Maritime Center was objectively baseless. RFA engaged in lobbying, using media and political channels to sway public opinion against longlining because of the effect that it perceived longliners would have on Atlantic fisheries. RFA could reasonably expect to succeed, and it did so. Its lobbying campaign was a success. It successfully educated local government officials concerning its views and helped to obtain a favorable governmental policy barring longline fishing vessels from mooring at a public facility.

Because AFB cannot overcome the first hurdle in the *Professional Real Estate* test **[**18]** we need not address RFA's subjective reasons for participating in the campaign and we do not need to discuss the second step -- whether baseless action by the defendants concealed an attempt to interfere directly with the business relationship of a competitor through the use of governmental process as an anti-competition weapon. Moreover, apart from our conclusion concerning RFA's subjective reasoning, the district court found that RFA was not a competitor of the plaintiffs. That finding is not clearly erroneous.

B. *Misrepresentation, bad faith, threats, and corruption*

AFB contends that *Noerr-Pennington* immunity should not apply because RFA organized and conducted a "smear" campaign against it, misrepresented information, made threats, and engaged in corrupt practices. There is no officially recognized *Noerr* immunity exception for any of these activities, but we will nevertheless address them as elements of the contention that RFA conducted an improper lobbying effort.

Misrepresentation

AFB presented no evidence that RFA deliberately made false and material representations in the course of its lobbying effort. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678, 687 (4th Cir. 1982) **[**19]** (stating that misrepresentations, to fall within the sham exception to *Noerr* immunity must be made with the requisite intent). *See also* Whelan v. Abell, 310 U.S. App. D.C. 396, 48 F.3d 1247 (D.C. Cir. 1995) (finding that even if litigation is not baseless the defendant is not entitled to *Noerr* immunity if it deliberately made false and material representations).

AFB's president testified generally that RFA presented false, half-true, and disparaging statements concerning longline **[*193]** fishing. The district court addressed four matters allegedly misrepresented by RFA: (1) that the City was bringing a big longline fishing fleet from Florida, (2) that there would be new boats operating out of the Maritime Center, (3) that the City was subsidizing longline fishing, and (4) that AFB was destroying natural resources by allowing longliners to dock at the Maritime Center. The same allegations were made in AFB's defamation claim.

There is no merit to AFB's allegation regarding the effect of longliners on natural resources. Ample evidence indicates that longlining may be destructive to marine resources. Thousands of pages of federal statutes, regulations, and proposed regulations **[**20]** have been created in an attempt to balance the nation's interest in protecting its fisheries against harms caused by longlining and other commercial fishing methods. Whether the harm is as great as RFA asserts, and whether it is balanced by the interests of the longline industry and the public's interest in longline fishing as a food source, do not obviate the fact that destruction of resources occurs. RFA cannot lose its *Noerr* protection for taking a position on this hotly debated topic.

RFA made no representation of fact that was not substantially true or reported by news agencies independent of RFA prior to RFA's arrival in Charleston. Many of the facts alleged by AFB as false were contained in a March 22, 1997 newspaper article written two months before RFA's arrival. This article stated that AFB hoped "to attract as many as 30 swordfish boats, shrimp trawlers and other fishing vessels" to the Maritime Center. The president of AFB testified that he hoped to attract to Charleston vessels that historically had done business with him at other locations.

Other statements allegedly misrepresented by RFA were made by AFB or its representatives. In his deposition AFB owner Vince **[**21]** Pyle stated that at least one longline vessel fishing in South Carolina waters hailed out of Florida. At a mass meeting on May 5 Pyle acknowledged the nomadic nature of longline vessels that work the Atlantic from Florida to North Carolina. AFB's own operational proposals stated that it planned to dock a fleet of longliners at the Maritime Center. There were no misrepresentations.

Threats and Corruption

James Donofrio, the president of RFA, contacted Pyle, the president of AFB, and told him that he would "call off the dogs" and cease lobbying against longliners docking at the Maritime Center if Pyle would agree not to bring longliners to the dock. According to Pyle, Donofrio claimed to have the power and connections to keep AFB out of the Maritime Center or to persuade those opposing it to withdraw their opposition if it would dock longliner vessels at another site. Pyle informed Donofrio that the AFB proposal was not financially feasible if longliners were not included, and rejected Donofrio's offer. CHP's name did not come up in this conversation. AFB sees this as a threat and a corrupt attempt to make a deal on behalf of CHP. The district court did not err in finding that **[**22]** this was only a conversation about settlement negotiations.

RFA wrote a letter to the mayor, thanking him for challenging the "done deal" with AFB [referring to the first selection of AFB] and recommending the acceptance of CHP as operator. This was insufficient to establish a conspiratorial relationship. A lobbying group may make recommendations through its lobbying campaign. We have previously described the mayor's change of mind about longlining. He publicly **[*194]** acknowledged that he had changed his mind and explained why.

AFB presented no evidence of bribes or blackmail or of any other corruption or impropriety engaged in by RFA to taint the governmental process in Charleston. In deposition testimony PRC commissioners Virgil Passailaigue and Tim Eubanks testified that nothing inappropriate or corrupt occurred during RFA's lobbying campaign. There is no substantial evidence of corruption in the City's own processes or of corrupt actions by RFA.

Bad Faith

RFA is a lobbying entity. Rightly or wrongly, it perceives longline fishing as depletion and mismanagement of resources by an industry that it considers antagonistic to its goals, and it considers governmental management of **[**23]** fisheries as ineffective. It joined in the efforts of others having a common purpose. It had a protected right to petition the government, and plaintiffs have not shown a sufficient basis to strip it of *Noerr-Pennington* immunity.

AFB charged that RFA acted in bad faith because it was directly opposed to AFB rather than to longlining in general, therefore *Noerr* protection is inapplicable. As we have held, inquiring into the subjective rationale of RFA's lobbying campaign would be appropriate only if the campaign was objectively baseless. RFA could reasonably expect, and did achieve, a successful lobbying effort. *See* *Professional Real Estate, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920*.

C. *Competitive Bidding Process Exception*

Noerr immunity is not lost because competitive bids were involved. Corrupt bidding can fall under the sham exception to *Noerr* but only if corrupt.

AFB relies on three bidding cases. *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)* (finding efforts to influence the setting of private standards that were routinely adopted by state and local **[**24]** governments did not qualify for *Noerr* immunity when the defendant's activities were a sham intending only to control the standards promulgated by a private trade association); *F. Buddie Contracting, Inc. v. Seawright, 595 F. Supp. 422 (N.D. Ohio 1984)* (holding that *Noerr* immunity did not apply because of the defendant's improper relationship with a city consultant who disqualified the plaintiff's bid); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir. 1988)* (stating that statutes requiring competitive bidding required the defendant to refrain from dealing with officials who administer the bid statutes).

These cases do not create a discrete competitive bid exception to *Noerr*. Competitive bidders are free to lobby the relevant government, but they cannot do so by corrupting the bid process. The above cases reaffirm that lobbying efforts involving competitive proposals can be a sham if other evidence indicates that corrupt or questionable practices are initiated by a competitor directly involved with the bidding process. RFA was not a competitor. Allegations that it received financial benefits from recreational **[**25]** fishing tournaments and receives funding through a boat company that caters to sport fishermen do not overcome *Noerr* immunity.

III. *STATE LAW CLAIMS*

AFB's state law claims allege interference with a contract and/or a prospective contract, conspiracy and defamation. All arose out of the same facts that give rise to the alleged antitrust violations. In *Cheminor **[*195]** Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999)*, the Third Circuit held that the same *First Amendment* principles on which

Noerr-Pennington was based applied to New Jersey state tort claims for malicious prosecution, unfair competition, and tortious interference with prospective economic advantage, based on the same activity of petitioning the government that barred the federal antitrust claim. We need not adopt such a broad general rule in this case because the district court did not err in dismissing each state law claim for failure to satisfy summary judgment standards or some element of the underlying state claim.

A. *Interference with Contractual and Prospective Contractual Relations and Conspiracy*

AFB alleged that in violation of state law RFA conspired with the CHP defendants **[**26]** and interfered with its contractual and prospective contractual relations with PRC. The district court held that RFA's purpose was to petition the local government not to allow longliners at the Maritime Center, that interference with AFB's prospective contract was only a by-product of RFA's campaign against longline fishing and that even if the interference was intentional, it was not for an improper purpose. [4]

HN9[] The elements of an intentional interference with prospective contractual relations are: (1) intentional interference with a plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the plaintiff. *See* *Crandall Corp. v. Navistar Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (S.C. 1990)*. If a defendant acts **[**27]** for more than one purpose his improper purpose must predominate in order to create liability. As an alternative to establishing an improper purpose the plaintiff may prove the defendant's method of interference was improper under the circumstances. *Id. at 180*. The improper purpose upon which AFB relies is its allegation that RFA conspired with co-defendant CHP to deprive AFB of a contract to operate the Center and to obtain for CHP the contract to operate.

HN10[] A civil conspiracy is the combination of two or more parties joined for the purpose of injuring the plaintiff, thereby causing him special damages. *See* *LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711, 713 (S.C. 1988)*. To establish a concert of action a plaintiff must produce direct or circumstantial evidence from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful exercise. A conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the plaintiff. *See* *First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372, 383 (S.C. Ct. App. 1998)*. Nevertheless, **[**28]** lawful acts may become actionable if the object is to ruin or damage the business of another. *See* *Lamotte, 370 S.E.2d at 713*.

As we have pointed out, CHP contacted RFA and requested assistance in opposing longliners' access to the Maritime Center. RFA responded, came to Charleston and began a successful lobbying effort. CHP assisted RFA in organizing and mobilizing citizens against longlining. When it appeared that the opposition to longlining was successful RFA sent a letter to the mayor thanking him for his support and recommending CHP as operator.

[*196] RFA is a lobbying group organized for and engaged in lobbying against commercial fishing methods that it opposes. A grassroots effort opposing the mooring of longline vessels at the Maritime Center was under way before RFA arrived in Charleston. The thrust of the campaign was against longline fishing and not at any other elements of AFB's proposed operations at the Center. In his conversation with Vince Pyle of AFB, President Donofrio of RFA proposed to "call the dogs off" if AFB would move longline vessels to a separate facility. He did not suggest that AFB give up its status as actual or proposed sub-lessee or make **[**29]** any concession other than removal of longline vessels.

The district court found that RFA's purpose was to exercise its *First Amendment* rights to petition the local government not to allow longliners at the Maritime Center and if it were found that RFA intentionally interfered with AFB's corporate opportunity, plaintiffs did not establish that it was for an improper purpose. We cannot say that either of these findings was error. Moreover, if the defendant acts for more than one purpose its improper purpose must predominate to create liability. *Crandall Corp. v. Navistar Int'l. Transp. Corp., 302 S.C. 265, 395 S.E.2d 179*.

[4] The district court did not address the question of whether AFB and PRC had entered into a contract but considered only interference with AFB's prospective contractual relations. No party suggests that this was error.

B. *Defamation*

The allegations that AFB says were false and defamatory are the same allegations made in AFB's antitrust claim, and they fail.

HN11[] A communication is defamatory only if it is false and tends to impeach the plaintiffs reputation. *See* *Elder v. Gaffney Ledger, Inc., 333 S.C. 651, 511 S.E.2d 383 (S.C. 1999)*, *rev'd on other grounds*, *341 S.C. 108, 533 S.E.2d 899 (S.C. 2000)*. As we concluded in our antitrust analysis, the alleged defamatory statements are substantially true. Truth of the matter or substantial **[**30]** truth is a complete defense to a claim for defamation. *See* *WeSav Fin. Corp. v. Lingefelt, 316 S.C. 442, 450 S.E.2d 580, 582 (S.C. 1994)*. Moreover, none of the allegedly false statements is inherently harmful to AFB's reputation.

The district court did not err in holding that RFA was not a competitor of AFB, that the *Noerr-Pennington* doctrine applies, that RFA is entitled to immunity, pursuant to it, and that none of the exceptions to *Noerr* apply. The decision of the district court is

AFFIRMED.

End of Document

[Elkins v. Microsoft Corp.](#)

Supreme Court of Vermont

November 1, 2002, Filed

No. 01-431

Reporter

174 Vt. 328 *; 817 A.2d 9 **; 2002 Vt. LEXIS 314 ***; 2002-2 Trade Cas. (CCH) P73,864

Richard L. Elkins v. Microsoft Corporation

Subsequent History: [*1]** As Amended March 1, 2003.

Prior History: On Appeal from Windham Superior Court. John P. Wesley, J.

Disposition: Reversed and remanded.

Core Terms

purchaser, indirect, antitrust, consumer, courts, decisions, consumer protection, construing, federal law, Federal Trade Commission Act, manufacturer, violator, court's decision, anti trust law, harmonization, damages, guided, cause of action, privity, seller, unfair trade practice, legislative intent, Clayton Act, interpreting, provisions, unfair, cases, state ***antitrust law***, antitrust action, operating system

LexisNexis® Headnotes

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss for failure to state a claim should not be granted unless there exist no facts or circumstances that would entitle a plaintiff to relief. On review of a trial court's disposition of a motion to dismiss, the Supreme Court of Vermont will assume the truth of all factual allegations pleaded in a complaint as well as all reasonable inferences that may be derived from the pleadings. To the extent that the supreme court's review of a trial court's decision involves questions of statutory construction, and thus questions of law, it is nondeferential and plenary.

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

With any attempt at statutory construction, the Supreme Court of Vermont begins with the plain meaning of the statutory language, because the court presumes that it reflects the legislature's intent.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Vt. Stat. Ann. tit. 9, § 2453(a)*.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN4[] **Private Actions, Standing**

The Vermont Consumer Fraud Act, *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, provides a private remedy for violations.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Vt. Stat. Ann. tit. 9, § 2461(b)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Vt. Stat. Ann. tit. 9, § 2451a(a)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

The Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, contains no privity requirement, that is, no provision that a consumer can sue only a retailer and no one further up the supply chain. The VCFA expressly states that any consumer, reinforced by the definition of consumer as any person, who suffers injury may bring an action under the statute against a seller, solicitor, or other violator.

Governments > Legislation > Interpretation

HN8[] **Legislation, Interpretation**

In general, the Supreme Court of Vermont will not read provisions into a statute that are not present unless it is necessary in order to make the statute effective.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

The plain meaning of the language in the Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, is supported by the express legislative intent behind the statute to protect the public against unfair or deceptive acts or practices and to encourage fair and honest competition. *Vt. Stat. Ann. tit. 9, § 2451*. In light of this purpose, the Supreme Court of Vermont has repeatedly held that the VCFA is remedial in nature and therefore must be construed liberally so as to furnish all the remedy and all the purposes intended. Of course, liberal construction does not allow the supreme court to stretch the language beyond legislative intent.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

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

HN10[] **Regulated Practices, Trade Practices & Unfair Competition**

The legislature clearly intended the Vermont Consumer Fraud Act, *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, to have as broad a reach as possible in order to best protect consumers against unfair trade practices. This intent underlies a private remedy section that allows suits by any consumer with no suggestion of a distinction between direct and indirect purchasers. It also underlies a description of proper defendants including not only a seller or solicitor, but also any other violator. In this context, any restriction to impose a privity requirement, that is to allow only direct purchasers to sue, must be stated in clear terms.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN11[] **Purchasers, Direct Purchasers**

The United States Supreme Court's Illinois Brick decision announced what has become to be known as the "indirect-purchaser" rule: a party who does not purchase a product directly from an antitrust violator is barred from bringing a cause of action for overcharge against that violator under federal law.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN12[] **Purchasers, Direct Purchasers**

It is one thing to consider the congressional policies identified in the United States Supreme Court's Illinois Brick and Hanover Shoe decisions in defining what sort of recovery federal ***antitrust law*** authorizes; it is something altogether different and inappropriate to consider them as defining what federal law allows states to do under their own ***antitrust law***. As construed in Illinois Brick, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. But nothing in Illinois Brick suggests that it would be contrary to congressional purposes for states to allow indirect purchasers to recover under their own antitrust laws.

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

HN13[] **Private Actions, Purchasers**

When viewed properly, the United States Supreme Court's Illinois Brick decision was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. Thus, states are free to determine how best to protect consumers against antitrust violations; in crafting or amending state ***antitrust law***, states can decide whether to adopt the indirect purchaser rule of Illinois Brick.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN14[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Vt. Stat. Ann. tit. 9, § 2453(b)*.

Governments > Legislation > Interpretation

HN15[] **Legislation, Interpretation**

There is a presumption that the legislature does not intend to enact meaningless legislation and, thus, when The Supreme Court of Vermont construes a statute, it must do so in a manner that will not render it ineffective or meaningless.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN16[] **Administrative Law, Sovereign Immunity**

Vt. Stat. Ann. tit. 9, § 2453(c) specifically references the Federal Trade Commission Act (FTCA) in instructing the Vermont Attorney General to ensure that rules and regulations enacted for the purposes of the Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, shall not be inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting the FTCA. That subsection makes sense only if *Vt. Stat. Ann. tit. 9, § 2453(b)* also means that the Supreme Court of Vermont is guided by federal court decisions construing the FTCA and not other federal antitrust laws. The Supreme Court of Vermont has expressly interpreted *§ 2453(b)* to mean that in construing the VCFA, the court looks to the interpretations accorded similar terms and provisions of the FTCA.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

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

HN17[] **Administrative Law, Sovereign Immunity**

The harmonization provision in *Vt. Stat. Ann. tit. 9, § 2453(b)* does not apply to the Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, as a whole but only to *Vt. Stat. Ann. tit. 9, § 2453(a)*, which sets out the practices prohibited under the VCFA. Thus, *§ 2453(b)* is not aimed at defining who can sue under the VCFA, but rather what conduct constitutes a violation of the VCFA. Nowhere in the VCFA is there any requirement that the definition of who may sue under the VCFA must be consistent with the definition of who may sue under federal ***antitrust law***, including under the Federal Trade Commission Act (FTCA). This is logical because the FTCA does not provide for a private cause of action and thus has no bearing on a determination on who can sue under the VCFA.

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

HN18[] **Private Actions, Standing**

The purpose behind both state and federal ***antitrust law*** is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct. To achieve this uniformity or predictability, the Supreme Court of Vermont is not required to define who may sue in Vermont state courts in the same way federal courts have defined who may maintain an action in federal court.

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

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

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

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN19[] **Private Actions, Standing**

By 2000 Vt. Acts & Resolves 65, the legislature enacted a specific antitrust remedy provision, *Vt. Stat. Ann. tit. 9, § 2465*, which allows any person to sue for a violation of an antitrust act including the Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, limits the damages available in a private action under the VCFA or other state antitrust act, and explicitly authorizes indirect purchaser antitrust actions based on a violation of *Vt. Stat. Ann. tit. 9, § 2453*.

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

HN20[] **Private Actions, Standing**

See *Vt. Stat. Ann. tit. 9, § 2465(b)*.

Governments > Legislation > Interpretation

HN21[] **Legislation, Interpretation**

Where the legislature has amended a prior law and the circumstances clearly indicate clarification to be intended, the Supreme Court of Vermont's construction of a statute must be governed by the disclosed intent of the legislature.

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

HN22[] **Private Actions, Purchasers**

2000 Vt. Acts & Resolves 65 did not effectuate a change in Vermont law that an indirect purchaser was entitled to bring a cause of action under the Vermont Consumer Fraud Act, *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*.

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

HN23[] **Private Actions, Purchasers**

There is no reason to treat antitrust cases differently from other Vermont Consumer Fraud Act (VCFA), *Vt. Stat. Ann. tit. 9, §§ 2451-2480g*, cases and prohibit indirect purchasers from bringing suit under *Vt. Stat. Ann. tit. 9, § 2461(b)*. Since consumers can generally sue under *§ 2461(b)* even though they are indirect purchasers of a good or service from a defendant, they can bring an antitrust case under *§ 2461(b)*. The recent addition to the VCFA of *Vt. Stat. Ann. tit. 9, § 2465(b)*, explicitly authorizing indirect purchaser antitrust suits, is not a change in the preexisting law.

Counsel: Kirsten A. Beske, David N. Dunn, and Potter Stewart, Jr. of Potter Stewart, Jr. Law Offices, P.C., Brattleboro, for Plaintiff-Appellant.

Robert Luce of Downs Rachlin Martin, PLLC, Burlington, and David Tulchin of Sullivan & Cromwell (Of Counsel), New York, New York, for Defendant-Appellee.

William H. Sorrell, Attorney General, and Julie Brill and David B. Borsykowsky, Assistant Attorneys General, Montpelier, for Amicus Curiae State of Vermont.

Judges: PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

Opinion by: DOOLEY

Opinion

[11] [*329]** DOOLEY, J. This is an appeal from the trial court's dismissal of a class action suit brought under the Vermont Consumer Fraud Act (VCFA or the Act), 9 V.S.A. §§ 2451-2480g. Plaintiff, Richard Elkins, alleged that defendant Microsoft Corporation (Microsoft) used its monopoly power to overprice the Windows 98 operating system which plaintiff purchased pre-installed in a personal computer from a computer **[***2]** manufacturer (called original equipment manufacturer or OEM). Based on the United States Supreme Court decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, the superior court dismissed the case because plaintiff was only an indirect purchaser of Windows 98, that is, he purchased it from the OEM rather than Microsoft. Plaintiff appeals arguing that he does not have to be a direct purchaser to sue under the VCFA. We agree and reverse and remand.

The facts of this case are not in dispute. Microsoft is the leading supplier of operating system software for personal computers. Microsoft distributed its Windows 98 operating system through OEM's, who pre-installed the software on personal computers they sold to consumers, and through retailers of CD-ROMs containing the software. In February 1999, plaintiff purchased a computer with a pre-installed Microsoft Windows 98 operating system. He subsequently brought suit under the VCFA, alleging that he and other similarly situated Vermont licensees of Windows 98 were injured by Microsoft's abuse of its monopoly power in charging consumers a price in excess of the price it would have been **[***3]** able to charge in a competitive market.

Microsoft moved to dismiss the complaint on the grounds that an "indirect purchaser" such as plaintiff does not suffer cognizable damages in an unfair **[**12]** competition case and thus is barred from bringing a claim under the VCFA. The trial court agreed and granted the motion.

The issue on appeal is the same as before the trial court: whether, given the Illinois Brick decision and the statutory language of the VCFA, an indirect purchaser is barred from bringing an action for antitrust violations under the VCFA. Plaintiff and amicus curiae State of Vermont argue that a suit by an indirect purchaser under the VCFA is not barred because (1) the VCFA provides a cause of action for indirect purchasers, and (2) the Illinois Brick indirect purchaser rule is not applicable because it construes the Clayton Antitrust Act, and not the VCFA, and our construction of the VCFA is not guided by federal Clayton Act decisions.

In response, Microsoft argues that (1) an indirect purchaser cause of action did not exist under the VCFA until the 2000 amendment, which became effective after plaintiff **[*330]** acquired his copy of Windows 98, and (2) the indirect purchaser rule **[***4]** of Illinois Brick controls here because there is no express statutory provision in the VCFA providing indirect purchasers a cause of action and because the VCFA directs that construction of its terms be guided by federal law.

HN1[] A motion to dismiss for failure to state a claim should not be granted unless there exists no facts or circumstances that would entitle plaintiff to relief. *Richards v. Town of Norwich, 169 Vt. 44, 48, 726 A.2d 81, 85 (1999)*. On review of the trial court's disposition of the motion to dismiss, this Court will assume the truth of all factual allegations pleaded in the complaint as well as all reasonable inferences that may be derived from the pleadings. *Id. at 48-49, 726 A.2d at 85*. To the extent that our review of the trial court's decision involves questions of statutory construction, and thus questions of law, it is nondeferential and plenary. *State v. Koch, 169 Vt. 109, 112, 730 A.2d 577, 580 (1999)*.

We begin with the applicable provisions of the VCFA and then consider the impact of Illinois Brick. As ***HN2***[] with any attempt at statutory construction, we begin with the plain meaning of the statutory language, because we presume **[***5]** that it reflects the Legislature's intent. *Dover Town Sch. Dist. v. Simon, 162 Vt. 630, 631, 650 A.2d 514, 516 (1994)* (mem.).

The central provision of the VCFA is *9 V.S.A. § 2453(a)*, which provides:

HN3[] (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

HN4[] The Act goes on to provide a private remedy for violations: ***HN5***[] Any consumer who . . . sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by *section 2453* of this title . . . may sue for appropriate equitable relief and may sue and recover from the seller, solicitor or other violator the amount of his damages . . . .

Id. § 2461(b) (emphasis added). "Consumer" is defined by the act as:

HN6[] Any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit [*331] of a member of his or her household, or in connection with the operation of his or her household . . . .

Id. § 2451a(a) (emphasis added).

HN7[] The statutory language contains no privity [***6] requirement, that is, no provision that the consumer can sue only the retailer and no one further up the supply [**13] chain. HN8[] In general, we will not read provisions into the statute that are not present unless it is necessary in order to make the statute effective. State v. O'Neill, 165 Vt. 270, 275, 682 A.2d 943, 946 (1996). The Act expressly states that any consumer, reinforced by the definition of consumer as "any person," who suffers injury may bring an action under the statute against a "seller, solicitor or other violator." The language does not support the imposition of a privity requirement.

HN9[] The plain meaning of the language is supported by the express legislative intent behind the statute to "protect the public" against "unfair or deceptive acts or practices" and to "encourage fair and honest competition." 9 V.S.A. § 2451; see State v. Int'l Collection Serv., Inc., 156 Vt. 540, 543, 594 A.2d 426, 429 (1991); Gramatan Home Investors Corp. v. Starling, 143 Vt. 527, 536, 470 A.2d 1157, 1162 (1983) (purpose of VCFA includes "to encourage a commercial environment highlighted by integrity and fairness"). In light of this [***7] purpose, this Court has repeatedly held that the VCFA is "remedial in nature" and therefore must be construed "liberally so as to furnish all the remedy and all the purposes intended." State v. Custom Pools, 150 Vt. 533, 536, 556 A.2d 72, 74 (1988); see also Carter v. Gugliuzzi, 168 Vt. 48, 52, 716 A.2d 17, 21 (1998) (VCFA should be applied "liberally to accomplish its purposes"); State v. Therrien, 161 Vt. 26, 31, 633 A.2d 272, 275 (1993). Of course, liberal construction does not allow us to stretch the language beyond legislative intent. See Wilder v. Aetna Life & Casualty Ins. Co., 140 Vt. 16, 19, 433 A.2d 309, 310 (1981).

HN10[] The Legislature clearly intended the VCFA to have as broad a reach as possible in order to best protect consumers against unfair trade practices. This intent underlies a private remedy section that allows suits by "any consumer" with no suggestion of a distinction between direct and indirect purchasers. It also underlies a description of proper defendants including not only a seller or solicitor, but also an "other violator," a broad term that covers defendant in this case. We think in this context that any [***8] restriction to impose a privity requirement, that is to allow only direct purchasers to sue, must be stated in clear terms. See Int'l Collection Serv., Inc., 156 Vt. at 549-50, 594 A.2d at 429 (in the [*332] absence of express language limiting Attorney General's enforcement power to personal consumer victims, plain meaning supports actions against defendants who engage in unfair and deceptive practices with respect to business consumers); Custom Pools, 150 Vt. at 536, 556 A.2d at 74 (if Legislature intended that Attorney General cannot sue a finance company that benefitted from the consumer fraud of a seller, "it could have done so with clear language to that effect").

Although we have never addressed the precise question before us, two of our decisions are instructive. In Carter v. Gugliuzzi, we held that a home purchaser could sue a real estate broker under § 2461(b) as a "seller" even though the broker did not own the home when it was sold to the plaintiff. Relying on the broad remedial purpose of the VCFA, the plain meaning of the term "seller," and the lack of any explicit limitation on that term, we held that the broker could be sued under § 2461(b) for [***9] deceptive representations that induced the sale. 168 Vt. at 53, 716 A.2d at 22. Also relevant is Poulin v. Ford Motor Co., 147 Vt. 120, 513 A.2d 1168 (1986), where a purchaser of an automobile sued both the dealer and the manufacturer because a representative of the manufacturer misrepresented that the specific model purchased was produced in very limited numbers so that its value would [**14] increase. We affirmed a jury verdict against both the dealer and manufacturer in response to various claims that plaintiff had failed to present the proof required by the statute, id. at 125-27, 513 A.2d at 1172-73, although we did not confront the precise claim made here. Poulin is exactly the kind of case that demonstrates that a privity requirement would seriously undermine the utility of the Act. Virtually all of the representations about the quality and features of a modern automobile are made by manufacturers, most through national and regional media advertisements. If we enforced a privity requirement, the consumer could not reach the perpetrator of consumer fraud.

Microsoft suggests that another decision, Wilder v. Aetna Life & Casualty Insurance Co., supports **[***10]** a privity requirement. In Wilder, plaintiff had been in an automobile accident with defendant's insured and sued the insurer under VCFA claiming it had failed to pay plaintiff pursuant to a settlement agreement. The main holding of Wilder is that the sale of an insurance policy is not a contract of "goods or services" under *§§ 2461(b)* and *2451a(a)* (definition of "consumer"). *140 Vt. at 18, 433 A.2d at 310*. This Court added, however, that we were "not dealing with a contractual situation between buyer and seller" but instead being asked "to read into the Act a transaction one step removed." *Id. at 19, 433 A.2d at 310*. Microsoft argues that this **[*333]** language precludes a suit by an indirect purchaser, who is "one step removed."

Microsoft misreads the Wilder alternative holding. The problem in Wilder was that the plaintiff was not a purchaser of the alleged good or service at all and, in that sense, was removed from the transaction that was needed to bring the transaction under *§ 2461(b)*. Here, plaintiff indisputably contracted for goods that included the Windows 98 operating system.

Microsoft also argues that the Legislature clearly intended that *§ 2461(b)* **[***11]** did not provide a remedy to indirect purchasers in antitrust actions as shown by Act 65, a 2000 amendment to the VCFA. We consider this argument in the next section because it arises from Microsoft's central position that we should treat VCFA antitrust actions differently from VCFA consumer protection actions and require privity for the former even if we do not require it for the latter. We turn now to the effect of federal law.

Microsoft's argument is based on the United States Supreme Court decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. In Illinois Brick, the State of Illinois, on its own behalf and on behalf of a number of local government entities, brought an action under § 4 of the Clayton Act alleging that defendants, manufacturers and distributors of concrete block, had conspired to fix the price of concrete block in violation of § 1 of the Sherman Act. The State and the local governments were all indirect purchasers of concrete block because the block was sold by the manufacturers directly to contractors to construct buildings, which were later sold to state and governmental entities. The United States Supreme **[***12]** Court, relying on the earlier case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, held that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of [§ 4 of the Clayton Act]." *Illinois Brick, 431 U.S. at 729*. Plaintiffs, therefore, were not entitled to recover the illegal overcharges that were passed on to them via the contractors. *Id. at 735*. **[**15]** ***HN11***[] Illinois Brick announced what has become to be known as the "indirect-purchaser" rule: a party who does not purchase a product directly from an antitrust violator is barred from bringing a cause of action for overcharge against that violator under federal law. See *California v. ARC America Corp., 490 U.S. 93, 96-97, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)*; *In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 708 (D. Md. 2001)*.

[*334] The critical decision in understanding the effect of Illinois Brick on this action is California v. ARC America Corp., in which defendants in state antitrust actions argued that **[***13]** allowing indirect purchasers to sue under state antitrust acts frustrated federal law so that such claims were preempted by federal law. The Court rejected this claim:

HN12[] It is one thing to consider the congressional policies identified in Illinois Brick and Hanover Shoe in defining what sort of recovery federal ***antitrust law*** authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own ***antitrust law***. As construed in Illinois Brick, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in Illinois Brick suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.

490 U.S. at 103. The Court later reiterated this theme: ***HN13***[] "When viewed properly, Illinois Brick was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state **[***14]** antitrust laws." *Id. at 105*. Thus, under ARC America, states are free to determine how best to protect consumers against antitrust violations; in crafting or amending state ***antitrust law***, states can decide whether to adopt the indirect purchaser rule of Illinois Brick.

Microsoft contends that ARC America stands for the rule that express statutory language is required in order to permit indirect purchasers to recover under state ***antitrust law***. Microsoft bases its contention on the Court's statement of the issue before it: "whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action." *Id. at 100*. We read this language, which comes early in the opinion, as a description of the issue rather than a limitation on the holding. That reading is reinforced by the fact that one of the state plaintiffs, Arizona, did not have an express provision in its statute allowing indirect purchaser suits, see *Bunker's Glass Co. v. Pilkington PLC, 47 P.3d 1119, 1125-26 n.7, 202 Ariz. 481 (Ariz. Ct. App. 2002)*,, *202 Ariz. 481, 47 P.3d 1119* **[***15]** but the Court acknowledged that the statute **[*335]** "might be interpreted as a matter of state law as authorizing indirect purchasers to recover." *ARC America Corp., 490 U.S. at 98 n.3*. More importantly, there is nothing in the rationale of ARC America to suggest that a state is not free to express its own policy in any way it desires. We reject Microsoft's narrow reading of ARC America. The issue before us is not whether the Vermont Legislature can allow indirect purchasers to sue; it is instead whether it has.

We now reach Microsoft's central argument that the holding of Illinois Brick **[**16]** should be followed in Vermont because *§ 2453(b)* directs that construction of the VCFA should be guided by federal law. *Section 2453(b)* provides:

HN14[] It is the intent of the legislature that in construing subsection (a) of this section, the courts of this state will be guided by the construction of similar terms contained in section 5(a)(1) of the Federal Trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States.

The text of subsection (a) is set out earlier in this opinion and is taken from § 5(a)(1) of the Federal Trade Commission **[***16]** Act, *15 U.S.C. § 45(a)(1)*. Microsoft construes the phrase "and the courts of the United States" in *§ 2453(b)* as encompassing federal court decisions interpreting all federal antitrust statutes, including the Clayton Act and the Sherman Act. See also *9 V.S.A. § 2451* (the purpose of the VCFA is "to complement the enforcement of federal statutes and decisions governing unfair methods of competition."). It argues, therefore, that *§ 2453(b)* requires this Court to follow the indirect purchaser rule of Illinois Brick and affirm the dismissal of Elkins's claim. For a number of reasons, we cannot agree with this construction of the "harmonization" provision.

First, Microsoft plainly misreads the language of *§ 2453(b)*. The phrase "and the courts of the United States" is part of the larger phrase "by the construction of similar terms contained in section 5(a)(1) of the Federal Trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States," and must be so limited as to include only those federal decisions construing the Federal Trade Commission Act. Microsoft's reading would have us **[***17]** divorce the phrase "in the courts of the United States" from its context and thus construe *§ 2453(b)* as stating in effect "the courts of this state will be guided by . . . the courts of the United States." Not only is this reading implausible, it also produces a **[*336]** direction so broad as to be practically meaningless. See *State v. Yorkey, 163 Vt. 355, 358, 657 A.2d 1079, 1080 (1995)* ***HN15***[] ("There is a presumption that the Legislature does not intend to enact meaningless legislation . . . [and], thus, when we construe a statute, we must do so in a manner that will not render it ineffective or meaningless.").

Second, our interpretation of *§ 2453(b)* is supported by other sections of the VCFA as well as by our previous decisions construing the Act. ***HN16***[] *Section 2453(c)* specifically references the Federal Trade Commission Act in instructing the Attorney General to ensure that rules and regulations enacted for the purposes of the Act "shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts interpreting the Federal Trade Commission Act." *9 V.S.A. § 2453(c)*. That subsection makes sense only if subsection **[***18]** (b) also means that we are guided by federal court decisions construing the Federal Trade Commission Act and not other federal antitrust laws.

This Court has expressly interpreted *§ 2453(b)* to mean that "in construing the Act, we look to the interpretations accorded similar terms and provisions of the Federal Trade Commission Act . . . ." *Carter, 168 Vt. at 52, 716 A.2d at 21* (citing *9 V.S.A. § 2453(b)*); see also *Russell v. Atkins, 165 Vt. 176, 182, 679 A.2d 333, 336 (1996)*; *Int'l Collection Serv., Inc., 156 Vt. at 544-45, 594 A.2d at 429*; *Poulin, 147 Vt. at 124-25, 513 A.2d at 1171-72*; *Christie v. Dalmig, Inc., 136 Vt. 597, 600-01, 396 A.2d 1385, 1387-88 (1979)*. Russell is particularly significant because it is an antitrust case.

[17]** Third, ***HN17***[] the harmonization provision in *§ 2453(b)* does not apply to the VCFA as a whole but only to *§ 2453(a)*, which sets out the practices prohibited under the Act. Thus, *§ 2453(b)* is not aimed at defining who can sue under the VCFA, but rather what conduct constitutes a violation of the Act. Nowhere in the Act is there any requirement that the definition of who **[***19]** may sue under the Act must be consistent with the definition of who may sue under federal ***antitrust law***, including under the FTCA. This is logical because the Federal Trade Commission Act does not provide for a private cause of action, see *Holloway v. Bristol-Myers Corp., 158 U.S. App. D.C. 207, 485 F.2d 986, 991 (D.C. Cir. 1973)*, and thus has no bearing on our determination on who can sue under the VCFA. As the Supreme Court of Iowa recently stated:

HN18[] The purpose behind both state and federal ***antitrust law*** is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct. To achieve this uniformity or predictability, we are **[*337]** not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court.

Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002).

We are not persuaded by Microsoft's additional argument that the Legislature's 2000 creation of a specific remedy for indirect purchasers supports its position. ***HN19***[] By Act 65 of 2000, the Legislature enacted a specific antitrust remedy provision, *9 V.S.A. § 2465* **[***20]** , which allowed "any person" to sue for a violation of an antitrust act including VCFA, limited the damages available in a private action under the VCFA or other state antitrust act and explicitly authorized indirect purchaser antitrust actions based on a violation of *§ 2453*. According to Microsoft, prior to the passage of Act 65, an indirect purchaser such as Elkins must have been barred from bringing suit under the VCFA; otherwise the legislative authorization of such a suit was unnecessary. It argues that allowing plaintiff's suit here would be an impermissible retroactive application of the amendment.

The express legislative purpose behind the amendment instructs otherwise. The amendment language states in relevant part:

HN20[] In any action for damages or injury sustained as a result of any violation of state antitrust laws, pursuant to *section 2453* of this title, the fact that the state, any public agency, political subdivision or any other person has not dealt directly with a defendant shall not bar or otherwise limit recovery. . . .

9 V.S.A. § 2465(b). In its Statement of Intent, the Legislature expressed the purpose behind this amendment: "This act clarifies **[***21]** the right of a direct or indirect purchaser to obtain recovery for a violation of the state ***antitrust law*** as set forth in chapter 63 of Title 9." 1999, No. 65 (Adj. Sess.), § 1 (emphasis added). ***HN21***[] Where the Legislature has amended a prior law and the circumstances clearly indicate clarification to be intended, this Court's construction of a statute must be governed by the disclosed intent of the Legislature. See *Town of Cambridge v. Town of Underhill, 124 Vt. 237, 241, 204 A.2d 155, 158 (1964)*; see also In re Shantee Point, Inc., ___ Vt. ___, ___, *811 A.2d 1243 (2002)* (where authorization issue is in litigation, amendment to provide the authorization "can be interpreted as clarifications adopted in light of . . . litigation, rather than substantive changes"). There is nothing to indicate that the Legislature's intended purpose behind the enactment of *§ 2465(b)* was contrary to the statement that **[*338]** it was a clarification and not necessarily **[**18]** a substantive change in the preexisting law. Therefore, based on the plain meaning of the statute, the expressly stated legislative intent, the remedial purposes of the Act, our previous decisions construing the VCFA, and the express **[***22]** legislative purpose behind the 2000 amendment, we find that ***HN22***[] Act 65 did not effectuate a change in Vermont law and that an indirect purchaser was entitled to bring a cause of action under the VCFA prior to the 2000 amendment.

We have saved until last the consideration of the myriad of decisions from federal and state courts considering the question before us under the law of the state involved. By way of context, approximately 33 states and the District of Columbia have allowed indirect purchasers to sue for at least some damages, many by statutes equivalent to *9 V.S.A. § 2465* and others by decision. See Note, Good "Brick" Walls Make Good Neighbors: Should a State Court Certify a Multistate or Nationwide Class of Indirect Purchasers?, *70 Fordham L. Rev. 2019, 2025-26 (2002)*; see generally Davis, Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall, 65 Antitrust L.J. 375 (1997). In virtually every state in which there is no explicit statute there has been litigation to resolve the issue. Further, state antitrust claims are often raised in federal antitrust suits so there are some federal **[***23]** decisions.

In support of its construction of *§ 2453(b)* and its effect on the construction of the VCFA as a whole, Microsoft relies on two federal district court cases that involve Vermont law. See *State v. Densmore Brick Co., 1980 U.S. Dist. LEXIS 11581, 1980 WL 1846*, at * 1 (D.Vt. Apr. 10, 1980), and *FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999)*. In Densmore, the State of Vermont sued a woodburning stove distributor for violations of the Sherman Act and the VCFA. In ruling on defendant's summary judgment motion, the court stated the general rule of Illinois Brick: that an antitrust plaintiff who was not a direct purchaser could not recover. *Densmore, 1980 U.S. Dist. LEXIS 11581, 1980 WL 1846*, at * 4. However, in denying the motion, the court ultimately found no reason to apply the indirect purchaser rule, as plaintiff had alleged a direct relationship. Id. Nowhere did the court address whether Illinois Brick was controlling law with respect to both federal and state law claims.

The subsequent holding in Mylan Laboratories relied upon Densmore for the proposition that Vermont case law prohibited indirect purchaser suits under the *VCFA. Mylan Labs., 99 F. Supp. 2d at 10*. **[***24]** Not only did the Mylan court misinterpret Densmore, it failed to do its own independent analysis. We find more accurate the later District of **[*339]** Maryland decision in *In re Microsoft, 127 F. Supp. 2d at 723, 725*. In this decision, the court found that it could not determine how this court would resolve the issue of whether an indirect purchaser could sue, labeling Microsoft's argument to the contrary as painting "with too broad a brush." *In re Microsoft, 127 F. Supp. 2d 702 at 723*. We agree with the court that the issue before us was entirely unresolved until this opinion. We decline to follow Mylan Laboratories or hold that Densmore is persuasive authority for Microsoft's position.

As the experience of other states in the construction of their antitrust and consumer fraud statutes may offer guidance, see *Int'l Collection Serv., Inc., 156 Vt. at 547-49, 594 A.2d at 430-32* (Court looks to other state's jurisprudence for guidance in construing the VCFA), we turn to a brief examination of the cases from other states. Because the statutory schemes vary markedly from state to state, it is helpful to place the decisions in three categories, as follows: **[***25]**

[19]** 1. Those Based on State Antitrust Acts - Unlike Vermont, most states have specific state antitrust acts. These statutes typically have federal harmonization provisions that require the court to look to federal court decisions interpreting any of the federal antitrust laws. Unless there is a specific provision in the state antitrust act allowing indirect purchasers to sue - that is, explicit rejection of the Illinois Brick rule - most of the court decisions in these states hold that they are bound to follow Illinois Brick. See *Pomerantz v. Microsoft Corp., 50 P.3d 929, 932 (Colo. Ct. App. 2002)*; *Berghausen v. Microsoft Corp., 765 N.E.2d 592, 596 (Ind. Ct. App. 2002)*; *Duvall v. Silvers, Asher, Sher & Mchapen, 998 S.W.2d 821, 825 (Mo. Ct. App. 1999)*; *Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 795 A.2d 833, 838 (N.H. 2002)*; *Siena v. Microsoft Corp., 796 A.2d 461, 464-65 (R.I. 2002)*. Those that refuse to follow Illinois Brick note that the harmonization provision is not absolute. See *Bunker's Glass Co., v. Pilkington, 47 P.3d at 1126-27*; *Comes, 646 N.W.2d at 446*; *Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680, 686 (N.C. Ct. App. 1996)* **[***26]** (federal law is considered "only as persuasive authority").

2. Those Based on Consumer Protection Acts, or Similar Legislation, in States that also Have Antitrust Acts - In most of the litigated cases, the plaintiff is precluded from suing under the state antitrust act because of the adoption of the Illinois Brick rule and sues instead under a consumer protection act, an unfair trade practices act or the like. The decisions in this category go in both directions depending upon the court's view of the need for consistency in

the result under the applicable acts. See *Vacco v. Microsoft Corp., 260 Conn. 59, 793 A.2d 1048, 1058, 1066 **[*340]** (Conn. 2002)* (because of broad harmonization provision, consumer cannot sue under state antitrust act; consumer also cannot sue under Connecticut Unfair Trade Practices Act); *Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 109 (Fla. Dist. Ct. App. 1996)* (although indirect purchaser cannot sue under state antitrust act, she can sue under the Florida Deceptive and Unfair Trade Practices Act); *Davidson v. Microsoft Corp., 143 Md. App. 43, 792 A.2d 336, 344-45 (Md. Ct. Spec. App. 2002)* (indirect purchaser who cannot sue under state antitrust **[***27]** act also cannot sue under Maryland Consumer Protection Act); *Ciardi v. F. Hoffmann-LaRoche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 314 (Mass. 2002)* (indirect purchaser who cannot sue under state antitrust act can sue under Massachusetts consumer protection statutes); *Abbott Labs., Inc. v. Segura, 907 S.W.2d 503, 507, 38 Tex. Sup. Ct. J. 961 (Tex. 1995)* (indirect purchaser who cannot sue under state antitrust act also cannot sue under Texas Deceptive Trade Practices-Consumer Protection Act); see also *Arnold v. Microsoft Corp., 2001 Ky. App. LEXIS 1311, 2001 WL 1835377*, at *4, * 7 (Ky. Ct. App. 2001) (indirect purchaser who cannot sue under "Kentucky's version of the Sherman Act" also cannot sue under unfair trade practices provision of the Kentucky Consumer Protection Act); *Blake v. Abbott Labs., Inc., 1996 Tenn. App. LEXIS 184, 1996 WL 134947*, at * 5, * 7 (Tenn. Ct. App. 1996) (indirect purchaser can sue under both Tennessee Unfair Trade Practices Act, the state antitrust act, and under the Tennessee Consumer Protection Act). In most of these cases, the court does not find Illinois Brick to be a direct barrier to suit, or, put another way, it does not find that only direct purchasers can sue under the consumer **[***28]** protection act or similar legislation. Illinois Brick is relevant to the outcome only because it may prevent a suit under the state antitrust act.

3. Those Based on a Consumer Protection Act in a State that Does Not Have an Antitrust Act - This category includes this case and one decision from another state. In Blewett v. Abbott Laboratories, the **[**20]** Washington Court of Appeals ruled that an indirect purchaser could not bring an antitrust action under the Washington Consumer Protection Act because of the broad federal harmonization provision - "the courts [shall] be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters." *86 Wn. App. 782, 938 P.2d 842, 845-46 (Wash. Ct. App. 1997)*.

While there is language in many of the decisions that we might otherwise find helpful, in general the decisions give us little guidance because of the critical differences in their statutory schemes. They involve either broad harmonization provisions that require the courts **[*341]** to be guided by federal court decisions interpreting any of the federal antitrust acts, including the Clayton Act that is interpreted in Illinois Brick, or they **[***29]** involve the interrelationship of a specific antitrust act, with a broad harmonization provision, and a more general consumer protection law. None is persuasive authority for the outcome of this case.

In summary, ***HN23***[] we find no reason to treat antitrust cases differently from other VCFA cases and prohibit indirect purchasers from bringing suit under *§ 2461(b)*. Since we have concluded that consumers can generally sue under *§ 2461(b)* even though they are indirect purchasers of a good or service from the defendant, we also hold that they can bring an antitrust case under *§ 2461(b)*. The recent addition to the VCFA of *§ 2465(b)*, explicitly authorizing indirect purchaser antitrust suits, was not a change in the preexisting law.

Reversed and remanded.

End of Document

NEW YORK v. MICROSOFT

United States District Court for the District of Columbia

November 1, 2002, Decided

Civil Action No. 98-1233 (CKK)

Reporter

231 F. Supp. 2d 203 *; 2002 U.S. Dist. LEXIS 21099 **; 2002-2 Trade Cas. (CCH) P73,852

STATE OF NEW YORK, et al., Plaintiffs v. MICROSOFT CORPORATION, Defendant.

Disposition: Court conditionally approved proposed consent decree as final judgment. Approval to become final following submission by parties of amendment to § VII.

Core Terms

Middleware, operating system, appellate court, decree, software, final judgment, products, license, compliance, Non-Microsoft, functionality, public interest, parties, anticompetitive, interoperate, provisions, terms, consent decree, user, district court, disclosure, interface, technologies, launch, fact finding, distributed, Platform, icons, explains, complaints

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN1[] **Settlements, Consent Judgments**

In considering proposed settlements, the court is generally required to assess whether the settlement fairly and reasonably resolves the controversy in a manner consistent with the public interest. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. The reviewing court is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy. In addition, because approval of a settlement is a judicial act that is committed to the informed discretion of the trial court, the court must satisfy itself that the decree is equitable in any effect it may have upon third parties.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN2[] Settlements, Antitrust Procedures & Penalties Act

The Antitrust Procedures and Penalties Act (Tunney Act) requires the court to subject any consent decree proposed in any civil proceeding brought by the United States under the antitrust laws to a determination of whether entry of such decree is in the "public interest." *15 U.S.C.S. § 16(b)*, *(e)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN3[] Settlements, Antitrust Procedures & Penalties Act

15 U.S.C.S. § 16(e) mandates that, prior to the entry of a proposed consent judgment, the district court must determine that entry of such judgment is in the public interest. *15 U.S.C.S. § 16(e)*. *15 U.S.C.S. § 16(e)* specifically requires the court to make an independent determination as to whether or not entry of a proposed consent decree is in the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN4[] Settlements, Consent Judgments

The court's role in protecting the public interest is one of ensuring that the government has not breached its duty to the public in consenting to the decree. In making this determination, the court may consider the following: (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment; (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. *15 U.S.C.S. § 16(e)*. These considerations are characterized more simply as an inquiry into the purpose, meaning, and efficacy of the decree.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN5[] Settlements, Consent Judgments

The district court should pay particularly close attention to a number of issues in its examination of the decree and corresponding assessment of the public interest. A district judge pondering a proposed consent decree should pay special attention to the decree's clarity, as it is the district judge who must preside over the implementation of the decree. Based on a similar rationale, district courts are expected to pay close attention to the enforcement provisions in a proposed consent decree. Where there exist third-party claims that entry of the proposed decree will cause affirmative harm, the district court should at least pause or "hesitate" in order to consider these claims before reaching a conclusion that the proposed decree is appropriate.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN6[] **Settlements, Consent Judgments**

The court's authority to review the proposed decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place. Accordingly, the court must accord deference to the government's predictions as to the effect of the proposed remedies. In this vein, a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN7[] **Settlements, Antitrust Procedures & Penalties Act**

A remedies decree in an antitrust case must seek to unfetter a market from anticompetitive conduct, to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. Although this inquiry is usually reserved for cases which are litigated through remedy, consideration of these "objectives," to the extent they are applicable to the facts of the case, remains appropriate where liability has been established in the case. Still, the court's assessment of the remedy's ability to satisfy these objectives is tempered by the deference owed to the government in the Antitrust Procedures and Penalties Act (Tunney Act) context.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN8[] **Settlements, Consent Judgments**

The mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition. Similarly, because structural relief is designed to eliminate the monopoly altogether, wisdom counsels against adopting radical structural relief in the absence of some measure of confidence that there has been an actual loss to competition that needs to be restored. Instead, the court crafting a remedy must assess the strength of the causation evidence that established liability and "tailor" the relief accordingly.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN9[] Settlements, Consent Judgments

A consent decree need not reflect the court's own choice of a remedy, but instead, giving due respect to the government's view of the effect of the remedial proposal, need only reflect a certain consonance with the liability allegations, or the liability findings.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Clayton Act > Penalties

HN10[] Settlements, Consent Judgments

The Antitrust Procedures and Penalties Act (Tunney Act), and the case law which follows, dictate that it is for the United States to weigh the benefits of a trade in the first instance, and that, barring a breach of duty in consenting to the decree, the court should respect the government's predictions as to the effect of the proposed remedy.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Clayton Act > Penalties

HN11[] Settlements, Consent Judgments

It is not contrary to the public interest, as contemplated by the Antitrust Procedures and Penalties Act (Tunney Act), to enter a decree that is not necessary, or that grants relief to which the government might not be strictly entitled. The public does not suffer because the defendant consented to limitations on its activities that could not otherwise be imposed.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN12[] Settlements, Antitrust Procedures & Penalties Act

In the context of the Antitrust Procedures and Penalties Act (Tunney Act), just as the court may not second guess the government's choices about what claims to bring in the first place, it should not treat differently those concessions proposed in a consent decree that might have been achieved at trial from those that might not have been achievable.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Clayton Act > Penalties

HN13[] Settlements, Consent Judgments

In the context of the Antitrust Procedures and Penalties Act (Tunney Act), the risks inherent in litigation are likely to be reflected in some portion of the proposed decree, and these risks are appropriately weighed by the government, rather than the court, in the first instance.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN14[] Settlements, Consent Judgments

Courts considering antitrust remedies are advised to pay special attention to the potential of any remedy to inflict harm upon third parties.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN15[] Settlements, Antitrust Procedures & Penalties Act

A court presiding over an Antitrust Procedures and Penalties Act (Tunney Act) proceeding need not conclude that the terms of the consent decree will best serve society, but only that the proposed decree is within the reaches of the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN16[] Settlements, Consent Judgments

On the subject of licenses and antitrust remedies, courts are best excluded from the administration of intricate and detailed rules relating to business affairs.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > Courts > Judicial Precedent

HN17[] Settlements, Consent Judgments

Precedent instructs the court to pay close attention to provisions that address enforcement of a consent decree.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN18[] **Supplemental Jurisdiction, Ancillary Jurisdiction**

District courts enjoy no free-ranging "ancillary" jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order. The district court's power over a consent decree, reflecting the hybrid between judicial order and contract, is limited to two sources. A district court may interpret and enforce a decree to the extent authorized by the decree itself or by the related order. Additionally, a district court may modify a decree pursuant to *Fed. R. Civ. P. 60(b)(5)*. This latter power is circumscribed by the Rule's requirements that such modification is appropriate if it is no longer equitable that the judgment should have prospective application. *Fed. R. Civ. P. 60(b)(5)*. A significant change in circumstances may warrant revision of a decree, though any such revision must be suitably tailored to the changed circumstances.

Counsel: For State of New York, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of New York, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of New York, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of New York, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of New York, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of California, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of California, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA.

For State of California, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of California, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of California, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Connecticut, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Connecticut, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA.

For State of Connecticut, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Connecticut, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Connecticut, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Florida, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Florida, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA.

For State of Florida, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Florida, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Florida, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Iowa, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Iowa, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA.

For State of Iowa, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Iowa, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Iowa, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Kansas, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Kansas, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA.

For State of Kansas, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Kansas, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Kansas, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Louisiana, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Maryland, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Maryland, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Maryland, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Maryland, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Maryland, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Maryland, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Maryland, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For Commonwealth of Massachusetts, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For Commonwealth of Massachusetts, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For Commonwealth of Massachusetts, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For Commonwealth of Massachusetts, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For Commonwealth of Massachusetts, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Michigan, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Michigan, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Michigan, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Michigan, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Michigan, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Michigan, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Michigan, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Minnesota, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Minnesota, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Minnesota, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Minnesota, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Minnesota, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of New Mexico, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of New Mexico, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of New Mexico, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of North Carolina, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA.

For State of North Carolina, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of North Carolina, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of North Carolina, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of North Carolina, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of North Carolina, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Ohio, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA.

For State of Ohio, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Ohio, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Ohio, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Ohio, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Ohio, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Ohio, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of South Carolina, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA.

For State of South Carolina, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of South Carolina, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Utah, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA.

For State of Utah, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Utah, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Utah, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Utah, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Douglas Lee Davis, Office of Attorney General State of West Virginia, Charleston, WV USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For District of Columbia, Ex Rel, PLAINTIFF:

For State of West Virginia, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Douglas Lee Davis, Office of Attorney General State of West Virginia, Charleston, WV USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of West Virginia, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Wisconsin, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For District of Columbia, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For District of Columbia, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For District of Columbia, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For District of Columbia, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For District of Columbia, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For State of Illinois, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Illinois, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For State of Illinois, Ex Rel, PLAINTIFF: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Illinois, Ex Rel, PLAINTIFF: Jay L Himes, New York Department of Law, New York, NY USA.

For State of Illinois, Ex Rel, PLAINTIFF: Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA.

For State of Illinois, Ex Rel, PLAINTIFF: Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA.

For State of Illinois, Ex Rel, PLAINTIFF: Steven R Kuney, Williams & Connolly, Washington, DC USA.

For USA Today Intervenor, PLAINTIFF: Barbara W Wall, Gannett Co, Inc, McLean, VA USA.

For USA Today Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For USA Today Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For USA Today Intervenor, PLAINTIFF: Mark E Faris, Gannett Co, Inc, McLean VA USA.

For The Washington Post Intervenor, PLAINTIFF: Eric Lieberman, Washington, DC USA.

For The Washington Post Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For The Washington Post Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For The Washington Post Intervenor, PLAINTIFF: Mary Ann Werner, Washington, DC USA.

For Los Angeles Times Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Los Angeles Times Intervenor, PLAINTIFF: Karlene Goller, Los Angeles, CA USA.

For Los Angeles Times Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Dow Jones & Company, Inc Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Dow Jones & Company Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Dow Jones & Company Intervenor, PLAINTIFF: Stuart D Karle, Dow Jones & Co, Inc, New York, NY USA.

For Cable News Network, LP, LLP Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Cable News Network, LP, LLP Intervenor, PLAINTIFF: Jonathan Donnellan, Cable News Network, LP, LLLP, Atlanta, GA USA.

For Cable News Network, LP, LLP Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For The Associated Press Intervenor, PLAINTIFF: David A Schulz, Clifford Chance Rogers & Wells LLP, New York, NY USA.

For The Associated Press Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For The Associated Press Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For The New York Times Company Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For The New York Times Company Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Bloomberg News Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Bloomberg News Intervenor, PLAINTIFF: Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Microsoft Corporation, DEFENDANT: Bradley Paul Smith, Sullivan & Cromwell, Washington, DC USA.

For Microsoft Corporation, DEFENDANT: John L Warden, Sullivan & Cromwell, New York, NY USA.

For Microsoft Corporation, DEFENDANT: Richard J Uroksky, Sullivan & Cromwell, New York, NY USA.

For Microsoft Corporation, DEFENDANT: Steven L Holley, Sullivan & Cromwell, New York, NY USA.

For Microsoft Corporation, DEFENDANT: William H Neukom, Microsoft Corporation, Redmond, WA USA.

Roy Ad Day, MOVANT, Pro se, Tarpon Springs, FL USA.

Carl Lundgren, MOVANT, Pro se, Arlington, VA USA.

Lonnie G Schmidt, MOVANT, Pro se.

For San Jose Mercury News, Inc, MOVANT: Aileen Meyer, Washington, DC USA.

For San Jose Mercury News, Inc, MOVANT: Robert Gutkin, Pillsbury Winthrop LLP, Washington, DC USA.

For Relpromax Antitrust Inc, MOVANT: Peter Peckarsky, Washington, DC USA.

For California Plaintiffs, MOVANT: Steven F Benz, Kellogg, Huber, Hansen, Todd & Evans, PLLC, Washington, DC USA.

For The Association for Competitive Technology, MOVANT: Gene C Schaerr, Sidley Austin Brown & Wood LLP, Washington, DC USA.

For Sun Microsystems, Inc, MOVANT: Bret A Campbell, Clifford Chance Rogers & Wells LLP, Washington, DC USA.

For State of Washington, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Vermont, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Tennessee, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of South Dakota, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Oregon, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of North Dakota, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of New Jersey, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of New Hampshire, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Nevada, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Missouri, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Mississippi, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Maine, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Indiana, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Idaho, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Colorado, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Arkansas, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Arizona, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For Gateway, Inc, MOVANT: John G Froemming, Howrey Simon Arnold & White, LLP, Washington, DC USA.

For SBC Communications Inc, MOVANT: Donald L Flexner, Boies, Schiller & Flexner LLP, Washington, DC USA.

For Onyx Software Corporation, MOVANT: Thomas J Horton, Orrick, Herrington & Sutcliffe LLP, Washington, DC USA.

Robert Koeing, MOVANT, Pro se, Oyster Bay, NY USA.

Timothy Bresnahan, MOVANT, Pro se, Stanford University Institute for Economic Policy Research, Stanford, CA USA.

Robert E Litan, MOVANT, Pro se, Washington, DC USA.

Judges: [1]** COLLEEN KOLLAR-KOTELLY, United States District Judge.

Opinion by: COLLEEN KOLLAR-KOTELLY

Opinion

[*204] MEMORANDUM OPINION

Presently pending before the Court is a joint stipulation entered by Defendant Microsoft Corporation and the Plaintiff States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin ("Plaintiff Settling States"). The stipulation indicates that these States have joined the settlement between the United States and Microsoft in *United States v. Microsoft Corp., 215 F. Supp. 2d 1* (D.D.C.). In *United* **[*205]** *States v. Microsoft Corp.*, the United States and Microsoft have proposed entry of a consent decree-the Second Revised Proposed Final Judgment ("SRPFJ")--as the final judgment in that case. Pursuant to *Federal Rule of Civil Procedure 54(b)*, the Plaintiff Settling States [1] ask the Court to enter the SRPFJ as a final judgment as to their claims. For the reasons set forth in the Memorandum Opinion issued in *United States v. Microsoft, 231 F. Supp. 2d 144, 2002 U.S. Dist. LEXIS 21097*, No. 98-1232 (D.D.C. Nov. 1, 2002), appended hereto as Appendix A, the Court conditionally approves the SRPFJ as a final judgment as to the claims of the Plaintiff Settling States.

[2]** ***HN1***[] In considering proposed settlements, the Court is generally required to assess whether the settlement fairly and reasonably resolves the controversy in a manner consistent with the public interest. *See Citizens for a Better Env't v. Gorsuch, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1126 (D.C. Cir.1983)*. "Naturally, the

[1] Remaining as Plaintiffs in this case, but not addressed in this Memorandum Opinion, are the States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, and the District of Columbia.

agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Id. at 1124* (quoting *United States v. Armour & Co., 402 U.S. 673, 681, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971))*; *see also* *United States v. Microsoft Corp., 312 U.S. App. D.C. 378, 56 F.3d 1448, 1461 (D.C. Cir. 1995)*. "The reviewing court is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." *United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982)*. In addition, because approval of a settlement is a judicial act that is committed to the informed discretion of the trial court, the **[**3]** Court must satisfy itself that the decree is equitable in any effect it may have upon third parties. *Donovan v. Robbins, 752 F.2d 1170, 1176-77 (7th Cir.1985)*; *see also* *Hooker Chemicals and Plastics Corp., 540 F. Supp. at 1072* ("The court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.") (quoting *City of Detroit v. Grinnell Corp. 495 F.2d 448, 462 (2d Cir. 1974))*.

The standard described above cannot be said to exceed that imposed by the Tunney Act, *15 U.S.C. § 16(b)-(h)*. ***HN2***[] The Tunney Act requires the Court to subject any consent decree proposed in any civil proceeding brought by the United States under the antitrust laws to a determination of whether entry of such decree is in the "public interest." *15 U.S.C. § 16(b)*,*(e)*; *See generally* *Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448*. The Court recited the legal history of this case and its former companion case--*United States v. Microsoft Corp.*--in Memorandum Opinions issued **[**4]** in *United States v. Microsoft Corp.* on July 1, 2002, and November 1, 2002. In its November 1, 2002, Opinion in *United States v. Microsoft Corp.*, the Court determined that, save for the provision specifying the Court's reservation of jurisdiction, entry of the SRPFJ as the final judgment in that case is in the public interest. *See* Appendix A; *Microsoft, 231 F. Supp. 2d 144, 2002 U.S. Dist. LEXIS 21097*, *3, No. 98-1232 (D.D.C. Nov. 1, 2002). As the claims of the Plaintiff Settling States are indistinguishable from the claims of the United States, except that the Plaintiff Settling States advanced claims under state law as well as federal law, based upon the detailed analysis set forth in the record of *United States v. Microsoft Corp.*, **[*206]** No. 98-1232, the Court finds that, with the exception of the reservation of jurisdiction, the SRPFJ is fair, reasonable, and in the public interest.

Because the Court has concerns that the reservation of jurisdiction in the proposed decree is insufficient to ensure clear enforcement of its terms by the Court, the Court shall condition its entry of the SRPFJ as the final judgment for the claims of the Plaintiff Settling States pending receipt by the Court of an amendment to that **[**5]** provision. *See* Appendix A; *Microsoft, 231 F. Supp. 2d 144, 2002 U.S. Dist. LEXIS 21097*, *168, 98-1232 (D.D.C. Nov. 1, 2002). The Court suggests that the public interest would be served if Microsoft and the parties to the settlement would agree to amend the proposed final judgment to reserve for the Court, in addition to the powers presently specified in the proposed final judgment, the power *sua sponte* to issue orders or directions for the construction or carrying out of the final judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof. Such an amendment would not appear to work a fundamental change to the parties' agreement and would ensure that the Court retains the power intended by Plaintiffs and which the Court considers necessary to ensure effective implementation of the final judgment in this case.

Based on the foregoing, the Court conditionally approves the SRPFJ as the final judgment as to the claims of the Plaintiff Settling States in the above-captioned case. The Court will enter final judgment upon receipt of a proposed decree which reflects the amendment described above. Such amendment shall be filed in writing with the Court not later than November 8, 2002. An **[**6]** appropriate Order accompanies this Memorandum Opinion.

November 1, 2002

COLLEEN KOLLAR-KOTELLY

United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.

Civil Action No. 98-1232 (CKK)

MEMORANDUM OPINION

Remaining in this case for the Court's determination is the resolution of a single issue: whether entry of the final judgment proposed by the parties is in the public interest. The Court makes this determination pursuant to the Antitrust Procedures and Penalties Act ("Tunney Act"), *15 U.S.C. § 16(b)-(h)*. In a previous Memorandum Opinion, the Court reviewed the pertinent procedural history and determined that the parties had satisfied the other requirements of the Tunney Act. *See generally* *United States v. Microsoft Corp., 215 F. Supp. 2d 1*, *9 (D.D.C. 2002). Having reviewed the voluminous record in this case and considered the factors enumerated in *15 U.S.C. § 16(e)*, the Court finds that, with the exception of the provisions relating to the retention of the Court's jurisdiction, the **[**7]** proposed consent decree is in the public interest. Accordingly, the Court conditionally approves the proposed consent decree as the final judgment in this case, pending the prompt agreement by the parties to a modification of the Court's retention of its jurisdiction.

I. PROCEDURAL HISTORY

On May 18, 1998, the United States filed a civil complaint alleging that Microsoft had engaged in anticompetitive conduct in violation of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. On that same date, a group of state plaintiffs filed a separate civil complaint alleging similar violations of federal law, as well as violations of the corresponding provisions of their various state laws. Not long after filing, the two cases were consolidated and thereafter, proceeded jointly through discovery and a trial on the merits. On November 5, 1999, Judge Thomas Penfield Jackson entered 412 findings of fact, *United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999)* **[*207]** (hereinafter cited as "*Findings of Fact*"), and on April 3, 2000, Judge Jackson entered conclusions of law, finding Microsoft liable for violations of *§§ 1* and *2* of the Sherman Act and the **[**8]** corresponding state law provisions, *United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000)*. On June 7, 2000, Judge Jackson entered final judgment in the consolidated cases and imposed a structural remedy of divestiture for Microsoft's violations of the Sherman Act. *United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000)*.

Microsoft appealed, and the United States Court of Appeals for the District of Columbia Circuit determined to consider the appeals in the consolidated cases *en banc.* Following extensive briefing and two days of oral argument, the appellate court issued a unanimous *per curiam* opinion affirming in part, reversing in part, vacating the remedy decree in full, and remanding in part for remedy proceedings before a different district court judge. *See* *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34 (D.C. Cir. 2001)* (*en banc*). Following reassignment, on September 28, 2001, this Court ordered that the parties enter into intensive settlement negotiations. *United States v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272*, Nos. 98-1232 and 98-1233 (D.D.C. Sept. 28,2001) (setting a schedule for settlement discussions). On that **[**9]** same date, the Court entered a schedule for discovery and commencement of evidentiary proceedings, in the event that the cases were not resolved through settlement. *United States v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272*, Nos. 98-1232 and 981233 (D.D.C. Sept. 28, 2001) (setting discovery guidelines and schedule).

The United States and Microsoft were able to reach a resolution in *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C.), in the form of a proposed consent decree, filed with the Court as the "Revised Proposed Final Judgment" on November 6, 2001. As a result, the Court vacated the discovery schedule with regard to *United States v. Microsoft Corp.* and deconsolidated that case from its companion case, *State of New York, et. al. v. Microsoft Corp.*, No. 98-1233 (D.D.C.). *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. Nov. 2, 2001) (vacating the Sept. 28, 2001, Scheduling Order with regard to Civil Action No. 98-1232); *United States v. Microsoft Corp., 2002 U.S. Dist. LEXIS 13050*, Nos. 98-1232 and 98-1233 (Feb. 1, 2002) (deconsolidating cases). Rather than proceed to an evidentiary hearing on the issue of remedy along with some of the plaintiffs in *State of New York, et. al. v. Microsoft* **[**10]** *Corp.*, [2] the United States and Microsoft commenced the process of obtaining judicial approval of the proposed consent decree pursuant to the Tunney Act, *15 U.S.C. § 16(b)-(h)*.

The November 6, 2001, filing of the Revised Proposed **[**11]** Final Judgment ("RPFJ") was accompanied by a "Stipulation" entered into by the United States, Microsoft, and the Settling States. The Stipulation provided that the Court could enter the proposed final judgment "at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*, **[*208]** and without further notice to any party or other proceedings." Stipulation and Revised Proposed Final Judgment at 1. The United States filed its "competitive impact statement" ("CIS") with the Court on November 15, 2001. Pursuant to *15 U.S.C. § 16(b)*, the United States published the proposed final judgment, along with the CIS, in the Federal Register on November 28, 2001. Revised Proposed Final Judgment and Competitive Impact Statement, *66 Fed. Reg. 59,452* (Nov. 28, 2001). On December 10, 2001, Defendant Microsoft filed with the Court its "description of . . . written or oral communications by or on behalf of [Microsoft] . . . with any officer or employee of the United States concerning or relevant to" the proposed consent decree. Thereafter, Microsoft supplemented this description on March 20, 2002.

The **[**12]** United States received 32,392 comments on the proposed final judgment and provided the full text of these comments to the Court on February 28, 2002. On March 1, 2002, the United States submitted the full text of the public's comments for publication in the Federal Register, and on May 3, 2002, the public comments appeared in the Federal Register pursuant to that submission. United States' Certificate of Compliance at 4; Public Comments, *67 Fed. Reg. 23,654* (Books 2-12)(May 3, 2002) . On May 9, 2002, the United States published in the Federal Register an "addendum containing the correct text of thirteen (13) comments for which either an incomplete or incorrect electronic version had been included in the original submission to the Federal Register." Addendum to Public Comments, *67 Fed. Reg. 31,373* (May 9, 2002); United States Certificate of Compliance at 4. The United States certified compliance with *15 U.S.C. § 16(b)-(d)* on May 9, 2002. On July 1, 2002, this Court confirmed the applicability of the Tunney Act to these proceedings and found that the parties had complied with the Act's requirements such that the matter was ripe for the **[**13]** Court's determination of the public interest. *See United States v. Microsoft Corp., 215 F. Supp. 2d 1 (D.D.C. 2002)*. [3]

II. TUNNEY ACT

A. Tunney Act

Concerned with the appearance of impropriety engendered by the secrecy of consent decree negotiations in antitrust cases, in addition to exposing to "sunlight" the process by which such consent decrees are negotiated, **[**14]** 119 Cong. Rec. at 24599, Congress determined that the judiciary should do more than merely "rubber stamp" proposed consent decrees in antitrust cases, H. Rep. No. 93-1463, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6536; S. Rep. No. 93298, at 5 (1973). *See also United States v. Microsoft Corp., 312 U.S.*

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[2] In the former companion case, *State of New York, et al. v. Microsoft Corp.*, the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin have entered into a conditional settlement with Microsoft as to the issue of remedy. Those Plaintiff States--"Settling States"--are awaiting approval by this Court of the settlement in this case before entry of the settlement in *State of New York, et al v. Microsoft Corp.* pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure*. Because the proposed final judgment addresses the Settling States as well as the United States in its terms, the Court, where appropriate, refers to both the United States and the Settling States as "Plaintiffs" in this Memorandum Opinion.

[3] Pursuant to the stipulation filed with the Court on November 6, 2001, Microsoft began complying with portions of the proposed final judgment on December 16, 2001, as if "it were in full force and effect." Stipulation at 2. On August 28, 2002, the United States submitted a "Notice" to the Court advising "the Court of Microsoft's compliance with various milestones established by the Second Revised Proposed Final Judgment ('SRPFJ')." Notice at 1 (Aug. 28, 2002). In general terms, the Notice indicates that Microsoft is in compliance with its requirements and "takes seriously its obligations under the SRPFJ." *Id. at 7*.

App. D.C. 378, 56 F.3d 1448, 1458 (D.C. Cir. 1995) (quoting legislative history). Accordingly, ***HN3***[] *§ 16(e)* of Title 15 mandates that, prior to the entry of a consent judgment proposed by the United States in an antitrust action, the district court must determine that "entry of such judgment is in the public interest." *15 U.S.C. § 16(e)*. Subsection (e) **[*209]** specifically requires the Court to "make an independent determination as to whether or not entry of a proposed consent decree is in the public interest." S. Rep. 93-298, at 5; *Microsoft, 56 F.3d at 1458* (quoting legislative history).

HN4[] The court's role in protecting the public interest is one of ensuring that the government has not breached its duty to the public in consenting to the decree." *United States v. Bechtel, 648 F.2d 660, 666 (9th Cir. 1981)*. In making this determination, **[**15]** the Court "may consider" the following:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). The D.C. Circuit characterized these considerations more simply as an inquiry into the "purpose, meaning, and efficacy of the decree." *Microsoft, 56 F.3d at 1462*.

The D.C. Circuit identified ***HN5***[] a number of issues to which the district court should pay particularly close attention in its examination of the decree and corresponding assessment of the public interest. "A district judge pondering a proposed consent decree . . . should pay special attention to the decree's clarity," as it is the district judge who **[**16]** must "preside over the implementation of the decree." *Id. at 1461-62*. Based on a similar rationale, district courts are expected to "pay close attention" to the enforcement provisions in a proposed consent decree. *Id. at 1462*. Where there exist third-party claims that entry of the proposed decree will cause affirmative harm, the district court should at least pause or "hesitate" in order to consider these claims before reaching a conclusion that the proposed decree is appropriate. *Id.*

Notwithstanding the district court's focused consideration of these and other issues, the Court must recall that ***HN6***[] its "authority to review the [proposed] decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place." *Id. at 1459-60*. Accordingly, the Court must accord deference to the "government's predictions as to the effect of the proposed remedies." *United States v. Thomson Corp., 949 F. Supp. 907, 914 (D.D.C. 1996)* (quoting *Microsoft, 56 F.3d at 1461*); *see also* *United States v. Western Elec. Co., 283 U.S. App. D.C. 299, 900 F.2d 283, 297 (D.C. Cir. 1990)* **[**17]** ("Although we see no doctrinal basis for the district court to defer to the DOJ's interpretation of the decree or its views about ***antitrust law***, it is to be expected that the district court would seriously consider the Department's economic analysis and predictions of market behavior."). In this vein, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest." *United States v. AT&T, 552 F. Supp. 131, 151 (D.D.C. 1982)* (quotation marks omitted), *aff'd without opinion sub nom.* *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)*; *accord* *Microsoft, 56 F.3d at 1460*; *Bechtel, 648 F.2d at 666*.

Having so identified the general standard in Tunney Act cases, this Court must inquire as to whether that standard applies equally and without modification in this **[*210]** case. The instant case is more complicated than the usual case in that it contradicts the rule that "because it is a settlement [and] there are no findings that the defendant has actually engaged in illegal practices . . . it is **[**18]** therefore inappropriate for the [district court] judge to measure the remedies in the decree as if they were fashioned after trial." *Microsoft, 56 F.3d at 1460-61* (emphasis omitted). In this case there has been a trial, and there have been findings of liability on numerous grounds. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. Therefore, it seems entirely appropriate to "measure the remedies" based upon the post-trial liability findings in this case. *Microsoft, 56 F.3d at 1461*. Accordingly, the findings of liability provide an essential foundation to this Court's analysis, as a "discrepancy between the remedy and undisputed facts of antitrust violations could be such as to render the decree 'a mockery of judicial power.'" Mass. School of Law at Andover, Inc. v. United States, 326 U.S. App. D.C. 175, 118 F.3d 776, 782 (D.C. Cir. 1997) (quoting Microsoft, 56 F.3d at 1462); *accord* Thomson, 949 F. Supp. at 913 ("The court is to compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively **[**19]** address the anticompetitive harms initially identified.").

While this is not to say that the circumstances of this case call for a review of the proposed decree in the absence of deference, the Court cannot simply proceed as if this were a case based upon untested allegations. In the usual case "remedies which appear less than vigorous may well reflect an underlying weakness in the government's case." Microsoft, 56 F.3d at 1460-61. Yet in this case, many, though certainly not all, of the strengths and weaknesses of the government's case have already been exposed. In this regard, the Court cannot overlook the fact that the appellate court sustained liability against Microsoft for violation of § 2 of the Sherman Act. Microsoft, 253 F.3d 59-78. Therefore, without applying a wholly distinct standard, this Court must remain ever-mindful of the posture of this case when assessing the proposed consent decree for determination of the public interest.

Given the liability findings, part of the public interest analysis will require consideration of the extent to which the proposed consent decree "meets the requirements for an antitrust remedy." AT&T, 552 F. Supp. at 153. **[**20]** ***HN7***[] "[A] remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' *Ford Motor Co.* [*v.* United States], 405 U.S. 562, 577 31 L. Ed. 2d 492, 92 S. Ct. 1142 [1972], . . . to 'terminate the illegal monopoly, [4] deny to the defendant **[*211]** the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' [United States v. United Shoe Machinery Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496]." Microsoft, 253 F.3d at 103. Although this inquiry is usually reserved for cases which are litigated through remedy, such as State of New York, et al. v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272, No. 98-1233 (D.D.C.), consideration of these "objectives," to the extent they are applicable to the facts of this case, remains appropriate because liability has been established in this case. Still, the Court's assessment of the remedy's ability to satisfy these objectives is tempered by the deference owed to the government in the Tunney Act context. *See generally* Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448.

[21]** Applying these principles to the instant case, because the district court has rendered findings of fact and liability which have been reviewed on appeal, the Court examines, in general terms, the correspondence between the liability findings and the conduct restrictions in the proposed consent decree. In conjunction with this inquiry, the Court is particularly attentive to the clarity of the proposed decree's provisions, the enforcement mechanisms, and to claims that harm will result from the implementation of the proposed decree. Microsoft, 56 F.3d at 1461-62.

III. DISCUSSION

A. Court of Appeals Opinion

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[4] The Court notes that the objective of "terminating the illegal monopoly," United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496 (1968), is incompatible with the facts of this case. Neither the district court, nor the appellate court concluded that Microsoft had unlawfully obtained its monopoly. *See* Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34; Microsoft, 87 F. Supp. 2d 30; *see also* Microsoft, 56 F.3d at 1452 (observing in the precursor to this case that "the government did not allege and does not contend--and this is of crucial significance to this case--that Microsoft *obtained* its alleged monopoly position in violation of the antitrust laws") (emphasis in original). Moreover, as noted by the appellate court, "the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior." Microsoft, 253 F.3d at 107 (citing *Findings of Fact* P 411). In this context, outright termination of the monopoly is a questionable remedial goal, as such action would exceed the limits of the controversy presented to the Court. Accordingly, the Court's inquiry into the extent to which the proposed consent decree "terminates the illegal monopoly," United Shoe, 391 U.S. at 250, will be limited, and the Court will instead focus upon terminating the illegal *maintenance* of the monopoly.

In most cases, judicial analysis of the public interest in a Tunney Act proceeding commences, quite logically, with an examination of the allegations laid out in the complaint. *See, e.g.,* *Thomson, 949 F. Supp. at 909-11* (describing complaint). Indeed, the district court is without authority to "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft, 56 F.3d at 1459*. In light of the procedural posture of this case, however, the **[**22]** complaint in this case is of little moment, as proceedings have far surpassed the allegations stage. Instead, the opinion of the appellate court provides the underpinning for this Court's analysis of the proposed decree. As a result, the Court pauses to summarize and recount the pertinent portions of the appellate opinion in this case. Where appropriate, a more detailed examination of the appellate court's opinion appears in the context of the Court's discussion of the specific provisions of the proposed final judgment.

1. Market Definition

The appellate court began its opinion by examining Plaintiffs' [5] *§ 2* Sherman Act claims and specifically, whether the district judge had identified the proper market for purposes of assessing Microsoft's monopoly power. The appellate court concluded that the district court had properly defined the relevant market as "the licensing of all Intel-compatible PC [6] operating systems [7] **[*212]** worldwide." *Microsoft, 253 F.3d at 52* (quoting *Microsoft, 87 F. Supp. 2d at 36*). Having agreed with the district court's definition of the relevant market, the appellate court adopted the district court's determination that **[**23]** "circumstantial evidence proves that Microsoft possesses monopoly power." *Id. at 56*. The appellate court further noted that "if we were to require direct proof [of monopoly power], . . . Microsoft's behavior may well be sufficient to show the existence of monopoly power." *Id. at 57*.

[24]** ***2. Theory of Liability***

Integral to the appellate court's adoption of the market definition was its simultaneous acceptance of Plaintiffs' theory of Microsoft's market dominance. Both the district and appellate courts noted that Microsoft's lawfully acquired monopoly is naturally protected by a "structural barrier," known as the "applications barrier to entry." *Id. at 55*. "That barrier . . . stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base." *Id.* (citing *Findings of Fact* PP 30, 36). This barrier creates a "chicken-and-egg" or network effects situation, which perpetuates Microsoft's operating system dominance because "applications will continue to be written for the already dominant Windows, [8] which in turn

[5] In referring to "Plaintiffs" throughout this Memorandum Opinion, the Court refers to the United States, as well as the Plaintiff States in Civ. No. 98-1233, who entered into a settlement agreement with Microsoft. *See supra* note 1. The Court notes, however, that the appellate court's opinion applies not only to the claims brought by the United States and the Settling States, but also to those states who have C in *State of New York, et al. v. Microsoft*, No. 98-1233 (D.D.C.).

[6] "PC" is short for "personal computer." *Findings of Fact* P 1.

[7] The appellate court, relying upon the factual testimony presented to the district court, explained the functions of a PC operating system:

> Operating systems perform many functions, including allocating computer memory and controlling peripherals such as printers and keyboards. Operating systems also function as platforms for software applications. They do this by "exposing"--i.e., making available to software developers--routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or "APIs." For example, Windows contains an API that enables users to draw a box on the screen. Software developers wishing to include that function in an application need not duplicate it in their own code. Instead, they can "call"--*i.e.*, use--the Windows API. Windows contains thousands of APIs, controlling everything from data storage to font display.

Microsoft, 253 F.3d at 53 (citations omitted).

[8] "In 1985, Microsoft began shipping a software package [for the PC] called Windows. The product included a graphical user interface, which enabled users to perform tasks by selecting icons and words on the screen using a mouse." *Findings of Fact* P

ensures that consumers will continue to prefer it over other operating systems." *Id.* Because "every operating system has different APIs," [9] applications written for one operating system will not function on another operating **[**25]** system unless the developer undertakes the "time consuming and expensive" process of transferring and adapting, known in the industry as "porting," the application to the alternative operating system. *Id. at 53*.

[26]** Plaintiffs proceeded under the theory that certain kinds of software products, termed "middleware," [10] could reduce the **[*213]** "self-reinforcing cycle," *Findings of Fact* P 39, by serving as a platform for applications, taking over some of the platform functions provided by Windows and thereby "weakening the applications barrier to entry," *id. P 68*. One of middleware's defining characteristics as a software product is its ability to "expose its own APIs." *Findings of Fact* P 28. Eventually, reasoned Plaintiffs, if applications were written to rely on the middleware API set, rather than the Windows API set, the applications could be made to run on alternative operating systems simply by porting the middleware. Ultimately, by writing to the middleware API set, applications developers could write applications which would run on any operating system on which the middleware was preset. Plaintiffs focused their attention primarily upon two such middleware threats to Microsoft's operating system dominance--Netscape Navigator [11] and the Java technologies. *Microsoft, 253 F.3d at 53*. The district and appellate courts accepted Plaintiffs' theory of competition despite the **[**27]** fact that "neither Navigator, Java, nor any other middleware product could [at that time], or would soon, expose enough APIs to serve as a platform for popular applications." *Id.*; *Findings of Fact* PP 28-29.

3. Four-Part Test for Liability

Having concluded that the district court properly identified the relevant market as the market for Intel-compatible PC operating systems and properly excluded middleware products from that market, the **[**28]** appellate court turned its attention to the issue of whether Microsoft responded to the threat posed by middleware in violation of *§ 2* of the Sherman Act. Specifically, the appellate court set out to determine whether Microsoft "maintained, or attempted to . . . maintain, a monopoly by engaging in exclusionary conduct." *Microsoft, 253 F.3d at 58*. The appellate court recounted that the district court answered that inquiry in the affirmative, finding Microsoft liable for violating *§ 2* of the Sherman Act:

> by engaging in a variety of exclusionary acts . . . specifically . . .: (1) the way in which it integrated [Internet Explorer] into Windows; (2) its various dealings with Original Equipment Manufacturers ("OEMs"), Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors (ISVs), and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole.

Id. In order to review the district court's findings on this point, the appellate court outlined a four-part test for determining whether particular conduct can be said to violate ***antitrust law***. "First, to **[**29]** be condemned as

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7. In 1995, Microsoft introduced an updated version of its Windows software known as "Windows 95." *Id. P 8*. Similarly, in 1998, Microsoft released "Windows 98." *Id.* Since that time, Microsoft has continued to update, revise, and re-create its "Windows" PC operating system.

[9] "APIs" are applications programming interfaces. As Judge Jackson explained: [An] operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen.

Findings of Fact P 2.

[10] Such software takes the name "middleware" because "it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers" and, therefore, is said to reside in the middle. *Findings of Fact*P 28.

[11] "Although certain Web browsers provided graphical user interfaces as far back as 1993, the first widely-popular graphical browser distributed for profit, called Navigator, was brought to market by the Netscape Communications Corporation ('Netscape') in December 1994." *Findings of Fact* P 17.

exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers." *Id. at 58* (emphasis in original). Second, the plaintiff must "demonstrate that the monopolist's conduct harmed competition, not just a competitor." *Id. at 59*. Third, "the monopolist may proffer a 'procompetitive justification' for its conduct." *Id.* (quoting *Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 483, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*). If this justification stands unrebutted by the plaintiff, the monopolist may escape liability. **[*214]** Therefore, the fourth prong of the inquiry requires that the plaintiff "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* The appellate court stressed that, although evidence of intent is relevant "to understand the likely effect of the monopolist's conduct," when assessing the balance between the anticompetitive harm and the procompetitive effect, the trial court should focus on the "effect of [the exclusionary] conduct, not the intent behind it." *Id.*

Using this framework, the appellate **[**30]** court addressed Microsoft's challenge to each of the findings by the district court. The appellate court examined the district court's four basic areas of findings with regard to § 2 liability in an order different from that of the district court. The Court presents these holdings, in the order addressed by the appellate court.

4. Original Equipment Manufacturer "OEM") Licenses

Commencing its analysis with the "licenses issued to original equipment manufacturers," [12] *id.* 253 F.3d at 59, the appellate court focused upon three license provisions "prohibiting the OEMs from: removing any desktop icons, folders, or 'Start' menu entries; (2) altering the initial boot sequence; and (3) otherwise altering the appearance of the Windows desktop," *id.* 253 F.3d at 61 (citing *Findings of Fact* P 213). Into the category of "otherwise altering the appearance of the Windows desktop," the appellate court subsumed the automatic launch of an alternative user interface, the prohibition against the addition of icons and folders different in size and shape from those used by Microsoft, and the prohibition on the use of the "Active Desktop" feature [13] to display third-party brands. *Id. 253 F.3d at 62*; **[**31]** *see also Findings of Fact* P 213. Of these license provisions, the appellate court concluded that, "with the exception of the one restriction prohibiting automatically launched alternative interfaces, all of the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification." *Id. 253 F.3d at 64*. In commencing its next area of analysis, the appellate court noted with regard to the license restrictions imposed upon OEMs that they "have a significant effect in closing rival browsers out of one of the two primary channels of distribution." *Id.*

5. Integration of Internet Explorer ("IE") and* [**32] *Windows

The appellate court next turned its attention toward the "integration of [Internet Explorer ("IE")] [14] and Windows." *Id.* At the outset of its analysis, the appellate court took a narrow view of the district court's determination, noting that the district court's "broad[]" condemnation of "Microsoft's decision to bind 'Internet Explorer to Windows with . . . technological shackles'" is supported by only three specific actions taken by Microsoft. *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 39*). The appellate court identified these three as (1) "excluding IE from the 'Add/Remove Programs' utility"; (2) "designing Windows so as in certain circumstances to override the user's choice of a default browser other than IE"; and (3) "commingling **[*215]** code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating system." *Id. 253 F.3d at 64-65*. Pursuant to its four part test for liability, the appellate court concluded that Microsoft could be held liable for the first and the third of these actions. *Id. 253 F.3d at 65-67*. As to the second of these **[**33]** actions, the override of the user's choice of default in certain circumstances, the court determined that Microsoft had proffered a procompetitive justification that went unrebutted by Plaintiffs, namely that the override was the result of "valid

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[12] Manufacturers of PCs are known as "original equipment manufacturers" or "OEMs." *Findings of Fact* P 10.

[13] "The Active Desktop was a Microsoft feature that, if enabled, allowed the Windows user to position Web pages as open windows that appear on the background, or 'wallpaper' of the Windows desktop." *Findings of Fact* P 314.

[14] Internet Explorer is Microsoft's Web browser. *Findings of Fact* P 17.

technical reasons" which justified the override in a "few out of the nearly 30 means of accessing the Internet." *Id. 253 F.3d at 67* (quotation marks omitted). Finding that Plaintiffs had neither rebutted Microsoft's procompetitive justification, nor demonstrated that the anticompetitive effect of the challenged act outweighed such justification, the appellate court held that "Microsoft may not be held liable for this aspect of its product design." *Id.*

6. Agreements with Internet Access Providers ("IAPs")

Directing its attention to Microsoft's "agreements with various IAPs," [15] which the district court "condemned" as exclusionary, the appellate court identified five Microsoft **[**34]** actions specifically relied upon by the district court for this condemnation:

> (1) offering IE free of charge to IAPs[;] . . . (2) offering IAPs a bounty for each customer the IAP signs up for service using the IE browser[;] . . . (3) developing the IE Access Kit ("IEAK"), a software package that allows an IAP to "create a distinctive identity for its service in as little as a few hours by customizing the [IE] title bar, icon, start and search pages," *Findings of Fact* P 249[;] . . . (4) offering the IEAK to IAPs free of charge, on the ground that those acts, too, helped Microsoft preserve its monopoly[,] [*Microsoft, 87 F. Supp. 2d] 30, 41-42*[;] . . . (5) agreeing to provide easy access to IAPs' services from the Windows desktop in return for the IAPs' agreement to promote IE exclusively and to keep shipments of internet access software using Navigator under a specific percentage, typically 25%. *See* [*Microsoft, 87 F. Supp. 2d] 30, 42* (citing *Findings of Fact* PP 258, 262, 289).

Id. 253 F.3d at 67-68. Grouping the first four of these actions together as "Microsoft's inducements," the appellate court held that these four actions **[**35]** merely "offered a consumer an attractive deal" and, therefore, could not be treated as anticompetitive. *Id. 253 F.3d at 68*. In contrast, the appellate court agreed with the district court that Microsoft's exclusive contracts with IAP's "are exclusionary devices, in violation of *§ 2* of the Sherman Act." *Id. 253 F.3d at 71*.

7. Agreements with Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple

The appellate court next considered Microsoft's "dealings with ICPs, which develop websites; ISVs, which develop software; and Apple, which is both an OEM and a software developer." *Id. 253 F.3d at 71*. The "deals" at issue in this portion of the case are grants of "free licenses to bundle IE with [the ICPs' and ISVs'] offerings" and the exchange **[**36]** of "other valuable inducements for [ICPs' and ISVs'] agreement to distribute, promote, and rely on IE rather than Navigator." *Id.* (quoting *Microsoft,* ***[*216]*** *87 F. Supp. 2d at 42-43*) (brackets and quotation marks omitted). The district court held these agreements to be anticompetitive in violation of *§ 2* of the Sherman Act because they had the effect of "directly inducing developers to focus on [Microsoft's] own APIs rather than ones exposed by Navigator." *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 42-43*) (quotation marks omitted).

At the outset of its analysis in this context, the appellate court concluded bluntly that "with respect to [Microsoft's] deals with ICPs, the District Court's findings do not support liability." *Id.* In contrast, the appellate court sustained the district court's finding of liability with regard to Microsoft's agreements with ISVs because Plaintiffs made "a *prima facie* showing that the deals have an anticompetitive effect," and Defendant did not successfully rebut this showing. *Id. 253 F.3d at 72*. In particular, the appellate court found that the exclusive provisions in these so-called "First Wave Agreements" **[**37]** with ISVs foreclosed a substantial share of the market for Navigator. *Id.*

Turning its attention in this context finally to Microsoft's relationship with Apple, the appellate court concluded that Microsoft's agreement with Apple was exclusionary in violation of *§ 2* of the Sherman Act. *Id. 253 F.3d at 72-74*. The appellate court recounted that in mid-1997, Microsoft and Apple entered into an agreement which obligated Microsoft to continue to release "up-to-date " versions of its office productivity software for Apple's systems, Mac Office. *Id. 253 F.3d at 73* (quoting *Findings of Fact* PP 350-52). The agreement further obligated Apple to make IE

[15] "PCs typically connect to the Internet through the services of Internet access providers ('IAPs'), which generally charge subscription fees to their customers in the United States." *Findings of Fact* P 15.

the default browser. *Id*. (quoting *Findings of Fact* PP 350-52). Pursuant to this same agreement, Apple promised not to install Navigator during the "default installation," and not to "position icons for non[-]Microsoft browsing software on the desktop of new Macintosh PC systems or Mac OS upgrades." *Id.* (quoting *Findings of Fact* PP 350-52). Similarly, the agreement prohibited Apple "from encouraging users to substitute another browser for IE, and stated that Apple [would] 'encourage its employees to use **[**38]** IE.'" *Id.* (quoting *Findings of Fact* P 352) (brackets omitted). The appellate court concluded that "this exclusive deal between Microsoft and Apple had a substantial effect upon the distribution of rival browsers." *Id.* Given the absence of a "procompetitive justification for the exclusive dealing arrangement," the appellate court affirmed the district court's finding of *§ 2* liability based upon Microsoft's exclusive deal with Apple. *Id. 253 F.3d at 74*.

8. Java

The appellate court grouped the next category of Microsoft conduct under the heading "Java" in reference to "a set of technologies developed by Sun Microsystems" ("Sun"). *Id.* The Java technologies are described as "another type of middleware posing a potential threat to Windows' position as the ubiquitous platform for software development." *Id.* (citing *Findings of Fact* P 28). The appellate opinion recounts that the district court identified four steps taken by Microsoft to "exclude Java from developing as a viable cross-platform threat: (a) designing a [Java Virtual Machine ("JVM") [16]] incompatible **[*217]** with the one developed by Sun; (b) entering into contracts, the so called 'First **[**39]** Wave Agreements,' requiring major ISVs to promote Microsoft's JVM exclusively; (c) deceiving Java developers about the Windows-specific nature of the tools it distributed to them; and (d) coercing Intel to stop aiding Sun in improving the Java technologies." *Id.* Of these actions, the appellate court concluded that all but the first action were anticompetitive in violation of *§ 2*. *Id. 253 F.3d at 74-78*. With regard to the first enumerated action, the incompatible JVM, the appellate court held that because the incompatible JVM did not have an anticompetitive effect which outweighed the procompetitive justification for the design, it could not provide a basis for antitrust liability. *Id. 253 F.3d at 75*.

[40]** Specifically, with regard to the First Wave Agreements, the appellate court observed that the district court had found the agreements, "although not literally exclusive . . . were exclusive in practice." *Id. at 75*. Although the district court did not enter precise findings as to the effect of the First Wave Agreements upon rival Java distribution, the appellate court determined that "the record indicates that Microsoft's deals with the major ISVs had a significant effect upon JVM promotion." *Id.* In the absence of procompetitive justification, the appellate court imposed liability for this aspect of the First Wave Agreements. *Id. at 76*.

As to the Java developer tools, the appellate court's imposition of liability focused not upon the fact that the tools created programs which were not cross platform, but upon the fact that Microsoft deceived software developers about the Windows-specific nature of the tools. *Id. at 76-77*. The appellate court found that Microsoft's deception was intentional and without procompetitive explanation. *Id. at 77*. As a result, the appellate court imposed liability for Microsoft's deception. **[**41]** *Id.*

9. Intel

As noted above, the appellate court's final imposition of liability arose out of a "threat" by Microsoft directed at Intel. *Id. at 77*. "Intel is [a firm] engaged principally in the design and manufacture of microprocessors." *Findings of Fact* P 95. A segment of Intel's business develops software, with the primary focus upon "finding useful ways to consume more microprocessor cycles, thereby stimulating demand for advanced Intel microprocessors." *Id.* The appellate court recounted that in 1995, Intel was in the process of "developing a high performance, Windows-compatible

[16] "The Java technologies include: (1) a programming language; (2) a set of programs written in that language, called the 'Java class libraries,' which expose APIs; (3) a compiler, which translates code written by a developer into 'bytecode'; and (4) a Java Virtual Machine ('JVM'), which translates bytecode into instructions to the operating system. [*Findings of Fact*] P 73. Programs calling upon the Java APIs will run on any machine with a 'Java runtime environment,' ['JRE'] that is, Java class libraries and a JVM. ***Id. PP 73, 74***." *Microsoft, 253 F.3d at 74*. The terms "JRE" and "JVM" are sometimes used interchangeably to refer to the Java platform. The court uses the term JVM throughout this Memorandum Opinion for that purpose.

JVM." *Microsoft, 253 F.3d at 77*. Furthering its efforts to combat the cross-platform threat of Java to the Windows platform, Microsoft repeatedly "urged Intel not to help Sun by distributing Intel's fast, Sun compliant JVM." *Id.* Eventually, Microsoft "threatened Intel that if it did not stop aiding Sun . . . then Microsoft would refuse to distribute Intel technologies bundled with Windows." *Id.* Intel capitulated after Microsoft threatened to support an Intel competitor, AMD, if Intel's efforts with Java continued. *Id.*

The appellate **[**42]** court acknowledged Microsoft's anticompetitive intent, as well as the anticompetitive effect of Microsoft's actions toward Intel. *Id.* Microsoft did not offer a procompetitive justification for its treatment of Intel, but "lamely characterized its threat to Intel as 'advice.'" *Id.* Rejecting the characterization of Microsoft's threat as mere "advice," the appellate court found the district court's imposition of liability to be supported by both **[*218]** fact and law. *Id. at 77-78*. On this basis, the appellate court imposed *§ 2* liability for Microsoft's threat to Intel.

Corresponding to the above-described imposition of liability pursuant to *§ 2* of the Sherman Act, the appellate court imposed liability upon Microsoft for violations of the relevant state law counterparts of the Sherman Act. *Id.* at 46. Beyond these findings, the appellate court did not find Microsoft liable for any additional antitrust violations. Specifically, the appellate court reversed the district court's conclusion that Microsoft's "course of conduct" as a whole constitutes a separate violation of *§ 2*. *Id. at 78*. In addition, the appellate court rejected the **[**43]** district court's finding of attempted monopolization and remanded the *§ 1* tying claim for further proceedings at the district court level. [17] Plaintiffs opted not to pursue the tying claim on remand. [18] Joint Status Report (Sept. 20, 2001) at 2.

10. Vacating the District Court's Order of Remedy

Following its **[**44]** review of the district court's conclusions with regard to liability, the appellate court considered the district court's choice of remedy. Over the objection of Defendant Microsoft, the district court decided to consider the merits of Plaintiffs' remedy proposal in the absence of an evidentiary hearing. *Microsoft, 253 F.3d at 98-99*; *see also Microsoft, 97 F. Supp. 2d at 61*. The district court did so based on the rationale that Microsoft's evidentiary proffers largely concerned "testimonial predictions about future events" which would be of little use to the court in identifying an "optimum remedy." *Microsoft, 253 F.3d at 99* (quoting *Microsoft, 97 F. Supp. 2d at 62*). Based upon its finding of liability for illegal monopoly maintenance, attempted monopolization, and illegal tying, the district court entered a remedy "nearly identical to plaintiffs' proposal" mandating the divestiture of Microsoft Corporation into an "Operating Systems Business" and an "Applications Business." *Id. 253 F.3d at 99-100* (quoting *Microsoft, 97 F. Supp. 2d at 64*). The original decree entered by the district court, often **[**45]** referred to as the Initial Final Judgment ("IFJ"), also included a number of "interim restrictions on Microsoft's conduct." *Id. 253 F.3d at 100*. The interim restrictions included, *inter alia*, mandatory disclosure "to third-party developers the APIs and other technical information necessary to ensure that software effectively interoperates with Windows," *id.* (describing IFJ § 3.b), a prohibition on Microsoft's ability to enter into contracts which oblige third parties to limit their "'development, production, distribution, promotion, or use of, or payment for' non-Microsoft platform level software," *id.* (quoting IFJ § 3.e), and a "'Restriction on Binding Middleware Products to Operating System Products' unless Microsoft also offers consumers 'an otherwise identical version' of the operating system without the middleware," *id.* (quoting IFJ § 3.g).

[*219] The appellate court found three fundamental flaws in the district court's order of remedy, each of which alone justified vacating the remedial decree. The appellate court first concluded that the failure to hold an evidentiary hearing in the face of disputed facts concerning the remedy violated the "cardinal principle **[**46]** of our

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[17] Plaintiffs' complaint also included a separate claim of "monopoly leveraging" under *§ 2* of the Sherman Act. Judge Jackson granted summary judgment in favor of Microsoft as to this claim on the grounds that the theory runs "contrary to both economic theory and the Sherman Act's plain language." *United States v. Microsoft, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485*, at * 27 (D.D.C. Sept. 14, 1998).

[18] Plaintiffs' tying claim alleged that "Microsoft's contractual and technological bundling of the IE Web browser (the 'tied' product) with its Windows operating system ('OS') (the 'tying' product) resulted in a tying arrangement that was per se unlawful." *Microsoft, 253 F.3d at 84*.

system of justice that factual disputes must be heard in an open court and resolved through trial-like evidentiary proceedings." *Id. 253 F.3d at 101*. The appellate court rejected the district court's conclusion that evidentiary proceedings would not be useful, noting that "a prediction about future events is not, as a prediction, any less a factual issue." *Id. 253 F.3d at 102*. Moreover, noted the appellate court, "drafting an antitrust decree by necessity 'involves predictions and assumption concerning future economic and business events.'" *Id.* (quoting *Ford Motor Co.*, 405 U.S. at 578).

In addition to the failure to hold an evidentiary hearing, the appellate court faulted the district court for its "failure to provide an adequate explanation for the relief it ordered." *Id. 253 F.3d at 103*. Finding the trial court's devotion of "a mere four paragraphs of its order to explaining its reasons for the remedy" insufficient, the appellate court observed that the initial remedy was not accompanied by an explanation of the manner in which the remedy would accomplish the objectives of a remedial decree in an antitrust case. *Id.* In this regard, the **[**47]** appellate court recited that "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' *Ford Motor Co.*, 405 U.S. at 577, to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' [*United Shoe, 391 U.S. at 250*]." *Id.* (internal citations in original).

Lastly, the appellate court concluded that the substantial modifications to the liability imposed by the district court merited a new determination of the remedy for the surviving antitrust violations. In particular, the appellate court noted that of the three original findings of liability, only liability for illegal monopoly maintenance in violation of *§ 2* of the Sherman Act had survived, and even this aspect of liability had been modified. *Id. 253 F.3d at 103-04*. The appellate court determined that where "sweeping equitable relief is employed to remedy multiple violations, and some--indeed most--of the findings of remediable violations do not withstand scrutiny" the remedy decree must be vacated because there no longer exists **[**48]** a rational connection between the liability imposed and the remedy ascribed thereto. *Id. 253 F.3d at 105*. Accordingly, the appellate court remanded the case for this Court to resolve any factual disputes surrounding a remedy and for this Court to exercise its "broad discretion" in imposing the "relief it calculates will best remedy the conduct . . . found to be unlawful." *Id.*

11. Causation and Remedy

In its appeal, Microsoft "urged" the circuit court to "reverse on the monopoly maintenance claim, because Plaintiffs never established a causal link between Microsoft's anticompetitive conduct, in particular its foreclosure of Netscape's and Java's distribution channels, and the maintenance of Microsoft's operating system monopoly." *Id. 253 F.3d at 78*. Relying heavily on the treatise on ***antitrust law*** authored by Phillip E. Areeda and Herbert Hovenkamp, the appellate court determined that liability in this case could be established through an "inference" of causation. *Id. 253 F.3d at 79* (citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 651c, at 78 **[*220]** (1996)). Applying this "rather edentulous test for causation" the appellate court identified two relevant inquiries, the satisfaction **[**49]** of which would result in liability:

> (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.

Id. On the record from the district court, the appellate court readily concluded that both inquiries had been satisfied and that liability must be imposed. *Id.*

The appellate court noted, however, that "Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue." *Id. 253 F.3d at 80*. Again relying upon Areeda and Hovenkamp, the appellate court focused upon the structural remedy that had been imposed by Judge Jackson and identified a relationship between the evidence of causation and the imposition of "radical structural relief":

> As we point out later in this opinion, divestiture is a remedy that is imposed only with great caution, in part because **[**50]** its long-term efficacy is rarely certain. Absent some measure of confidence that there has been

> an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief. *See* 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 91-92 ("More extensive equitable relief, particularly remedies such as divestiture designed to eliminate the monopoly altogether, raise more serious questions and require a clearer indication of a significant causal connection between the conduct and creation or maintenance of the market power.").

Id. (internal citation omitted). Later in the opinion, the appellate court again quoted from Areeda and Hovenkamp, highlighting the need for "a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of the market power" where the remedy is structural relief. *Id. 253 F.3d at 106* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 9192) (emphasis added by appellate court). The appellate court instructed that in the absence of "a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market . . . the antitrust defendant's **[**51]** unlawful behavior should be remedied by 'an injunction against the continuation of that conduct.'" *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67).

In effect, the appellate court appears to have identified a proportionality between the severity of the remedy and the strength of the evidence of the causal connection. Accordingly, ***HN8***[] the "mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67). Similarly, because structural relief is "designed to eliminate the monopoly altogether," 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67, "wisdom counsels against adopting radical structural relief" in the "absence of some measure of confidence that there has been an actual loss to competition that needs to be restored," *id.* Instead, the court crafting a remedy must assess the strength of the causation evidence that established liability and "tailor" the relief accordingly. *Microsoft, 253 F.3d at 107*.

[*221] As the Court recounted above, the United States, along with nine State Plaintiffs, reached an agreement **[**52]** on the issue of remedy. As a result, these Plaintiffs opted not to litigate further the issue of remedy. The United States proceeded to seek approval of the settlement agreement and the entry of the agreement as the final judgment in this case pursuant to the Tunney Act, *15 U.S.C. § 16(b)-(h)*. Having determined that the issue is ripe for the Court's consideration, the Court addresses the proposed final judgment and the public interest in the paragraphs below.

B. Second Revised Proposed Final Judgment

The Second Revised Proposed Final Judgment (SRPFJ) which the parties seek to have entered as a final judgment in this case sets forth a number of restrictions upon Microsoft's conduct which are intended to remedy the effects of Microsoft's anticompetitive behavior. Section III of the SRPFJ, entitled "Prohibited Conduct," contains the substance of these restrictions, organized into subsections by letters. SRPFJ § III.A-J. Sections III.A, B, and F can be grouped together according to the similarity of their terms and the manner in which the terms compliment each other. Each of these sections restricts Microsoft's ability to utilize its market power **[**53]** as a means, via retaliation and coercion, to protect its monopoly.

1. Anti-Retaliation and Uniform Licenses

Section III.A bars Microsoft from "retaliation" against OEMs by altering its commercial relationship with that OEM or "withholding newly introduced forms of non-monetary Consideration . . . from that OEM" in certain circumstances. *Id.* § III.A. In particular, the provision bars retaliation where Microsoft knows the OEM "is or is contemplating":

> 1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;
> 2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or
> 3. exercising any of the options or alternatives provided for under this Final Judgment.

SRPFJ § III.A. The provision further requires Microsoft to provide written notice to a "Covered OEM" [19] and at least "thirty days' opportunity to cure" prior to termination of that OEM's Windows Operating System **[**54]** Product license. *Id.* However, where Microsoft has already provided "two or more such notices during the term of [the Covered OEM's] Window's Operating System Product License," Microsoft is not obligated to provide "such a termination notice and opportunity to cure." *Id.*

There are two exceptions to subsection A. First, and without controversy, the provision shall not be construed to "prohibit Microsoft from enforcing any provision of any license with any OEM or intellectual property right that is not inconsistent with the Final Judgment." *Id.* Second, and more significantly, the provision does not prohibit Microsoft from "providing Consideration **[*222]** to any OEM with respect to any Microsoft product or service where **[**55]** that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion or licensing of that Microsoft product or service." *Id.*

The United States identifies § III.A as a provision broadly drawn so as to "ensure[] that OEMs have contractual and economic freedom to make decisions about distributing and supporting non-Microsoft middleware products without fear of coercion or retaliation by Microsoft." United States Mem. in Support of the RPFJ (hereinafter cited as "United States Mem.") at 57. Section III.A focuses on OEMs because of the significance of the OEM channel as a means of distributing rival middleware and operating systems. *Id.* The exception in § III.A for consideration commensurate with the promotion of or other similar support for Microsoft's products is intended to preserve "permissible collaborations between an OEM and Microsoft to promote Microsoft products and services." United States Response to Public Comments (hereinafter cited as "United States Resp.") at 78. For example, explains the government, "an OEM that collaborates with Microsoft on developing a particular product through extensive testing, or offers **[**56]** advertising or other promotion, may be compensated for its greater role through a higher level of Consideration for that product than one that is not developing or supporting that product." *Id.* Given this reasoned explanation, the Court concludes that the exception in § III.A for compensation commensurate with an OEM's promotion or similar support for a Microsoft product is appropriately tailored to permit procompetitive agreements between Microsoft and OEMs.

a. "Microsoft Platform Software"

The Court pauses its discussion of § III.A at this point to examine the term "Microsoft Platform Software," which is the first of a number of carefully defined terms used throughout the SRPFJ. The proposed final judgment defines Microsoft Platform Software as the combination or alternative of two other defined terms. *See* SRPFJ § VI.L. "'Microsoft Platform Software' means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product." *Id.* Each of the two terms used in the definition of "Microsoft Platform Software" raises its own definitional issues, with the more complex issues arising in conjunction with latter of the two. Accordingly, the Court will **[**57]** examine each definition in turn.

i. Windows Operating System Product

The SRPFJ defines a "Windows Operating System Product" as

> the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

SRPFJ § VI.U. Controversy swirls around the SRPFJ's definition of "Windows Operating System Product" largely because of the final sentence in the definition, which leaves to Microsoft's discretion the determination of which code shall comprise a Windows Operating System Product. This controversy, to quote the Immortal Bard, **[*223]** is

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[19] "Covered OEMs" is a defined term. Pursuant to § VI.D, "'Covered OEMs' means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective date of the Final Judgment." SRPFJ § VI.D.

really "much ado about nothing." The criticism of this aspect of the definition arises from an interpretation which views the final sentence as a form of absolution for Microsoft from any liability **[**58]** for the illegal tying of two distinct products based upon the design of its Windows operating system product. Such criticism is misplaced.

The definitions in the final judgment in this case do not possess the power to alter the application of the antitrust laws to Microsoft's conduct or its products. The power to determine which software code constitutes a "Windows Operating System Product" for purposes of the SRPFJ cannot logically be viewed as a grant of special rights or immunity from prosecution under the antitrust laws for illegal tying. Quite simply, the code that Microsoft identifies as a "Windows Operating System Product" has no impact upon the ability of the Department of Justice, or any future plaintiff, to allege that the product identified as a "Windows Operating System Product" for purposes of the SRPFJ is an illegal amalgamation of two separate products under *§ 1* of the Sherman Act. Likewise, the definition of "Windows Operating System Product" in the SRPFJ cannot curtail the ability of a court to determine that Microsoft has illegally tied two products which are separate under the antitrust laws. Instead, the definition merely recognizes that, as a practical matter, **[**59]** Microsoft retains the power to determine which software code it will include in the products marketed as "Windows."

The definition of "Windows Operating System Product" is similarly misunderstood as enabling Microsoft to somehow manipulate which code is included in the definition in order to avoid classification as a "Microsoft Middleware Product." According to this misreading of the definition, Microsoft could avoid inclusion of a particular piece of code within the definition of "Microsoft Middleware Product," SRPFJ § VI.K, by simply declaring that the code is part of a "Windows Operating System Product." The fatal flaw in this reading of the definition is the presumption that "Microsoft Middleware Product" and "Windows Operating System Product" are mutually exclusive terms; that is not the case. Software code can simultaneously fall within both the "Windows Operating System Product" and "Microsoft Middleware Product" definitions. *Id.* § VI.K, U. Once again, therefore, the definition of "Windows Operating System Product" merely recognizes that Microsoft, as the distributor of a product called "Windows," has the discretion to determine which code to include in its distribution **[**60]** of that product.

ii. "Microsoft Middleware Product"

As recounted above, the latter portion of the definition of "Microsoft Platform Software" rests upon the definition of "Microsoft Middleware Product." In the SRPFJ, "Microsoft Middleware Product" means:

> 1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and
> 2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product
> a. Internet browsers, email client software, networked audio/video client software, instant messaging software or
> b. functionality provided by Microsoft software that --
>
> i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft **[*224]** (or by an entity acquired by Microsoft) from a Windows Operating System Product;
> ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and
>
> iii. is Trademarked. **[**61]** [20]

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[20] Trademarked is defined in the SRPFJ to have the following meaning:

> distributed in commerce and identified as distributed by a name other than Microsoft (R) or Windows (R) that Microsoft has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as (R) or TM, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for the name in the United States Patent and Trademark Office; or (iii) asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft (R) or Windows (R) trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final

> Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.

SRPFJ § VI.K. The first portion of this definition captures various types of functionality provided by one of a set of existing, named products and their successors. The functionalities in this list go beyond the functionality provided by the Java technologies and Netscape's Navigator, the middleware technologies which were the focus of the liability findings in this case, and include a broad range of existing middleware technologies.

[62]** The latter portion of the definition enables inclusion in the decree of future technologies, provided the new technologies meet certain requirements. To fall within the prescient portion of the definition, the software code must first be distributed as part of any "Windows Operating System Product," the definition of which the Court discussed above. *Id.* The rationale for this requirement is quite clear, as Windows is Microsoft's product in the monopoly market. If the Microsoft software has not been included in Windows, it lacks a fundamental relationship to the theory and imposition of liability in this case. The second element of such future functionality is that it must also be distributed separately from a Windows Operating System Product. The government's rationale for this requirement derives from its view that the "competitive significance of middleware products such as browsers and media players will be relatively small if they are not distributed in any form separate from a Windows Operating System Product." United States Resp. at 44. This view results from the fact that, absent separate distribution, Microsoft will remain unable to reach the "large installed base of Windows **[**63]** machines" and can only impact users willing to upgrade to new versions of the operating system. *Id.* Even then, Microsoft releases new operating systems at fairly long intervals and, in the absence of separate distribution, will be unable to update and release new versions of products provided originally with the operating system. *Id. at 44-45*. Therefore, according to the government, the competitively significant middleware portions of Windows, of necessity, will be distributed separately.

[*225] The third element of the definition is based upon yet another defined term requiring that the "Microsoft Middleware Product" provide similar functionality to that provided by a "NonMicrosoft Middleware Product." SRPFJ § VI.K. In this instance, the definition of "NonMicrosoft Middleware Product" [21] is indisputably broad, incorporating anything which can be reasonably identified as "middleware" and which has achieved a certain level of popularity. *Id.* § VI.N.

[64]** Finally, the requirement that Microsoft trademark the future functionality derives from the government's recognition of the "business reality that Microsoft often names and markets the technologies that it wishes developers and consumers to adopt." United States Resp. at 53. The government further explains that, in its view, "Microsoft has little incentive to bury its new products inside other applications in order to avoid having it meet the Trademark standard." *Id.* These explanations address and rebut to the Court's satisfaction criticisms of the "trademarked" requirement in the definition of "Microsoft Middleware Product."

b. Anti-Retaliation: Original Equipment Manufacturers ("OEMs")

Having examined the various components of the definition of "Microsoft Platform Software," the Court returns to its original inquiry into the effect of § III.A. The government asserts, and the Court sees little basis to disagree, that §

> Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft (R) or Windows (R) trademarks, and hereby abandons any such rights that it may acquire in the future.

SRPFJ § VI.T.

[21] The SRPFJ defines "Non-Microsoft Middleware" as

> a non-Microsoft software product running on a Windows Operating System Product (i) that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System, and (ii) of which at least one million copies were distributed in the United States within the previous year.

SRPFJ § VI.N.

III.A will prevent Microsoft from hindering an OEM's ability to choose to support products which have the capacity to threaten Microsoft's operating system monopoly. Contrary to some criticism, the Court regards the limited scope of this provision, **[**65]** in that it addresses only competition relative to Microsoft's dominant role as a platform for applications, as entirely appropriate given the middleware theory of liability pursued in this case. *See generally* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. The Court further regards § III.A as presenting clear and enforceable terms.

The only lingering concern held by the Court is that § III.A does nothing to prevent Microsoft from making threats of retaliation. The factual findings and liability in this case evidence that Microsoft has used not only actual retaliation, but threats of retaliation in coercing certain kinds of behavior. *See, e.g.*, *id. at 77-78* (discussing Microsoft's "threat to Intel"). Given the power Microsoft wields as a monopolist, it would be appropriate to prohibit Microsoft from stifling competition with threats of bad treatment. The United States explains the absence of any ban on threats rather logically, noting that where the retaliation itself is prohibited, any threat of retaliation is empty and, therefore, without power. United States Resp. at 75. While a rational explanation, the Court regards a ban on threats of retaliation, at a minimum, **[**66]** as more comforting to business entities dealing with Microsoft when making decisions about supporting Microsoft competitors. Nevertheless, it is a far cry from making a "mockery of judicial **[*226]** power" that the remedy in this case does not include a ban on threats of retaliation. *Microsoft, 56 F.3d at 1462*. Accordingly, this criticism matters little in the Court's assessment of the public interest, as ***HN9***[] a consent decree need not reflect the Court's own choice of a remedy, but instead, giving due respect to the government's view of the effect of the remedial proposal, need only reflect a certain consonance with the liability allegations, or more appropriately in this case, the liability findings. *See* *id. at 1461*.

c. Anti-Retaliation: Independent Software Vendors ("ISVs") and Independent Hardware Vendors ("IHVs")

Section III.F mirrors § III.A to some extent, in that it too prohibits retaliation, but § III.F applies to Microsoft's conduct towards ISVs and IHVs. SRPFJ § III.F. Pursuant to § III.F.1:

Microsoft shall not retaliate against any ISV or IHV because of that ISV's or IHV's:

> a. developing, using, distributing, promoting **[**67]** or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or
> b. exercising any of the options or alternatives provided for under this Final Judgment.

Id. § III.F.1. Inasmuch as § III.F.1 mirrors § III.A, criticism with regard to the absence of a ban on threats of retaliation is equally applicable. For the reasons discussed with regard to § III.A, however, the Court need not tarry long on the absence of such a prohibition. In all other respects, the protections in § III.F reflect the liability findings against Microsoft for retaliating against ISVs and IHVs. *See* *Microsoft, 253 F.3d at 72-73* (discussing Microsoft's dealings with Apple), 77-78 (describing Microsoft's "threat to Intel" [22]). Furthermore, because § III.F.1 prohibits retaliation responsive to IHVs' or ISVs' support for software which "competes" with not only "Microsoft Platform Software," but "any software that runs on software that competes with Microsoft Platform Software," its protections are broadly drawn. SRPFJ § III.F.1. Simultaneously, however, § III.F.1 remains appropriately **[**68]** grounded in its reflection of the monopoly market in this case and does not stray inappropriately into markets unrelated to the market in which liability was imposed. *Id.* The Court observes, in this regard, that there is little justification for protection against retaliation for software which does not "compete" with the monopoly product or run on software which "competes" with the monopoly product. The Court, therefore, finds that the protections afforded by § III.F.1 are appropriately drawn so as to advance the public interest.

d. Uniform Licenses

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[22] In the *Findings of Fact*, Judge Jackson noted that Intel is both an IHV and an ISV. *Findings of Fact* P 95 ("Although Intel is engaged principally in the design and manufacture of microprocessors, it also develops some software.").

Section III.B is said to strengthen § III.A by mandating that Microsoft provide uniform license terms to Covered OEMs. SRPFJ § III.B. The uniform royalties are to be established in a schedule, which is accessible **[**69]** to Plaintiffs and the covered OEMs. *Id.* Notwithstanding the general uniformity of the licenses, Microsoft may provide volume discounts based upon the volume of the OEM's licenses of a Windows Operating System Product or group of such products. *Id.* § III.B.2. The licenses may also include discounts so long as the discounts are uniform among the Covered OEMs. [23] *Id.* § III.B.3. The discounts **[*227]** must also be based on objective, verifiable criteria and may not be inconsistent with other portions of the SRPFJ. *Id.* This section simplifies the complex royalty licenses so as to prevent Microsoft from using the license terms as a means by which to coerce and control the OEMs into favoring Microsoft products. United States Mem. at 57. Still, the provision is limited such that larger OEMs may, quite reasonably, receive different treatment than some of the smaller OEMs. *Id.*

[70]** The strongest criticism of § III.B argues that it should forbid Microsoft's practice of using market development allowances ("MDAs") and other discounts. Vociferous though this criticism may be, it ignores the fact that there is no liability in this case which regards the use of MDAs themselves, or in conjunction with other anticompetitive behavior, to be an antitrust violation. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. Quite to the contrary, the United States takes the view that MDAs and similar discounts, when not misused, constitute "efficient behavior that has little or no potential to be used by Microsoft for anticompetitive purposes." United States Resp. at 81. Other provisions of the SRPFJ protect against the potential for misuse of MDAs, via retaliation or selective rewarding, such that there is little justification, and certainly no necessity, for a ban on Microsoft's use of MDAs and other discounts. Moreover, MDAs and similar discounts are prohibited any time they are inconsistent with any other term of the SRPFJ. SRPFJ § III.B.3.

By mandating uniformity, the SRPFJ sacrifices the ability of OEMs to negotiate the most favorable terms. The Court recognizes that despite **[**71]** the obvious benefit to be gained by uniformity in licenses, undoubtedly, there are some which would be happier with the freedom to negotiate. Yet, ***HN10***[] the Tunney Act, and the case law which follows, dictate that it is for the United States to weigh the benefits of such a trade in the first instance, and that, barring a breach of duty in consenting to the decree, *Bechtel, 648 F.2d at 666*, the Court should respect the government's "predictions as to the effect of the proposed remedy." *Microsoft, 56 F.3d at 1461*. Adhering to this guidance, the Court cannot say that the imposition of uniform licenses and the preservation of Microsoft's ability to utilize MDAs and similar discounts approach a breach of duty by the government.

In sum, the Court finds the above-described provisions in the SRPFJ to be an effective means of protecting against Microsoft's utilization of its monopoly position to retaliate against companies that choose to support products that have the capacity to threaten Microsoft's monopoly. In particular, the Court finds that the definitions discussed in this section, though they appear throughout the SRPFJ, namely "Windows Operating System Product, **[**72]** " "Microsoft Middleware Product," and "Microsoft Platform Software," comport with the theory of liability in this case and, in many instances, exceed the actual scope of the liability in some ways, such that a number of products not directly involved in Microsoft's anticompetitive conduct are addressed in the proposed final judgment. The Court finds that, to the extent that these definitions encompass products beyond the scope of the liability findings, such breadth is appropriate, and likely necessary, to ensure that the anticompetitive conduct ceases and to prevent its reoccurrence. **[*228]** *See* *Bechtel, 648 F.2d at 666* ***HN11***[] ("It is not contrary to the public interest, as contemplated by the [Tunney Act], to enter a decree that is not necessary, or that grants relief to which the government might not be strictly entitled. The public does not suffer because [the defendant] consented to limitations on its activities that could not otherwise be imposed.").

2. Flexibility in OEM Licenses

a. Icons, Shortcuts, and Menu Entries

[23] However, Microsoft may establish a two tiered discount schedule, one for the ten largest Covered OEMs, and another for the eleventh through the twentieth Covered OEMs. SRPFJ § III.B.3.a.

Unlike Sections III.A and III.B, which bear a more general relation to the liability findings, the conduct enjoined in § III.C correlates **[**73]** closely to Microsoft practices which were found to violate *§ 2* of the Sherman Act. Rather than a blanket prohibition on the license restrictions which were found to be anticompetitive, § III.C provides substantial, though not absolute, flexibility to OEMs in configuring personal computers. Subsection C.1 prohibits restriction on an OEM's installation and display of icons, shortcut, and menu entries for any "Non-Microsoft Middleware or any product or service . . . that distributes, uses, promotes, or supports any Non-Microsoft Middleware, . . . anywhere . . . in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed." SRPFJ § III.C.1. Section VI.M. defines "Non-Microsoft Middleware" broadly as:

> a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating **[**74]** System.

Id. § VI.M. Excluded from the mandated flexibility in § III.C.1 is Microsoft's ability to limit the icons, shortcuts, or menu entries placed in a particular area according to the functionality provided by the product, so long as the limitation is non-discriminatory with respect to Microsoft and non-Microsoft products. *Id.* § III.C.1. In practical terms, this limitation means, for example, that if Microsoft has created a menu list for software providing email capability, the OEM is not free to configure Windows to place icons for programs which do not provide email capability in that area. This limitation is intended to balance Microsoft's concerns with protecting consumer clarity and the provision of OEM flexibility. United States Resp. at 89-90. The government notes that the prohibition on discrimination in the application of this exception prevents Microsoft from "prescribing the functionality so narrowly that it becomes, in effect, discriminatory." *Id. at 91*. Likewise, the non-discrimination language precludes Microsoft from "completely forbidding the promotion or display of a particular Non-Microsoft Middleware Product on the ground that Microsoft **[**75]** does not have a competing product itself." *Id.* "To do so," explains the government, "would be discriminatory." *Id.*

The Court has reviewed the common complaint of some individuals and entities filing comments that the term "functionality" used in SRPFJ § III.C.1 is too vague to be enforced. In short, the Court disagrees. Admittedly the term is broad and somewhat flexible, but in this area of technology, overly restrictive terminology will prove useless as the technology continues to evolve. Therefore, the Court takes the view that the phrase "particular types of functionality" carries sufficient meaning to **[*229]** be applied effectively and without confusion. SRPFJ § III.C.1. Section III.C.1 provides flexibility in product configuration while preserving for Microsoft control over the appearance of its product at the outermost edges. The core freedom of configuration provided in § III.C.1 far outweighs the limited exception to this freedom where such configuration works a bizarre and unjustified result. Accordingly, the Court takes the view that § III.C.1 will redress the illegal conduct, promote competition, and further the public interest.

b. Size and Shape of Icons

[76]** Section III.C.2. enables installation and display of shortcut icons of any size or shape, provided the shortcut "does not impair the functionality of the user interface." *Id.* § III.C.2. This provision, like the one described above, provides OEM flexibility, while eliminating the most extreme manifestations of that flexibility. Once again the central complaint about subsection C.2 involves an allegation of vagueness. Some individuals and entities argue that there is insufficient clarity in what it means to "impair the functionality of the user interface." *Id.*

The appellate court displayed a certain limited respect for Microsoft's configuration of the user interface when it held that the prevention of "drastic alteration of Microsoft's copyrighted work" was a valid basis for one of Microsoft's license restrictions. *Microsoft, 253 F.3d at 63*. At the same time, the appellate court rejected Microsoft's general claim that its license restrictions "merely prevent OEMs from taking actions that would reduce substantially the value of Microsoft's copyrighted work." *Id.* The exception in § III.C.2 for alterations which "impair the functionality" of the user interface **[**77]** attempts to strike a balance between these polar examples. In the Court's view, there is no ambiguity in the language of § III.C.2, and the Court cannot say that its effect is inconsonant with the liability in this case. Quite to the contrary, this provision appears to strike the appropriate balance between OEM freedom, Microsoft's interests in protecting the functionality of its product against drastic alteration, and the appellate court's imposition of liability.

c. Automatically Launched Software

Section III.C.3 concerns licensing restrictions which are oddly reminiscent of restrictions for which the appellate court did not impose antitrust liability, namely the automatic launch of an alternative user interface at the conclusion of the boot sequence. *Id.* The appellate court observed that the automatic launch of software which replaces the Microsoft user interface worked a "drastic alteration" of Microsoft's copyrighted product, while Microsoft's restriction had only a "marginal anticompetitive effect." *Id.* As a result, the appellate court rejected the imposition of liability for Microsoft's prohibition in its OEM licenses of this practice. *Id.* Notwithstanding **[**78]** this similarity, § III.C.3. applies to more than the automatic launch of an alternative user interface, regulating the automatic launching of any non-Microsoft Middleware Product "at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connection to or disconnections from the Internet" without regard to whether such automatically launched product disturbs the Microsoft user interface. SRPFJ § III.C.3. This provision protects automatic launching of Non-Microsoft Middleware Products only where "a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time" and imposes stringent limitations upon such automatic launching. *Id.* Where such Non-Microsoft Middleware is permitted to automatically launch, § III.C.3. requires **[*230]** that the middleware either provide no user interface or a user interface that resembles the corresponding Microsoft Middleware Product interface. *Id.*

In response to complaints regarding the restrictive nature of § III.C.3, the United States invokes the D.C. Circuit's rejection of liability for the automatic launching of an alternative user interface as a justification for **[**79]** the limitations in that provision. *Microsoft, 253 F.3d at 63*. As explained by the United States, this provision attempts to strike a balance between Microsoft's interest in "preventing unjustified drastic alterations to its copyrighted work" and allowing new innovations and product features. United States Resp. at 94. The most obvious flaw in this rationale, however, is that § III.C.3 is not directed exclusively at the launching of alternative user interfaces, but includes the launching of software products which launch automatically, but do so within the general parameters of the Microsoft user interface. SRPFJ § III.C.3. Despite some acknowledgment of this flaw, the United States argues that the restrictions in § III.C.3 are tolerable because they "govern[] only the original OEM configuration," such that the end user can click on an icon to enable the automatic launching of Non-Microsoft Middleware notwithstanding the restrictions in § III.C.3. United States Resp. at 94. Given this ability, argues the United States, § III.C.3 reflects a "reasonable compromise" between Microsoft's concerns for ease of use and the liability findings in this case. *Id.*

In **[**80]** the Court's view, the restrictions in § III.C.3 give too much credence to Microsoft's purportedly "valid interest" in providing consistent product characteristics valued by users. *Id.* The appellate court rejected a remarkably similar concern proffered by Microsoft in an attempt to justify the other license restrictions imposed by Microsoft upon OEMs. *Microsoft, 253 F.3d at 63-64*. The appellate court's rejection in this regard can be read to include any restriction on the automatic launching of software which does *not* replace the Microsoft user interface. *Compare* *id. at 64* ("In sum, we hold that with the exception of the one restriction prohibiting automatically launched alternative interfaces, all the OEM license restrictions at issue . . . violate *§ 2* of the Sherman Act."), *with Findings of Fact* P 213 ("Third, Microsoft prohibited OEMs from installing programs, including [but not limited to] alternatives to the Windows desktop user interface, which would launch automatically upon completion of the initial Windows boot sequence."). Moreover, this Court cannot help but recognize that this provision has the potential to empower Microsoft **[**81]** to control, or at least regulate, the pace of innovation with regard to middleware products designed to launch automatically, but which do not replace the user interface and, thereby, run afoul of the appellate court's opinion.

Importantly, however, the Court does not assess the proposed final judgment in a vacuum. In this regard, although the Court might have crafted a different remedy, the Court cannot conclude that the government has violated the public trust in agreeing to the terms set forth in § III.C.3. *See* *Bechtel, 648 F.2d at 666*. When considered as part of the greater whole of the proposed decree which offers OEM freedoms not clearly implicated in the appellate court's ruling, the Court can only conclude that the United States conceded this aspect of OEM flexibility in exchange for other freedoms which, in the government's view, will more effectively benefit competition. *See* *Microsoft, 56 F.3d at 1461*. **HN12**[] "Just as the Court may not second guess the government's choices about what claims to bring in the first **[*231]** place, it should not treat differently those concessions proposed in a consent decree that might have been achieved at trial from those **[**82]** that might not have been achievable." *Thomson, 949 F. Supp. at 927*. Although liability was established in this case, there remained litigation surrounding the issue of remedy, during which there would have been no guarantee that the United States would obtain all of the provisions it desired. **HN13**[] The risks inherent in litigation are likely to be reflected in some portion of the proposed decree, and these risks are appropriately weighed by the government, rather than the Court, in the first instance. *See* *AT&T, 552 F. Supp. at 151*. Giving limited deference to the assessment of the United States which takes the view that Microsoft has a valid interest in "having a computer boot up quickly the first time it is turned on," United States Resp. at 94, the Court does not deem this particular provision, though it is likely one of the proposed decree's more obvious weaknesses, to so conflict with important public policy or ***antitrust law*** that it removes the proposed decree from "the reaches of the public interest," *Microsoft, 56 F.3d at 1458* (quoting statement originally in *United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975))*. **[**83]**

d. Internet Access Provider ("IAP") Offers in the Initial Boot Sequence

In general, subsection C.5 is aimed at remedying the restrictions on OEM modification of the initial boot sequence--"the process that occurs the first time a consumer turns on the computer," *Microsoft, 253 F.3d at 61*, which were found by the appellate court to violate *§ 2*. *Id. at 61-64*. The appellate court noted that this restriction "prevents OEMs from using [the initial boot sequence] to promote the services of IAPs." *Id. at 62*. This restriction hinders the distribution and/or promotion of non-Microsoft middleware which was often used by the IAPs in their internet access software. *Id.* Removal of this restriction will once again allow OEMs to promote various IAPs by inserting an option for choosing an IAP during the initial boot sequence.

As with subsection C.3, subsection C.5 of § III lifts a restriction directly implicated in the appellate court's liability findings, but does not do so completely. Section III.C.5 enables OEMs to offer an IAP service of their choosing during the initial boot sequence, but only where the offer complies with **[**84]** Microsoft's "reasonable technical specifications." SRPFJ § III.C.5. The appellate court concluded that Microsoft's prohibition on the inclusion of IAP registration offers in the initial boot sequence were without procompetitive justification. *Microsoft, 253 F.3d at 63-64*. In particular, the appellate court rejected Microsoft's arguments that OEM alterations created "quality issues," *id. at 64* (quoting Defendant's Trial Exhibit 2395), and caused consumer confusion because the district court found that OEMs, not Microsoft, bear the additional support costs associated with such a result. *Id*. (citing *Findings of Fact* P 159). Given this holding, there is little basis in the liability findings for the retention of Microsoft's power to impose "reasonable technical specifications" on an OEMs' insertion of an IAP offer in the initial boot sequence.

Despite this observation, however, the same analysis which applied to subsection C.3 applies to subsection C.5 of § III. That is, the Court cannot say that the limited retention of discretion permitted by Microsoft with regard to the insertion of IAP registration offers is so flawed that it renders the **[**85]** entire decree, or even this particular section of the decree, outside of the public interest. *See* *AT&T, 552 F. Supp. at 150-51*. Rather, the Court observes once again, that this limited retreat **[*232]** from the full feasible relief which the United States might have obtained through litigation reflects the give and take of a negotiated settlement. *Id. at 151*. Moreover, the preservation of Microsoft's ability to impose "reasonable technical specifications" upon registration sequences inserted into the boot sequence is less objectionable than the reservation of Microsoft authority in § III.C.3 because the exception from § III.C.5 subjects Microsoft to an objective standard of reasonableness. If the technical specifications are objectively "unreasonable," Microsoft is without power to impose them. As a result, the Court is convinced that the freedom provided to OEMs by the opportunity to insert IAP registrations during the initial boot sequences, even as limited by § III.C.5, will have the procompetitive effect of enabling promotion and distribution of non-Microsoft middleware. *See* *Microsoft, 253 F.3d at 62*. The Court regards it unlikely that **[**86]** Microsoft's imposition of "reasonable technical specifications" upon this freedom will undercut substantially its value to competition.

e. Alternative Operating Systems and Other Alternatives under the Final Judgment

Subsection C.4 of § III, prohibits Microsoft from restricting an OEM's ability to "offer[] users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product." SRPFJ § III.C.4. In effect, § III.C.4. provides OEMs with the option of launching competing operating systems and prevents Microsoft from interfering with OEM decisions to do so. Lastly, § III.C.6. provides protection for OEMs which exercise any of the options provided to them pursuant to § III.H. of the SRPFJ, which the Court discusses in greater detail below. *Id.* § III.C.6. The Court sees little worthy of criticism in these final provisions of subsection C, each of which should serve to provide OEM flexibility, which in turn, should encourage competition.

f. End-User Access

Like subsection C, subsection H of § III is aimed at providing **[**87]** flexibility in the OEM channel of distribution for non-Microsoft middleware, as well as for consumers in configuring their own Windows installation. Scheduled to take effect not later than twelve months from the submission of the SRPFJ to the Court, subsection H concerns the addition, removal, and placement of shortcuts, icons, and menu entries. *Id.* § III.H. As recounted above, the appellate court found that Microsoft's restrictions on icon appearance and placement, folders and menu entries, and other alterations of the appearance of the desktop had the effect of "imposing significant costs upon the OEMs." *Microsoft, 253 F.3d at 62*. As a result of these additional costs, Microsoft "reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage." *Id.* The appellate court rejected Microsoft's proffered procompetitive justifications for these restrictions and, therefore, found them to be exclusionary in violation of *§ 2* of the Sherman Act. *Id. at 63-64*.

Section III.H.1(a) requires that Microsoft permit end users and OEMs "to enable or remove **[**88]** access to each Microsoft Middleware Product or Non-Microsoft Middleware Product by . . . displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally **[*233]** displayed." SRPFJ § III.H.1(a). In derogation of this provision, Microsoft reserves the right to restrict the display of icons, shortcuts, and menu entries in any list of the same "specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products." *Id.* The government explains that this exception is intended to "capture broad categories of products" so as to avoid consumer confusion by ensuring orderly placement of product icons, shortcuts, and menu entries. United States Resp. at 99. As is plain from the language of the exception, Microsoft may not use these product categories to discriminate between its own products and its competitors' products. SRPFJ § III.H.1(a).

Section III.H.1(a) is responsive to the appellate **[**89]** court's finding of anticompetitive behavior in Microsoft's exclusion of IE from the Add/Remove Programs utility. *Microsoft, 253 F.3d at 67*. The government posits that the provision will "alter Microsoft's current practice of creating an artificial distinction between . . . Non-Microsoft Middleware Products and Microsoft Middleware Products." United States Resp. at 98. On this rationale, the government predicts that users will be able, with the assistance of the SRPFJ, "to make choices on the merits about Microsoft and Non-Microsoft Middleware Products." *Id.* As with § III.C.1, § III.H.1(a) reserves for Microsoft the right limit the insertion of particular icons, shortcuts, and menu entries in lists or other areas of Windows which are reserved for particular functionality. SRPFJ § III.H.1(a). Once again, the Court does not regard such a limitation as inappropriately restrictive of OEM and end-user ability to configure Windows. The limitations imposed by Microsoft must be nondiscriminatory and may not be used to benefit Microsoft software over third-party software. *Id.* As a result, the Court rejects any contention that such a limitation will hinder the appropriately **[**90]** procompetitive effect of the remedial provision. On this basis, the Court finds that § III.H.1(a) advances the public interest.

Section III.H.1(b) also requires Microsoft to allow end users and OEMs to enable or remove access to middleware products by "enabling or disabling automatic invocations pursuant to § III.C.3 of the SRPFJ that are used to launch Non-Microsoft Middleware Products or Microsoft Middleware Products." *Id.* § III.H.1(b). Again, § III.C.3. concerns the automatic launch of Non-Microsoft Middleware. *Id.* § III.C.3. The "mechanism" for such enabling or disabling must offer an unbiased choice between each Microsoft Middleware Product and NonMicrosoft Middleware Product and may offer such an unbiased choice as between all Microsoft Middleware Products as a group and Non-

Microsoft Middleware Products as a group. *Id.* § III.H.1.(b). The Court finds this provision unobjectionable and appropriately procompetitive.

i. Designation of a Non-Microsoft Middleware Product in Place of a Microsoft Middleware Product

The second subpart of § III.H. requires Microsoft to allow end users and OEMs to designate a NonMicrosoft Middleware Product **[**91]** to be invoked in place of [a] Microsoft Middleware Product (or vice versa)" in certain circumstances. *Id.* § III.H.2. This provision requires that the option be presented to end users "via an unbiased mechanism" and to OEMs "via a standard OEM preinstallation kits" in any situation "where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a **[*234]** separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product." *Id.* As exceptions to the foregoing, Microsoft may invoke a Microsoft Middleware Product where the product would be "invoked solely for use in interoperating with a server maintained by Microsoft" or "that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement." *Id.* § III.H.2(a)-(b). The government explains that the central goal and the anticipated effect of § III.H.2 are that Microsoft will be required to "implement and respect default settings in a number of circumstances." United States Resp. at 101.

Critics of § III.H.2 complain that Microsoft could engineer its software to avoid falling within the **[**92]** requirements of a "separate Top-Level Window" displaying either "all of the user interface elements" or the "Trademark of the Microsoft Middleware Product." SRPFJ § III.H.2. Microsoft's ability to circumvent this provision through its product design, argue some, will undercut the usefulness of the affirmative portion of § III.H.2. The government explains that these qualifications exist to "ensure that access to defaults exists whenever the alternative Microsoft product would be launched as the full 'product' . . . rather than when just a portion of the product's underlying functionality is launched to perform functions in Windows itself . . . or otherwise where the end user might not necessarily be aware that he or she is using a specific Microsoft Middleware Product." United States Resp. at 102.

The most obvious flaw in this criticism of § III.H.2 is that such criticism fails to recognize that the provision offers relief beyond that which might be regarded as necessary to redress the liability in this case. Microsoft prevailed on its assertion that the override of a user's choice of a default browser was justified, and as a result, the appellate court did not ascribe liability **[**93]** for Microsoft's failure to provide true defaults, *Findings of Fact* P 171 ("While Windows 98 does provide the user with the ability to choose a different default browser, it does not treat this choice as the 'default browser' within the ordinary meaning of the term."). *See* *Microsoft, 253 F.3d at 67*. Despite this holding, § III.H.2 addresses the acknowledged anticompetitive effect of the override of non-Microsoft defaults, *id. at 65*, by requiring Microsoft to make non-Microsoft products the "default" in certain circumstances. SRPFJ § III.H.2. This requirement in § III.H.2 exceeds even the scope of the facts addressed during the liability phase because the mandatory setting of defaults applies to multiple types of software functionality, not merely Web-browsing functionality. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. Moreover, the government views the limited nature of § III.H.2 as one of the strengths of the provision, rather than its weakness. In this regard, the government notes that paramount in § III.H.2 is the ability to "provide certainty and a bright line regarding when Microsoft is obligated to provide and respect a default setting. **[**94]** " United States Resp. at 102. Based on the foregoing, and deferring to the government's view that § III.H.2 will have a procompetitive effect because of the clarity in its terms, however circumscribed, the Court cannot say that the United States has erred or strayed from the realm of acceptable remedies in sacrificing some flexibility in order to achieve the "bright line" drawn by the provision.

With regard to the latter portion of § III.H.2, the Court notes that subsections H.2(a) and (b) appear to reflect the two findings by the appellate court as to liability **[*235]** or, more specifically, the lack thereof. The relationship between subsection H.2(a) and the appellate opinion in this case is somewhat subtle, but the United States explains that automatic invocation of a "Microsoft Middleware Product . . . solely for use in interoperating with a server maintained by Microsoft (outside of the general context of Web browsing)" derives from the appellate court's holding that Microsoft did not violate *§ 2* in designing its product to override a user's browser preference in conjunction with invocation of the Windows "Help" system, *Microsoft, 253 F.3d at 67*. *See* United States **[**95]** Resp. at 104-05. The government avers that "the current Windows Help system, as well as other parts of the Windows interface, rely on interoperating with servers maintained by Microsoft." *Id. at 104*. While the Court might not have interpreted the appellate court's holding to require the precise exception in § III.H.2(a), the Court cannot say that the provision is inappropriate, and certainly, the provision does not conflict with the appellate court's holding. Rather, the provision is remarkable in that it tracks an exception to liability, which was carefully carved out by the appellate court, without sacrificing the effectiveness of the provision itself.

The link between § III.H.2(b)'s "reasonable technical requirement" language and the appellate court's finding with regard to Microsoft's "override the user's preferences" is somewhat less subtle. *Microsoft, 253 F.3d at 67*. Addressing whether Microsoft's product design to "override the user's choice of a default browser in certain circumstances" was anticompetitive, the appellate court concluded that Microsoft's proffered "valid technical reasons" were sufficient to outweigh any anticompetitive effect **[**96]** of the override. *Id.* As a result, the appellate court did not ascribe liability for this aspect of Microsoft's product design. *Id.* Section III.H.2(b) tracks the appellate court's liability holding on this point, while simultaneously countering any anticompetitive effects of the product design by requiring that Microsoft provide the unfulfilled technical requirements to any ISV requesting them. SRPFJ § III.H.2(b). Given the close relationship between § III.H.2(b) and the appellate opinion in this case, the Court finds little merit in the criticism of the provision in the public's comments. Like the exception in § III.H.2(a), the exception in subpart H.2(b) acknowledges the nuances of the appellate court's holding and yet maintains the potency of the restrictive portion of the provision. In doing so, § III.H comports with the public interest.

ii. Automatic Alteration of OEM Configuration

The final provision in § III.H., subsection 3, prohibits a Windows Operating System Product from automatically altering an OEM's icon, shortcut, or menu-entry configuration without first seeking confirmation from the user. *Id.* § III.H.3(a). Furthermore, pursuant to § III. **[**97]** H.3(b), the Windows Operating System Product may not seek confirmation from the end user for such a non-user initiated change in configuration until "14 days after the initial boot up of a new Personal Computer." *Id.* § III.H.3(b). Any request for confirmation pursuant to this section must be unbiased with regard to Microsoft Middleware Products and Non-Microsoft Middleware. *Id.* § III.H.3.

Section III.H.3 is written carefully to enable a feature in Microsoft's latest version of Windows, the "Clean Desktop Wizard," to remove unused icons from the desktop. CIS at 48; United States Resp. at 107. The 14-day grace period received wide criticism in the public's comments for its brevity, which, argue critics, devalues **[*236]** space on the desktop. The government explains that this time-frame was chosen as a "reasonable compromise between the need to use desktop icons to promote Non-Microsoft Middleware, and the needs of users who would prefer to be presented with the choice of moving unused icons to a folder." United States Resp. at 108. The government further asserts that there are other valuable areas in Windows within which nonMicrosoft middleware products can be promoted. *Id.* While **[**98]** the former explanation offered by the government is valid, the Court finds the latter rationale weak given the role that placement on the desktop played in the liability proceedings. *See, e.g.*, *Microsoft, 253 F.3d at 61* (finding that the inability to remove desktop icons for IE protected Microsoft's monopoly), 68-71 (holding that Microsoft's exclusive agreements with IAPs concerning desktop placement foreclosed a substantial share of the market). The more salient point made by the government is that the trigger and the confirmation for change must be unbiased with respect to Microsoft products and non-Microsoft products, such that the "Clean Desktop Wizard" should not be viewed as a tool for the suppression of non-Microsoft middleware products. United States Resp. at 107-08. Moreover, the government explains that the utility does not delete the icons, but merely moves the icons from the desktop into a folder from which they may be retrieved if the user changes his or her mind. *Id. at 108-09*. The Court notes in addition that there is no ascription of liability for Microsoft's alteration of user preferences and that the closest conduct to any such **[**99]** alteration--the override of defaults--is conduct for which Microsoft was absolved of liability. *Microsoft, 253 F.3d at 67*. In sum, the Court is not compelled to conclude that the preservation of a consumer option for a desktop "clean-up" tool is discordant with the public interest, so long as there exist adequate protections to ensure that the tool is not used as a sword with which Microsoft can attack its competitors.

g. Sections III.C and III.H: Remedy for Commingling Liability

Taking a more broad view of Sections III.C and III.H, the United States posits that these sections "remedy Microsoft's anticompetitive commingling of browser and Windows operating system code by requiring Microsoft to redesign its Windows Operating System Products to permit OEMs and end users effectively to remove access to

Microsoft Middleware Products (Section III.H) and to allow competing middleware to be featured in its place (Section III.C)." United States Resp. at 114. The invocation of anticompetitive conduct in this context refers to the appellate court's affirmance of the following district court finding:

> The District Court condemned Microsoft's decision to bind **[**100]** IE to Windows 98 "by placing code specific to Web browsing in the same files as code that provided operating system functions." [*Findings of Fact*] P 161; *see also id. PP 174, 192*. Putting code supplying browsing functionality into a file with code supplying operating system functionality "ensures that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows . . . ." *Id. P 164*. As noted above, preventing an OEM from removing IE deters it from installing a second browser because doing so increases the OEM's product testing and support costs; by contrast, had OEMs been able to remove IE, they might have chosen to pre-install Navigator alone. *See id. P 159*.

[*237] *Microsoft, 253 F.3d at 65-66* (ellipsis in original). Rejecting Microsoft's factual assertion that it does not commingle browsing and non-browsing code, the appellate court reiterated that "commingling has an anticompetitive effect; . . . the commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the **[**101]** API set exposed by Microsoft's operating system." *Id. at 66*.

The government correctly notes that the basis for the appellate court' condemnation of commingling is its anticompetitive effect and that, in the absence of such effect, it is not at all clear that the practice of commingling would be of antitrust concern. United States Resp. at 115. This observation is significant because, in this instance, the government proposes a remedy which does not simply proscribe the conduct found to be anticompetitive in violation of *§ 2*. Instead, the remedy for Microsoft's commingling liability is more closely aligned with alleviating the anticompetitive effect of the conduct, rather than simply banning the conduct itself.

This approach receives much criticism in the public's comments on the proposed consent decree. In general terms, these comments insist that Microsoft should be required to "uncommingle ," or make removable, much of the software code in its Windows operating system. Not surprisingly, the United States rejects this criticism and insists that it has never pursued a position that would have required the removal or removability of code. *Id. at 115-16*; **[**102]** *see also Microsoft, 97 F. Supp. 2d at 68* (IFJ requiring the removal of end-user access, *not* code removal). Indeed, even the *Findings of Fact* support the view that code removal is unnecessary: Judge Jackson noted in P 165 that "from the user's perspective, uninstalling Internet Explorer [via the 'Add/Remove' function] was equivalent to removing the Internet Explorer program from Windows 95." *Findings of Fact* P 165. The United States takes this view one step further, asserting that, contrary to theories advanced by some individuals and entities filing comments, "the basis for commingling liability, and remedy, in this case is the presence, from the user's perspective, of the product, and consequent confusion and other deterrents to installation of additional, rival middleware products; the mere presence of APIs is not enough." United States Resp. at 119.

Non-party cries for removal of software code as a remedy appear to reflect a substantive misunderstanding of the commingling liability in this case, which did not condemn Microsoft for including middleware functionality along with a product offering operating system functionality. [24] The remedy then, **[**103]** need not separate the functionalities, rather, it need only protect against any anticompetitive effect of the manner in which the functionalities have been bundled. In this case, the anticompetitive effect was found to be a disincentive to OEMs to install nonMicrosoft middleware products. If that disincentive can be removed, then the remedy is within the realm of appropriate relief. *See* 2 PHILLIP E. AREEDA ET AL., ***ANTITRUST LAW*** P 325a, at 246 (2d ed. 2000) ("The decree . . . will not embody harsh measures when less severe ones will do.").

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[24] Any such condemnation would likely be reflected in the imposition of liability for illegal tying, rather than liability for illegal for monopoly maintenance. *Cf. generally* *United States v. Microsoft Corp., 331 U.S. App. D.C. 121, 147 F.3d 935 (D.C. Cir. 1998)*. Such a tying claim was offered by Plaintiffs pursuant to a *per se* analysis and was ultimately rejected by the appellate court. *Microsoft, 253 F.3d at 89*.

[*238] The United States predicts that §§ III.C and **[**104]** III.H will enhance competition between Microsoft middleware and non-Microsoft middleware, *see, e.g.*, CIS at 29, 45, and the Court is obliged to give some amount of deference to this prediction. *Mass. School of Law, 118 F.3d at 782*; *Microsoft, 56 F.3d at 1461*. In fact, the Court sees substantial merit in the government's explanation of the relationship between the theory of liability advanced by Plaintiffs, Judge Jackson's *Findings of Fact*, the district and appellate courts' findings of liability on this point, and the proposed consent decree's focus on end-user access, rather than code removal or redesign. Accordingly, the Court rejects the view that a remedial decree which does not mandate the "uncommingling " of code necessarily renders the remedy inappropriate, inadequate, or discordant with the public interest.

Adding emphasis to the foregoing conclusion is one final and important consideration--the effect of the remedy upon consumers and other participants in this segment of the industry. In addition to its prediction that §§ III.C and III.H will effectively remedy commingling, the United States predicts that a "blanket prohibition" of **[**105]** the practice "would impose a wholly unnecessary and artificial constraint on software design and could have adverse implications for consumers." United States Resp. at 119-20. The government goes on to predict that:

> Changes to the operating system that would be required to implement such a blanket prohibition likely would have adverse effects not only upon Microsoft and its customers but also upon third parties that already have designed software to rely on the present operating system code. A flat prohibition on commingling in this particular case, without due regard to the competitive impact of that commingling, therefore likely would be harmful, not helpful.

Id. at 120. The Court is hard pressed to reject a remedy on the grounds that it lacks a provision which has the potential to give rise to such dire consequences. Indeed, ***HN14***[] courts considering antitrust remedies are advised to pay special attention to the potential of any remedy to inflict harm upon third parties. *See* *Microsoft, 56 F.3d at 1462*. Moreover, the Court acknowledges that a remedy requiring code removal would disregard the repeated admonition offered by the appellate court in an earlier **[**106]** *Microsoft* opinion that its is undesirable for the Court to inject itself into matters of product design. *Microsoft, 147 F.3d at 949-50* and n.13 (identifying a "limited competence of courts to evaluate high-tech product designs and the very high cost of error" associated therewith); *but see* *Microsoft, 253 F.3d at 65* ("Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are *per se* lawful."). Based on the foregoing, the Court will not reject the SRPFJ on the ground that it does not include a blanket prohibition against commingling Web-browsing code with operating system code. To the contrary, the Court finds that the end-user focus of the remedy comports with the public interest as it minimizes potential for harm to third parties and, nevertheless, carries a great potential for the advancement of competition.

3. Agreements with Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Others

a. Exclusive Agreements

Section III.G of the SRPFJ governs Microsoft's ability to enter into agreements with **[**107]** IAPs, ICPs, ISVs, IHVs, [25] and OEMs **[*239]** which require any such entity to distribute, promote, use or support, "exclusively or in a fixed percentage," any Microsoft Platform Software. SRPFJ § III.G.1. Subsection G.1 prohibits Microsoft from entering into any exclusive or fixed percentage agreement except where "Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use, or support for software that competes with Microsoft Platform Software." *Id.* This portion of the consent decree is aimed at remedying the liability findings against Microsoft for entering into exclusive contracts with IAPs and ISVs. Citing to the "First Wave Agreements," the appellate court first deemed anticompetitive Microsoft's promise to ISVs to give "preferential support . . ., other technical information, and the right to use certain Microsoft seals of approval," *Microsoft, 253 F.3d at 71*, in exchange for the ISVs' exclusive use of IE as the default browser and the ISVs' exclusive "use of Microsoft's 'HTML Help,' which is accessible only with [IE]," *id. at 71-72*. [26] **[**109]** The

[25] An "IHV" is an "independent hardware vendor that develops hardware to be included in or used with a Personal Computer running a Windows Operating System Product." SRPFJ § VI.H.

appellate **[**108]** court further determined that Microsoft's agreement with Apple, "which is both an OEM and a software developer," [27] *id. at 71*, for Apple's exclusive use of IE as the default browser was anticompetitive in violation of *§ 2*. *Id. at 72-74*. Lastly, once again citing to the "First Wave Agreements," the appellate court concluded that "to the extent Microsoft's First Wave Agreements with ISVs conditioned receipt of Windows technical information upon the ISVs' agreement to promote Microsoft's JVM exclusively," *id. at 75*, the agreements were "exclusionary, in violation of the Sherman Act." *Id. at 76*. [28]

Some individuals and entities filing comments contend that the "commercially practicable" representation in § III.G.1 is too **[**110]** easily evaded and, therefore, will be ineffective. The United States responds by explaining the manner in which the provision will function. The government first explains that the provision will prevent Microsoft "from guaranteeing that rival technology will not become broadly available," United States Resp. at 133, by "making it logically impossible for Microsoft to seek--much less get--any form of exclusive distribution, promotion, use, or support on all of a third party's products, no matter how much Microsoft is willing to pay." *Id. at 134*. In this regard, § III.G.1 is shown to appropriately permit contracts with other participants in the industry which cannot be said to be anticompetitive. **[*240]** The government goes on to debunk the contention that Microsoft can extract the "commercially practicable" representation by pressuring the party with which it is contracting, as such tactics would not satisfy the "good faith" requirement in § III.G.1. *Id. at 133-34*. The "good faith" requirement prevents Microsoft from pressuring or coercing any such entity into making the necessary representation. *Id.* Similarly, Microsoft cannot simply include such representations as boilerplate **[**111]** language in its contracts as, once again, the "good faith" requirement will not have been met. *Id.*

The appellate court expressly observed in conjunction with its discussion of Microsoft's illegal exclusive contracts that "exclusivity provisions in contracts may serve many useful purposes," such that they are "a presumptively legitimate business practice." *Microsoft, 253 F.3d at 69*. "Exclusive contracts are commonplace--particularly in the field of distribution--in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable, and unjustified burden on any such firm." *Id. at 70*. Because ***antitrust law*** does not condemn all exclusive contracts, even if entered into by a monopolist, the Court regards it as entirely appropriate for the remedy in this case to prohibit only those contracts that have a significant degree of foreclosure of the market. In this light, § III.G.1 is shown to be a provision which carefully balances the prohibition of anticompetitive conduct and the preservation of opportunities **[**112]** for symbiotic relationships between Microsoft and third parties which are not likely to be anticompetitive in their effect.

b. Placement on the Desktop

To further remedy Microsoft's anticompetitive exclusive deals with IAPs, subsection G.2 of Section III prohibits agreements with IAPs and ICPs that condition placement on the desktop (or elsewhere in Windows) on a promise to refrain from distribution, promotion, or use of any software that competes with certain functionality offered by Microsoft as part of its operating system--Microsoft Middleware. SRPFJ § III.G.2. Accordingly, subsection G.2

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[26] In contrast, the appellate court declined to find Microsoft liable for entering into similar deals with ICPs on the grounds that Plaintiffs "failed to demonstrate that Microsoft's deals with the ICPs have a substantial effect upon competition." *Microsoft, 253 F.3d at 71*.

[27] Although identified as an OEM in the appellate court's opinion, the Court observes that Apple does not fit into the definition of OEM provided in the SRPFJ because it does not license Microsoft's operating system product. SRPFJ § VI.O. The Court remains unconcerned by this fact because the protections afforded to OEMs concern their licensing of Windows, and therefore, it would make little sense to include Apple within the purview of these protections. *See, e.g.*, SRPFJ § III.A-C, H. Moreover, Apple appropriately receives protections afforded to ISVs. *Id.* §§ III.D, F-G, I and VI.I.

[28] The proposed consent decree's prohibition on exclusive or fixed-percentage agreements extends beyond the specific findings of liability to apply to ICPs and IHVs. This extension is appropriate, as "the public does not suffer because [the defendant] consented to limitations on its activities that could not otherwise be imposed." *Bechtel, 648 F.2d at 666*.

provides broad protection for present and future middleware which competes with Microsoft Middleware. Section III.G.2 directly addresses the liability finding against Microsoft for entering into contracts with IAPs for prominent desktop placement in exchange for the IAPs' exclusive promotion of Microsoft's browser. *Microsoft, 253 F.3d at 68-71*. Subsection G.2 broadens the remedial decree beyond the liability finding with regard to IAPs to protect ICPs as well, despite the fact that liability with regard to Microsoft's agreements with ICPs was ultimately rejected by **[**113]** the appellate court. *Microsoft, 253 F.3d at 71*. This expansion beyond the liability is not over-broad and reflects a means of prohibiting Microsoft from engaging in conduct which is closely related to the conduct for which Microsoft was found liable. *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697 (1978)* (holding that an injunction that "goes beyond a simple proscription against the precise conduct previously pursued . . . is entirely appropriate").

c. Joint Ventures, Joint Development Agreements, and Joint Services Agreements

The latter portion of § III.G makes clear that neither subsection G.1 nor G.2 prohibits Microsoft from entering into **[*241]** agreements which limit competition within the context of a "bona fide joint venture . . . joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value add-on to an existing product, technology or service, in which both Microsoft and the [other entity] contribute significant developer or other resources." *Id.* § III.G. Also excepted from the purview of § III.G are any agreements in which Microsoft **[**114]** licenses intellectual property from a third party. *Id.* This exception provides an incentive for Microsoft to license nascent technology from third-party vendors for distribution with Microsoft products. United States Resp. at 136-37. Such an exception protects the potential for third parties to benefit from Microsoft's broad distribution capability. *Id.*

The above-described limitations placed on subsections G.1 and G.2 receive some criticism to the effect that Microsoft will simply be able to label its agreements "joint ventures" so as to escape the limitations otherwise imposed by § III.G. As is often the case, these critics fail to carefully consider the precise wording of the provision. The words "bona fide" modify the joint ventures to which the exception applies. SRPFJ § III.G. Were Microsoft to simply label ordinary transactions as "joint ventures" because they involve some amount of collaboration, the "bona fide" requirement would not be met. Similarly, criticism of the use of the term "bona fide" fails to recognize that the term is a legal term which carries with it a particular legal significance. Therefore, there is nothing vague or ambiguous about its use. In a **[**115]** similar vein, comments which assert that the terms "joint development or joint services arrangement" are without meaning fail to take account of the language modifying these terms which makes clear that the joint activity must be aimed at new products, technologies, or services, or a material value add-on to existing technology, and that the parties to the arrangement must each contribute significant resources. *Id.* The exception is tailored to permit joint activities that are genuinely procompetitive and, indeed, recognizes that non-compete clauses may be appropriate where two firms legitimately share resources to create new or improved opportunities for consumers. United States Resp. at 136. Given these considerations, the permissive exceptions to the restrictive portion of § III.G. are shown to be far more narrow in their application than most recognize. Accordingly, the Court sees little merit in the general criticism that the exceptions in § III.G for joint ventures, joint development agreements, and joint services agreements are overly broad.

The more salient criticism of § III.G arises from the fairly broad exception of "any agreements in which Microsoft licenses intellectual **[**116]** property in [sic] from a third party" from the purview of the prohibitive portions of the provision. SRPFJ § III.G. Critics of this portion of the SRPFJ contend that Microsoft can simply add an intellectual property license to an exclusive agreement in order to circumvent the prohibitive portion of § III.G. The United States explains that the exception "permits Microsoft, in licensing new technology from an ISV for incorporation into a Microsoft product, to ensure that the ISV will not also license the same technology to a competitor who hopes to 'free ride' on Microsoft popularization of the technology." United States Resp. at 137. In this regard, the government argues that the exception preserves Microsoft's "incentives to invest in such popularization." *Id.*

Although the government's explanation is reasonable, the government does not **[*242]** explain why the exception for agreements in which Microsoft licenses intellectual property is not more carefully tailored to address the circumstance referenced by the government. Given the breadth of the exclusion, it is possible that agreements which the government did not intend to exclude from the prohibitory portion of § III.G, nonetheless, **[**117]** will be excluded. The government appears far less concerned about this potential over-breadth, than with the potential for the exception to provide an unintended loophole. In this regard, the government observes that a license of intellectual property as a pretext for otherwise exclusionary terms would be subject to review by the United States, and could result in a request for modification if the provision is abused. *Id.*

The exception from § III.G of agreements in which Microsoft licenses third-party intellectual property provides an additional example of a provision which the Court, if called upon to craft a remedy, would likely not craft so broadly. However, it scarcely bears repeating that ***HN15***[] a court presiding over a Tunney Act proceeding need not conclude that the terms of the consent decree "will *best* serve society," but only that the proposed decree is "within the reaches of the public interest." *Microsoft, 56 F.3d at 1460* (quoting *Western Elec. Co., 900 F.2d at 309*) (emphasis in original). Had the government been unable to offer a reasoned justification and predictive effect of the exception in § III.G for agreements in which Microsoft **[**118]** licenses intellectual property, the Court might well have concluded that the exception does not accord with the public interest. The Court is not faced with such a circumstance. The government has offered a legitimate justification for the balance struck between the prohibitive and permissive portions of § III.G, and the Court declines to second guess the wisdom of this balance. Recalling that "above all, [a] consent decree . . . [is] the product[] of a negotiated settlement from which, presumably, no party obtained everything it wanted," *Thomson, 949 F. Supp. at 914*, the Court takes the view that this particular exception in § III.G of the SRPFJ may reflect one of those instances in which the government exchanged some degree of breadth for some other valuable benefit. *See* *AT&T, 552 F. Supp. at 151* ("Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.") (quoting *United States v. Armour & Co., 402 U.S. 673, 681, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971))*. Given the totality of the facts, the **[**119]** Court cannot conclude that the breadth of the exception in the latter portion of § III.G so far detracts from the remainder of the provision, and the other portions of the decree, that it falls beyond the reaches of the public interest.

d. Limitations on Support for Competing Products

Section III.F.2 [29] is aimed directly at Microsoft's dealings with ISVs. Pursuant to § III.F.2 Microsoft may not condition any benefit or "grant of Consideration" on an ISV's "refraining from developing, using, distributing, or promoting" software that competes with Microsoft Platform Software. *Id.* § III.F.2. Excepted from the protections of § III.F.2, however, are agreements which limit an ISV's "development, use, distribution, or promotion" of such competing software, where such agreement is reasonable in its terms and "reasonably necessary to . . . a bona fide contractual obligation of the ISV to use, **[*243]** distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft." *Id.* § III.F.2.

[120]** The government explains the exception in § III.F.2 as a means by which to "protect ISVs' opportunity to engage in legitimate, procompetitive arrangements with Microsoft," such as a very basic agreement whereby Microsoft "provides an ISV with funds for the promotion of Microsoft software and prohibits the ISV from spending those funds to promote rival software." United States Resp. at 127-28. In the face of criticism, the United States maintains that this exception will not permit Microsoft to "enter into an agreement that provides an ISV with assistance in promoting a Microsoft product on [the] condition that the ISV not also distribute, use, or promote, a rival product, because such a limitation would not be reasonably related to the ISV's obligation to promote the Microsoft product." *Id. at 128*. The government readily admits that the language of this exception is somewhat "general[]" but contends that this generality is a "necessary tradeoff ." *Id.* In this regard, the government argues that more precise provisions provide greater opportunity for circumvention, while a provision like § III.F.2, which relies on "general but established legal terms," will provide the **[**121]** government and the Court with greater flexibility to consider the substance rather than the "mere form of Microsoft's future agreements with ISVs." *Id.* The government further notes that were there no such exception, § III.F.2 would prohibit lawful, procompetitive agreements with ISVs. *Id.* This explanation satisfies the Court that the terms of § III.F are not drawn contrary to the public interest.

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[29] Section III.F.1 is discussed *supra* Part III.B.1.c.

Viewed in their entirety, §§ III.F and III.G not only prohibit the anticompetitive conduct identified by the appellate court with regard to ISVs, IAPs, and IHVs, but these provisions extend further, to address Microsoft's conduct with other participants in the industry even though Microsoft's dealings with these entities did not give rise to liability in this case. More importantly, these provisions strike a delicate balance between the prohibition of conduct found to be anticompetitive, or conduct closely related to conduct found to be anticompetitive, and the preservation of conduct that benefits other participants in the industry, as well as consumers. The Court regards it particularly necessary when addressing Microsoft's contracting power to ensure that procompetitive, mutually **[**122]** beneficial arrangements are not prohibited by the terms of an overbroad decree. Acknowledging that the United States has weighed these considerations in the first instance, the Court regards the balance struck as one which falls within the realm of an acceptable remedy.

4. API Disclosure, Interoperability, and Related Provisions

Sections III.D and III.E generally concern the disclosure of APIs, communications protocols, and other technical information for purposes of ensuring successful interoperation with Microsoft's Windows operating system. Subsection D requires Microsoft to disclose the "APIs and related Documentation" used by "Microsoft Middleware" to interoperate with Windows. SRPFJ § III.D. The provision defines "APIs" as "the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product to obtain any services from that Windows Operating System Product." *Id.* While the rationale for this type of disclosure rests, in part, upon the finding of liability for conditioning the provision of technical information on illegal, exclusive **[*244]** agreements, **[**123]** *Microsoft, 253 F.3d at 71-72*, it can be viewed more broadly to relate to the United States' theory of the case as a whole. As recounted above, the United States proceeded to trial on the theory that Microsoft had acted anticompetitively in an effort to boost its own middleware and stifle rival middleware because those products posed a potential "platform threat." The disclosure of interfaces and related technical information pursuant to § III.D ensures the ability of competitive products to interoperate effectively with the Windows operating system and in a manner which is not disadvantaged by comparison to Microsoft's middleware technology. Accordingly, such disclosure has the potential to increase the ability of competing middleware to threaten Microsoft's operating system monopoly.

a. API Disclosures

One of the more prevalent criticisms of the SRPFJ arises in conjunction with § III.D, relating specifically to the use of the term "Microsoft Middleware." As indicated above, § III.D mandates the disclosure of the APIs relied upon by "Microsoft Middleware to interoperate with a Windows Operating System Product." SRPFJ § III.D. The definition of "Microsoft **[**124]** Middleware" is very similar to the definition of "Microsoft Middleware Product," discussed *supra* Part III.B.1.a.ii. The term "Microsoft Middleware" is used in this context, rather than "Microsoft Middleware Product," because § III.D requires the identification of particular pieces of software code.

In order to identify specifically the appropriate pieces of code, the definition of "Microsoft Middleware" identifies the code that Microsoft distributes separately from Windows and trademarks or identifies as a major version of any Microsoft Middleware Product. SRPFJ § VI.J. The oft-criticized separate distribution requirement provides not only a ready means by which to identify code, but acknowledges that the most competitively significant products will be distributed and updated at more frequent intervals than Microsoft's entire operating system product. *See* United States Resp. at 44-45. Similarly, the requirement of trademarking serves also to identify the competitively significant software, while simultaneously excluding security patches, fixes, or other small downloads. *Id. at 47-48*. Lastly, "Microsoft Middleware" must provide functionality which is the **[**125]** same or substantially similar to the functionality provided by a "Microsoft Middleware Product." SRPFJ § VI.J. Because a "Microsoft Middleware Product," by definition, is part of Windows, *id.* § VI.K, this last major requirement serves to ensure a close link to the monopoly market and Microsoft's product in that market. *See* United States Resp. at 4849. On this point, the government explains, in particular, that its case was never intended to address products that Microsoft never distributed with its Windows operating system, and therefore, the relationship to Microsoft's monopoly product is entirely consonant with the theory of liability. *Id. at 48*. The government further explains that the parameters of "Microsoft Middleware" exceed mere application to the Microsoft counterparts to Navigator and Java, extending to a number of present and future middleware technologies. Such expansion is appropriately forward-looking and accords with the general law of remedies in ***antitrust law***. *See* *United Shoe, 391 U.S. at 250*.

Criticisms of this definition in the government's remedial decree are wide-ranging, with most sharing the view that the definition **[**126]** should apply to more Microsoft software. The United States has offered a **[*245]** reasoned justification for each limitation in the definition. These explanations are directly responsive to the criticism and serve to rebut all of the various accusations regarding the parameters of "Microsoft Middleware." In short, the Court is not convinced that the parameters of "Microsoft Middleware" and the ensuing impact upon Microsoft's obligations under the proposed final judgment are inappropriately drawn or are in conflict with the public interest.

Additionally, the definition of "API" receives criticism by those filing comments. API is defined in § III.D as "the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product." SRPFJ § III.D. Some entities filing comments complain that the definition of API is too narrow. In his *Findings of Fact*, Judge Jackson described APIs as the "synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating **[**127]** system." *Findings of Fact* P 2. The definition in the SRPFJ is consistent with the description in the *Findings of Fact* and, given the liability which was affirmed by the appellate court, is appropriately limited in scope. In this regard, the Court notes that because liability in this case concerns middleware, it would far exceed that liability to require Microsoft to disclose interfaces between its operating system products and all applications and devices. Moreover, as the government explains, the definition of API is fairly broad such that "whatever Microsoft Middleware uses to request services from a Windows Operating System Product, whether it includes something that could arguably be called a 'file format' or not, is the subject of disclosure." United States Resp. at 144. Accordingly, the Court concludes that the definition of API is sufficiently broad, yet appropriately tailored to reflect the extent of liability in this case.

Similarly, some entities filing comments complain that the definition of "Documentation" is too limited. The Court finds little merit in this complaint. "Documentation" is defined in the SRPFJ as "all information regarding the identification and **[**128]** means of using APIs that a person of ordinary skill in the art requires to make effective use of those APIs." SRPFJ § VI.E. The goal of this provision is clear; the "Documentation" should enable a software developer to utilize the APIs which are disclosed pursuant to § III.D. The Court is satisfied that the definition of "Documentation" is appropriately drawn to accomplish that legitimate goal.

One additional complaint relevant to this discussion concerns the timing of the disclosures mandated by § III.D. Section III.D provides for two alternatives relevant to timing, one for new major versions of Microsoft Middleware, and another for the release of a new version of a Windows Operating System Product. *Id.* § III.D. "In the case of a new major version of Microsoft Middleware, the disclosures . . . shall occur no later than the last major beta test release of that Microsoft Middleware." *Id.* The United States explains that the "last major beta test release for various Microsoft Middleware Products" will likely occur "anywhere from two to seven months prior to the commercial release of the product." United States Resp. at 153. The government further explains that earlier release **[**129]** of the information is not feasible, despite the fact that developers within Microsoft may have earlier access to the APIs. *Id.* at 154. This is so because the API is often not finalized, tested, and fully documented at that stage, and may, in fact, continue to change. *Id.* **[*246]** Any alteration to the API threatens not only to destroy the usefulness of the disclosure for software developers, but has the capacity to hinder developers in the creation of software. *Id.* Given these bases, it does not seem unreasonable to fix a time for disclosure which will ensure that the disclosed information is stable and unlikely to be subjected to future alteration.

"In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section shall occur in a Timely Manner." SRPFJ § III.D. "Timely Manner" appears in the definition section and "means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is made available via an MSDN subscription offering or of which 150,000 or more beta copies are distributed." *Id.* § VI.R. The government explains that the timing of disclosures relevant to the release of new Windows **[**130]** Operating System Products reflects the "approximate current MSDN subscription base" such that disclosure is triggered by the distribution of 150,000 beta copies of the software. United States Resp. at 155. Once again, given the explanations in the government's response to public comments, the timing of disclosures pursuant to § III.D does not seem to be unreasonable or unjustified.

Disclosure beyond these parameters, while potentially useful to other industry participants in combating Microsoft's dominance in the operating system market, is not absolutely required by the liability in this case. Indeed, the disclosures in § III.D are not clearly directed at the redress of a specific finding of liability, but instead advance the more general antitrust remedial goal of "eliminating the effects of the illegal conduct." *Nat'l Soc'y Prof'l Eng'rs, 435 U.S. at 698*. Both the United States and Microsoft acknowledge that, at present, Microsoft discloses, supports, and evangelizes many Windows APIs. *See* Microsoft Mem. in Support of the SRPFJ at 29; United States Resp. at 140. Of course, Microsoft has a clear business incentive to do so, as it is this disclosure, in part, **[**131]** which makes the Windows platform attractive to applications developers. United States Resp. at 140-41. As the United States explains, the mandated disclosures in § III.D will be useful "in those cases where Microsoft may have a strategic interest in withholding APIs that outweighs Microsoft's natural incentive to disclose them--namely, where Microsoft's own middleware is competing with rival middleware that threatens the applications barrier to entry." *Id.* In this regard, § III.D appropriately requires disclosure of "the most competitively significant APIs . . . used by competing [middleware] products, not those used by completely different types of software." *Id. at 140*.

b. Communications Protocols

In a similar vein § III.E requires that Microsoft license, for purposes of interoperating or communicating with a Windows Operating System Product, any communications protocol installed on a Windows client which is used to interoperate or communicate with a Microsoft server operating system product without the addition of software code to the client. SRPFJ § III.E. This aspect of the proposed consent decree, like § III.D, is forward-looking and seeks to address **[**132]** the "rapidly growing server segment of the market." United States Mem. at 59. A "growing number of applications . . . run on servers, rather than on the desktop." Sibley Decl. P 56. These technologies "represent[] a strong source of competition to Microsoft in the business computing segment and may yet make a serious attack on the applications barrier to entry in the desktop PC market." *Id.* Hence, the goal of this **[*247]** disclosure is to ensure that rival middleware can interoperate with servers running Microsoft's server operating system software and thereby compete vigorously with Microsoft middleware. *Id.* In addition, enabling non-Microsoft middleware to interoperate with Microsoft's operating systems in the server segment ensures that Microsoft does not "incorporate into Windows features or functionality with which only its own servers can interoperate, and then refuse to make available information about those features non-Microsoft servers need in order to have the same opportunities to interoperate with the Windows operating system." United States Mem. at 58-59.

Although this aspect of the remedy plainly exceeds the scope of liability it is appropriately forward-looking. **[**133]** *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132, 23 L. Ed. 2d 129, 89 S. Ct. 1562-63 (1969)*; *Int'l Salt Co. v. United States, 332 U.S. 392, 400, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. Certainly it cannot be said that the disclosures specified in Sections III.D and E are a blanket prohibition on all future violations of the antitrust laws. *See* *Zenith Radio, 395 U.S. at 133*. To the contrary, these provisions are closely connected with the theory of liability in this case and further efforts to "ensure that there remain no practices likely to result in monopolization in the future." *United Shoe, 391 U.S. at 250*. As a result, the provisions plainly fall within the public interest.

c. Interoperation

Somewhat controversial in § III.D and E is the fact that the SRPFJ does not include a definition of "interoperate." Entities raising this concern assert that the CIS offers some explanation of the term, but in the absence of a definition in the SRPFJ, there is no guarantee that the term will be given the meaning ascribed in the CIS. In the CIS, the government explains that "the effect of Section III.D. is to assure Non-Microsoft Middleware meaningful access **[**134]** to the same services provided by the operating system as those available to Microsoft Middleware." CIS at 35. Similarly, with regard to § III.E, the CIS explains that subsection E "ensures that ISVs will have full access to, and be able to use, the protocols that are necessary for software located on a server computer to interoperate with, and fully take advantage of, the functionality provided by any Windows Operating System Product." *Id.* From this language, it appears that the United States defines the ability to "interoperate" as the ability to "fully take advantage of functionality" or as the ability to have "meaningful access" to services. *Id. at 35-36*. Adding further confusion, the government, in its responses to the public comments offers that § III.E is intended to "allow for the possibility of seamless two-way interoperability." United States Resp. at 165.

Critics note, and the government acknowledges, that Microsoft has espoused a different understanding of "interoperate" in its submissions to the European Union. United States Resp. at 164. Nevertheless, the government insists that it has reached a "meeting of the minds" with Microsoft as to the intended meaning **[**135]** of "interoperate" and its effect in the SRPFJ. *Id.* The government further notes that, in an effort to clarify the meaning of "interoperate," it agreed with Microsoft to add language to § III.E., supplementing the term such that "interoperate" became "interoperate, or communicate." *Id. at 164-65*; *compare* RPFJ § III.E, *with* SRPFJ § III.E. This addition provides a very simple definition of "interoperate" in the text of the decree, clarifying the parties' intent.

[*248] Courts reviewing proposed consent decrees pursuant to the Tunney Act are obliged to pay close attention to any potential ambiguity, particularly since it is the district court which must enforce the decree. *Microsoft, 56 F.3d at 1462-63*. Aware of the criticism of the lack of definition of "interoperate," the Court inquired of Microsoft as to whether there was some ambiguity in the decree or a lack of agreement with the government. Hearing Transcript ("Tr.") at 81-82 (March 6, 2002). Microsoft, responded carefully, stating that, "the competitive impact statement and the extraordinarily lengthy response to comments . . . were prepared without any input from or consultation with Microsoft." **[**136]** *Id. at 82*. Further noting that "it is impossible that two different people or parties would write any document in exactly the same way," Microsoft nevertheless expressed its agreement with the government that the parties "have a meeting of the minds" and "certainly agree with the scope and operation of the judgment." *Id. at 82-83*; *see also* United States Resp. at 164.

Taking the parties as their word, the Court is not compelled to conclude that the parties lack agreement or that the SRPFJ is ambiguous simply because Microsoft has advanced a different understanding of a particular term in an unrelated forum. So long as Microsoft and the United States have a common understanding in this case, the fact that Microsoft advanced a different position in some other context is not relevant. Moreover, a clear definition of the term appears in § III.E, as a result of the addition of the words "or communicate" in order to clarify the meaning of the term "interoperate," SRPFJ § III.E ("Microsoft shall make available . . . any Communications Protocol that is . . . (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to *interoperate, or* **[**137]** *communicate*, natively . . . with a Microsoft server operating system product.") (emphasis added). *See* United States Mem. Regarding Modifications at 5-6; United States Resp. at 164-65. Accordingly, the use of the term in § III.E, at present, does not appear to carry ambiguity. Moreover, as the parties' intent will control the interpretation of this decree, *see* *Microsoft, 147 F.3d at 945 n. 7*, and given the clarification and ensuing revision, there seems little risk of dispute as to the parties' intent should the use of the term prove troublesome in the future.

The use of the term "interoperate" in § III.D presents a slightly harder problem, as the parties did not augment the use of the term "interoperate" in § III.D with the word communicate." The government's submission is unhelpful on this point, as it refers only to the use of the term "interoperate" in § III.E and does not mention the term's use in § III.D. Nevertheless, the Court cannot conclude that the lack of definition for the term renders the provision ambiguous. Microsoft's obligations are fixed in § III.D primarily by the definition of API, rather than the use of the term "interoperate;" the **[**138]** term "interoperate" serves only to circumscribe the purpose for which the API must be disclosed. SRPFJ § III.D. The definition of API which appears in § III.D strongly indicates the meaning to be given to "interoperate" by its reference to "obtaining services from." *Id.* Therefore, rather than require a separate definition, the use of the term "interoperate" in § III.D is apparent from its context. Based on this fact and the parties' agreement that they have a "meeting of the minds," the Court is satisfied that Microsoft's **[*249]** obligations under § III.D are sufficiently clear.

It is worthy of note, at this juncture, that § III.E is directed at a segment of the industry which was addressed in a very limited manner during the liability trial and was not related to the imposition of liability. The government explains the inclusion of this provision based upon the rationale that "the United States believed that the RPFJ's effectiveness would be undercut unless it addressed the rapidly growing server segment of the market." United

States Mem. at 59. Given the forward-looking nature of § III.E, and the limited relation of servers to the liability imposed in the case, the Court recognizes **[**139]** that the protections in § III.E evidence the successful efforts of the United States to obtain a decree which not only redressed the specific conduct found to violate the antitrust laws, but to obtain protection which is prospective in its focus. Such a prospective remedy is particularly warranted in this case given the rapid pace of change in the software industry. *See* *Microsoft, 253 F.3d at 49*. In the absence of this type of provision and the other prospective provisions in the SRPFJ, it is quite possible that the core of the decree would prove prematurely obsolete. Instead, Plaintiffs and Microsoft appear to have proposed a decree that acknowledges the continuing change in the industry and expands appropriately from the imposition of liability. Although the government may not have been "strictly entitled" to such expansion, this fact cannot itself render the decree in conflict with the public interest, as contemplated by the Tunney Act. *Bechtel, 648 F.2d at 666*.

d. Reasonable, Non-Discriminatory Licenses

Closely related to the disclosures mandated by § III.D and E is § III.I, which concerns the terms pursuant to which Microsoft must **[**140]** license its intellectual property rights in conjunction with it obligations under the SRPFJ. Subsection I provides that Microsoft shall offer licenses to the relevant entities (ISVs, IHVs, IAPs, ICPs, and OEM) of "any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment." SRPFJ § III.I. Such licenses shall be "reasonable and non-discriminatory" in all regards, including the amount of royalties and monetary consideration, and shall be limited in scope such that they are no broader than necessary. *Id.* § III.I.1-2. In addition, pursuant to § III.I, Microsoft may reserve the right to prohibit the transfer, assignment, or sublicense of the intellectual property right conferred by the license. *Id.* § III.I.3. As is apparent from the terms of subsection I and the government's explanation, this provision "ensures that Microsoft cannot use its intellectual property rights to undermine the competitive value of its obligations in Sections III.D and E, while at the same time [it] permits Microsoft to take legitimate steps to prevent unauthorized use of its **[**141]** intellectual property." United States Resp. at 171. [30]

One significant complaint about this provision is that Microsoft should not be entitled to *any* royalty in exchange for its disclosures. The Court finds little merit in this position. To prohibit Microsoft from charging a reasonable royalty would require **[*250]** Microsoft to give away significant amounts of valuable intellectual property rights. The Court does not agree that the liability in this case supports, much less requires, such a drastic and draconian remedy. *See* *Microsoft, 253 F.3d at 106* ("Mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum **[**142]** competition") (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW***, P 650a, at 67). The appellate court established "a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference." *Id. at 106-07*. While this "edentulous" test was sufficient for the imposition of liability, *id. at 79*, the relative potency of the causal connection established during the liability phase cannot be overlooked in a discussion of remedy, *id. at 80* ("Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue . . . .").

Based on the specific circumstances in this case, the Court finds that the requirement that Microsoft license its intellectual property at reasonable and non-discriminatory rates is entirely appropriate. Because "reasonableness" is generally recognized as an objective standard, *see* *Stringer v. Black, 503 U.S. 222, 237, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992)*, its incorporation into the SRPRJ serves to limit substantially the terms that Microsoft may impose in licenses of information disclosed pursuant to the final judgment. Greater specificity **[**143]** as to the terms of the licenses would likely be inappropriate, as case law ***HN16***[] on the subject of licenses and antitrust remedies advises that courts are best excluded from "the administration of intricate and detailed rules" relating to business affairs. *United States v. Paramount Pictures, 334 U.S. 131, 163, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)* ("The judiciary is unsuited to affairs of business management . . . ."). Moreover, the disclosure and licensing of intellectual property serves primarily to "unfetter" the market from the effects of Microsoft's illegal conduct, rather than redress very particular exclusionary conduct. *Ford Motor Co.*, 405 U.S. at 577. Therefore, the disclosure and

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[30] During the public comment period, some entities lodged complaints about RPFJ § III.I.5, which required a cross-license of certain intellectual property rights. In response, the United States and Microsoft agreed to amend § III.I to remove subsection I.5 in its entirety. *Compare* SRPFJ § III.I, *with* RPFJ § III.I.

license of such information in the absence of a reasonable royalty would impose an unduly confiscatory remedy upon Microsoft.

e. Source Code Access

Related to these disclosure provisions are the complaints of individuals and entities that those receiving such disclosures are not afforded access to the Windows operating system source code. This complaint reflects the fact that the IFJ originally entered by Judge Jackson, thereafter vacated by the appellate court, included a provision mandating **[**144]** access by representatives of OEMs, ISVs, and IHVs to "relevant and necessary portion of the source code" in order "to facilitate compliance, and monitoring of compliance" in conjunction with efforts to enable interoperation. *Microsoft, 97 F. Supp. 2d at 67*. In this regard, the IFJ required Microsoft to make the relevant portions of the source code accessible at a "secure facility" where appropriate persons could "study, interrogate and interact" with the code. *Id.* The SRPFJ, like the IFJ, utilizes access to the source code as a means of enforcement, but limits such access to a special committee which serves Plaintiffs, rather than permitting access by representatives of the OEMs, ISVs, and IHVs. SRPFJ § IV.A.2. Hence, the same goal--ensuring compliance--is accomplished, albeit through a slightly different means. This shift in focus is abundantly appropriate given that it is Plaintiffs who are responsible for enforcement of the decree, not third parties in the marketplace who will likely benefit from **[*251]** the decree's provisions. To the extent entities or individuals desire access to the Microsoft source code for purposes other than ensuring compliance with the consent, **[**145]** such a use is discordant with the intent underlying the provision, and its predecessor in Judge Jackson's IFJ. As a result, the Court finds the absence of source code access for OEMs, ISVs, and other third parties to be of little concern.

f. Security-Based Limitations

Subsection J limits Microsoft's disclosures under the SRPFJ to ensure that the mandated disclosures do not result in the release of information which "would compromise the security of a particular installation . . . of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria." *Id.* § III.J.1(a). In addition, subsection J excludes from disclosure any API, interface, or other information which Microsoft is "lawfully directed" by a "governmental agency of competent jurisdiction" not to do so. *Id.* § III.J.1(b). The chief complaint about these so-called "security carve-out" provisions is that they are more broad than is necessary to accomplish the goal of ensuring security. Such complaints ignore the limitations in the provision that require the release of information to **[**146]** work an *actual* compromise of security, rather than a potential, hypothetical, or likely compromise of security. Similarly, as the government explains, the provision applies to "particular installations," meaning "end-user installations or a specific, narrowly-prescribed subset of installations" and not all installations using a particular product or functionality. United States Resp. at 179. Accordingly, the Court finds complaints about § III.J.1 unpersuasive.

Subsection J further limits Microsoft's disclosure obligations with regard to a specific subset of the APIs and communications protocols that Microsoft will have to disclose. The provision specifies that Microsoft may condition licenses relating to "anti-piracy systems, antivirus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product" on the requirement that the licensee:

> (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, **[**147]** (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

SRPFJ § III.J.2. Plainly, the thrust of this provision is to provide some protection for Microsoft from companies or individuals which may seek to make improper use of the API documentation and communications protocol disclosures made pursuant to the SRPFJ. Contrary to some comments, nothing in this provision authorizes Microsoft to discriminate against certain individuals or companies based on their development philosophy or not-for-profit status. Instead, subsection J.2 strikes a balance between protecting Microsoft's intellectual property rights and effecting the **[*252]** mandates of the decree. Indeed, the fears of some that they will face **[**148]** exclusion based upon having been sued for patent infringement and lost are unfounded, as such a suit is not itself evidence of "*willful* violation of intellectual property rights." *Id.* (emphasis added). Subpart (c) of § III.J merely offers Microsoft some flexibility in establishing reasonable and nondiscriminatory standards for determining that an individual or entity has not requested a license of intellectual property for some improper or illegitimate purpose that threatens Microsoft security. Nothing in the phrasing "reasonable, objective standards" authorizes Microsoft to use this term of the proposed decree to discriminate or oppress industry participants at its whim. *Id.* Concomitantly, subpart (d) does not entitle Microsoft to the licensee's intellectual property, but instead provides for independent third-party testing and verification relevant to Microsoft specifications and only where the specifications are "related to the proper operation and integrity of the systems and mechanisms identified in [§ III.J.2]." *Id.* The government explains that the cost of such independent testing is to be borne by the licensee because "with other third-party testing programs **[**149]** in the software industry, the cost is usually borne by the organization submitting the program." United States Resp. at 183. As all of these provisions constitute reasonable means of balancing competing interests, the Court fails to see any substantial merit in the complaints and comments of the provision's detractors.

5. Term of Decree

Section V of the SRPFJ provides that the decree "will expire on the fifth anniversary of the date it is entered by the Court." SRPFJ § V.A. Section V further empowers Plaintiffs to apply to the Court "for a one-time extension" of the five-year term of the decree "in any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations." *Id.* § V.B.

Though simple in language and effect, the proposed term of the decree, five years from the date of entry by the Court, has also met with significant criticism. Critics argue that the five-year term is too short. These individuals and entities contend that there is no basis to deviate from the general policy of the Antitrust Division to avoid negotiation of decrees of less than ten years in duration. *Antitrust Division Manual* **[**150]** at IV-54 (3d ed. Feb. 1998) ("With regard both to the preparation of proposed draft decrees by staff as well as to decree proposals that may be made by defendants, note that the Division's standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. The staff should not negotiate any decree of less than 10 years' duration, although decrees of longer than 10 years may be appropriate in certain circumstances."). The government responds that each decree must be tailored to fit the circumstances of the case, United States Resp. at 203 (citing *Antitrust Division Manual* at IV-51 ("While the scope of relief obtained in prior antitrust cases may be viewed as precedent, the theory behind equitable relief is that it should be fashioned to fit the particular facts of the case at issue."), and notes that the Antitrust Division has imposed five-year terms in numerous other decrees, *id.* (citing cases).

The government justifies departure from the standard ten-year term in this case because of the pace of technological change in the computer industry. United States Resp. at 202. At this point in the case, there can be no dispute that **[**151]** the industry has shown a great capacity for rapid change. As the D.C. Circuit noted in June of 2001:

> **[*253]** Just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second.

Microsoft, 253 F.3d at 49. The government observes that absent a departure from the ten-year term, there exists a substantial risk that the decree will become highly regulatory in nature. United States Resp. at 203. Given these considerations, it is difficult to fault the government for departing from the usual ten-year term in this instance.

6. Compliance and Enforcement

The final portions of the SRPFJ detail the procedures for enforcement of the decree. As noted **[**152]** above, ***HN17***[] precedent instructs the Court to "pay close attention" to provisions that address enforcement of a consent decree. *Microsoft, 56 F.3d at 1462*. Although divided into numerous parts and subparts, virtually every aspect of the enforcement and compliance mechanisms interrelates with some other aspect, such that the provisions can be best understood when viewed as a whole, rather than piecemeal. Accordingly, the Court will commence its careful analysis of the compliance and enforcement provisions in the proposed consent decree with detailed descriptions of the provisions. Once this background is established, the Court will examine the most common and salient complaints about the compliance and enforcement provisions and assess whether these complaints render this aspect of the decree to be in discord with the public interest.

a. Technical Committee and Compliance Officer

The initial focus of this portion of the consent decree concerns the "Technical Committee" which serves to "assist in enforcement of and compliance with" the terms of the consent decree. SRPFJ § IV.B.1. The three committee members are to be "experts in software design and programming. **[**153]** " *Id.* § IV.B.2. The independence of the committee members is ensured by the exclusion from candidacy of any individual employed by Microsoft or a Microsoft competitor in the past year, or retained as a consulting or testifying expert by any person in this action or other action adverse to Microsoft. *Id.* In addition, committee members shall not perform any work for Microsoft or a Microsoft competitor for two years after serving on the committee. *Id.*

Section IV.B establishes a detailed procedure for the selection of the three committee members, with each side selecting one member, and those two members selecting the third member. *Id.* § IV.B.3. All members of the committee must be appointed by the Court to serve. *Id.* Committee members shall serve for a 30-month term, which is renewable at the option of the party that initially selected that member of the committee. *Id.* § IV.B.4. The third member may be reappointed or replaced pursuant to the same procedure by which that member was selected. *Id.*

Although the Technical Committee serves Plaintiffs, Microsoft is responsible for the cost and expense of the service of the committee, including the payment of reasonable **[**154]** fees and expenses. *Id.* § IV.B.6. In addition, Microsoft is obligated **[*254]** to provide each committee member with a permanent office and related facilities on its corporate campus in Redmond, Washington. *Id.* § IV.B.7. At the further cost and expense of Microsoft, the committee may, with approval of the government, hire impartial staff and consultants to assist the committee in performing its duties. *Id.* § IV.B.8.h.

The committee is empowered broadly to "monitor Microsoft's compliance with its obligations under [the] Final Judgment." *Id.* § IV.B.8.a. In concert with this broad grant of authority, the proposed final judgment specifies that the committee may, on reasonable notice to Microsoft, interview Microsoft personnel; inspect and copy Microsoft documents; access Microsoft systems, equipment, premises, and facilities; and require Microsoft personnel to compile data, reports, or other information. *Id.* § IV.B.8.b. The proposed final judgment further specifies that the Technical Committee shall have access to Microsoft source code and that the committee may study, interrogate, and interact with the source code in conjunction with its duties. *Id.* § IV.B.8.c.

[155]** As evidenced by the reporting requirements attendant to the Technical Committee's duties, the committee is answerable to the government. The proposed final judgment mandates that the committee provide bi-annual reports to Plaintiffs regarding the actions undertaken by the committee in furtherance of its duties. *Id.* § IV.B.8.e. Such reports shall include an identification of the business practices reviewed and the ensuing recommendations of the committee to Microsoft. *Id.* Notwithstanding this reporting obligation, the committee must also provide a written report to the government immediately upon "reason to believe that there may have been a failure by Microsoft to comply with any term" of the judgment. *Id.* § IV.B.8.f.

The Technical Committee is empowered to receive complaints from Microsoft's "Compliance Officer" as well as from third parties or the government. *Id.* § IV.B.8.d. When the committee receives complaints from third parties, it may communicate with these parties regarding their complaints, but the committee is ultimately obliged to maintain confidentiality with regard to information obtained from Microsoft. *Id.* § IV.B.8.g. In fact, the proposed final **[**156]** judgment mandates that the committee and its consultants and staff enter into confidentiality agreements with Microsoft such that all information gathered by the committee from Microsoft is not disclosed beyond Microsoft, Plaintiffs, or the Court. *Id.* § IV.B.9. In this regard, the committee is expressly banned from making public statements relating to its activities. *Id.* § IV.B.10.

As the Technical Committee is the enforcement arm of the government, the substantial counterpart to the committee is the Microsoft Internal Compliance Officer. In contrast to the impartiality of the Technical Committee, however, the Compliance Officer is far more closely aligned with Microsoft. The Compliance Officer will be an employee of Microsoft responsible for administering Microsoft's antitrust compliance program and "helping to ensure compliance" with the decree. *Id.* § IV.C. In accordance with the general duty to supervise Microsoft's compliance, the Compliance Officer is specifically obligated under the proposed consent decree with distributing a copy of the final judgment to all present officers and directors of Microsoft and their successors. SRPFJ § IV.C.3. The Compliance Officer **[**157]** must ensure that such officers and directors are "annually briefed on the meaning and requirements of [the] Final Judgment and the U.S. antitrust laws and advising them that Microsoft's legal advisors are available to confer **[*255]** with them regarding any question concerning compliance with [the] Final Judgment or under the U.S. antitrust laws." *Id.* § IV.C.3.c. Likewise, the Compliance Officer must obtain from each such officer and director "an annual written certification that he or she: (i) has read and agrees to abide by the terms of [the] Final Judgment; and (ii) has been advised and understands that his or her failure to comply with [the] Final Judgment may result in a finding of contempt of court." *Id.* § IV.C.3.d. In concert with these duties, the Compliance Officer must maintain records of the above-described distribution and certification. *Id.* § IV.C.3.e. Lastly, the Compliance Officer is specifically obliged to receive complaints from third parties and the government concerning Microsoft's compliance and to maintain a record of all such complaints and the action taken by Microsoft with respect to each such complaint. *Id.* § IV.C.3.g-h

In addition to these **[**158]** core duties, both the Technical Committee and the Compliance Officer are obliged to take certain action in conjunction with efforts toward the voluntary resolution of disputes. Along with the government, the Technical Committee and the Compliance Officer may receive complaints from third parties regarding Microsoft's compliance with the terms of the decree. *Id.* § IV.D. The Compliance Officer and the Technical Committee may also receive complaints from each other and from the government. *Id.* In order to facilitate the communication of such complaints and inquiries by third parties, the Compliance Officer is responsible for providing information on Microsoft's web site regarding the submission of complaints and for enabling the submission of complaints and inquiries to the Compliance Officer via the website. *Id.* §§ IV.C.3.f. and IV.D.3.b. Within thirty days of the receipt of such complaint, Microsoft may "attempt to resolve it or reject it" and must then "promptly advise the [Technical Committee] of the nature of the complaint and its disposition." *Id.* § IV.D.3.c.

Correspondingly, when the Technical Committee receives complaints, it shall investigate such complaints **[**159]** and consult with the government regarding such investigation. *Id.* § IV.D.4. During the investigation, the Technical Committee shall meet with the Compliance Officer in an effort to allow Microsoft to respond to the substance of the complaint and, thereby, reach an informal resolution of the complaint where possible and appropriate. *Id.* Where the committee finds merit in a complaint, it shall so advise Microsoft and Plaintiffs and propose a cure. *Id.* § IV.D.4.c. Notably, the work product, findings, and recommendations of the committee are not to be admitted in "any law enforcement proceedings before the Court for any purpose," and members of the committee are prohibited from testifying in any capacity before a court or other tribunal. *Id.* § IV.D.4.d. Similarly, any information gathered by or any report from the Technical Committee is to be treated as highly confidential pursuant to the Protective Order entered in this case. *Id.* § IV.B.9.

Notwithstanding all of the procedures in place with regard to the Technical Committee, ultimately the power to enforce the terms of the decree rests with the government. SRPFJ § IV.A. Accordingly, representatives of the government **[**160]** may, [31] in complete disregard of the Technical Committee, **[*256]** subject to lawful privilege, investigate and inspect Microsoft source code, books, accounts, correspondence, memoranda, and the like in conjunction with enforcement. *Id.* § IV.A.2. The government may interview Microsoft employees and agents and require submission of written reports. *Id.* Although Plaintiffs possess "the authority to seek such orders as are necessary from the Court to enforce [the] Final Judgment," on the occasion that the United States alleges a violation of §§ III.C, III.D., III.E, or III.H, it must first provide Microsoft with the opportunity to cure prior to seeking an order from the Court. *Id.* § IV.A.4. Any such cure will not constitute a defense to enforcement with respect to "knowing, willful or systematic violations." *Id.*

[161]** Having thoroughly reviewed the provisions specific to compliance and enforcement proposed by the parties, the Court turns its attention to the merits of these provisions. The most common complaints about the compliance and enforcement scheme concern the Technical Committee, with the overall rallying cry that the committee will be an ineffective tool for delay. In sum, in the Court's view, much of the criticism in this regard misunderstands the role of the Technical Committee. Although Microsoft plays a role in the selection of the committee's members and the committee is portrayed as "independent" in many regards, the proposed decree itself, as well as the parties' filings make clear that the committee exists to assist the government in enforcing the decree. *See, e.g.*, United States Resp. at 191-93; Microsoft Mem. in Support of the SRPFJ at 61; CIS at 56-58. The impartial or independent nature of the committee's members exists primarily to enable investigation of third-party complaints for purposes of enforcement. Impartiality of the committee will likely foster an environment of cooperative resolution, rather than one of persistent conflict and litigation. Otherwise, attempts **[**162]** at enforcement have a greater potential to take on the tenor of adversary proceedings, resolved in most instances with great difficulty and delay.

Importantly, the Technical Committee is not intended as a substitute for the enforcement authority of the United States. As explained at the Tunney Act hearing, the proposed consent decree "does not . . . cede the enforcement powers of the Department of Justice to some other entity." Tr. at 39. Instead, the proposed decree appropriately devises a mechanism for the provision of impartial and expert compliance assessment to the parties charged with enforcement. Such assistance, which comes at a cost to Defendant only, can only assist Plaintiffs' enforcement efforts and should not be viewed as a hindrance or a cause of delay. Dovetailing with the misunderstanding of the role of the Technical Committee are complaints regarding the qualifications for the committee's members. Because the SRPFJ sets forth only minimum qualifications with regard to technical expertise, some entities and individuals complain that the committee will be unskilled at interpretation of the decree--which requires legal expertise. As the legal interpretation of the decree **[**163]** is properly left to the parties, with ultimate authority resting with the Court, the focus on the technical expertise of the Technical Committee is far from troubling. Although the committee will investigate technical issues and advise the government, the responsibility remains with the government to examine the terms of the decree and assess in the first instance whether, as a legal matter, the decree has been violated. Should the government take the view there has been a violation, it is the government, not the Technical Committee, which must present that view to the Court.

[*257] Similarly misunderstanding the role of the Technical Committee, some entities filing comments complain that the Technical Committee is not required to inform third parties of the status or ultimate resolution of their complaints. Once again, the committee serves Plaintiffs--the entities properly responsible for enforcing the decree, not third parties. Certainly third-party input will be significant in assessing compliance and ensuring the decree's overall effectiveness. The decree, therefore, provides wide avenues for third-party input. Still, third-party concerns cannot supplant the ultimate enforcement role **[**164]** of the government, nor should third-party complaints burden mechanisms established for the government's and ultimately the Court's benefit.

Another significant criticism regarding the Technical Committee finds its roots in the bar on the use of Technical Committee "work product, findings or recommendations" in judicial proceedings. Those who find fault in this aspect

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[31] The SRPFJ provides this power equally to the United States and the Settling States but requires that the States shall consult first with the "States' enforcement committee to minimize the duplication and burden of the exercise of [such] powers, where practicable." SRPFJ § IV.A.

of the decree tend to interpret the bar broadly, speculating that there exists a "fruit of the poisonous tree" rule, such that any information in the hands of the committee cannot be utilized by Plaintiffs in formal enforcement proceedings before the Court. Such an interpretation ignores the plain language of the provision and the unequivocal intent of the parties. The government was clear on this point on numerous occasions. The limitation on the use of Technical Committee work product does not preclude the government from "utilizing, relying on, or making derivative use of the [Technical Committee's] work product" in conjunction with its own enforcement activities, CIS at 58, nor does the provision preclude Plaintiffs from obtaining Microsoft documents from the committee for use in an enforcement proceedings. Tr. **[**165]** at 46. In short, the prohibition on the use of committee work product is most accurately described as "a narrow recognition that the opinions or conclusions reached by the committee as a whole or by members of the committee would not be admissible, but the information that they gather certainly would be used by [the government] and introduced into evidence by [the government]." *Id. at 46-47*.

b. Retention of Jurisdiction

One of the more salient concerns raised in the comments is the fact that neither Microsoft, nor the government, are obliged under the proposed decree to report to the Court regarding Microsoft's compliance with the decree. Compounding this omission from the decree is the limited nature of the clause specifying the degree to which the Court retains jurisdiction. Section VII provides in full:

> Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling either of the parties thereto to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, **[**166]** and to punish violations of its provisions.

SRPFJ § VII. The D.C. Circuit recently made clear that ***HN18***[] "district courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Pigford v. Veneman, 292 F.3d 918, 924 (D.C. Cir. 2002)*. The *Pigford* court further explained that the district court's power over a consent decree, reflecting the hybrid between judicial order and contract, is limited to two sources. A district court may interpret and enforce a decree to the extent authorized by the decree itself or by the related order. *Id. at 923*. Additionally, a district court may **[*258]** modify a decree pursuant to *Rule 60(b)(5) of the Federal Rules of Civil Procedure*. *Id.* This latter power is circumscribed by the Rule's requirements that such modification is appropriate if "it is no longer equitable that the judgment should have prospective application." *Fed. R. Civ. P. 60(b)(5)*; *Pigford, 292 F.3d at 925*. As the D.C. Circuit recounted the present state of the law, "a significant change in circumstances [may] warrant[] revision of [a] decree, **[**167]** " *id.* (quoting *Rufo v. Inmates of Suffolk Co. Jail, 502 U.S. 367, 383, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992))*, though any such revision must be "suitably tailored to the changed circumstances," *id.* (quoting *Rufo, 502 U.S. at 370*).

A strict reading of § VII would appear to limit this Court's jurisdiction to "enabling either of the parties thereto to apply to this Court . . . for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions." SRPFJ § VII. This language does not clearly vest the Court with the authority to act *sua sponte* to order certifications of compliance and other actions by the parties.

Such a circumstance is not acceptable to the Court. The Court considers it imperative, in this unusually complex case, for the Court's retention of jurisdiction to be clearly articulated and broadly drawn. Such clarity and broad reservation of power are necessary to ensure that the Court may require action of the parties when it deems appropriate and need not wait for the parties to file a motion before action **[**168]** is taken. The government, in its colloquy with the Court, indicated its view that the Court would be free to require the government to file reports with the Court on issues relating to the "progress of enforcement of the decree," Tr. at 47-48, but the retention of jurisdiction in § VII does not reflect this view. Indeed, counsel indicated that the parties expressly opted *not* to identify the specific mechanism for reporting to the Court based upon the view that they "didn't think it was [their] place to tell the Court how often [it] might want reports from [the parties]." *Id. at 48*. Counsel went on to explain that they "didn't think that Microsoft and [the government] should be negotiating that, but rather wait to hear from [the

Court] on that," anticipating that if the Court "has any concerns at all [it] will let [the parties] know and [they] will fix it." *Id.*

As the proposed final judgment is presently drafted, the Court is not convinced that it has retained the authority, on its own volition, to inform the parties of a particular concern and to require additional action by the parties. Given the parties apparent intent to the contrary, the Court cannot **[**169]** conclude that this aspect of the proposed final judgment is in the public interest. As this Court "must preside over the implementation of the decree," the Court "is certainly entitled to insist" upon precision in the decree's reflection of the intent of the parties. *Microsoft, 56 F.3d at 1461-62*. As a result, this Court takes the view that the proposed final judgment should be amended to reflect the intent expressed to the Court at the March 6, 2002, hearing. In the absence of a clear reflection of the parties' intent with regard to the Court's involvement, the Court is unable to find that the decree is in the public interest.

As the Court "can foresee difficulties in [the] implementation" of a decree wherein the retention of jurisdiction does not make clear the Court's power to act *sua sponte* as may be appropriate or necessary, the Court must "insist that [this] matter be attended to." *Id. at 1462*. The Court suggests that the public interest would be **[*259]** served if Microsoft and the United States (and the Settling States) would agree to amend the proposed final judgment to reserve for the Court, in addition to the powers presently specified in **[**170]** the proposed final judgment, the power to *sua sponte* issue orders or directions regarding to the final judgment, including, but not limited to orders regarding the construction or carrying out of the final judgment, the enforcement of compliance therewith, and the punishment of any violation thereof. Such an amendment would not appear to work a fundamental change to the parties' agreement and would ensure that the Court retains the power intended by the parties and which the Court deems necessary to ensure effective implementation of the final judgment in this case.

Because the Court has found all other aspects of the proposed final judgment to be in the public interest, the Court is loathe to reject the proposed consent decree on this defect alone. Rather, the more prudent course appears to be a conditional approval of the consent decree, dependent upon the parties' prompt agreement to the modification proposed by the Court, or some similar modification. Accordingly, out of an abundance of caution, the Court will condition its approval of the consent decree pending an alteration to § VII which makes clear that the Court may take appropriate action regarding enforcement of the **[**171]** decree on its own volition and without prompting by the parties. In the presence of such a provision, there will be no doubt that the Court may require certifications of compliance, the regular status reporting, and other action by the parties as the Court deems necessary or appropriate.

IV. CONCLUSION

In conclusion, the Court is compelled to comment more generally on the terms of the proposed remedy. First, the Court commends the parties for their intense efforts at reaching a settlement and their willingness to try to do so in the face of previous failures. Second, and more importantly, praise is due based solely on the quality of the fruits of their collaborative labors. While the proposed final judgment, in general, is appropriately crafted to address the anticompetitive conduct, as well as conduct related thereto, the Court regards the document as laudable not for these traits alone, but for the clear, consistent, and coherent manner in which it accomplishes its task. Far from an amalgam of scattered rules and regulations pieced and patched together to restrict Microsoft's anticompetitive business conduct, the proposed final judgment adopts a clear and consistent philosophy **[**172]** such that the provisions form a tightly woven fabric. The proposed final judgment takes account of the theory of liability advanced by Plaintiffs, the actual liability imposed by the appellate court, the concerns of the Plaintiffs with regard to future technologies, and the relevant policy considerations. The product, although not precisely the judgment the Court would have crafted, with the exception of the reservation of jurisdiction, does not stray from the realm of the public interest.

Based on the foregoing, the Court finds that, with the exception of § VII of the SRPFJ, the Court is satisfied that the parties have reached a settlement which comports with the public interest. With regard to § VII, the Court's only reservation concerns the retention of jurisdiction. Accordingly, the Court will conditionally approve the proposed consent decree as the final judgment in this case. Such conditional approval will become final following the submission by the parties of an amendment to § VII which reflects the parties' intention that the Court retain **[*260]** jurisdiction to take action *sua sponte* in conjunction with the enforcement of the decree. Upon receipt of such an amendment, if **[**173]** satisfied with the proposal, the Court will enter the proposed final judgment, as amended, as the final judgment in this case. The Court provides in a separate Order that the parties shall indicate their intent on this issue in a written submission filed with the Court not later than November 8, 2002.

November 1, 2002

COLLEEN KOLLAR-KOTELLY

United States District Judge

New York v. Microsoft Corp.

United States District Court for the District of Columbia

November 1, 2002, Decided

Civil Action No. 98-1233 (CKK)

Reporter

224 F. Supp. 2d 76 *; 2002 U.S. Dist. LEXIS 21185 **; 2002-2 Trade Cas. (CCH) P73,853

STATE OF NEW YORK, et al., Plaintiffs v. MICROSOFT CORPORATION, Defendant.

Notice: [1]** [EDITOR'S NOTE: PART 1 OF 3. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

Subsequent History: Judgment entered by *New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 22862 (D.D.C., Nov. 6, 2002)*

Affirmed by *Massachusetts v. Microsoft Corp., 373 F.3d 1199, 362 U.S. App. D.C. 152, 2004 U.S. App. LEXIS 13489 (2004)*

Modified by *New York v. Microsoft Corp., 2006 U.S. Dist. LEXIS 95072 (D.D.C., Sept. 21, 2006)*

Prior History: New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 21125 (D.D.C., Nov. 1, 2002)
United States v. Microsoft Corp., 253 F.3d 34, 346 U.S. App. D.C. 330, 2001 U.S. App. LEXIS 14324 (2001)

Core Terms

middleware, software, operating system, appellate court, technologies, Plaintiffs', server, platform, products, functionality, district court, handheld, Non-Microsoft, network, interoperation, license, anticompetitive, monopoly, anti trust law, user, barrier, liability phase, restrictions, interactive, television, exposed, developers, threats, decree, portions

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN1[] **Preclusion of Judgments, Law of the Case**

When issues have been resolved at a prior stage in the litigation, based upon principles of judicial economy, courts generally decline to revisit resolved issues. More than a mere rule-of-thumb, the "law of the case doctrine" refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases. Similar to the law of the case doctrine is the "mandate rule," a more powerful version of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case. Under the mandate rule, an inferior court has no power or authority to deviate from the mandate issued by an appellate court.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] Public Enforcement, State Civil Actions

It is the job of the district court to frame the remedy decree in an antitrust case, and the district court has broad discretion in doing so. The relief in an antitrust case must be effective to redress the violations and to restore competition. Not only should the relief ordered cure the ill effects of the illegal conduct, and assure the public freedom from its continuance, it necessarily must fit the exigencies of the particular case. Ultimately, the goal of a remedy in an equitable suit is not the punishment of past transgression, nor is it merely to end specific illegal practices. Rather, the remedy should effectively pry open to competition a market that has been closed by a defendant's illegal restraints. Equitable relief in an antitrust case should not embody harsh measures when less severe ones will do, nor should it adopt overly regulatory requirements which involve the judiciary in the intricacies of business management.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] Public Enforcement, State Civil Actions

In crafting a remedy specific to the violations, the court is empowered to enjoin not only the acts for which the defendant was found liable, but other related unlawful acts, lest all of the untraveled roads to restraint of trade be left open and only the worn one be closed. In this regard, the court's remedy is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Notwithstanding this flexibility, the court may not simply enjoin all future violations of the antitrust laws. Rather, a remedy should be tailored to fit the wrong creating the occasion for the remedy. Moreover, the remedial decree should be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] Public Enforcement, State Civil Actions

The mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition. Similarly, because structural relief is designed to eliminate the monopoly altogether, wisdom counsels against adopting radical structural relief in the absence of some measure of confidence that there has been an actual loss to competition that needs to be restored. Instead, the court crafting a remedy must assess the strength of the causation evidence that established liability and "tailor" the relief accordingly.

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

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

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

HN5[] Relevant Market, Product Market Definition

The definition of the relevant product market is a necessary element of a monopolization charge.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Public Enforcement, State Civil Actions**

In the antitrust context, the determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Public Enforcement, State Civil Actions**

In order to cure the ill effects of the illegal conduct, and assure the public freedom from its continuance, the remedial decree imposed by the court should range broadly through practices connected with acts actually found to be illegal.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Public Enforcement, State Civil Actions**

Once liable for an antitrust violation, a defendant may be restricted in its business so as to force a relinquishment of the fruits of the anticompetitive conduct. It is this surrender which is to assist the courts in prying open to competition a market that has been closed by defendants' illegal restraints.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Public Enforcement, State Civil Actions**

The equitable powers of the courts to remedy antitrust violations may justify uprooting all parts of an illegal scheme-the valid as well as the invalid-in order to rid the trade or commerce of all taint of the anticompetitive actions.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Public Enforcement, State Civil Actions**

A remedy in an antitrust case seeks not only to eliminate illegal conduct, but to address the effects of that conduct upon the marketplace. Pursuant to this view, therefore, it may be appropriate in some instances that a remedy address some legal conduct which, by its relation to the illegal and anticompetitive conduct, perpetuates the antitrust violator's restraint on trade. At the same time, however, an antitrust violator should not be subject to an outright denial of the ability to continue to do business and to compete with other participants in the market and in other markets.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[] Public Enforcement, State Civil Actions

In exercising its equitable jurisdiction, a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] Public Enforcement, State Civil Actions

The suggestion that antitrust violators may not be required to do more than return the market to the status quo ante is not a correct statement of the law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] Public Enforcement, State Civil Actions

A full exploration of facts is usually necessary in order for the district court properly to draw an antitrust decree so as to prevent future violations and eradicate existing evils.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN14[] Public Enforcement, State Civil Actions

Drafting an antitrust decree by necessity involves predictions and assumptions concerning future economic and business events. Whether or not the court accepts a particular factual prediction often rests upon whether the witness has identified a sound basis in fact or logic to justify the prediction. Where no such basis has been identified, unless self-evident to the court, the court may accord little weight to the prediction. Similarly, because of the predictive nature of the testimony, much of the factual testimony is meaningless unless such testimony is considered together with the accompanying argument regarding the intended use of the testimony.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Courts > Judicial Precedent

HN15[] Public Enforcement, State Civil Actions

Although precedents uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade, such measures are justified only where the required action reasonably tends to dissipate the restraints.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

HN16[] Public Enforcement, State Civil Actions

While the court's ability to impose a remedy in an antitrust case is not merely to end the specific illegal practices, there is no authorization for the court to interfere with ordinary commercial practices.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN17[] **Public Enforcement, State Civil Actions**

A district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court. The court may only restrain commission of the unlawful acts and other related unlawful acts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN18[] **Public Enforcement, State Civil Actions**

Antitrust law does not authorize the court to regulate the conduct of an antitrust violator in areas bearing little relation to the violation. The test is whether or not the required action reasonably tends to dissipate restraints and prevent evasions.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

HN19[] **Antitrust & Trade Law, Sherman Act**

Even where the government has proved antitrust violations at trial, the remedies must be of the same type or class as the violations, and the court is not at liberty to enjoin all future violations of the antitrust laws, however unrelated to violations found by the court. The court must be careful to avoid constructions of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act which might chill competition, rather than foster it.

Torts > Business Torts > Unfair Business Practices > Elements

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

HN20[] **Unfair Business Practices, Elements**

Conduct cannot be condemned as exclusionary, even where the intent behind it is anticompetitive, unless there has been a showing that the monopolist's conduct on balance harms competition. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. The federal antitrust laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. Harm to one or more competitors, however severe, is not condemned by the Sherman Act in the absence of harm to the competitive process and thereby harm to consumers.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN21[] Public Enforcement, State Civil Actions

A monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals. The court undoubtedly has the discretion to uproot all parts of an illegal scheme-the valid as well as the invalid-in order to rid the trade or commerce of all taint of the illegal conduct. Still, in resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, the court is instructed to weigh the circumstances under which the illegal acts occur.

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] Antitrust & Trade Law, Sherman Act

Action which is harmful to competitors does not, by itself, violate the antitrust laws.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] Public Enforcement, State Civil Actions

In cases where a monopolist has consummated an exclusionary act, equitable relief beyond a mere injunction against repetition of the act is generally appropriate. Recognizing the possibility that the specific act under challenge may be unique to the circumstances and unlikely to be precisely repeated, and the need to undo the various effects of the act, the relief must be "tailored" to fit the wrong. The tailoring must have sufficient breadth to ensure that a certain "class" of acts, or acts of a certain type or having a certain effect, not be repeated.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN24[] Public Enforcement, State Civil Actions

Merely for purposes of enjoining the conduct itself, exclusionary conduct is best defined rather broadly in the sense of resolving against the monopolist any doubts concerning the significance of the conduct's contribution to the monopoly.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN25[] Public Enforcement, State Civil Actions

In the context of an antitrust remedy, it is not a proper task for the court to undertake to redesign products.

Counsel: For State of New York, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney

General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of California, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Connecticut, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Florida, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Iowa, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Kansas, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly, LLP, Washington DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For Commonwealth of Kentucky, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin O' Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Louisiana, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Maryland, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For Commonwealth of Massachusetts, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Michigan, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Minnesota, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of New Mexico, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. For State of North Carolina, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Ohio, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of South Carolina, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. For State of Utah, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of West Virginia, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA. Douglas Lee Davis, Office of Attorney General State of West Virginia, Charleston, WV USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Wisconsin, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of West Virginia, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, New York, NY USA. Douglas Lee Davis, Office of Attorney General State of West Virginia, Charleston, WV USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Wisconsin, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For District of Columbia, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA. For State of Illinois, Ex Rel, PLAINTIFF: Alan R Kusinitz, New York State Attorney General's Office, Antitrust Bureau, New York, NY USA. For State of Illinois, Ex Rel, PLAINTIFF: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA. Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA. Jay L Himes, New York Department of Law, New York, NY USA. Kevin J O'Connor, Office of the Attorney General of Wisconsin, Madison, WI USA. Richard L Schwartz, New York Attorney General's Office, Antitrust Bureau, New York, NY USA. Steven R Kuney, Williams & Connolly, Washington, DC USA.

For USA Today Intervenor, PLAINTIFF: Barbara W Wall, Gannett Co, Inc, McLean, VA USA. Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA. Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA. Mark E Faris, Gannett Co, Inc, McLean VA USA. For Washington Post Intervenor, PLAINTIFF: Eric Lieberman, Washington, DC USA. For Los Angeles Times Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA. Karlene Goller, Los Angeles, CA USA. For Dow Jones & Company, Inc Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA. Stuart D Karle, Dow Jones & Co, Inc, New York, NY USA. For Cable News Network, LP, LLP Intervenor, PLAINTIFF: Jay Ward

Brown, Levine Sullivan & Koch, LLP, Washington, DC USA. For The Associated Press Intervenor, PLAINTIFF: David A Schulz, Clifford Chance Rogers & Wells LLP, New York, NY USA. For The New York Times Company Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA. For Bloomberg News Intervenor, PLAINTIFF: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA. Lee Levine, Levine Sullivan & Koch, LLP, Washington, DC USA.

For Microsoft Corporation, DEFENDANT: Bradley Paul Smith, Sullivan & Cromwell, Washington, DC USA. John L Warden, Sullivan & Cromwell, New York, NY USA. Richard J Uroksky, Sullivan & Cromwell, New York, NY USA. Steven L Holley, Sullivan & Cromwell, New York, NY USA. William H Neukom, Microsoft Corporation, Redmond, WA USA.

Roy Ad Day, MOVANT, Pro se, Tarpon Springs, FL USA.

Carl Lundgren, MOVANT, Pro se, Arlington, VA USA.

Lonnie G Schmidt, MOVANT, Pro se.

For San Jose Mercury News, Inc, MOVANT: Aileen Meyer, Washington, DC USA.

For San Jose Mercury News, Inc, MOVANT: Robert Gutkin, Pillsbury Winthrop LLP, Washington, DC USA.

For Relpromax Antitrust Inc, MOVANT: Peter Peckarsky, Washington, DC USA.

For California Plaintiffs, MOVANT: Steven F Benz, Kellogg, Huber, Hansen, Todd & Evans, PLLC, Washington, DC USA.

For The Association for Competitive Technology, MOVANT: Gene C Schaerr, Sidley Austin Brown & Wood LLP, Washington, DC USA.

For Sun Microsystems, Inc, MOVANT: Bret A Campbell, Clifford Chance Rogers & Wells LLP, Washington, DC USA.

For State of Washington, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Vermont, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Tennessee, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of South Dakota, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Oregon, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of North Dakota, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of New Jersey, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of New Hampshire, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Nevada, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Missouri, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Mississippi, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Maine, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Indiana, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Idaho, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Colorado, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Arkansas, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For State of Arizona, MOVANT: Ellen S Cooper, Office of the US Attorney General, Baltimore, MD USA.

For Gateway, Inc, MOVANT: John G Froemming, Howrey Simon Arnold & White, LLP, Washington, DC USA.

For SBC Communications Inc, MOVANT: Donald L Flexner, Boies, Schiller & Flexner LLP, Washington, DC USA.

For Onyx Software Corporation, MOVANT: Thomas J Horton, Orrick, Herrington & Sutcliffe LLP, Washington, DC USA.

Robert Koeing, MOVANT, Pro se, Oyster Bay, NY USA.

Timothy Bresnahan, MOVANT, Pro se, Stanford University Institute for Economic Policy Research, Stanford, CA USA.

Robert E Litan, MOVANT, Pro se, Washington, DC USA.

COLLEEN KOLLAR-KOTELLY, United States District Judge.

Judges: COLLEEN KOLLAR-KOTELLY, United States District Judge.

Opinion by: COLLEEN KOLLAR-KOTELLY

Opinion

[*83] [SEE TABLE OF CONTENTS IN ORIGINAL]

MEMORANDUM OPINION

"*There is a remedy for all things but death . . . .*" [1]

[*86] ***INTRODUCTION***

Presently pending before the Court are two dueling remedy proposals seeking to redress the wrongs inflicted upon competition by Defendant Microsoft Corporation. These proposals were presented to this Court following the district court's determination of liability for violation of the Sherman Act, a partial affirmance by the United States Court of Appeals for the District of Columbia Circuit, and an order of remand by the appellate court accompanied by instructions to impose a remedy. Upon review of the entire factual record in this case, the determinations of liability affirmed by the D.C. Circuit, the parties' legal memoranda, and the relevant legal authority, the Court enters the following legal and discretionary **[**2]** conclusions and order of remedy. The Court bases such conclusions and remedy upon its findings of fact, entered below and in Appendix A.

I. PROCEDURAL HISTORY

On May 18, 1998, simultaneous with the filing of a complaint by the United States in a related case, a group of state plaintiffs filed a civil complaint alleging antitrust violations by Microsoft and seeking preliminary and permanent injunctions barring the company's allegedly unlawful conduct. [2] *See* *United States v. Microsoft Corp., 253 F.3d 35, 47*. In *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C.), the federal government brought claims pursuant to federal law, while in *State of New York, et al. v. Microsoft Corp.*, No. 98-1233 (D.D.C.), the Plaintiff States [3] **[**4]**

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[1] MIGUEL DE CERVANTES, DON QUIXOTE, Part 2, Book 5, Chapter 10 (1615).

[2] Despite the 1998 filing of the instant suit, the antitrust issues raised in this litigation commenced in the mid-1990s. *See* *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 49 (D.C. Cir. 2001)* (*en banc*).

brought claims pursuant to both federal and state law. These two cases were consolidated, and following a bench trial in the consolidated cases, Judge Thomas Penfield Jackson concluded that Microsoft had violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, imposing liability for illegal monopoly maintenance, attempted monopolization, and unlawful tying. *United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.D.C. 2000).* **[**3]** Correspondingly, Judge Jackson held that Microsoft had violated the state antitrust laws analogous to §§ 1 and 2 of the Sherman Act in each of the nineteen plaintiff states and the District of Columbia. [4] *Id. at 54*. To remedy these findings of liability, Judge Jackson ordered the division of Microsoft into two separate corporations. *United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.D.C. 2000)*. Microsoft filed an appeal in both cases. On appeal, the D.C. Circuit deferred to Judge Jackson's factual findings, *Microsoft, 253 F.3d at 118*, altered his findings of liability-affirming in part and reversing in part, and vacated the remedy decree, *Microsoft 253 F.3d at 46*.

[*87] The appellate court remanded the cases to this Court with instructions to hold a "remedies-specific evidentiary hearing," *id. at 103*, and to "fashion an appropriate remedy" in light of the revised liability findings, *id. at 105*. Following remand, pursuant to Court Order, the parties in the two consolidated cases entered into intensive settlement negotiations. *See United States v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272*, Nos. 98-1232 and 98-1233 (D.D.C. Sept. 28, 2001) (order requiring the parties to enter into settlement negotiations). The settlement negotiations did not resolve both cases in their entirety. However, the United States **[**5]** and Microsoft were able to reach a resolution in *United States v. Microsoft Corp.* in the form of a proposed consent decree. The settlement negotiations were partially successful with regard to the states' case, *State of New York, et al. v. Microsoft Corp.*; a portion of the plaintiffs in that case joined the settlement between the United States and Microsoft. [5] Consequently, those states have elected not to proceed to a remedies-specific hearing in *State of New York, et al. v. Microsoft Corp.* The states which opted not to join the settlement between the United States and Microsoft have proposed a remedy distinct from that presented in the proposed consent decree.

Following expedited discovery, on March 18, 2002, an evidentiary hearing on the issue of the remedy commenced. The parties submitted the direct testimony in written format, while cross-examination **[**6]** and re-direct testimony were offered in open court. Over thirty-two trial days, the Court reviewed the written direct testimony and heard the live testimony of fifteen witnesses proffered by Plaintiffs [6] and nineteen [7] **[**8]** witnesses proffered by Microsoft. [8]

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[3] The "Plaintiff States" for purposes of this opinion are the States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, and the District of Columbia. Also plaintiffs in the suit, though their claims are not addressed in this Memorandum Opinion, are the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin.

[4] This suit was originally brought by twenty states and the District of Columbia. One state withdrew from the action prior to the issuance of liability findings by the District Court. Another state settled its claims in July of 2001. The claims of the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin were litigated through liability and have been conditionally settled as to the issue of remedy.

[5] The so-called "Settling States" are the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin.

[6] Plaintiffs presented the testimony of thirteen fact witnesses: (1) Peter Ashkin, (2) James Barksdale, (3) John Borthwick, (4) Anthony Fama, (5) Richard Green, (6) Mitchell Kertzman, (7) Dr. Carl Ledbetter, (8) Michael Mace, (9) Steven McGeady, (10) Larry Pearson, (11) David Richards, (12) Jonathan Schwartz, and (13) Michael Tiemann; and two expert witnesses: (1) Dr. Carl Shapiro; and (2) Dr. Andrew Appel.

[7] One of these nineteen witnesses was James Thomas ("Tom") Greene, Senior Assistant Attorney General for the State of California, an adverse witness whose testimony Defendant presented in the form of videotaped deposition excerpts and the transcript thereof. Def. Ex. 1530 (Greene). When referring to Mr. Greene's testimony, the Court cites to the page number which appears on the deposition transcript.

[8] Defendant presented the testimony of fifteen fact witnesses: (1) Dr. James Allchin, (2) Linda Wolfe Averett, (3) Scott Borduin, (4) David Cole, (5) Heather Davisson, (6) Brent Frei, (7) William H. Gates, III, (8) James Thomas ("Tom") Greene, (9) Chris Hofstader, (10) Christopher Jones, (11) Will Poole, (12) W. J. Sanders, III, (13) Robert Short, (14) Gregg Sutherland, and (15) Richard L. Ulmer; and four experts: (1) Dr. John K. Bennett, (2) Dr. Kenneth G. Elzinga, (3) Dr. Stuart E. Madnick, (4) Dr. Kevin M. Murphy.

Of these witnesses, Plaintiffs offered expert testimony from Dr. Andrew Appel, Professor of Computer Science at Princeton University, whom the Court qualified as an expert in the field of computer science and software engineering. Plaintiffs' only other expert was Dr. Carl Shapiro, Professor of Business Strategy at the University of California at Berkeley. The Court qualified Dr. Shapiro as an expert in the field of economics. Microsoft presented expert testimony from Dr. John Bennett, a professor in the Department of Computer Science and Electrical Computer Engineering at the University of Colorado at Boulder, and Dr. Stuart Madnick, **[*88]** Professor of Information Technology at the Sloan School of Management and Professor of Engineering Systems in the Engineering Division of the Massachusetts Institute of Technology's School of Engineering. Both Drs. Madnick and Bennett were qualified by the Court as experts in the field of computer **[**7]** science. Microsoft also offered the expert testimony of Dr. Kenneth Elzinga, Professor of Economics at the University of Virginia, and of Dr. Kevin Murphy, Professor of Business Economics in the Graduate School of Business at the University of Chicago. The Court qualified Drs. Elzinga and Murphy as experts in the field of economics.

At the outset of this phase of the proceeding, both parties proposed to offer expert testimony on the subject of decree enforcement from "legal experts." In response to a request by Microsoft to exclude such testimony, *see generally* "Defendant Microsoft Corporation's Motion in Limine to Exclude the Expert Report of John H. Shenefield Which Improperly Proffers a Legal Conclusion," the Court raised a concern that the expert legal testimony, at least as framed by the parties, was improper. The Court also expressed the opinion that the "expert legal testimony" would be presented **[**9]** more appropriately by the attorneys in the form of oral argument. In response to the Court's concern, the parties voluntarily withdrew their presentation of these expert witnesses and opted instead to present the information to the Court in the form of legal briefs and argument. *See* Trial Transcript ("Tr."). at 1633-40, 1835-40.

II. LAW OF THE CASE

HN1[] When issues have been resolved at a prior stage in the litigation, based upon principles of judicial economy, courts generally decline to revisit resolved issues. More than a mere rule-ofthumb, the "'law of the case doctrine' refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc., 311 U.S. App. D.C. 1, 49 F.3d 735, 739 (D.C. Cir. 1995)*. Similar to the law of the case doctrine is the "mandate rule," a "'more powerful version' of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." *Independent Petroleum Ass'n of Am. v. Babbitt, 344 U.S. App. D.C. 216, 235 F.3d 588, 597 (D.C. Cir. 2001)* **[**10]** (quoting *LaShawn A. v. Barry, 318 U.S. App. D.C. 380, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996)* ("An even more powerful version of the [law-of-the-case] doctrine--sometimes called the 'mandate rule'--requires a lower court to honor the decisions of a superior court in the same judicial system.")). "Under the mandate rule, 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Id.* (quoting *Briggs v. Pennsylvania R.R. Co., 334 U.S. 304, 306, 92 L. Ed. 1403, 68 S. Ct. 1039 (1948))*.

In this case, the mandate of the appellate court requires this Court to fashion a remedy appropriately tailored to the revised liability findings. *Microsoft, 253 F.3d at 105*. Not surprisingly then, the starting place for this Court's determination of an appropriate remedy is the appellate opinion in this case. As the sole issue remaining in the case concerns a remedy for Microsoft's violation of *§ 2* of the Sherman Act, rather than a reassessment of liability, the relevant portions of the appellate opinion consist of that court's discussion of *§ 2* liability. For background purposes, the Court shall summarize the pertinent portions of the appellate decision, **[**11]** placing the primary focus **[*89]** upon the appellate court's determination of *§ 2* liability.

A. Court of Appeals Opinion

1. Market Definition

The appellate court began its opinion by examining Plaintiffs' [9] **[**12]** *§ 2* Sherman Act claims and, specifically, whether the district judge had identified the proper market for purposes of assessing Microsoft's monopoly power. The appellate court concluded that the district court had properly defined the relevant market as "the licensing of all Intel-compatible PC [10] operating systems [11] worldwide." *Microsoft, 253 F.3d at 52* (quoting *Microsoft, 87 F. Supp. 2d at 36*). Having agreed with the district court's definition of the relevant market, the appellate court adopted the district court's determination that "circumstantial evidence proves that Microsoft possesses monopoly power." *Id. at 56*. The appellate court further noted that "if we were to require direct proof [of monopoly power], . . . Microsoft's behavior may well be sufficient to show the existence of monopoly power." *Id. at 57*.

[13]** ***2. Theory of Liability***

Integral to the appellate court's adoption of the market definition was its simultaneous acceptance of Plaintiffs' theory of Microsoft's market dominance. Both the district and appellate courts noted that Microsoft's lawfully-acquired monopoly is naturally protected by a "structural barrier," known as the "applications barrier to entry." *Microsoft 253 F.3d at 55*. "That barrier . . . stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base." *Id.* (citing *Findings of Fact 84 F. Supp. 2d at 18, 19 PP30, 36)*. This barrier creates a "chicken-and-egg" or network effects situation, which perpetuates Microsoft's operating system dominance because "applications will continue to be written for the already dominant Windows, [12] which in turn ensures that consumers **[*90]** will continue to prefer it over other operating systems." *Id.* Because "every operating system has different APIs," [13] applications written for

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[9] In referring to "Plaintiffs" in this context, the Court refers to those Plaintiff States which the Court identified in footnote 3. The Court notes, however, that the appellate court's opinion applies not only to the claims brought by the "Litigating States" in this case, but to the claims brought by the so-called "Settling States" in this action and by the United States in *United States v. Microsoft*, No. 98-1232 (D.D.C.).

[10] "PC" is short for "personal computer." *United States v. Microsoft, 84 F. Supp. 2d 9, P 1 (D.D.C. 1999)* (hereinafter cited as "*Findings of Fact*").

[11] The appellate court, relying upon the factual testimony presented to the district court, explained the functions of a PC operating system:

> Operating systems perform many functions, including allocating computer memory and controlling peripherals such as printers and keyboards. Operating systems also function as platforms for software applications. They do this by "exposing"-i.e., making available to software developers-routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or "APIs." For example, Windows contains an API that enables users to draw a box on the screen. Software developers wishing to include that function in an application need not duplicate it in their own code. Instead, they can "call"-*i.e.*, use-the Windows API. Windows contains thousands of APIs, controlling everything from data storage to font display.

Microsoft, 253 F.3d at 53 (citations omitted).

[12] "In 1985, Microsoft began shipping a software package [for the PC] called Windows. The product included a graphical user interface, which enabled users to perform tasks by selecting icons and words on the screen using a mouse." *Findings of Fact,* 84 F. Supp.2d at *13 P 7*. In 1995, Microsoft introduced an updated version of its Windows software known as "Windows 95." *Findings of Fact,* 84 F. Supp. 2d at *3 Wyo. 167, 3 Wyo. 168, 13 P 8*. Similarly, in 1998, Microsoft released "Windows 98." *Id.* Since that time, Microsoft has continued to update, revise, and re-create its "Windows" PC operating system. Microsoft's most current version of Windows is "Windows XP," which is available in both a "Home" edition and a "Professional" edition.

[13] "APIs" are applications programming interfaces. As Judge Jackson explained: [An] operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen.

Findings of Fact, 84 F. Supp. 2d at *12 P 2*. For a supplemental definition of "API," *see infra* note 35.

one operating system will not function on another **[**14]** operating system unless the developer undertakes the "time consuming and expensive" process of transferring and adapting, known in the industry as "porting," the application to the alternative operating system. *Microsoft, 253 F.3d at 53*.

[15]** Plaintiffs proceeded under the theory that certain kinds of software products, termed "middleware," [14] could reduce the "self-reinforcing cycle," *Findings of Fact, 84 F. Supp. 2d at 20, P 39*, by serving as a platform for applications, taking over some of the platform functions provided by Windows and thereby "weakening the applications barrier to entry," *Findings of Fact, 84 F. Supp. 2d at 28, P 68*. One of middleware's defining characteristics as a software product is its ability to "expose its own APIs." *Findings of Fact,84 F. Supp. 2d at 17, P 28*. Eventually, reasoned Plaintiffs, if applications were written to rely on the middleware API set, rather than the Windows API set, the applications could be made to run on alternative operating systems simply by porting the middleware. Ultimately, by writing to the middleware API set, applications developers could write applications which would run on any operating system on which the middleware was preset. Plaintiffs focused their attention primarily upon two such middleware threats to Microsoft's operating system dominance-Netscape Navigator [15] and the Java technologies. *See Microsoft, 253 F.3d at 53*. The district and appellate courts accepted Plaintiffs' theory of competition despite **[**16]** the fact that "neither Navigator, Java, nor any other middleware product could [at that time], or would soon, expose enough APIs to serve as a platform for popular applications." *Id.*; *Findings of Fact, 84 F. Supp. 2d at 17, 18, PP 28-29*.

3. Four-Part Test for Liability

Having concluded that the district court properly identified the relevant market as the market for Intel-compatible PC operating systems and properly excluded middleware products from that market, **[**17]** the appellate court turned its attention to the issue of whether Microsoft responded to the threat posed by middleware in violation of *§ 2* of the Sherman Act. Specifically, the appellate court set out to determine whether Microsoft "maintained, or attempted to . . . maintain, a monopoly by **[*91]** engaging in exclusionary conduct." *Microsoft, 253 F.3d at 58*. The appellate court recounted that the district court answered that inquiry in the affirmative, finding Microsoft liable for violating *§ 2* of the Sherman Act:

> by engaging in a variety of exclusionary acts . . . specifically . . .: (1) the way in which it integrated [Internet Explorer] into Windows; (2) its various dealings with Original Equipment Manufacturers ("OEMs"), Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors (ISVs), and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole.

Id. In order to review the district court's findings on this point, the appellate court outlined a four-part test for determining whether particular conduct can be said to violate ***antitrust law***. "First, **[**18]** to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers." *Microsoft, 253 F.3d at 58* (emphasis in original). Second, the plaintiff must "demonstrate that the monopolist's conduct harmed competition, not just a competitor." *Microsoft, 253 F.3d at 59*. Third, "the monopolist may proffer a 'procompetitive justification' for its conduct." *Id.* (quoting *Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 483, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992))*. If this justification stands unrebutted by the plaintiff, the monopolist may escape liability. Therefore, the fourth prong of the inquiry requires that the plaintiff "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* The appellate court stressed that, although evidence of intent is relevant "to understand the likely effect

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[14] Such software takes the name "middleware" because "it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers" and, therefore, is said to reside in the middle. *Findings of Fact, 84 F. Supp. 2d at 17, P 28*.

[15] "Although certain Web browsers provided graphical user interfaces as far back as 1993, the first widely-popular graphical browser distributed for profit, called Navigator, was brought to market by the Netscape Communications Corporation ('Netscape') in December 1994." *Findings of Fact, 84 F. Supp. 2d at 14, P 17*.

of the monopolist's conduct," when assessing the balance between the anticompetitive harm and the procompetitive effect, the trial court should focus on the "effect of [the exclusionary] conduct, not the intent behind it." *Id.*

Using this framework, the appellate **[**19]** court addressed Microsoft's challenge to each of the findings by the district court. The appellate court examined the district court's four basic areas of findings with regard to *§ 2* liability in an order different from that of the district court. The Court presents these holdings, in the order addressed by the appellate court.

4. Original Equipment Manufacturer ("OEM") Licenses

Commencing its analysis with the "licenses issued to original equipment manufacturers," [16] *Microsoft, 253 F.3d at 59*, the appellate court focused upon three license provisions "prohibiting the OEMs from: removing any desktop icons, folders, or 'Start' menu entries; (2) altering the initial boot sequence; and (3) otherwise altering the appearance of the Windows desktop," *Microsoft, 253 F.3d at 61* (citing *Findings of Fact, 84 F. Supp. 2d at 61, P 213)*. Into the category of "otherwise altering the appearance of the Windows desktop," the appellate court subsumed the automatic launch of an alternative user interface, the prohibition against the addition of icons and folders different in size and shape from those used by Microsoft, and the prohibition against the use of the "Active Desktop" feature [17] to display third-party **[*92]** brands. *Microsoft, 84 F. Supp. 2d at 62*. **[**20]** ; *see also Findings of Fact, 84 F. Supp. 2d at 61, P 213*. Of these license provisions, the appellate court concluded that, "with the exception of the one restriction prohibiting automatically launched alternative interfaces, all of the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification." *Microsoft, 84 F. Supp. 2d at 64*. In commencing its next area of analysis, the appellate court noted with regard to the license restrictions imposed upon OEMs that they "have a significant effect in closing rival browsers out of one of the two primary channels of distribution." *Id.*

5. Integration of Internet Explorer ("IE")* [**21] *and Windows

The appellate court next turned its attention toward the "integration of [Internet Explorer ("IE")] [18] and Windows." *Id.* At the outset of its analysis, the appellate court took a narrow view of the district court's determination, noting that the district court's "broad[]" condemnation of "Microsoft's decision to bind 'Internet Explorer to Windows with . . . technological shackles'" is supported by only three specific actions taken by Microsoft. *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 39*). The appellate court identified these three as (1) "excluding IE from the 'Add/Remove Programs' utility"; (2) "designing Windows so as in certain circumstances to override the user's choice of a default browser other than IE"; and (3) "commingling code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating system." *Microsoft, 84 F. Supp. 2d at 64, 65* . Pursuant to its four part test for liability, the appellate court concluded that Microsoft could be held liable for the first and the third of these actions. *Microsoft, 84 F. Supp. 2d at 65-67*. As to the second of these actions, the override **[**22]** of the user's choice of default in certain circumstances, the court determined that Microsoft had proffered a procompetitive justification that went unrebutted by Plaintiffs, namely that the override was the result of "valid technical reasons" which justified the override in a "few out of the nearly 30 means of accessing the Internet." *Microsoft, 84 F. Supp. 2d at 67* (quotation marks omitted). Finding that Plaintiffs had neither rebutted Microsoft's procompetitive justification, nor demonstrated that the anticompetitive effect of the challenged act outweighed such justification, the appellate court held that "Microsoft may not be held liable for this aspect of its product design." *Id.*

6. Agreements with Internet Access Providers ("IAPs")

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[16] Manufacturers of PCs are known as "original equipment manufacturers" or "OEMs." *Findings of Fact, 84 F. Supp. 2d at 13, P 10*.

[17] "The Active Desktop was a Microsoft feature that, if enabled, allowed the Windows user to position Web pages as open windows that appear on the background, or 'wallpaper' of the Windows desktop." *Findings of Fact, 84 F. Supp. 2d at 88, P 314*.

[18] Internet Explorer is Microsoft's Web browser. *Findings of Fact, 84 F. Supp. 2d at 14, P 17*.

Directing its attention to Microsoft's "agreements with various IAPs," [19] which the district court "condemned" as exclusionary, the appellate court identified five Microsoft actions specifically relied **[**23]** upon by the district court for this condemnation:

> (1) offering IE free of charge to IAPs[;] . . . (2) offering IAPs a bounty for each customer the IAP signs up for service using the IE browser[;] . . . (3) developing the IE Access Kit ("IEAK"), a software package that allows an IAP to "create a distinctive identity for its service in as little as a few hours by customizing the [IE] title bar, icon, start and search pages," *Findings of Fact, 84 F. Supp. 2d at 71, P 249*[;] . . . (4) offering the IEAK to **[*93]** IAPs free of charge, on the ground that those acts, too, helped Microsoft preserve its monopoly[,] [*Microsoft, 87 F. Supp. 2d at 41-42*[;] . . . (5) agreeing to provide easy access to IAPs' services from the Windows desktop in return for the IAPs' agreement to promote IE exclusively and to keep shipments of internet access software using Navigator under a specific percentage, typically 25%. *See* [*Microsoft, 87 F. Supp. 2d at 42* (citing *Findings of Fact, 84 F. Supp. 2d at 73, 74, 81, PP 258, 262, 289)*.

Microsoft, 84 F. Supp. 2d at 67-68. Grouping the first four of these actions together as "Microsoft's inducements," the appellate court held that these four actions merely "offered a consumer an attractive **[**24]** deal" and, therefore, could not be treated as anticompetitive. *Microsoft, 84 F. Supp. 2d at 68*. In contrast, the appellate court agreed with the district court that Microsoft's exclusive contracts with IAPs "are exclusionary devices, in violation of *§ 2* of the Sherman Act." *Microsoft, 84 F. Supp. 2d at 71*.

7. Agreements with Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple

The appellate court next considered Microsoft's "dealings with ICPs, which develop websites; ISVs, which develop software; and Apple, which is both an OEM and a software developer." *Microsoft, 84 F. Supp. 2d at 71*. The "deals" at issue in this portion of the case are grants of "free licenses to bundle IE with [the ICPs' and ISVs'] offerings" and the exchange of "other valuable inducements for [ICPs' and ISVs'] agreement to distribute, **[**25]** promote, and rely on IE rather than Navigator." *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 42-43*) (brackets and quotation marks omitted). The district court held these agreements to be anticompetitive in violation of *§ 2* of the Sherman Act because they had the effect of "directly inducing developers to focus on [Microsoft's] own APIs rather than ones exposed by Navigator." *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 42-43*) (quotation marks omitted).

At the outset of its analysis in this context, the appellate court concluded bluntly that "with respect to [Microsoft's] deals with ICPs, the District Court's findings do not support liability." *Id.* In contrast, the appellate court sustained the district court's finding of liability with regard to Microsoft's agreements with ISVs because Plaintiffs made "a *prima facie* showing that the deals have an anticompetitive effect," and Defendant did not successfully rebut this showing. *Microsoft, 84 F. Supp. 2d at 72*. In particular, the appellate court found that the exclusive provisions in these so-called "First Wave Agreements" with ISVs foreclosed a substantial share of the market for Navigator. **[**26]** *Id.*

Turning its attention in this context finally to Microsoft's relationship with Apple, the appellate court concluded that Microsoft's agreement with Apple was exclusionary in violation of *§ 2* of the Sherman Act. *Microsoft, 84 F. Supp. 2d at 72-74*. The appellate court recounted that in mid-1997, Microsoft and Apple entered into an agreement which obligated Microsoft to continue to release "up-to-date" versions of its office productivity software for Apple's systems, Mac Office. *Microsoft, 84 F. Supp. 2d at 73* (citing *Findings of Fact, 84 F. Supp. 2d at 95, 96, PP 350-52)*. The agreement further obligated Apple to make IE the default browser. *Id*. (citing *Findings of Fact, 84 F. Supp. 2d at 96, 96, PP 350-52)*. Pursuant to this same agreement, Apple promised not to install Navigator during the "default installation," and not to "position icons for non[-]Microsoft browsing software on the desktop of new Macintosh PC systems or Mac OS upgrades." *Id.* (quoting *Findings of Fact, 84 F. Supp. 2d at 95, 96, PP 350-52)*. Similarly, the agreement prohibited Apple "from encouraging users to substitute another browser for IE, and stated that Apple

[19] "PCs typically connect to the Internet through the services of Internet access providers ('IAPs'), which generally charge subscription fees to their customers in the United States." *Findings of Fact, 84 F. Supp. 2d at 14, P 15*.

[would] 'encourage its **[*94]** employees to use IE.'" *Id.* (quoting *Findings of Fact, 84 F. Supp. 2d at 96, P 352)* (brackets omitted). **[**27]** The appellate court concluded that "this exclusive deal between Microsoft and Apple had a substantial effect upon the distribution of rival browsers." *Id.* Given the absence of a "procompetitive justification for the exclusive dealing arrangement," the appellate court affirmed the district court's finding of *§ 2* liability based upon Microsoft's exclusive deal with Apple. *Microsoft, 84 F. Supp. 2d at 74*.

8. Java

The appellate court grouped the next category of Microsoft conduct under the heading "Java" in reference to "a set of technologies developed by Sun Microsystems" ("Sun"). *Id.* The Java technologies are described as "another type of middleware posing a potential threat to Windows' position as the ubiquitous platform for software development." *Id.* (citing *Findings of Fact, 84 F. Supp. 2d at 17, P 28)*. The appellate opinion recounts that the district court identified four steps taken by Microsoft to "exclude Java from developing as a viable cross-platform threat: (a) designing a [Java Virtual Machine ("JVM") [20]] incompatible with the one developed by Sun; (b) entering into contracts, the so-called 'First Wave Agreements,' requiring major ISVs to promote Microsoft's JVM exclusively; **[**28]** (c) deceiving Java developers about the Windows-specific nature of the tools it distributed to them; and (d) coercing Intel to stop aiding Sun in improving the Java technologies." *Id.* Of these actions, the appellate court concluded that all but the first action were anticompetitive in violation of *§ 2*. *Microsoft, 84 F. Supp. 2d at 74-78*. With regard to the first enumerated action, the incompatible JVM, the appellate court held that because the incompatible JVM did not have an anticompetitive effect which outweighed the procompetitive justification for the design, it could not provide a basis for antitrust liability. *Microsoft, 84 F. Supp. 2d at 75*.

[29]** Specifically, with regard to the First Wave Agreements, the appellate court observed that the district court had found the agreements, "although not literally exclusive . . . were exclusive in practice." *Microsoft, 253 F.3d at 75*. Although the district court did not enter precise findings as to the effect of the First Wave Agreements upon rival Java distribution, the appellate court determined that "the record indicates that Microsoft's deals with the major ISVs had a significant effect upon JVM promotion." *Id.* In the absence of procompetitive justification, the appellate court imposed liability for this aspect of the First Wave Agreements. *Microsoft, 253 F.3d at 76*.

As to the Java developer tools, the appellate court's imposition of liability focused not upon the fact that the tools created programs which were not cross-platform, but upon the fact that Microsoft deceived software developers about the Windows-specific nature of the tools. *Microsoft, 253 F.3d at 76-77*. The appellate court found that Microsoft's deception was intentional and without procompetitive explanation. *Microsoft, 253 F.3d at 77*. As a result, the appellate court imposed **[*95]** liability for Microsoft's deception. **[**30]** *Id.*

9. Intel

As noted above, the appellate court's final imposition of liability arose out of a "threat" by Microsoft directed at Intel. *Microsoft, 253 F.3d at 77*. "Intel is [a firm] engaged principally in the design and manufacture of microprocessors." *Findings of Fact, 84 F. Supp. 2d at 34, P 95*. A segment of Intel's business develops software, with the primary focus upon "finding useful ways to consume more microprocessor cycles, thereby stimulating demand for advanced Intel microprocessors." *Id.* The appellate court recounted that in 1995, Intel was in the process of "developing a high performance, Windows-compatible JVM." *Microsoft, 253 F.3d at 77*. Furthering its efforts to combat the cross-platform threat of Java to the Windows platform, Microsoft repeatedly "urged Intel not to help Sun by distributing Intel's fast, Sun compliant JVM." *Id.* Eventually, Microsoft "threatened Intel that if it did not stop aiding Sun . . . then

[20] "The Java technologies include: (1) a programming language; (2) a set of programs written in that language, called the 'Java class libraries,' which expose APIs; (3) a compiler, which translates code written by a developer into 'bytecode'; and (4) a Java Virtual Machine ('JVM'), which translates bytecode into instructions to the operating system. [*Findings of Fact,84 F. Supp. 2d at 29, P 73*. Programs calling upon the Java APIs will run on any machine with a 'Java runtime environment,' ['JRE'] that is, Java class libraries and a JVM. *Findings of Fact, 84 F. Supp. 2d at 29, PP 73, 74*." *Microsoft, 253 F.3d at 74*. The terms "JRE" and "JVM" are sometimes used interchangeably to refer to the Java platform. The court uses the term JVM throughout this Memorandum Opinion for that purpose.

Microsoft would refuse to distribute Intel technologies bundled with Windows." *Id.* Intel capitulated after Microsoft threatened to support an Intel competitor, AMD, if Intel's efforts with Java continued. *Id.*

The appellate **[**31]** court acknowledged Microsoft's anticompetitive intent, as well as the anticompetitive effect of Microsoft's actions toward Intel. *Id.* Microsoft did not offer a procompetitive justification for its treatment of Intel, but "lamely characterized its threat to Intel as 'advice.'" *Id.* Rejecting the characterization of Microsoft's threat as mere "advice," the appellate court found the district court's imposition of liability to be supported by both fact and law. *Microsoft, 253 F.3d at 77-78*. On this basis, the appellate court imposed *§ 2* liability for Microsoft's threat to Intel.

Corresponding to the above-described imposition of liability pursuant to *§ 2* of the Sherman Act, the appellate court imposed liability upon Microsoft for violations of the relevant "state law counterparts of" the *Sherman Act. Microsoft, 253 F.3d at 46*. Beyond these findings, the appellate court did not find Microsoft liable for any additional antitrust violations. Specifically, the appellate court reversed the district court's conclusion that Microsoft's "course of conduct" as a whole constitutes a separate violation of *§ 2*. *Microsoft, 253 F.3d at 78*. In addition, the appellate court rejected the district court's finding of **[**32]** attempted monopolization and remanded the *§ 1* tying claim for further proceedings at the district court level. [21] Plaintiffs opted not to pursue the tying claim on remand. [22] Joint Status Report (Sept. 20, 2001) at 2.

10. Vacating the District Court's Order of Remedy

Following its review of the district court's **[**33]** conclusions with regard to liability, the appellate court considered the district court's choice of remedy. Over the objection of Defendant Microsoft, the district court decided to consider the merits of Plaintiffs' remedy proposal in the absence of an evidentiary hearing. *Microsoft, 253* ***[*96]*** *F.3d at 98-99*; *see also Microsoft, 97 F. Supp. 2d at 59, 61*. The district court did so based on the rationale that Microsoft's evidentiary proffers largely concerned "testimonial predictions about future events" which would be of little use to the court in identifying an "optimum remedy." *Microsoft, 253 F.3d at 99* (quoting *Microsoft, 97 F. Supp. 2d at 62*). Based upon its finding of liability for illegal monopoly maintenance, attempted monopolization, and illegal tying, the district court entered a remedy "nearly identical to plaintiffs' proposal" mandating the divestiture of Microsoft Corporation into an "Operating Systems Business" and an "Applications Business." *Microsoft,253 F.3d at 99-100* (quoting *Microsoft, 97 F. Supp. 2d at 64*). The original decree entered by the district court, often referred to as the Initial **[**34]** Final Judgment ("IFJ"), also included a number of "interim restrictions on Microsoft's conduct." *Microsoft, 253 F.3d at 100*. The interim restrictions included, *inter alia*, mandatory disclosure "to third-party developers the APIs and other technical information necessary to ensure that software effectively interoperates with Windows," *id.* (describing IFJ § 3.b), a prohibition on Microsoft's ability to enter into contracts which oblige third parties to limit their "'development, production, distribution, promotion, or use of, or payment for' non-Microsoft platform-level software," *id.* (quoting IFJ § 3.e), and a "'Restriction on Binding Middleware Products to Operating System Products' unless Microsoft also offers consumers 'an otherwise identical version' of the operating system without the middleware," *id.* (quoting IFJ § 3.g).

The appellate court found three fundamental flaws in the district court's order of remedy, each of which alone justified vacating the remedial decree. The appellate court first concluded that the failure to hold an evidentiary hearing in the face of disputed facts concerning the remedy violated the "cardinal principle of our system of justice **[**35]** that factual disputes must be heard in an open court and resolved through trial-like evidentiary proceedings." *Microsoft, 253 F.3d at 101*. The appellate court rejected the district court's conclusion that evidentiary

[21] Plaintiffs' complaint also included a separate claim of "monopoly leveraging" under *§ 2* of the Sherman Act. Judge Jackson granted summary judgment in favor of Microsoft as to this claim on the grounds that the theory runs "contrary to both economic theory and the Sherman Act's plain language." *United States v. Microsoft, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485, at *27 (D.D.C. Sept. 14, 1998)*.

[22] Plaintiffs' tying claim alleged that "Microsoft's contractual and technological bundling of the IE Web browser (the 'tied' product) with its Windows operating system ('OS') (the 'tying' product) resulted in a tying arrangement that was per se unlawful." *Microsoft, 253 F.3d at 84*.

proceedings would not be useful, noting that "a prediction about future events is not, as a prediction, any less a factual issue." *Microsoft, 253 F.3d at 102*. Moreover, noted the appellate court, "drafting an antitrust decree by necessity 'involves predictions and assumption concerning future economic and business events.'" *Id.* (quoting *Ford Motor Co. v. United States, 405 U.S. 562, 578, 31 L. Ed. 2d 492, 92 S. Ct. 1142 (1972))*.

In addition to the failure to hold an evidentiary hearing, the appellate court faulted the district court for its "failure to provide an adequate explanation for the relief it ordered." *Microsoft, 253 F.3d at 103*. Finding the trial court's devotion of "a mere four paragraphs of its order to explaining its reasons for the remedy" insufficient, the appellate court observed that the initial remedy was not accompanied by an explanation of the manner in which the remedy would accomplish the objectives of a remedial decree in an antitrust case. *Id.* In this regard, the **[**36]** appellate court recited that "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' *Ford Motor Co., 405 U.S. at 577*, to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' *United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496 (1968)*." *Id.* (internal citations in original).

Lastly, the appellate court concluded that the substantial modifications to the liability imposed by the district court merited **[*97]** a new determination of the remedy for the surviving antitrust violations. In particular, the appellate court noted that of the three original findings of liability, only liability for illegal monopoly maintenance in violation of *§ 2* of the Sherman Act had survived, and even this aspect of liability had been modified. *Microsoft, 253 F.3d at 103-04*. The appellate court determined that where "sweeping equitable relief is employed to remedy multiple violations, and some-indeed most-of the findings of remediable violations do not withstand scrutiny" the remedy decree must be vacated **[**37]** because there no longer exists a rational connection between the liability imposed and the remedy ascribed thereto. *Microsoft, 253 F.3d at 105*. Accordingly, the appellate court remanded the case for this Court to resolve any factual disputes surrounding a remedy and for this Court to exercise its "broad discretion" in imposing the "relief it calculates will best remedy the conduct . . . found to be unlawful." *Id.*

11. Remand

The appellate court offered specific guidance to this Court regarding the inquiry to be undertaken following remand. In this regard, the appellate court focused most of its attention on the merits of a structural remedy, noting in particular that if, in fact, Microsoft is a "unitary company," rather than the product of mergers and acquisitions, it is not scissile. *Id.* In addition, the appellate court reiterated its concern over the quantum of proof provided to support a causal connection between the exclusionary conduct and Microsoft's persistence in the dominant market position. *Microsoft, 253 F.3d at 107*. Notably, however, the appellate court did not remark that this Court should consider whether or not to impose any remedy. Instead, the appellate court advised this **[**38]** Court to "consider which of the [original] decree's conduct restrictions remain viable in light of [its] modification of the original liability decision," *Microsoft, 253 F.3d at 105*, and admonished that the remedy imposed should be carefully "tailored to fit the wrong creating the occasion for the remedy," *Microsoft, 253 F.3d at 107* ("We have drastically altered the scope of Microsoft's liability, and it is for the District Court in the first instance to determine the propriety of a specific remedy for the limited ground of liability we have upheld.").

B. District Court's Findings of Fact and Surviving Conclusions of Law

As this Court noted above, the inquiry on remand is fundamentally constrained and guided by the conclusions of the appellate court. The appellate court's conclusions, in turn, rely heavily upon the findings of fact entered by the district court following the liability trial. After a 76-day bench trial, *Microsoft, 253 F.3d at 47*, Judge Jackson entered 412 numbered paragraphs as his "Findings of Fact," *see* *Findings of Fact, 84 F. Supp. 2d 9*. These findings provided the factual basis for the district court's ensuing conclusions of law, issued **[**39]** some four months later. *See* *Microsoft, 253 F.3d at 48*. In considering Microsoft's challenge to the district court's factual findings, the appellate court applied the usual deference to the district court's factual conclusions and found no "clear error," *see* *Microsoft, 253 F.3d at 118*. Additionally, the appellate court held that the district court's factual findings permitted meaningful appellate review. *Id.* In particular, the appellate court refused to reverse the district court's factual findings relevant to the "commingling of browsing and non-browsing code." *Microsoft, 253 F.3d at 66*. Faced with

Microsoft's continuing protestations that the district court's commingling finding was clearly erroneous, the appellate court specifically denied Microsoft's plea that it vacate Finding of Fact, 84 F. Supp. 2d at 49, P 159 "as it relates to the commingling of code." *Id.*

[*98] Because all of the district court's factual findings survived challenge on appeal, they comprise the law of this case and may be relied upon during the remedy phase of this proceeding. Crocker, 49 F.3d at 739. Indeed, it would make little sense to proceed to craft a remedy in the absence of substantial **[**40]** reliance upon the factual foundation which underlies the liability entered in this case. Hence, the factual findings of the district court, like the conclusions of the appellate court, comprise the foundation upon which this court must construct a remedy. Still, the Court remains mindful of the vital distinction between factual findings, however adverse, and legal conclusions.

A somewhat more complex problem is presented by the legal conclusions of the district court. Although exceedingly thorough in its analysis, the opinion of the appellate court did not specifically address at least one of the legal conclusions reached by Judge Jackson during the liability phase. In Part I.A.2.a.i of its opinion, the district court addressed the manner in which Microsoft battled the browser threat in the OEM channel of distribution. Microsoft, 87 F. Supp. 2d at 39. The district court concluded that "Microsoft's campaign proceeded on three fronts":

> First, Microsoft bound Internet Explorer to Windows with contractual and, later, technological shackles . . . . Second, Microsoft imposed stringent limits on the freedom of OEMs to reconfigure or modify Windows 95 and Windows **[**41]** 98 . . . . Finally, Microsoft used incentives and threats to induce especially important OEMs to design their distributional, promotional and technical efforts to favor Internet Explorer to the exclusion of Navigator.

Id. In its review of the district court's liability findings, in Part II.B.1 and 2 of its opinion, the appellate court addressed these findings in a different sequence, considering first the license restrictions Microsoft imposed upon the OEMs, Microsoft, 253 F.3d at 59-64, and second the binding or "integration" of IE and Windows, Microsoft, 253 F.3d at 64-67. The appellate court concluded its analysis of the OEM channel with its discussion of integration, never squarely discussing the district court's finding with regard to the use of "incentives and threats." *See* Microsoft, 253 F.3d at 59-67.

Microsoft acknowledges that the appellate court declined to address individually all of Judge Jackson's specific findings of liability. Microsoft Proposed Conclusions of Law (hereinafter cited as "Microsoft Prop. Concl. of Law") P 79. Microsoft contends that the "acts condemned by Judge Jackson," but not specifically addressed by the appellate court, **[**42]** "apparently were the basis for his conclusion that 'Microsoft's conduct as a whole . . . reinforces the conviction that [Microsoft] was predacious.'" *Id.* (quoting Microsoft, 87 F. Supp. 2d at 44) (emphasis omitted) (alteration by Microsoft). Drawing further upon this rationale, Microsoft argues that the appellate court's reversal of the "course of conduct" liability determination implicitly reverses any of the district court's liability findings not specifically addressed by the appellate court. *See id.*

While an attractive and simple resolution to a complex quandary, Microsoft's reasoning is flawed. In conflating all of Judge Jackson's remaining liability findings, Microsoft ignores the express holding of the appellate court. The appellate court determined to reverse the "course of conduct" liability on the grounds that the district court had *failed to identify* the acts sufficient to support its finding of liability: "The District Court did not point to *any* series of acts, each of which harms competition only slightly but the cumulative effect of which is significant enough to form **[*99]** an independent basis for liability." Microsoft, 253 F.3d at 78 **[**43]** (emphasis added). Tellingly, the appellate court enumerated "the *only specific acts*" relied upon by the district court in assessing liability on a "course of conduct" theory. *Id.* (emphasis added). In this vein, the appellate court recounted that "the only specific acts" identified by the district court, namely "Microsoft's expenditures in promoting its browser," were "not in themselves unlawful." *Id.* "Because the District Court identified no other specific acts as a basis for 'course of conduct liability,'" the appellate court reversed that liability determination. *Id.*

In light of the basis for the appellate court's reversal on this point, it is antithetical to conclude that specific anticompetitive acts clearly described by the district court elsewhere in its conclusions of law are somehow reversed by the appellate court's rejection of the "course of conduct" finding of liability. Indeed, if these findings of anticompetitive conduct could have been treated as the basis for the district court's "course of conduct" liability finding, the appellate court would have considered such findings in reviewing the basis for the district court's "course of conduct" liability **[**44]** determination. Because the appellate court declined to look beyond the particular acts enumerated by the district court in conjunction with its "course of conduct" analysis, there is no basis upon which this Court can conclude that, by reversing liability based upon a "course of conduct," the appellate court implicitly reversed findings of anticompetitive conduct entered by Judge Jackson elsewhere in his opinion.

Although the Court rejects Microsoft's argument in this regard as without rational support, the Court need not dwell long on the appropriate treatment of acts identified by the district court as anticompetitive but not addressed by the appellate court, as Plaintiffs do not rely on any of these acts. Although Plaintiffs contend that Microsoft simply did not appeal Judge Jackson's finding of liability based upon the "incentives and threats" described in *Findings of Fact, 84 F. Supp. 2d at 66, 68, PP 230-38*, Plaintiffs assert that the clearly affirmed bases of liability are sufficient to guide this Court's consideration of "the appropriate remedial provisions as to Microsoft's relations with OEMs." Plaintiffs' Proposed Conclusions of Law (hereinafter cited as "Pl. Prop. Concl. of Law") at 5. Plaintiffs **[**45]** argue that the Court may make its determination of an appropriate remedy in the absence of any reliance upon the "incentives and threats" liability finding entered by Judge Jackson. [23] Because Plaintiffs denounce any reliance upon Judge Jackson's apportioning of liability for coercing OEMs with incentives and threats, neither will the Court rely upon such a finding of liability in its consideration of the appropriate remedy.

C. General *Antitrust Law* of Remedies

It has long been established that ***HN2***[] it is the job of the district court to frame the remedy decree in an antitrust case, and the district court has broad discretion in doing so. *Int'l Salt Co. v. United States, 332 U.S. 392, 400, 92 L. Ed. 20, 68 S. Ct. 12-01 (1947)*. "The relief in an antitrust **[**46]** case must be 'effective to redress the violations' and 'to restore competition.'" *Ford Motor Co., 405 U.S. at 573* (quoting *United States v. E. I. Du Pont De Nemours & Co., 366 U.S. 316, 326, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961))*. Not only should the relief ordered **[*100]** "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance," *Ford, 405 U.S. at 575* (quoting *United States v. United States Gypsum Co., 340 U.S. 76, 88, 95 L. Ed. 89, 71 S. Ct. 160, 1951 Dec. Comm'r Pat. 580 (1950))*, "it necessarily must 'fit the exigencies of the particular case,'" *id.* (quoting *Int'l Salt, 332 U.S. at 401*). Ultimately, the goal of a remedy in an equitable suit is not the "punishment of past transgression, nor is it merely to end specific illegal practices." *Int'l Salt, 332 U.S. at 401*. Rather, the remedy should "effectively pry open to competition a market that has been closed by [a] defendant['s] illegal restraints." *Id.* Equitable relief in an antitrust case should not "embody harsh measures when less severe ones will do," 2 PHILLIP E. AREEDA ET AL., ***ANTITRUST LAW*** P 325a, at 246 (2d ed. 2000), nor should it adopt overly regulatory requirements which involve **[**47]** the judiciary in the intricacies of business management, *United States v. Paramount Pictures, 334 U.S. 131, 163, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*.

HN3[] In crafting a remedy specific to the violations, this Court is empowered to enjoin not only the acts for which the defendant was found liable, but "other related unlawful acts," lest "all of the untraveled roads to [restraint of trade] be left open and [] only the worn one be closed." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (internal quotation marks and citations omitted). In this regard, the Court's remedy "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal." *Gypsum Co., 340 U.S. at 88-89*; *see also United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)* ("Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole."). Notwithstanding this flexibility, the Court may not simply enjoin "all future violations of the antitrust laws." *Zenith Radio, 395 U.S. at 133.* **[**48]** Rather, a remedy "should be tailored to fit the wrong creating the occasion for the remedy." *Microsoft, 253 F.3d at 107*. Moreover, the case law counsels that the remedial decree

[23] Beyond this single liability finding, which the Court raised with the parties, Plaintiffs have not directed the Court to other instances where the district court ascribed liability, and the appellate court's treatment of that finding is unclear or absent.

should be "as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know[] their duties and unintended contempts may not occur." *Int'l* Salt, 332 U.S. at 400.

In reversing the district court's original order of remedy in this case, the appellate court criticized the district court for failing to explain how the remedy would "'unfetter a market from anticompetitive conduct,' Ford Motor Co., 405 U.S. at 577 . . . 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' [United Shoe, 391 U.S. at 250]." Microsoft, 253 F.3d at 103. In attempting to provide the explanation sought by the appellate court, this Court notes at the outset that the facts and circumstances of this case necessarily affect the extent to which this Court's order of remedy **[**49]** will "accomplish those objectives." *Id.* It bears repeating that the monopoly in this case was not found to have been illegally acquired, *see* United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448, 1452 (D.C. Cir. 1995), [24] but only to have been illegally **[*101]** maintained. *See* Microsoft, 253 F.3d at 46. Moreover, the appellate court observed that "the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior." 84 F. Supp. 2d at 107 (citing Findings of Fact, 84 F. Supp. 2d at 111, P 411). In this regard, the "causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market" was established "only through inference." 84 F. Supp 2d at 106-07. Given these circumstances, as the parties concede, it does not seem to be a valid objective for the remedy in this case to actually "terminate" Microsoft's monopoly. Rather, the proper objective of the remedy in this case is termination of the exclusionary acts and practices related thereto which served to illegally maintain the monopoly.

[50]** The fact that the "causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market" was established "only through inference," *id.*, has given rise to significant disagreement between the parties as to Plaintiffs' burden on remand. In its appeal, Microsoft "urged" the circuit court to "reverse on the monopoly maintenance claim, because plaintiffs never established a causal link between Microsoft's anticompetitive conduct, in particular its foreclosure of Netscape's and Java's distribution channels." Microsoft, 253 F.3d at 78. Relying heavily on the treatise on ***antitrust law*** authored by Phillip E. Areeda and Herbert Hovenkamp, the appellate court determined that liability in this case could be established through an inference of causation. Microsoft, 253 F.3d at 79 (citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 651c, at 78 (rev. ed. 1996)). Applying this "rather edentulous test for causation" the appellate court identified two relevant inquiries, the satisfaction of which would result in liability:

> (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing **[**51]** significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.

Microsoft, 253 F.3d at 79-80. On the record from the district court, the appellate court readily concluded that both inquiries had been satisfied and that liability must be imposed. *Id.*

The appellate court noted, however, that Microsoft's "concerns over causation have more purchase in connection with the appropriate remedy." 253 F.3d at 80. In particular, the appellate court noted that the strength of the causal connection is to be considered "in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue." *Id.* Again relying upon Areeda and Hovenkamp, the appellate court focused on the structural remedy that had been imposed by Judge Jackson and identified a relationship between the evidence of causation and the imposition of such a "radical" remedy:

> As we point out later in this opinion, divestiture is a remedy that is imposed only with great caution, in part because its long-term **[**52]** efficacy is rarely certain. Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural

[24] In that case, which is often recognized as the precursor to this case, the appellate court noted that "the government did not allege and does not contend-and this is of crucial significance to this case-that Microsoft *obtained* its alleged monopoly position in violation of the antitrust laws." Microsoft, 56 F.3d at 1452 (emphasis in original).

> **[*102]** relief. *See* 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 91-92 ("More extensive equitable relief, particularly remedies such as divestiture designed to eliminate the monopoly altogether, raise more serious questions and require a clearer indication of a significant causal connection between the conduct and creation or maintenance of the market power.").

Id. (internal citation omitted). Later in the opinion, the appellate court again quoted from Areeda and Hovenkamp, highlighting the need for "a clearer indication of a *significant causal connection* between the conduct and the creation or maintenance of the market power" where the remedy is structural relief. *Microsoft, 253 F.3d at 106* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 91-92) (emphasis added by appellate court). The appellate court instructed that in the absence of "a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market . . . the antitrust defendant's unlawful **[**53]** behavior should be remedied by 'an injunction against the continuation of that conduct.'" *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67).

In effect, the appellate court appears to have identified a proportionality between the strength of the evidence of the causal connection and the severity of the remedy. Accordingly, ***HN4***[] the "mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67). Similarly, because structural relief is "designed to eliminate the monopoly altogether," 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 91, "wisdom counsels against adopting radical structural relief" in the "absen[ce of] some measure of confidence that there has been an actual loss to competition that needs to be restored," *Microsoft, 253 F.3d at 80*. Instead, the court crafting a remedy must assess the strength of the causation evidence that established liability and tailor the relief accordingly. *Microsoft, 253 F.3d at 107*. [25]

[54]** While the appellate court's discussion of causal connection in Parts II.C and V.F of its opinion remains instructive on the issue of remedy, it bears emphasizing that the appellate court was largely concerned in those portions of its opinion with the propriety of a structural remedy of dissolution. Because Plaintiffs have not persisted in their request for a structural remedy of dissolution, for the most part, this Court examines the existing causal connection through a different lens than that anticipated and addressed by the appellate court. [26] Nevertheless, the Court's determination **[*103]** of the appropriate remedy in this case reflects, among other considerations, the strength of the evidence linking Defendant's anticompetitive behavior to its present position in the market.

[55]** The appellate court also noted a "practical" difficulty facing this Court relevant to the issue of remedy. *Microsoft, 253 F.3d at 48*. The appellate court appropriately observed at the outset of its review the "problematic" fact that over six years, now seven, "have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive." *Microsoft, 253 F.3d at 49*. This span of time is an "eternity in the computer industry," which is characterized by rapid change. *Id.* The appellate court further acknowledged that the "dramatic" changes that can occur in the computer industry in such a short period of time "threaten[] enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions." *Id.* The appellate court recognized that in such cases "conduct remedies may be unavailing . . . because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless)." *Id.* At a minimum, opined the

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[25] Relying upon the appellate court's discussion of causation, Microsoft has argued that Plaintiffs have not satisfied the requirements of antitrust standing ("causation") and "antitrust injury" and must do so in this remanded proceeding in order to obtain any remedy. As explained in great detail in the Court's Memorandum Opinion dated June 12, 2002, these issues were, of necessity, addressed in conjunction with the finding and affirmance of liability by the district court and appellate court. *See State of New York, et al. v. Microsoft Corp., 209 F. Supp. 2d 132*, slip op. *passim* (D.D.C.2002). In setting up this straw-man argument, Microsoft ignores the distinction between the establishment of some type of causation, which is fundamental to a finding of liability and an assessment of the strength of the causal connection between the anticompetitive behavior and the maintenance of the monopoly for purposes of crafting a remedy. Only the latter of these inquiries is presently before the Court.

[26] As the parties' arguments reflect, it is unclear whether the appellate court intended only for this court to re-examine the existing evidence relevant to the "causal connection" in conjunction with crafting a remedy, or whether Plaintiffs were to be given an opportunity to supplement the evidence relating to causation.

appellate court, such complexities demand an "evidentiary hearing on remedies-to update and flesh out the available information." *Id.*

The **[**56]** parties and the Court undertook the lengthy process of precisely such an evidentiary hearing and endeavored to update and flesh out the relevant factual information. Notwithstanding these substantial efforts and the benefits derived therefrom, as the appellate court certainly anticipated, there remain difficulties inherent in crafting conduct remedies an "eternity" after commencement of the relevant conduct. Aware, though undeterred, by these difficulties, the Court, in the exercise of its discretion, has arrived at an appropriate remedy for Microsoft's illegal behavior. Ever-mindful of the complexities identified by the appellate court and guided by the words of the Immortal Bard that "it is excellent to have a giant's strength, but it is tyrannous to use it like a giant," [27] the Court sets forth its findings of fact, order of remedy, and justification therefor.

III. SCOPE OF THE REMEDY

On December 7, 2001, Plaintiffs and Defendant simultaneously **[**57]** filed their competing proposals for a remedy in this case. In response to Plaintiffs' proposal and the discovery which ensued, Microsoft filed a motion in limine seeking "to exclude all evidence concerning server operating systems, hand-held devices, television set-top boxes and Web services." Def. Mot. in Limine to Exclude Testimony on Products Unrelated to the Limited Ground of Liability Upheld by the Ct. of Appeals at 1. Microsoft argues, *inter alia*, that these devices and products fall outside of the monopoly market and are unrelated to the conduct found to be anticompetitive and, therefore, are inappropriate for consideration and coverage by the remedy in this case. *Id.* All of the Microsoft conduct which was found to be exclusionary in violation of *§ 2* of the Sherman Act was directed at "preventing the effective distribution and use of products that might threaten that monopoly." *Microsoft, 253 F.3d at 58*. The type of products at which Microsoft directed this conduct were identified by the district court as "middleware," with a specific focus on the Navigator and the Java technologies. Having reserved ruling on Microsoft's motion and permitted the parties **[**58]** to further develop the relevant facts, the Court now addresses **[*104]** as a threshold matter the manner in which Plaintiffs propose to treat "middleware" in the remedial phase of this case.

Ordinarily, the Court might conclude rather swiftly that products which fall outside of the relevant market are inappropriate for discussion and consideration by the Court in conjunction with the crafting of a remedy for illegal monopoly maintenance. The Court does not do so in this case because the theory of liability pursuant to which Plaintiffs' prevailed involved Microsoft's response to a type of product which did not fall within the monopoly market, but nevertheless posed a potential threat to Microsoft's monopoly. Accordingly, the Court pauses to examine the monopoly market, the products which were excluded from that market, and the relationship of middleware to this market.

HN5[] The definition of the relevant product market is a necessary element of a monopolization charge. *See* *United States v. Grinnell Corp., 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Microsoft, 253 F.3d 51*. As noted above, the monopoly market in this case is the market for Intel-compatible PC operating systems. **[**59]** *See* *Microsoft, 253 F.3d at 51*. Microsoft objected to this market definition, arguing that the district court had defined the market too narrowly, improperly excluding "three types of products: non-Intel compatible operating systems (primarily Apple's Macintosh operating system, Mac OS), operating systems for non-PC devices (such as handheld computers and portal Websites), and 'middleware' products, which are not operating systems at all." *Microsoft, 253 F.3d at 52*. The appellate court summarily rejected Microsoft's challenge with regard to the exclusion of the first two types of products, observing that Microsoft had not challenged the key district court findings of fact which determined that the products were not likely to perform the functions of a PC anytime in the near future. *Id.* The appellate court considered more carefully Microsoft's argument with regard to the exclusion of middleware from the market, but ultimately concluded, *Microsoft, 253 F.3d at 54*, that middleware did not meet the test of "reasonable interchangeability," *Microsoft, 253 F.3d at 53*.

[27] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 2.

Microsoft subsequently challenged as inconsonant the exclusion of middleware from the market and Plaintiffs' **[**60]** theory of liability that Microsoft's suppression of the middleware threat could amount to illegal monopoly maintenance in violation of *§ 2*. *Microsoft, 253 F.3d at 54*. The appellate court rejected this contention based upon the distinction between the level of competitive threat relevant to establishing a market definition and the level of competitive threat relevant to the imposition of *§ 2* liability. *Id.* "Nothing in *§ 2* of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes." *Id.* The appellate court observed, in this regard, that because middleware was merely a *nascent* threat, *id*., it may simultaneously *threaten* to "become a viable substitute for Windows" and yet, remain outside of the relevant monopoly market because it is "not *presently* a viable substitute for Windows." *Id.* (emphasis added). Based upon this analysis, the appellate court affirmed the district court's identification of the relevant market and determined that Microsoft possessed monopoly power in that market. *Microsoft, 253 F.3d at 54-58*.

Notably, the district court in the liability phase provided **[**61]** only a general definition of what exactly constitutes "middleware," defining the term largely through example and the identification of key attributes, rather than absolute characteristics. As the district court pointed out in its *Findings of Fact*, Navigator had "three key middleware attributes that endowed it with the potential to diminish the applications **[*105]** barrier to entry." *Findings of Fact, 84 F. Supp. 2d at 28, P 69*. The Navigator browser was a complement to Windows, rather than a substitute operating system and, therefore, had the potential to gain widespread use. *Id.* Additionally, Navigator exposed "a set (albeit a limited one) of APIs" which provided platform capabilities, and "it had been ported to more than fifteen different operating systems." *Id.* Similarly, the Java technology exposed its own APIs and, thus, enabled applications written in Java to be ported with relative ease. *Findings of Fact, 84 F. Supp. 2d at 29, P 74*. Java had the potential to achieve the necessary ubiquity because it could be, and ultimately was, distributed along with Navigator. *Findings of Fact, 84 F. Supp. 2d at 30, P 76*. It is noteworthy that the district court regarded the potential of Navigator and Java to "hasten the demise of the applications **[**62]** barrier to entry" as a "combined effort" resulting from the "symbiosis" between the two technologies, which exceeded the potential independently held by either of the technologies. *Findings of Fact, 84 F. Supp. 2d at 30, P 77*. Although they played, at best, an extremely limited role in the liability findings, mention was made of the potential threats to Microsoft's monopoly by (1) Lotus Notes, which presented "a graphical interface that was common across multiple operating systems; . . . exposed a set of APIs to developers; and, like Navigator, . . . served as a distribution vehicle for Sun's Java runtime environment," *Findings of Fact, 84 F. Supp. 2d at 30, P 78; (2)* Intel's Native Signal Processing software, "which interacted with the microprocessor independently of the operating system and exposed APIs directly to developers of media content," *id.*; and (3) Apple's and RealNetworks' multimedia playback technologies, "which ran on several platforms (including the Mac OS and Windows) and similarly exposed APIs to content developers," *id.*

Drawing from this rather amorphous definition, as noted above, Plaintiffs identify a broad new set of technologies which they believe merits treatment by the remedy in this case. **[**63]** Plaintiffs appear to recognize that it is insufficient to simply identify other technologies that the district court excluded from the monopoly market and argue that these technologies are relevant to the remedy in this case on those grounds alone. [28] Instead, Plaintiffs attempt to establish a nexus between the newly identified technologies and the acts for which Microsoft was found liable. To establish this nexus, Plaintiffs propose that the newly identified technologies are "middleware," *see* States' Proposed Remedy ("SPR") § 22.w, or are software that poses a platform threat similar to that posed by middleware. Such a nexus, argue Plaintiffs, justifies imposition of a remedy for Microsoft's antitrust violations that broadly addresses these newly identified technologies, despite their virtual absence from the liability phase. Not surprisingly, Microsoft vehemently disagrees with the proposition that the technologies identified by Plaintiffs are sufficiently like Navigator and Java such that these technologies should be addressed by the Court's remedy in this case. As a result, the Court's consideration of the relevance of these newly identified technologies to the remedy in **[**64]** this case turns predominantly upon whether the particular technology can be viewed as a kind of

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[28] The technologies identified by Plaintiffs in this phase of the proceeding include products which, like middleware, were excluded from the monopoly market, but which, unlike middleware, did not play a role in the attribution of liability to Microsoft for exclusionary conduct. *Microsoft, 253 F.3d at 52*.

middleware, or at least as a "nascent" threat which is similar to the middleware threats addressed during the liability phase.

[*106] In the following section, the Court examines factually the various middleware and middleware-related definitions proposed in the parties' two remedies. To provide the necessary background to this discussion, the Court commences the discussion with a brief examination of the case law relied upon by Plaintiffs that is specifically relevant to the scope of the remedy. The Court next addresses and renders factual findings regarding the treatment of middleware under the two competing **[**65]** remedy proposals, as these definitions play a significant role in defining the scope of the remedy. The Court then examines the new technologies identified by Plaintiffs, as well as the theories advanced by Plaintiffs to relate these technologies to the theory of liability in this case. Following the entry of factual findings on these topics, the Court applies the relevant case law and, in the exercise of its discretion, reaches appropriate conclusions regarding the inclusion or exclusion of these technologies from the scope of the remedy. The Court's determination with regard to these technologies then informs the Court's assessment of the appropriate treatment of middleware in the remedy. Lastly, the Court addresses, both factually and legally, other attempts by Plaintiffs to broaden the scope of the remedy in this case, as well as Microsoft's opposing view, which advocates a severe narrowing of the scope of the remedy in this case.

From this analysis the Court ultimately concludes that Plaintiffs' proposed definition of "middleware" is inconsonant with the treatment of the term during the liability phase of this case. Plaintiffs include in their definition of "middleware" almost **[**66]** any software product, without regard to the potential of the product to evolve into a true platform for other applications. In addition, the Court observes that Plaintiffs' middleware definition, because of its use throughout their proposed remedy, renders various provisions of Plaintiffs' remedy ambiguous and, therefore, unenforceable. A further flaw in Plaintiffs' treatment of middleware is the inclusion of technologies which fall outside of the relevant market and which do not pose a threat to Microsoft's monopoly similar to the threat posed by nascent middleware. While the Court does not fault Plaintiffs' general approach in looking beyond the relevant market to search for the new nascent threats, the Court is unable to conclude that Plaintiffs have established that all of these technologies have the capacity to increase competition within the relevant market. Notwithstanding the Court's rejection of Plaintiffs' "middleware" definition, the Court concludes that one of the technologies identified by Plaintiffs, server/network computing, has the capacity to function in a role akin to middleware, and thereby increase competition in the relevant market. Accordingly, the Court determines **[**67]** to address this technology in a portion of the remedy where the Court need not corrupt the definition of "middleware" in order to do so.

A. Legal Authority Related to Scope of the Remedy

HN6[] "The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court." *Gypsum, 340 U.S. at 89*. Plaintiffs premise their theory with regard to the appropriate scope of the remedy for Microsoft's antitrust violations on Supreme Court precedent that instructs that an appropriate remedy in antitrust cases typically exceeds "a simple proscription against the precise [unlawful] conduct previously pursued," *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*, because "a mere prohibition of the precise scheme would be ineffectual to prevent **[*107]** restraints," *Bausch & Lomb, 321 U.S. at 727*. *See* Pl. Supp. Mem. in Opp'n to Def. Mot. in Limine to Exclude Testimony on Products Unrelated to the Limited Ground of Liability Upheld by the Ct. at 37. Indeed, the Supreme Court has long held that ***HN7***[] in order to "cure the ill effects of the illegal conduct, and assure **[**68]** the public freedom from its continuance," the remedial decree imposed by the Court in this case should "range broadly through practices connected with acts actually found to be illegal." *Gypsum, 340 U.S. at 88-89*. Yet despite unquestionable legal authority which indicates that the Court may address conduct beyond the precise parameters of that found to violate the antitrust laws, Plaintiffs advocate an extraordinarily expansive view of the conduct that can be encompassed by a remedy in this case.

Plaintiffs rely chiefly upon four cases in which the Supreme Court sanctioned behavioral remedies that governed conduct beyond the parameters of the antitrust violation. The earliest of the cases heavily relied upon by Plaintiffs is *International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. In that case, the defendant, engaged in the commerce of salt and related products, owned patents "on two machines for utilization of salt products." *Id. at 394*. The defendant distributed the machines principally through leases. *Id.* The terms of the equipment leases required the lessees to purchase from the defendant "all unpatented salt and salt **[**69]** tablets consumed in the leased machine." *Id.* Discussing whether this aspect of the leases impermissibly restrained trade, the Supreme Court concluded that although the patents conferred upon the defendant a "right to restrain others from making, vending or using the patented machine . . . the patents confer no right to restrain use of, or trade in, unpatented salt." *Id. at 395-96*. As a result, the defendant was held liable for the violation of ***antitrust law***. *Id. at 396*. To redress the liability finding, the defendant proposed a decree that enjoined it from refusing to license, lease, or sell any machine on the grounds that a licensee, lessee, or purchaser had used or planned to use salt not manufactured by defendant. *Id. at 399 n.8*. The government, however, sought and obtained a decree that, *inter alia*, directed the defendant to lease or sell the salt utilization machines generally to any applicant on non-discriminatory terms and conditions, *id. at 398 n.7*, notwithstanding the fact that the record did not reflect any "threat [by the defendant] to discriminate after the judgment of the Court is pronounced, **[**70]** " *id. at 399*.

In response to the defendant's challenge to the decree on the grounds that "the injunction should go no farther than the violation or threat of violation," the Supreme Court explained:

> We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the **[*108]** proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

Id. at 400. With this **[**71]** statement, the Supreme Court made clear that ***HN8***[] once liable for an antitrust violation, a defendant may be restricted in its business so as to force a relinquishment of the fruits of the anticompetitive conduct. It is this surrender which is to assist the courts in "prying open to competition a market that has been closed by defendants' illegal restraints." *Id. at 401*. Notably, however, despite the language regarding "relinquishment" of illegally obtained "fruits," the remedy affirmed by the Court in *International Salt* did not mandate a divestiture of the defendant's assets or a structural division of the defendant, but merely regulated the terms pursuant to which the defendant could engage in its business of leasing or selling the salt machines. *Id. at 398 n.7*.

The following year, in *United States v. Paramount Pictures, 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*, the Supreme Court reiterated its view that ***HN9***[] the equitable powers of the courts to remedy antitrust violations may justify "uprooting all parts of an illegal scheme-the valid as well as the invalid-in order to rid the trade or commerce of all taint" of the anticompetitive actions. *Id. at 148.* **[**72]** The underlying facts of that case concerned, among a number of other restraints, agreements between movie distributors and exhibitors, known as "clearances," which were "designed to protect a particular run of a film against a subsequent run." [29] *Id. at 144-45*. The district court in that case concluded that these agreements while not *per se* unlawful, could constitute unreasonable restraints of trade in some instances. *Id. at 146-47*. On the facts before it, the district court imposed liability upon the defendants for "a conspiracy to restrain trade by imposing unreasonable clearances." *Id. at 147*. Having affirmed the finding of liability on this point, the Supreme Court examined the remedial decree provision that placed the burden on the defendant distributor to prove the legality of any clearance that was subsequently challenged. The Supreme Court concluded that the remedy imposed by the district court was appropriate because the district court "could . . . have eliminated clearances completely for a substantial period of time, even though . . . they were not illegal per se." *Id. at 148*. The Supreme Court observed **[**73]** in this regard that "those who have shown such a marked proclivity for

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[29] "A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres." *Id. at 144 n.6*.

unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law." *Id.*

With these two rulings, the Supreme Court confirmed that ***HN10***[] a remedy in an antitrust case seeks not only to eliminate illegal conduct, but to address the effects of that conduct upon the marketplace. Pursuant to this view, therefore, it may be appropriate in some instances that a remedy address some legal conduct which, by its relation to the illegal and anticompetitive conduct, perpetuates the antitrust violator's restraint on trade. At the same time, however, nothing in these two cases indicates that an antitrust violator should be subject to an outright denial of the ability to continue **[**74]** to do business and to compete with other participants in the market and in other markets.

[*109] Plaintiffs next direct the Court to the Supreme Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. In that case, the Supreme Court considered antitrust claims relating to various unlawful "patent pools," including those in *Canada, England, and Australia. 395 U.S. at 105*. The trial court found liability relating to all of the "patent pools" and entered "injunctive relief against further participation in any arrangement to prevent Zenith from exporting electronic equipment into *any foreign market*." *Id. at 107* (emphasis added). The Supreme Court agreed with the court of appeals that there was insufficient evidence to support a claim for money damages relating to the Australian and English markets, *id. at 126-28 (England), 129 (Australia)*, but agreed with the district court that defendant and another entity "were conspiring to exclude Zenith and others from the Canadian market," *id. at 131*. Accordingly, the Supreme Court concluded that, "judged by the proper standard, the record **[**75]** before [it] warranted the injunction with respect to Canada." *Id.* Notwithstanding this conclusion, the Court went on to "reinstate the injunction entered by the District Court insofar as it more broadly barred [the defendant] from conspiring with others to restrict or prevent Zenith from entering any other foreign market." *Id. at 132*. The Court explained:

> ***HN11***[] In exercising its equitable jurisdiction, "(a) federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past." . . . We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by § 16, should not respond to the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts."

Id. at 132-33 (quoting *NLRB v. Express Publishing Co., 312 U.S. 426, 435, 85 L. Ed. 930, 61 S. Ct. 693, 436 (1941))*. It is from this passage that Plaintiffs appear to derive **[**76]** their familiar refrain that the remedy imposed by this Court should reach the conduct found to violate the antitrust laws, as well as conduct which is "the same or similar" to such illegal conduct. Importantly, however, as the *Zenith Radio* Court expressed the rule, the related acts must also be "unlawful" or of the "same type or class" in order to warrant injunction. *Id.* In this regard, the *Zenith Radio* case does not support so broad a reading as to say that clearly lawful practices may be enjoined simply because they will weaken the antitrust violator's competitive position.

Finally, Plaintiffs call to this Court's attention the Supreme Court's holding in *National Society of Professional Engineers v. United States* that an injunction that "goes beyond a simple proscription against the precise conduct previously pursued . . . is entirely appropriate." *435 U.S. at 698*. In that case, upon finding that an association's cannon of ethics prohibiting competitive bidding by its members was unlawful *per se*, the district court enjoined the association "from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding **[**77]** is unethical." *Id. at 697*. The Supreme Court affirmed liability and rejected the defendant's contention that the provision should be struck down because of its potential, if broadly read, to "block legitimate paths of expression on all ethical matters relating **[*110]** to bidding." *Id. at 698*. Quoting from *International Salt*, the Supreme Court noted that the "transgressor" could "bring any proper claims for relief [from the remedy] to the court's attention," *id.* (quoting *332 U.S. at 400*) (quotation marks omitted), should the defendant "wish[] to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids," *United States, 435 U.S. at 699* (quoting the court of appeals opinion in that case) (quotation marks omitted).

These four cases, argue Plaintiffs, comprise a "rich body of case law" which supports their expansive view of the remedy. Pl. Supp. Mem. in Opp'n to Def. Mot. in Limine to Exclude Testimony on Products Unrelated to the Limited

Ground of Liability Upheld by the Ct. of Appeals at 40. The Court does not agree that this body of law, though it may be "rich," can withstand the heavy burden **[**78]** heaped upon it by Plaintiffs. Undoubtedly Plaintiffs are correct that there is ample precedent to support the imposition of conduct remedies which go beyond the specific acts found to be anticompetitive, as the Supreme Court stated in a more recent summary of its own body of law on the subject:

> ***HN12***[] The suggestion that antitrust violators may not be required to do more than return the market to the status quo ante is not a correct statement of the law. In *United States v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915*, we sustained broad injunctions regulating motion picture licenses and clearances which were not related to the status quo ante.

Ford Motor Co., 405 U.S. at 573 n.8 (citations and quotation marks omitted). Plaintiffs' remedy, however, extends this precedent well beyond its clear and logical application. In each of the cases relied upon by Plaintiffs, to the extent that the remedy imposed exceeded the specific anticompetitive conduct, the restrictions were closely related to the anticompetitive conduct. As the Court explains in detail below, in this case, the scope of Plaintiffs' proposal exceeds most rational extensions of injunctive **[**79]** relief for the anticompetitive conduct. While some of the areas of expansion proposed by Plaintiffs are closely related to the circumstances which gave rise to liability in this case, the majority of practices that Plaintiffs seek to enjoin in relation to alleged "bad" acts by Microsoft do not fall squarely within the category of "acts which are of the same type or class" as those found to violate the antitrust laws. *Zenith Radio, 395 U.S. at 132*.

B. Findings of Fact Related to Scope of the Remedy

1. Introduction

HN13[] "[A] 'full exploration of facts is usually necessary in order (for the District Court) properly to draw (an antitrust) decree' so as 'to prevent future violations and eradicate existing evils.'" *United States v. Ward Baking Co., 376 U.S. 327, 330, 11 L. Ed. 2d 743, 84 S. Ct. 763-31 (1964)* (quoting *Associated Press v. United States, 326 U.S. 1, 22, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945))*. The Court observes at the outset of its examination of the evidence in this case that, in the present context, the ability of the Court to render findings of fact, in the ordinary sense, is rather limited. As the appellate court itself observed, ***HN14***[] "drafting an antitrust decree **[**80]** by necessity 'involves predictions and assumptions concerning future economic and business events.'" *Microsoft, 253 F.3d at 102* (quoting *Ford Motor Co., 405 U.S. at 578*). Whether or not this Court accepts a particular factual prediction often rests upon whether the witness has identified a sound basis in fact or logic to **[*111]** justify the prediction. Where no such basis has been identified, unless self-evident to the Court, the Court may accord little weight to the prediction. Similarly, because of the predictive nature of the testimony, much of the factual testimony is meaningless unless such testimony is considered together with the accompanying argument regarding the intended use of the testimony. The Court observes in this regard that, quite often, Plaintiffs' arguments are presented primarily through the testimony of their witnesses. Recognizing the importance of addressing these intertwined factual and legal assertions, the Court sets forth this testimony as a part of its factual discussion. In many instances, however, the Court neither credits nor rejects these intertwined assertions in its factual discussion because the Court ultimately finds **[**81]** the argument based thereon to be unpersuasive or irrelevant.

The Court further observes that, in this proceeding, factual testimony often resembles that which would otherwise appear to be a legal or discretionary conclusion. This convergence is understandable given that issues of fact and law tend to lose their already faint distinctions in the context of any discussion regarding what constitutes an appropriate or sufficient remedy. Nevertheless, in rendering its separate factual findings pursuant to *Rule 52 of the Federal Rules of Civil Procedure*, the Court has endeavored to draw the necessary distinction between predictive factual assertion and legal conclusion.

Prior to entering factual findings, the Court pauses to address the role played by Microsoft's competitors in this proceeding. It is both understandable and expected that Plaintiffs would turn to industry participants to develop the factual record regarding the impact of Microsoft's illegal conduct upon competition, to identify any new technologies which may be relevant to the issue of remedy, and to explain the relation of such technologies to the monopoly market. Undoubtedly, testimony from industry participants played **[**82]** a role during the liability phase, as such participants are most likely to have the relevant factual knowledge. *See* Microsoft, 87 F. Supp. 2d 34; Findings of Fact, 84 F. Supp. 2d 9. Thus, to the extent that Microsoft's competitors have offered testimony explaining various technologies and the impact of potential remedial provisions, their testimony is often useful to the Court. Nevertheless, where such testimony reveals a self-interest in a particular remedial provision which is not balanced by a particular benefit to competition as a whole or to other participants in the industry, the Court, of necessity, considers with caution the views of these industry participants. The Court takes careful note of those remedial proposals which advance the interests of particular competitors and takes pains to ensure that the remedy in this case is not a vehicle by which such competitors can advance their own interests. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884-59 (1993); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). **[**83]** Any other result would run contrary to ***antitrust law*** and principles of equity.

The Court has considered the evidence submitted by the parties, made determinations as to its relevancy and materiality, assessed the credibility of the testimony of the witnesses, both written and oral, and ascertained the probative significance of the documentary and visual evidence presented. Based upon the Court's consideration of the entire record in this case and all of the reasonable inferences to be **[*112]** drawn therefrom, the Court sets forth the following factual findings. The Court sets forth additional factual findings in Appendix A.

2. Treatment of Middleware

Plaintiffs and Defendant have proposed detailed injunctive relief as the remedy in this case. *See* Pl. Ex. 1509 (hereinafter "States' Proposed Remedy" or "SPR"); Def. Ex. 1020 (hereinafter "Second Revised Proposed Final Judgment" or "SRPFJ"). Integral to understanding the two remedies proposed in this case is a preliminary understanding of the manner in which the two remedies treat middleware. In simple terms, the treatment of middleware in the two remedies plays a significant role in defining the scope of products which will receive **[**84]** various protections under the terms of the respective remedies. For example, both proposed remedies impose restrictions upon Microsoft's ability to retaliate against companies which sell or support third-party middleware. *See, e.g.*, SPR § 8; SRPFJ § III.A. In addition, both proposed remedies address the middleware portions of Microsoft's operating system, imposing certain requirements upon Microsoft with regard to its product design related to these portions of its operating system. *See, e.g.*, SPR § 2.c; SRPFJ § III.H. By way of further example, both proposed remedies require Microsoft to provide certain kinds of technical information with regard to the interaction between its operating system and its software products which are treated as Microsoft middleware. *See, e.g.*, SPR § 4; SRPFJ § III.D. By addressing middleware of various types, both remedies intend to increase the ability of third-party middleware to provide platform capabilities which rival the platform function of the Windows operating system.

a. "Middleware" and Related Definitions in Microsoft's Proposal

Despite these similarities in addressing the treatment of middleware, the two remedy **[**85]** proposals adopt rather distinct and divergent approaches to defining the term. Microsoft's proposed remedy does not actually use the term "middleware" standing alone, but instead addresses primarily two types of software: "Microsoft Middleware Products" and "NonMicrosoft Middleware Products." As is quite apparent from the terminology, Microsoft's remedy proposal draws a distinction between middleware technology incorporated into Microsoft's own products and the middleware capabilities of third-party software products. Somewhat counter-intuitively, "Microsoft Middleware Products" and "Non-Microsoft Middleware Products," as defined in the SRPFJ, do not mirror each other, meaning that "Microsoft Middleware Products" are *not* defined as the Microsoft versions of "Non-Microsoft Middleware Products." *See* SRPFJ § VI.K, N. This unexpected relationship between the two definitions results from the different uses of the definitions in specific portions of Microsoft's remedy proposal.

The term "middleware," as used in the liability phase of this case, was not limited to precise types of functionality, but instead encompassed products displaying certain "key" attributes that "endow" the **[**86]** technology with the "potential to diminish the applications barrier to entry." *Findings of Fact, 84 F. Supp. 2d at 28, P 69*. In other words, the middleware in need of protection was characterized as the software products which "Microsoft feared . . . because they facilitated the development of user-oriented software that would be indifferent to the identity of the underlying operating system." *Findings of Fact, 84 F. Supp. 2d at 30, P 78*. The liability findings of this case primarily concern Microsoft's efforts to compete with two specific **[*113]** middleware products: (1) the Navigator Web browsing software from Netscape and (2) Sun's Java technologies. *See* *Microsoft, 253 F.3d at 53*. Plaintiffs established that Navigator and Java, because they were cross-platform-meaning they ran on multiple PC operating systems-had the potential to develop into software development platforms that would attract the attention of applications developers. *See id*. The district and appellate courts accepted Plaintiffs' theory that, if a sufficient number of ISVs wrote applications that drew on capabilities provided by these middleware platforms, consumers would have less interest in running applications on Windows and might use **[**87]** non-Microsoft operating systems under their Web-browsing and/or Java software layer, such that the Windows base could be replaced with some other operating system that would support the middleware. *Microsoft, 253 F.3d at 55*; *Findings of Fact,84 F. Supp. 2d at 17,18, PP 28-29*. In this regard, the surviving liability determinations turn largely on Microsoft's efforts to thwart Netscape's ability to distribute Navigator and Sun's ability to distribute Java in the primary channels of distribution. *See* *Microsoft, 253 F.3d 59-78*.

The potential competitive significance of Navigator and Java turned on the key attributes of those programs which, together, held the potential to provide an easily portable software development platform. [30] *Findings of Fact, 84 F. Supp. 2d at 28-30, PP 69-77*. First, the software provided a complement to Windows, rather than a replacement. *Findings of Fact, 84 F. Supp. 2d at 28, PP 69-70, 73-74*. In addition, Navigator and Java exposed a set of APIs which provided a platform so that developers, relying on the platform capabilities of the programs, could write multiple types of applications to run on Navigator and Java. *Findings of Fact, 84 F. Supp. 2d at 28, 29, P 69, 74*. Finally, Navigator and Java both ran on Windows, as well **[**88]** as other PC operating systems, such that reliance on Navigator and Java's API set would render applications instantly portable to multiple operating systems. *Id.* Adding to this potential was the newly emerging popularity of the Internet and Internet browsing software, which provided a significant purchasing incentive to first-time PC buyers. *Findings of Fact, 84 F. Supp. 2d at 28, P 70*.

i. "Non-Microsoft Middleware" in the SRPFJ

Given the defining trait of running on multiple operating systems, "middleware," as the term was utilized during the liability phase, most frequently refers to third-party, non-Microsoft software. Microsoft's own software products are unlikely to behave as true middleware because Microsoft, as the monopolist, has little interest in creating an alternative platform which is portable from Microsoft's operating system to a non-Microsoft operating **[**89]** system. Still, because Microsoft software products often provide a functionality similar to that provided by a thirdparty middleware product, such software is often treated as Microsoft middleware. Microsoft's remedy proposal therefore uses the term "Non-Microsoft Middleware" to make clear the reference to third-party software. "Non-Microsoft Middleware" is defined in the SRPFJ as:

> a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to **[*114]** or run on that non-Microsoft Operating System.

SRPFJ § VI.M. "Non-Microsoft Middleware," as that term is defined in the SRPFJ, captures the essence of the middleware threats which were discussed during the liability phase. *See id.* In fact, the definition of "Non-Microsoft Middleware" expands beyond the middleware discussed at the liability phase in that it does not require that the software products already run **[**90]** on multiple PC operating systems, only that they have the potential, *if ported* to such operating systems, to serve as platforms for applications. *See id.*

The term "Non-Microsoft Middleware" is noteworthy for the breadth of its coverage of software products without limitation as to specific types of functionality. Consistent with the liability phase, these software products are

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[30] A "platform" is software that provides functionality upon which ISVs can call during the creation of their own software programs. *See* Gates P 52.

principally limited by the requirement that they run on Microsoft's monopoly product-Windows, while exposing a range of functionality through published APIs. *Id.* "Non-Microsoft Middleware" is utilized in significant portions of Microsoft's remedy proposal and is the term which most often identifies the products which will receive some form of protection under Microsoft's remedy proposal. For example, § III.A of the SRPFJ prohibits Microsoft, *inter alia*, from retaliating against OEMs for supporting in any way "Non-Microsoft Middleware." *Id.* § III.A. Likewise, § III.C of Microsoft's remedy proposal restricts Microsoft's ability to impose license restrictions upon OEMs with regard to the installation and display of icons, shortcuts, and menu entries for "Non-Microsoft Middleware." *Id.* **[**91]** § III.C. Therefore, under the umbrella of "Non-Microsoft Middleware," Microsoft's remedy proposal affords coverage or protection to a wide variety of third-party software products. [31]

ii. "Non-Microsoft Middleware Product" in the SRPFJ

Microsoft's proposed remedy also uses the term "Non-Microsoft Middleware Product," which is defined similarly to "Non-Microsoft Middleware," but adds a requirement that "at least one million copies" of the product "were distributed in the United States within the previous year." SRPFJ § VI.N. Some of Plaintiffs' witnesses contended that the definition of "NonMicrosoft Middleware Product" is in discord with the use of the term "middleware" **[**92]** during the liability phase because it requires some degree of popularity for the product before it is covered by the definition as a middleware product. Specifically, Plaintiffs' witnesses pointed to the "one-million-copies" threshold mark in the "Non-Microsoft Middleware Product" definition and argued that it excludes the kinds of nascent threats which are most similar to the products toward which Microsoft was found to have directed its illegal conduct. *See, e.g.*, Ashkin P 169; Richards P 139. To the contrary, the one-million-copies threshold is consistent with the treatment of middleware in the liability phase of this proceeding. The one-million-copies distribution requirement in the definition of "Non-Microsoft Middleware Products" is reflective of the treatment of middleware threats in this case because the district and appellate courts did not merely focus on *any* software with the potential to serve as a multi-purpose platform, but specifically focused upon middleware which could "gain widespread use based on its value as a complement to **[*115]** Windows." *Findings of Fact,84 F. Supp. 2d at 28, P 69*; *see also* *Findings of Fact, 84 F. Supp. 2d at 29, PP 72* (describing Navigator's widespread adoption after its release), **[**93]** *Findings of Fact, 84 F. Supp. 2d at 30, P 76* (describing Java's inclusion in Navigator). The products upon which Judge Jackson focused in imposing liability were not merely middleware, but were middleware *threats*, because of their popular use, platform capabilities, and their ensuing ability to reduce the applications barrier to entry. *Findings of Fact, 84 F. Supp. 2d at 28-30, PP 69-78*.

Additionally, it is noteworthy that the term "Non-Microsoft Middleware Product" is utilized in only one section of Microsoft's proposed remedy, § III.H. This portion of Microsoft's remedy proposal requires Microsoft to configure its operating system products so as to permit the removal of end-user access to, and certain "automatic invocations" [32] of "Microsoft Middleware Products," as well as "Non-Microsoft Middleware Products." SRPFJ § III.H.1. This portion of the SRPFJ also provides for the replacement of "Microsoft Middleware Products" with "Non-Microsoft Middleware Products" in very specific instances. *Id.* § III.H.2. Because this portion of Microsoft's proposed remedy requires Microsoft to undertake the redesign of its own product, Jones P 119, the one-million-copies threshold relieves Microsoft of the obligation to redesign its product to accommodate **[**94]** a particular piece of software with extremely limited use. Elsewhere in Microsoft's remedy proposal, where there is no burden upon Microsoft to redesign its product, the one-million-copies distribution threshold does not apply. *See, e.g.*, SRPFJ § III.A, C.

To emphasize the limited relevance of the one-million-copies threshold, the Court reiterates that Microsoft's remedy proposal primarily utilizes the term "Non-Microsoft Middleware," which does not incorporate any minimum threshold for distribution, in its extension of protection to products well beyond the types of products that were addressed during the liability phase. This lack of a threshold leads to the inclusion in the remedy of virtually any nascent

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[31] For example, pursuant to the definition of "Non-Microsoft Middleware," products competitive with Microsoft Office would receive protection from various types of adverse action by Microsoft, notwithstanding the fact that Microsoft Office is a product which has always been separate and distinct from Microsoft's operating system.

[32] The term "automatic invocations" refers generally to the launching of a particular piece of software functionality without the direct invocation of such software by the user.

"middleware" technology, regardless of its popularity or promise of success. Therefore, the key distinction between the two **[**95]** definitions is rooted in the liability determination, as well as practical considerations attendant to the imposition of design obligations upon Microsoft.

iii. "Microsoft Middleware Product" in the SRPFJ

In contrast to the broad definitions of "Non-Microsoft Middleware" and "Non-Microsoft Middleware Products," the term "Microsoft Middleware Product" is defined according to a specific set of existing Microsoft functionalities, as well as future Microsoft functionality. The existing set of functionalities which are included in "Microsoft Middleware Product" are those provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express, and their successors in Windows. SRPFJ § VI.K.1. The future technologies captured by the definition of "Microsoft Middleware Product" encompass software included in Windows that provides the functionality of Internet browsers, email client software, networked audio/video client software, and instant messaging software. *Id.* § VI.K.2. Other future technologies captured in the definition of "Microsoft Middleware Product" are those functionalities which are both distributed as part of **[**96]** Windows and distributed separately from Windows by Microsoft, trademarked **[*116]** by Microsoft, and which compete with third-party middleware products. *Id.*

"Microsoft Middleware Product" extends well beyond the Microsoft counterparts to the two non-Microsoft technologies which were primarily at issue in the liability phase of this case (Java and Navigator) to include media playback technology, which was addressed briefly during the liability phase, *Findings of Fact, 84 F. Supp. 2d at 30, P 78*, and to govern the Microsoft counterparts to other wellrecognized potential middleware threats to Windows' dominance, such as email client software and instant messaging software. *See* SRPFJ § VI.K. The term "Microsoft Middleware Product," as defined in the SRPFJ, focuses upon software technologies which have been incorporated or "integrated" into the Windows operating system, in reflection of the fact that the two technologies principally at issue during the liability phase were mirrored by Microsoft technologies that had been incorporated into Windows. *See Findings of Fact, 84 F. Supp. 2d at 43, 49, 107, 108, PP 133, 155, 397, 398* . The focus on technologies incorporated into Windows further reflects the fact that Microsoft software technologies **[**97]** that have never been part of Windows fall outside of Microsoft's monopoly product, which, of course, is the focus of this proceeding.

iv. "Microsoft Middleware" in the SRPFJ

In portions of Microsoft's proposed remedy, there is a need to identify the specific code in Windows. Hence, Microsoft's remedy proposal uses the term "Microsoft Middleware," which is largely reflective of the definition of "Microsoft Middleware Product," but which is further limited to the *code* separately distributed and trademarked or marketed as a major version of the Microsoft Middleware Product. SRPFJ § VI.J. The term "Microsoft Middleware" is used sparingly in Microsoft's remedy proposal, with its most significant and prominent use arising in conjunction with a provision that requires Microsoft to disclose very specific APIs and related technical information. Section III.D of Microsoft's proposed remedy requires Microsoft to disclose all of the interfaces relied upon by "Microsoft Middleware" to obtain services from Windows. *Id.* § III.D. Because "Microsoft Middleware" is defined as functionality included in or "integrated" into Windows, § III.D requires that Microsoft draw distinctions **[**98]** between portions of Windows in order to identify the APIs relied upon by one portion-the middleware portion-to obtain services from the remaining portion of Windows. *See id.* §§ III.D, VI.J. In order to distinguish between these two portions of Windows that coexist within the same piece of software, the definition of "Microsoft Middleware" identifies the relevant software by its code. The separate distribution requirement, along with the requirement that the distributed software is a "major version of [the] Microsoft Middleware Product," ensures that the code is easily distinguishable from the remainder of Windows. *Id.* § VI.J; Tr. at 5166 (Jones) ("We look at those components and we basically . . . we draw a lasso around them and look at everything going out and everything coming in.").

Plaintiffs' witnesses disagreed with these limitations, arguing that because the determinations to distribute separately and to market as a major version or trademark rest in Microsoft's discretion, Microsoft has the ability to manipulate and control which code falls within the definition. *See, e.g.*, Ledbetter P 153; Tr. at 1160-61 (Tiemann). These arguments fail to recognize the need **[**99]** for precision in identifying a distinction between "Microsoft Middleware" and the remainder of Windows. Plaintiffs do not offer an alternative method for identifying the specific code that **[*117]** constitutes "Microsoft Middleware," or some similar portion of Windows, nor do Plaintiffs establish that such precision is unnecessary. Rather, Microsoft presents ample evidence that, without a method by which to identify the specific code to be treated as the middleware portion of Windows, it cannot undertake the disclosure obligations which would be required by § III.D of Microsoft's remedy proposal (nor by § 4 of Plaintiffs' remedy proposal). *See* Appendix A, Part VI. By providing a mechanism by which to identify the specific pieces of Windows code which constitute the relevant middleware portion of Windows, Microsoft's definition identifies the otherwise imperceptible boundary between "middleware" and "operating system." Although the definition of "Microsoft Middleware" proposed in the SRPFJ is noticeably more circumscribed than the equivalent definition in Plaintiffs' proposed remedy, discussed *infra*, these limitations serve to provide bright lines by which Microsoft can determine what **[**100]** portions of Windows code are affected by the remedy. [33]

Plaintiffs' witnesses further criticized Microsoft's method for identifying these portions of code on the ground that Microsoft retains too much power to control which code falls within the definition of "Microsoft Middleware." *See, e.g.*, Kertzman P 68; Ledbetter P 153; Richards P 87; Shapiro P 195. These criticisms ignore the economic forces which countervail the likelihood that Microsoft will manipulate its products to exclude specific code from the definition. For example, Plaintiffs' witnesses specifically noted that Microsoft may simply opt not to distribute code separately. *See, e.g.*, Kertzman P 68; Ledbetter P 153. Microsoft often distributes separately certain technologies which are included **[**101]** in new releases of Windows because such distribution enables users of previous Windows versions to take advantage of the latest improvements to these technologies. *See* Jones P 61; Poole P 76. Such distribution benefits Microsoft, as it permits Microsoft to continually improve the quality of its products, even after they are sold, and to expand the user base of new technology without waiting for consumers to purchase an entirely new operating system. Therefore, if Microsoft determines not to distribute separately certain portions of code, it will deny itself the benefits of such distribution. Likewise, if Microsoft should choose to distribute a product which is not a major version of Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, or Outlook Express, and Microsoft chooses not to trademark the separate distribution in an effort to avoid inclusion in the definition of "Microsoft Middleware," *see* SRPFJ § VI.J and K, Microsoft will sacrifice the advantage gained by having a trademarked product in the marketplace. Plaintiffs have not offered credible evidence indicating that Microsoft is likely to sacrifice the advantages of trademarking **[**102]** and separate distribution in order to circumvent the terms of the remedy in this case. [34] Accordingly, the Court accords Plaintiffs' complaint little weight.

b. "Middleware" and Related Definitions in Plaintiffs' Proposal

Plaintiffs' remedy proposal takes an entirely different approach to middleware. **[*118]** Unlike the Microsoft remedy proposal, which draws a sharp distinction between third-party software products which are middleware and Microsoft products which compete with that middleware, Plaintiffs' remedy proposal utilizes the term "middleware," standing alone, to identify both Microsoft and non-Microsoft software. Plaintiffs also incorporate the term "middleware" into the definition of another term in their remedy proposal-"Microsoft Middleware Product." Because of this incorporation, the terms "middleware" and "Microsoft **[**103]** Middleware Product" in Plaintiffs' remedy proposal overlap substantially.

i. "Middleware" in the SPR

Reflective of their complaint that Microsoft's treatment of middleware is too narrow, Plaintiffs' remedy proposal incorporates into "middleware" a far broader set of products and functions. Plaintiffs define "middleware" as

> software . . . that operates directly or through other software within an Operating System or between an Operating System (whether or not on the same computer) and other software (whether or not on the same

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[33] Indeed, Judge Jackson relied upon the separate distribution of browser functionality in the Windows 95 Service Pack to identify the separation between Microsoft's browsing functionality and its operating system functionality. *Findings of Fact,84 F. Supp. 2d at 56, P 190*.

[34] Were Microsoft to make a practice of doing so in a manner which thwarted the objective of the remedy in this case, Plaintiffs could petition the Court for relief on this point.

> computer) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or made Interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products.

SPR § 22w. As a result, middleware, according to Plaintiffs' definition, is virtually any block of software code which exposes even a single API. [35] Bennett PP 30, 35-36; Madnick P 136; Tr. at 4592-93, 4889 (Gates); Def. Ex. 1530 at 61 (Greene).

[104]** Very small blocks of software code can be considered to be separate pieces of middleware pursuant to Plaintiffs' proposed remedy. As a result, individual files or even parts of files within Windows may be said to be middleware. *See* Gates P 165; Tr. at 6042-43 (Madnick). For each action mandated or restricted by Plaintiffs' proposed remedy where the term "middleware" appears, *see, e.g.*, SPR §§ 2.c, 5, 10, 11, [36] or is incorporated into the definition of another term, *see, e.g.*, SPR § 22.x, such obligations apply to very small blocks of software code, rather than to software code that is generally regarded as a software product. In this regard, Plaintiffs' definition of "middleware" is described as highly "granular," Gates P 165; Madnick P 152, as it separates middleware into extraordinarily fine "grain." *See* Bennett PP 30, 35-36.

[105]** Rather than focus on the platform potential of software, Plaintiffs focus exclusively upon the ability of a piece of software to expose even a single API. Nearly any software can expose a few APIs, yet not all software that exposes a few APIs carries the potential to serve as a platform **[*119]** for applications, let alone the potential to evolve into a platform that can dissipate the applications barrier to entry protecting Microsoft's PC operating system monopoly. *See* Bennett PP 30, 35-36; Madnick PP 136-39; Tr. at 841-42 (Ashkin); Tr. at 619-20 (Richards). Plaintiffs fail to adduce evidence sufficient to establish that these various pieces of software, which often lack robust platform capabilities but expose at least one API, have the capacity to lower the applications barrier to entry, and thereby promote competition in the monopolized market. As a result, to label such software as "middleware" is not consistent with the manner in which middleware was discussed during the liability phase of this case. Rather, the relevant middleware is the software that runs on desktop versions of Windows and other PC operating systems and carries the potential to serve as a general-purpose development **[**106]** platform. It is this platform trait which makes the software a middleware threat because the platform capability of the middleware competes with the platform capability of Windows. More importantly, because Plaintiffs' definition of "middleware" is over-inclusive and does not reflect the presence of a genuine platform threat, the Court cannot find that remedial provisions which address virtually any software which exposes one or more APIs will benefit competition in the relevant market.

ii. "Microsoft Middleware Product" in the SPR

As noted above, Plaintiffs' remedy proposal utilizes the term "Microsoft Middleware Product" to refer to a class of Microsoft software. Plaintiffs' remedy proposal provides two different ways in which a particular piece of software may fall within the parameters of a "Microsoft Middleware Product." [37] The first part of the definition of "Microsoft

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[35] One particularly helpful definition of "API" explains:

> An API, in effect, is a doorway between programs that can be used for specified purposes. For example, a PC operating system will generally control how images are displayed on the PC's computer screen. By exposing an API, the operating system may enable other programs also to display images on the computer screen without the need to replicate all of the code of the operating system that performs this function.

Ledbetter P 32.

[36] These portions of Plaintiffs' remedy proposal refer to "non-Microsoft middleware," which is not itself a defined term in Plaintiffs' remedy proposal. As a result, non-Microsoft takes its plain meaning and merely serves to modify the defined term "middleware." *See* SPR §§ 2.c, 5, 10.

[37] Section 22.x of Plaintiffs' remedy proposal provides:

> "Microsoft Middleware Product" means
>
> i. Internet browsers, e-mail client software, media creation, delivery and playback software, instant messaging software, voice recognition software, digital imaging software, directories, Exchange, calendaring systems, systems and enterprise

Middleware Product" enumerates an expansive list of functionalities, each of which alone constitutes a separate "Microsoft Middleware Product." SPR § 22.x.i. The latter portion of the definition requires that, in order to be a "Microsoft Middleware Product," the product must be middleware (according **[**107]** to Plaintiffs' definition) that is or has been distributed by Microsoft separately from Windows within the past three years and provides a functionality similar to that provided **[*120]** by the middleware of a Microsoft competitor. *Id.* § 22.x.ii.

[108]** Addressing first the list of functionalities proffered in the definition of "Microsoft Middleware Product," the Court finds that the functionalities which are included in the definition of "Microsoft Middleware Product" expand far beyond those provided by the middleware principally addressed by the district court during the liability phase. Plaintiffs have not presented evidence regarding the platform capabilities of many of the functionalities listed in their definitions of "middleware" and "Microsoft Middleware Product." With regard to those few functionalities that Plaintiffs did address during the evidentiary hearing, the Court is not satisfied that Plaintiffs have presented evidence to establish that even these functionalities possess platform potential akin to that possessed by Navigator and Java. *See* Elzinga P 135; Gates PP 147-49; Madnick PP 136-39, 212; Tr. at 841-42 (Ashkin); Tr. at 3307 (Shapiro).

With regard to the latter portion of the definition of "Microsoft Middleware Product," the Court finds that the incorporation of Plaintiffs' definition of "middleware" into this portion of the definition renders "Microsoft Middleware Products," like "middleware," to be virtually **[**109]** any portion of a Microsoft software product that exposes even a single API and is presently distributed separately or has been distributed separately from Windows by Microsoft within the past three years. *See* Bennett PP 30, 35-36; Madnick P 145. Once again, the fact that a software product or a piece of a software product exposes APIs does not itself equate with a conclusion that the software product holds the potential to serve as a platform for applications, let alone the potential to evolve into a platform with the capacity to reduce the applications barrier to entry. *See* Bennett PP 30, 35-36; Madnick PP 136-39; Tr. at 841-42 (Ashkin); Tr. at 619-20 (Richards). As a result, there is no basis for a finding that inclusion in the remedy of any separately distributed Microsoft software product which exposes just a single API will enhance competition in the monopolized market.

Aside from Plaintiffs' inclusion in the most fundamental definitions of the proposed remedy software products and portions thereof which have not been shown to possess the potential to erode the applications barrier to entry, Plaintiffs' definitions of "middleware" and "Microsoft Middleware Product" suffer **[**110]** from even greater infirmities when the use of the definitions in the remedy proposal is examined. Plaintiffs' remedy proposal, like Microsoft's proposal, mandates the disclosure of APIs and related technical information relied upon by some form of Microsoft middleware technology to interoperate with the Windows operating system. *Compare* SPR § 4, *with* SRPFJ § III.D. However, Plaintiffs' remedy proposal, in defining "Microsoft Middleware Product" through the identification of a particular functionality, is insufficiently precise to provide Microsoft with notice as to what portions of its Windows product are implicated in the provision.

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management software, Office, Handheld Computing Device synchronization software, directory services and management software, the Common Language Runtime component of the .Net framework, and Compact Framework, whether provided in the form of files installed on a computer or in the form of Web-Based Software, or

ii. Middleware distributed by Microsoft that -

(1) is, or in the three years preceding this Judgment has been, distributed separately from an Operating System Product, any successors thereto, or

(2) provides functionality similar to that provided by Middleware offered by a Microsoft competitor.

SPR § 22.x. Oddly, this definition does not specify that the software products listed in subpart "i" must be *Microsoft* software products. The Court presumes, however, that Plaintiffs intended that such products would be Microsoft products given that the term is "Microsoft Middleware Product." Subpart "ii" does not suffer from a similar infirmity, as it specifies that the products must be "Middleware *distributed by Microsoft*." *Id.* § 22.x.ii (emphasis added).

For example, "media creation, delivery and playback software" is identified as a kind of "Microsoft Middleware Product." [38] **[**112]** SPR §§ 4, 22.x.i. Will Poole, a Microsoft **[*121]** Vice President responsible for the Windows New Media Platforms Division, pointed out that it is very difficult to try to "draw a box around the components of Microsoft's . . . multimedia software" because "many different areas of the operating system handle multimedia content." Poole P 83. As Mr. Poole attested, it is unclear whether "the basic APIs that enable an application or **[**111]** the operating system to play an 'alert' sound . . . are part of Microsoft's 'media creation, delivery and playback software.'" *Id.*[39] Plaintiffs have not established that there is any clear definition or consensus in the industry, or even within Microsoft, as to what portions of Windows would constitute "media creation, delivery, and playback software" and what would be considered to be simply part of the "operating system" functionality, *i.e.*, "Microsoft Platform Software." [40] As a result, the definition of "Microsoft Middleware Product" provided in Plaintiffs' remedy is ambiguous, leaving Microsoft without clear guidance, and the Court with compliance issues, as to what is expected for compliance with the API disclosure portion and other portions of Plaintiffs' proposed remedy. [41]

3. New Technologies

Plaintiffs have also identified certain technologies which, prior to this remedy proceeding, had not been addressed by the district and appellate courts in detail in conjunction with this case. Plaintiffs identify these technologies as the new frontier in "middleware platform threats" and, therefore, seek to include these technologies in the definition of "middleware" and related definitions. **[**113]** In the paragraphs below, the Court examines four categories of technologies in order to determine if Plaintiffs' proposal to encompass these technologies within the remedy is appropriate: (1) network and server-based applications; (2) interactive television middleware and set-top boxes; (3) handheld devices; and (4) Web services.

a. Server/Network Computing In large computing networks, PCs are often known as "clients," and the large computers used to store data and run centralized applications are known as "servers." Madnick PP 42-43. Traditionally, the majority of software applications have been located on the PC, but in the network context, applications may reside on the server. Ledbetter PP 16-17, 21. Applications residing on the server call upon server operating systems to provide functionality, which is ultimately executed "for" a client PC. *Id. P 50*. Most client computers are PCs that run some version of the Windows operating system. Madnick P 44. The operating systems used on servers, however, are more diverse, such that it is common to have a heterogeneous network, meaning a network "containing a combination of clients and server operating systems from different **[**114]** vendors." Short P 22; *see also* Ledbetter P 64; Madnick P 44. Heterogeneous networks are the norm, **[*122]** rather than the exception. Madnick P 53; *see also* Ledbetter P 64.

Heterogeneous networks have the ability to function because server operating systems are capable of "interoperation" with clients running a variety of operating systems. Ledbetter P 49. In general terms, when two devices or systems have the ability to "interoperate" they can exchange information and use the information that has been exchanged. Ledbetter P 65; Madnick P 46. The concept of interoperability encompasses a continuum; it is not an absolute standard. Madnick P 46, Tr. at 7108-09 (Bennett); Tr. at 5782-83 (Madnick); Tr. at 5477 (Short);

[38] In contrast, Microsoft's proposed remedy, in the context of discussing API disclosures, identifies the particular Microsoft middleware technology as specific software *code*. SRPFJ §§ III.D; VI.J. From these identifications of the code for middleware technology present in Windows, Microsoft is able to identify the APIs relied upon by the middleware to obtain functionality from the remainder of the Windows operating system.

[39] One of Microsoft's computer science experts, Dr. Stuart E. Madnick, described a similar problem with regard to the inability to identify the precise code implicated in other portions of Plaintiffs' remedy proposal. *See id. P 164* (discussing § 12 of Plaintiffs' remedy proposal).

[40] "Microsoft Platform Software" is defined in Plaintiffs' remedy proposal as "a Windows Operating System Product or Microsoft Middleware Product or any combination of a Windows Operating System Product and a Microsoft Middleware Product." SPR § 22.y.

[41] Another example of the failure of Plaintiffs' definition of "Microsoft Middleware Product" is addressed in Appendix A, Part X.B.

see also Ledbetter PP 65-66; Tiemann P 179. For this reason, interactions among computer systems may be classified in terms of how "tightly" or "fully" they interoperate. Madnick PP 55, 61; *see also* Ledbetter P 66; Madnick P 119; Short P 16.

Clients and servers in a homogeneous network interoperate differently than clients and servers in a heterogeneous network. Madnick PP 61-68. For two computers to interoperate, they must have compatible software installed. Therefore, **[**115]** interoperation is most easily accomplished by computers in the same "hardware-software platform family." Madnick P 61. For example, "a Sun workstation and a Sun server, both running Solaris on SPARC processors" can be said to be in the same "hardware-software platform family" and, therefore, share many "common points of reference" such as file systems and interfaces, making interoperation relatively straightforward and easy to accomplish. *Id.* When the client and server versions of the operating systems are built on a common base of code, with a very high degree of overlap, applications that run on the client version generally will run on the server version of the same operating system. *Id. P 64*. In these homogeneous contexts, the client version of the operating system generally includes "builtin " or "native" software that enables the client computer to connect to a server running the same operating system. *Id. P 64*.

In the more common model, a heterogeneous network, interoperation is more complex because of basic differences between types of hardware and operating systems. *Id. P 65*. For example, "the Mac OS, NetWare, variants of Unix, and Windows all store files in **[**116]** different ways and track different file characteristics." *Id.* There are a variety of methods used to overcome differences between client and server capabilities. One such method is the identification of a common "language" or a communications "protocol" [42] which both pieces of the network understand or support "natively," meaning without the addition of software code. *See* Madnick PP 68-71; *see also* Short PP 36-38. Another method involves adding software to the server to make the client computer "think" it is communicating in a homogeneous network. Madnick PP 68-75; *see also* Short PP 44-49. The software added to the server, if interoperating with a Windows client for example, will enable the server to provide services to the Windows client in the same manner as would a Windows server. Madnick PP 73-74. Yet another method of interoperation in a heterogeneous network involves the addition of software code to the client which enables the client to communicate more effectively with the server. *Id. PP 68, 76-82*; *see also* Short PP 39-43. When software is added to the client computer to enable interoperation, **[*123]** the client software relies on the client operating system's **[**117]** APIs in the same manner as an ordinary application. Madnick P 80.

In each of these configurations, successful interoperation can be achieved. Nevertheless, because of the complexity of modern software, perfect interoperation between different types of hardware and software products (a heterogeneous network) is largely aspirational. *Id. PP 88-89, 97*; *see also* *id. PP 46, 82*; Gates P 305. Said otherwise, even with these methods of facilitating interoperation, it is rare that the result will be identical to what would have been achieved in a homogeneous network, because the features of the various pieces of the network will handle functionality in different ways. *See* Madnick P 82.

Server operating systems expose APIs for use by applications and, on behalf of those applications, **[**118]** call on PC (client) operating systems to provide basic functions of the PCs connected to the network. Ledbetter P 47. Software developers are increasingly writing programs that rely, or "call," on APIs exposed by server operating systems such that the server operating system provides the "platform" for applications. *Id. PP 47-48*; Green P 76; Tr. at 1508-09 (Ledbetter). Ultimately, the application running on the server operating system will run "*for*" the client PC in a manner similar to that which would exist if the application were running directly *on* the client. Tr. at 1507 (Ledbetter); *see also* Ledbetter PP 47-48; Tiemann P 127.

Dr. Carl S. Ledbetter, Senior Vice President, Engineering/Research and Development, and Chief Technology Officer for Novell, Inc., [43] Ledbetter P 1, testified on behalf of Plaintiffs that because most server operating systems are capable of interoperating "effectively with a variety of client PC operating systems and other different server

[42] A protocol is a method of communicating information across a network. Morse Code, a series of dots and dashes that represent letters of the alphabet, is an example of a very simple protocol, albeit in a different context. Gates P 101.

[43] Novell, Inc. is a "provider of network computing software." Ledbetter P 1.

operating systems . . . applications written to invoke the APIs of a network operating system (instead of the APIs of a particular PC operating system) can be shared among client PCs that do not themselves **[**119]** employ the same operating system." *Id. P 49*. Dr. Ledbetter theorized that the brand of PC operating system will decrease in importance as software developers begin to write programs for APIs exposed by server operating systems, rather than for the APIs exposed by PC operating systems. *Id. P 50*. Based upon this view, Dr. Ledbetter predicted that "server operating systems, if they are a platform for enough applications and if they function efficiently with non-Microsoft client PCs, could enable consumers to receive the applications they want using desktop PCs that run non-Microsoft operating systems." *Id.* With this prediction, Dr. Ledbetter invoked the potential of server/network computing to challenge the applications barrier to entry in a manner similar to that of Navigator and Java, as discussed throughout the liability phase. Ledbetter P 50; *see also* Tiemann P 131; Shapiro P 172.

Central to the success of server/network **[**120]** computing is the ability of heterogeneous networks to interoperate successfully. Within these heterogeneous networks, Windows operating systems account for the vast majority of PC clients, while a wide mix of server operating systems are utilized, with most servers employing two or more different server operating systems. Madnick P 53; *see also* Gates PP 92-94; Short P 28. Client-to-server interoperation is enabled by disclosure of the interfaces exposed by Windows clients that are required by a non-Windows server to make its functionality available to those clients. Short P 34. In this regard, the **[*124]** "tools" of client-to-server interoperation are APIs, communications protocols, and related technical information. Tr. at 5486 (Short).

b. Set-Top Boxes and Interactive Television Software

A set-top box is a limited-function computer attached to a television for purposes of enabling interactive television technologies. Kertzman P 4. In terms of functionality, interactive television technology generally involves the provision of a range of more traditionally television-oriented services, such as the ability to order "video-on-demand," an on-screen television guide, and the **[**121]** ability to interact with particular television programs, as well as a range of functionality typically associated with personal computer use, such as email, Internet access, instant messaging, and the provision of streaming audio and media through a personal computer media player. Kertzman P 3. The set-top box is linked, at present, to a server usually located at the cable or satellite television provider. *Id. P 4*. The server software residing at the cable company powers the majority of the interactive television content, sending commands to the set-top "clients." *Id. P 23*. These servers also download a small piece of software to each client as it connects to the server. *Id.*[44] At present, interactive television software has not been deployed to the personal computer. Tr. at 2091-92 (Kertzman). Rather, the software is currently distributed to companies like cable, satellite, and telephone companies that provide multichannel television programming to consumers for use on set-top boxes and is not distributed to traditional OEMs as that term has been used in this litigation. *See id.*

[122]** Mitchell Kertzman, the Chief Executive Officer of Liberate Technologies, a company which supplies interactive television software, Kertzman P 1, testified that interactive television software exposes APIs, enabling it to serve as a platform for a number of applications typically associated with the personal computer, such as email, instant messaging, and streaming audio and video. *Id. P 29*. Mr. Kertzman testified that his company's interactive television software is cross-platform and, hence, can run on multiple operating systems. *Id. P 28*. Mr. Kertzman asserts that because of its platform capabilities interactive television software has the potential to pose a "platform threat" to Windows. [45] Kertzman P 33. This platform threat, theorizes Mr. Kertzman, will result from the ability of the interactive television software to attract developers to write applications for the platform it provides, which can be ported to any operating system. In this regard, Mr. Kertzman does not distinguish precisely between whether the

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[44] For ease of reference, the Court will refer to the software which powers interactive television, including the server-resident software and the "small piece" of software residing on the set-top box, as "interactive television software."

[45] Mr. Kertzman theorizes that there is presently a "convergence," Kertzman P 37, underway between the PC and set-top box such that "the lines between set-tops and PCs are blurring as set-tops acquire more computing functionality and the PC acquires more television functionality" and the two will ultimately be a "unified device," *id. P 81*. *See generally* *id. PP 37-40*.

"platform" is provided by the portion of the software which runs on a server or the portion of the software which is downloaded to the client set-top box. *See* **[**123]** Tr. at 2111-13 (Kertzman).

Interactive television has yet to achieve significant popularity, despite the fact that its "take off" has been predicted for many **[*125]** years. Tr. at 2115 (Kertzman). Given that interactive television software, to date, has not been deployed on the PC, Mr. Kertzman's predictions regarding the potential of interactive television software to "threaten" Windows are almost entirely speculative.

c. Handheld Devices

The term "handheld devices" is a largely descriptive term which refers to a category of computing devices that perform many of the functions of an ordinary personal computer but are much smaller, **[**124]** such that they are "hand held." *See* Mace P 13. This category can also include socalled "smart phones," which are devices that combine the PC-like capabilities of handheld devices and mobile telephone technology. *Id. P 21*. Handheld devices have been "commercially successful" since approximately 1996, when the original "Palm Pilot" handheld device was introduced by Palm, Inc. ("Palm"). *Id. P 8*. As six years have passed since handheld devices achieved "commercial success[]," *id.*, the technology is not nascent. A handheld device's core use is to manage a user's personal information, such as calendar and address book functions, electronic mail, and Internet browsing. *Id. PP 12, 24*. Because the capabilities of handheld devices generally overlap with those of a personal computer, the vast majority of handheld device users "synchronize" information contained in their handheld device with information contained in their personal computer or on a server. *Id. PP 25-26*. Through synchronization, the handheld device automatically merges its information with information stored on a PC or server. *Id. P 25*. Handheld devices have already gained widespread popularity. Palm **[**125]** manufactures the most popular operating systems for handheld devices, with a United States market share of approximately eighty percent. Tr. at 1900 (Mace).

Testifying on behalf of Plaintiffs, Michael Mace, Chief Competitive Officer of PalmSource, Inc., a wholly owned subsidiary of Palm, [46] Mace P 1, attested that he anticipates that the continued advancement of the handheld device will result in the replacement of the personal computer by the handheld device. *Id. P 15*. Mr. Mace explained that he has seen "interest among PC software developers in converting their software" to run on the Palm operating system for handheld devices, *id. P 17*, and that there are more than 13,000 software programs available to run on the Palm operating system alone. *Id. P 12*. In this regard, Mr. Mace emphasized that although, in his view, the PC is not "obsolete," he believes that "handheld sales are already starting to reduce the growth of PC sales, and . . . they will eventually replace many personal computers." *Id. P 18*. Mr. Mace did not offer any testimony regarding plans to port handheld device operating systems to personal computers, nor did he testify that handheld device synchronization **[**126]** software has any platform capabilities.

Microsoft recently entered into the handheld market with the "Pocket PC." *Id. P 19*. Mr. Mace expressed concern over Microsoft's entry into the market. *See id. P 35*. Mr. Mace testified at length regarding Palm's inability to reach an agreement with Microsoft regarding "cooperative access to Microsoft's .NET technologies." *Id. P 70*; *see generally id. PP 55-72*. In this regard, Mr. Mace accused Microsoft of "manipulating" .NET and raised an additional concern "about what other things Microsoft could do to interfere with our business." *Id. P 74*. In particular, Mr. Mace asserted that "Microsoft software **[*126]** standards could be manipulated to degrade the performance of our products or disable them." *Id. P 76*. To support this contention, Mr. Mace described a series of unsuccessful negotiations between Microsoft and Palm surrounding the availability of the .Net platform for the Palm operating **[**127]** system. *Id. PP 55-72*. The negotiations failed because Palm perceived that the terms Microsoft sought to impose would threaten to turn Palm customers into Microsoft customers if ISVs began to write to Microsoft technology supported by Palm, rather than the Palm operating system. *Id.*

Palm was intimately involved in the inclusion of handheld device-related software in Plaintiffs' proposed remedy and stands to benefit competitively from such inclusion. Tr. at 1866-90 (Mace). For example, in his direct testimony, Mr. Mace recounted Palm's desire that IE be converted to run on the Palm operating system, and Microsoft's refusal to

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[46] Palm sells both hardware and software for handheld devices. Mace P 9.

do so. Mace PP 8789 . Palm views this litigation as a means by which to gain access to the source code for IE and thereby create a version of IE for the Palm operating system. Tr. at 2480-84, 2491 (Mace).

d. Web Services

Web services are almost universally viewed as the new frontier in computing, providing a new computing paradigm. Allchin P 14. Because "Web services" are new and emerging, and in many ways are still largely conceptual, there are multiple understandings within the industry as to what constitutes "Web services." The intangible **[**128]** nature of Web services, combined with the substantial disagreement about the precise parameters of the same make it extremely difficult to define the term. Based upon the evidence provided by the parties in this proceeding, the Court can only characterize Web services in somewhat general terms.

The concept of Web services concerns the exchange of information and functionality from one computing device to another through a defined set of industry standard interfaces. *See* Allchin P 41; Gates P 40; Tr. at 2792 (Schwartz). By using Web services built on one of a number of standard protocols, applications connected to each other via the Internet or other networks can share data, as well as invoke functionality supplied by one another-interoperate- without regard as to how they were built or on which operating system they are running. Allchin P 42; *see also* Def. Ex. 1398 (Anne Thomas Manes, Enabling Open, Interoperable, and Smart Web Services[:] *The Need for Shared Content*, (Sun Microsystems, Inc.) March 2001). Web services are server-based applications that can be accessed directly by other software programs, as well as by the consumer through a variety of devices, including **[**129]** the PC, cellular phone, and handheld device. Allchin PP 43-44, 65; Borthwick P 73. Interoperability from server to server, and between servers and non-PC devices, is considered by many to be fundamental to the functioning of Web services. Allchin PP 53, 64; Schwartz P 164; *see also* Richards P 98.

The term "Web services" does not refer merely to "services delivered across the Web" or otherwise related to the Internet. [47] **[**130]** Allchin PP 41, 43-44. As a result, Web-browsing software is not integral to **[*127]** the functioning of Web services because many Web services will involve direct communications between devices or programs and will not be accessed by an end user at all. *Id. PP 43-45*. In this sense, Web-browsing software of the type addressed during the liability phase will play no role in the creation, delivery, or use of many Web services. *Id.* However, Web browsers can play a limited role in that they often provide the user interface to Web services. *Id. PP 44-45*. [48]

Microsoft has given the name ".NET" to its "emerging platform for Web services." *Id. P 43*. Microsoft's.NET vision encompasses software for building, deploying, operating, integrating, and consuming Web services. *Id. P 49*. William H. Gates, III, Microsoft's Chairman of the Board and Chief Software Architect, Gates P 1, characterized Microsoft's efforts in the Web services area as a "bet the company" initiative. Tr. at 4562 (Gates). On behalf of Microsoft, Dr. Allchin described the "core" of .NET as "XML," a format for describing data. *Id. P 55*. Additional industry standards such as SOAP, WSDL and UDDI "collectively round out the underpinnings for .NET." *Id. P 57*. These standards, in Microsoft's view, will enable the ready interoperation of **[**131]** a wide variety of computing devices. *Id. PP 51, 54, 61-62*.

Not surprisingly, Microsoft is not alone in having a vision for Web services. Microsoft's .NET initiative and Sun's Java platform represent competing and "fundamentally different" visions of the ideal way to develop and deliver distributed business applications. *Id. P 64*; *see also* Schwartz P 57. Microsoft's .NET Framework is one element of

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[47] Dr. James Allchin, Group Vice President for Platforms at Microsoft, Allchin PP 1, 13, provided an example of Web services: "The Web services model permits an automobile manufacturer's computer system to communicate via the Internet with a piston supplier's computer to place new orders without any human intervention. There is no Web-browsing software involved at all." Allchin P 43.

[48] Because of the limited relationship between Web-browsing software and Web services, the Court's discussion and conclusions regarding Web services are unrelated to the manner in which the Court's remedy will address Web-browsing software. The Court's remedy treats Web-browsing software as middleware. *See infra* Parts III.C.5, III.B.2.a.

Microsoft's .NET initiative. Allchin P 67. Visual Studio.NET is a set of tools that software developers can use to write software programs that will run within Microsoft's.NET Framework. *Id. P 68*.

The Chief Strategy Officer for Sun Microsystems, Inc., Jonathan Schwartz, testifying on behalf of Plaintiffs, Schwartz P 1, theorized that "if the most popular applications are delivered as Web services, instead of [as] stand-alone PC applications, the applications barrier protecting Windows could be substantially eroded." *Id. P 36*. Mr. Schwartz further testified that Web services, in his view, have the capacity to challenge the popularity and the necessity of the PC. In this regard, Mr. Schwartz theorized that the increasing residence of Web service components "on servers **[**132]** that can be accessed with a variety of client devices" renders Microsoft's desktop operating system less necessary to the ability to run the desired applications. *Id. P 37*; *see also id. P 38*; Borthwick P 74.

John Borthwick, a Vice President at America Online Inc. ("AOL") Advanced Services, Borthwick P 1, articulated a fear that Microsoft will use its present monopoly position in the market for Intel-compatible PC operating systems to "tilt end-users towards Microsoft's services" and thereby induce software developers "to develop their Web services to conform exclusively to the .NET platform." *Id. P 77*; *see also id. PP 76-85*; Schwartz PP 111-12; 126. Mr. Borthwick's fear in this regard engenders a prediction that "as users become dependent on Microsoft's Web services, Microsoft can ensure that they remain dependent on Windows XP and its subsequent updates" by "interfering with interoperation between its own platform software and rival servers, operating systems **[*128]** and hand-held devices" so as to ultimately "force users to purchase new iterations of Windows XP if they wish to access Web services through their PCs." Borthwick P 85; *see also id. PP 98, 101, 103*. Mr. **[**133]** Borthwick's concerns were echoed almost verbatim by Mr. Schwartz of Sun Microsystems. *See* Schwartz P 126 ("By widely distributing its .NET platform with its ubiquitous operating system and other products . . . Microsoft has the power potentially to tip the market for Web services platform in favor of .NET"). In essence, both Messrs. Schwartz and Borthwick expressed concern that Microsoft has the power "to use its Windows operating system to thwart platform competition in the market for Web services." Borthwick P 103; *see also id. PP 108*; 114; Schwartz P 134. Mr. Schwartz built upon Mr. Borthwick's fear by asserting that, in addition to Microsoft's dominance in the market for PC operating systems, Microsoft's "presence in the server software market allows it to exert control over servers hosting or running Web services in ways that will protect the position of Windows." Schwartz P 129.

C. Conclusions Regarding Scope of the Remedy

Plaintiffs' best theory to justify inclusion of the above-described products or devices in an appropriate remedy is to identify them as types of "middleware," which have the capacity to serve as alternative platforms, running on top **[**134]** of the operating system, in the same way as Java or Navigator. With limited exceptions, Plaintiffs are unsuccessful at pounding these square pegs into the round holes of liability in this case. Plaintiffs' search for middleware threats of the same type or class as Navigator and Java takes them outside of the realm of software applications written for PCs, to include software which is running predominantly on non-PC devices. This fundamental aspect of the theory is not itself flawed, so long as the technologies have the potential to interact with the PC operating system in such as way as to function as "middleware," consistent with the use of that term in the liability phase. Microsoft has steadfastly maintained that none of these technologies is a proper subject of the remedy in this case because they are not truly "middleware" as that term was used in the liability phase. Therefore, argues Microsoft, these technologies are unrelated to the findings of liability affirmed by the appellate court and have no place in this proceeding. [49]

[135]** ***HN15***[] Although "precedents . . . uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade," such measures are justified only where "the required action reasonably tends to dissipate the restraints." *Bausch & Lomb, 321 U.S. at 726*. The Court finds that, of the

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[49] Despite this position, Microsoft has addressed at least one area of technology, servers and network computing, in one provision of its proposed remedy. *See* SRPFJ § III.E (mandating the disclosure of communications protocols).

new "middleware" or "platform threat" technologies identified by Plaintiffs, only one of the four-server/network computing-has been shown to presently have a reasonable possibility of "dissipating the restraints" on trade imposed by Microsoft. *Id.* Although this technology does not function precisely as "middleware" has throughout this proceeding, the platform threat it poses to Microsoft's dominance in the monopoly market is both real and similar to the threats posed by Navigator and the Java technologies. *Zenith Radio, 395 U.S. at 132*. In contrast, the theories of dissipation of the restraints on trade which **[*129]** Plaintiffs utilize to justify inclusion in the remedy of the remaining three of these four technologies, in their present state, [50] are fundamentally flawed.

[136]** ***1. Server/Network Computing***

Plaintiffs offer a strong, though still imperfect, argument for the inclusion of protection for technologies relating to network and server-based applications. Plaintiffs neither allege nor present evidence that these technologies will function as middleware in the traditional manner-meaning that the software physically resides on the PC and functions as a platform for other applications. *See supra* Part III.B.2.a. Therefore, these technologies lack one of the defining characteristics of middleware as it has been discussed in this case thus far. Notwithstanding this fact, networks and server-based technologies do have the capacity to function in a manner similar to that of traditional middleware by providing a layer between the operating system and the top-level applications. *See id.*; *see also supra* Part III.B.3.a.

In this model, personal computers, known in this context as "clients," are linked electronically to a central computer known as a "server" such that they form a "network." The server runs a "server operating system" which exposes its own APIs and, therefore, is capable of supporting software applications such that a user **[**137]** can access the application through the client PC. *See supra* Part III.B.3.a. Plaintiffs argue that in this configuration the server operating system plays the role of traditional middleware because it provides a platform for applications other than the PC operating system. Because server operating systems have the ability to interact or "interoperate" with multiple PC operating systems, an application written to a single server operating system can then be present for use by a client PC without regard to the type of PC operating system on the client. *Id.* In this scheme, the server operating system parallels and, indeed, resembles the more traditional middleware that was the focus of liability because it provides a platform for applications, as discussed *supra* Part III.B.2.a.

Given the Court's conclusion that servers should be included, the remedy in this case will provide substantial protection for server/network computing by requiring Microsoft to disclose technical information relating to communications protocols which are "natively" supported by Windows. *See infra* Part IV.E.2. The disclosure of this information will significantly advance the ability of non-Microsoft **[**138]** server operating systems to interact with client PCs running Windows. Such assistance is appropriate as it looks toward the new model of the "platform threat" and seeks to ensure that the ill effects of Microsoft's conduct are not felt in this related area of the industry. *See Nat'l Soc'y of Prof'l Eng'rs*, *435 U.S. at 698; Paramount Pictures, 334 U.S. at 148*.

In addition, because server operating systems provide a platform which "competes" with Microsoft's PC operating system to host applications for the PC, much in the way traditional middleware provides a platform and, thereby, competes with Microsoft's PC operating system, the Court's remedy affords vendors of server operating systems some protection from retaliatory action by Microsoft. *See infra* Part IV.D. Likewise, the Court's remedy provides similar protection against Microsoft **[*130]** retaliation for software vendors who write software which runs "on" server operating systems "for" use on a PC. *Id.* This curtailing of Microsoft's conduct with respect to server/network computing addresses conduct closely related to the retaliatory conduct for which Microsoft has been held liable, **[**139]** so as to ensure that the "untraveled roads" toward illegal maintenance of a monopoly are not "left open." *Int'l* *Salt, 332 U.S. at 400*.

2. Set-Top Boxes and Interactive Television Software

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[50] Notwithstanding this conclusion, as the Court discusses, *infra* Part III.C.2, if interactive television software evolves as Plaintiffs predict, it will be protected by portions of the Court's remedy.

In some respects, interactive television software can be likened to the middleware platform threats discussed earlier in this case, such as Navigator, because the technology offers a somewhat "new" capability, interactive television functionality and simultaneously serves as a platform for other functionalities such as email and Web browsing. *See supra* Part III.B.3.b. At present, however, unlike the middleware threat posed by Navigator, interactive television software does not reside on the PC, but instead is present predominantly on the server, with a small portion on the television set-top box. *Id.* Therefore, Plaintiffs' view of interactive television software as a "middleware platform threat" is based upon the presumption that the functionality presently residing on the set-top box will someday be ported from the set-top box [51] to run on desktop personal computers. This presumption is the fundamental flaw in Plaintiffs' argument.

[140]** The potential "threat" posed by interactive television software is almost entirely hypothetical. *Id.* There is insufficient evidence for the Court to conclude that interactive television software will be ported in the near future. *Id.* Similarly, there is insufficient evidence to support a conclusion that, if ported, such software will gain significant popularity. *Id.* As a result of this dearth of evidence, the Court concludes that the remedy in this case may be effective and appropriate without extending its protections to interactive television software as it exists today.

The Court observes, however, that should interactive television software develop in the manner predicted by Plaintiffs, it will likely be protected by portions of the remedy imposed by the Court which protect "Non-Microsoft Middleware." In other words, if interactive television software someday runs on Windows, which it does not presently do, and exposes a range of functionality through APIs, it will receive all of the protections afforded "Non-Microsoft Middleware" in the remedial decree imposed by the Court. Similarly, such technology will be eligible for treatment as a "Non-Microsoft Middleware Product, **[**141]** " provided that it obtains a measurable level of popularity as software running on Intel-compatible personal computers to warrant treatment as a middleware platform threat. *See supra* Part III.B.2.a.ii; *infra* Part III.C.5. The Court further observes that if Microsoft were to respond to interactive television technology in a manner similar to its response to the previous middleware platform threats, namely by incorporating such technology into Windows and trademarking the same, interactive television software could receive the protection afforded by the limitations on Microsoft's conduct relative to "Microsoft Middleware" imposed by the Court's remedy described below. [52]

[142] [*131]** ***3. Handheld Devices***

In contrast to server/network computing, or even Plaintiffs' predictions regarding interactive television software, the technology associated with handheld devices has not been shown to have the potential to function in a manner similar to middleware consistent with the liability phase. *See supra* Part III.B.3.c. Plaintiffs advance four theories pursuant to which handheld devices pose a "platform threat to the Windows operating system." *Pl. Prop. Findings of Fact, 84 F. Supp. 2d at 47, P 147*. The Court rejects each of these theories as either logically flawed or unsupported by the evidence.

Relying predominantly upon Mr. Mace's prediction that handheld devices will eventually replace the personal computer, Plaintiffs first argue that this potential substitution of handheld devices in place of personal computers can be characterized as a "platform threat." *Id.* Even if the Court accepts Mr. Mace's prediction regarding the future

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[51] The Court focuses, in this section, upon the platform potential of that portion of the software which resides on the set-top box. The platform potential of the portion of set-top software which runs on a server can be subsumed into the more general analysis of the capabilities of network computing. *See supra* Parts III.B.3.a, III.C.1.

[52] Treatment as "Non-Microsoft Middleware" affords protections against retaliation and with regard to OEM installation of an icon, shortcut, or menu entry. Treatment as a "NonMicrosoft Middleware Product" would, in specifically defined instances, enable interactive television software to be invoked in place of the Microsoft technology which would otherwise launch automatically.

If the Microsoft counterpart to interactive television software falls within the definition of "Microsoft Middleware," at some point in the future, Microsoft will be required to disclose the APIs and related technical information for interfaces that are relied upon by the Microsoft version of the interactive television software to receive services from the remainder of Windows. *See infra* Part IV.E.

success of the handheld device, Plaintiffs' theory that this replacement represents a "platform threat," as that phrase has been used throughout this proceeding, is flawed. The theory of the "platform threat" posed by middleware posits that **[**143]** the middleware has the potential to erode the applications barrier to entry such that the brand of the underlying operating system is of less importance. In contrast, Plaintiffs' first theory regarding the competitive significance of the handheld device does not envision a world in which the brand of the PC operating system lacks significance, but instead envisions a world in which the PC itself and, therefore, the operating system on which it runs lacks significance. [53]

[144]** Direct competition between the handheld device and the personal computer does not establish that competition will increase in the market for Intel-compatible personal computer operating systems. Such competition instead provides only the possibility that sales of personal computers, and therefore, the number of personal computers running the Windows operating system, will decline. Plaintiffs have not offered evidence which shows that Microsoft's share of the market for Intel-compatible personal computer operating systems will simultaneously decline, or that a decline in PC sales generally will encourage other entrants into the market for Intel-compatible PC operating systems. *See supra* Part III.B.3.c. As a result, the Court finds that Plaintiffs' first explanation of the handheld device's relation to the remedy in this case is not only far removed from the theory of the "middleware platform threat" which gave rise to **[*132]** the liability in this case, but logically unsound.

Plaintiffs argue second that as handheld devices increase in popularity, attracting more software developers and potentially beginning to replace the personal computer, there is an "increased likelihood" that "a **[**145]** handheld device operating system developer would port it to run on Intel-compatible PCs." *Pl. Prop. Findings of Fact, 84 F. Supp. 2d at 47, P 148*. Plaintiffs offer no direct support for this theory. Plaintiffs do not offer testimony from or about any such "handheld device operating system developer" with an interest in porting the operating system to serve as an operating system for a personal computer. *See supra* Part III.B.3.c. Indeed, handheld devices have been commercially successful" since at least 1996, and yet Plaintiffs do not offer any evidence which indicates that the operating systems on which the devices run will be ported to run on the PC. *Id.* Accordingly, the Court must reject Plaintiffs' second theory of relevance as entirely speculative and unsupported by fact.

Plaintiffs next assert that because handheld devices compete with PCs for the attention of software developers there will be a reduction in the number of applications written for the personal computer. Pl. Prop. Findings of Fact PP 149-50. This reduction, contend Plaintiffs, will directly reduce the applications barrier to entry. *Id.* While there is evidence that a great number of applications are written for the handheld **[**146]** device, *see supra* Part III.B.3.c, Plaintiffs have not presented evidence that there has been any decrease in the number of PC applications since the rise in popularity of the handheld device. In short, there is no evidence linking the number of applications written for handheld devices to a decrease in the number of applications written for the PC. Even assuming that the increase in popularity of the handheld device would result in a decreased number of PC applications, from this point Plaintiffs merely reassert a version of their first theory of relevance, arguing that this decrease in PC applications will "impact competition between handhelds and PCs." *Pl Prop. Finding of Fact, 84 F. Supp. 2d at 48, P 150*. As the Court concluded above, competition between handheld devices and PCs has not been shown to have any impact upon the market for PC operating systems. Plaintiffs also assert that a reduction in the number of PC applications will impact "competition among [operating system] manufacturers by reducing the Windows applications barrier to entry." *Id.* Plaintiffs fail to identify any *evidence* which supports this theory. *See generally supra* Part III.B.3.c. Mere reduction in the number of **[**147]** applications written for all PC operating systems has not been shown by Plaintiffs to reduce the applications barrier to entry. In sum, the Court rejects Plaintiffs' third theory of relevance regarding handheld devices as lacking entirely in factual support and logically flawed.

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[53] Inasmuch as Plaintiffs' view the handheld device as a substitute for the PC, Plaintiffs' argument for the inclusion of handheld devices in the scope of the remedy represents an ironic about-face from Plaintiffs' earlier position-taken in conjunction with the identification of the relevant market in the liability phase-that handheld devices are *not* interchangeable with the PC. *Microsoft, 253 F.3d at 52*; *Findings of Fact, 84 F. Supp. 2d at 15, P 23*. In this regard, the Court observes that, unlike middleware, handheld devices were not treated as "nascent threats" during the liability phase.

Lastly, Plaintiffs contend that the increasing popularity in handheld devices carries the potential to threaten Microsoft's monopoly in the market for Intel-compatible PC operating systems by creating a larger market and greater consumer demand for cross-platform middleware. *See* Pl. Prop. Finding of Fact, 84 F. Supp. 2d at 48, P 151. Plaintiffs do not offer any evidence, let alone economic analysis, that identifies a relationship between the market for handheld devices and the available and potential distribution channels of cross-platform middleware. *See supra* Part III.B.3.c. Because the Court cannot accept Plaintiffs' speculation that there exists such a relationship, the Court rejects Plaintiffs fourth theory of the relevance of handheld devices **[*133]** to the issue of remedy in this case. [54]

[148]** Based on the foregoing, the Court rejects Plaintiffs' insistence that handheld devices need some form of protection by the remedial decree imposed in this case. Handheld devices did not play a role during the liability phase of this case, beyond exclusion from the relevant market, and they have not been shown to be relevant to the Court's task of terminating the illegal conduct, United Shoe, 391 U.S. at 250, and restoring competition to the relevant market, Ford Motor Co., 405 U.S. at 573. **HN16**[] While the Court's ability to impose a remedy in an antitrust case is not "merely to end the specific illegal practices," *Int'l* Salt, 332 U.S. at 401, there is no authorization for the Court to "interfere with ordinary commercial practices." Bausch & Lomb, 321 U.S. at 728. Intervention into a market outside of and unrelated to the monopoly market is not justified merely because Microsoft has begun to compete in the new market and such competition is feared.

4. Web Services

The analysis of Plaintiffs' arguments relative to Web services is similar to the analysis applied to handheld devices. Plaintiffs attempt to relate **[**149]** the emerging area of Web services to this proceeding primarily by emphasizing the seemingly collective recognition in the industry that Web services comprise the new computing platform. *See supra* Part III.B.3.d. Yet the mere importance of Web services to Microsoft and the industry as a whole is not sufficient to justify extending the remedy in this case to regulate Microsoft's conduct in relation to Web services. Although Plaintiffs *assume* that Microsoft will engage in anticompetitive conduct in the future in conjunction with its participation in this emerging area of technology, this case cannot be used as a vehicle by which to fight every potential future violation of the antitrust laws by Microsoft envisioned by Microsoft's competitors. **HN17**[] "[A] district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court." Zenith Radio, 395 U.S. at 133. The Court may only restrain commission of the unlawful acts and other *related* unlawful acts. *Id.*

Plaintiffs argue that Web services carry the potential to decrease reliance upon personal computers **[**150]** while increasing reliance upon other computing devices, emphasizing that a number of non-PC devices will have the capacity to access Web services. In this regard, much of Plaintiffs' focus relative to Web services identifies the potential of Web services to enable **[*134]** other devices, such as handheld devices and cellular phones, to erode the market for personal computers. Therefore, argue Plaintiffs, use of these devices may grow so popular that dependence on and the popularity of the personal computer will decrease. Whether Plaintiffs' theory on this point is correct or not, Plaintiffs have not explained how the increase in the use of non-PC devices in conjunction with Web services will reduce Microsoft's monopoly in the market for PC operating systems. As the Court noted above, mere

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[54] More clearly established than the relationship between handheld devices and this proceeding is the fact that Microsoft's primary competitor in the handheld market would benefit from the inclusion of handheld devices within the definitions of "middleware" and "Microsoft Middleware Product." In fact, the evidence establishes that Palm was intimately involved in the inclusion of such software in Plaintiffs' proposed remedy and stands to benefit competitively from such inclusion because inclusion of handheld devices in the remedy would, for example, afford Palm access to significant information regarding Microsoft's proprietary technologies and would hinder Microsoft's ability to compete in a market already dominated by Palm. *See supra* Part III.B.3.c; *see, e.g.*, SPR §§ 4, 5, 6, 7, 8, 11, 15. This fact, although hardly dispositive of the issue, gives the Court concern as to the legitimacy of the inclusion of handheld-related software in the scope of the remedy. Plaintiffs' inclusion of handheld devices in the scope of their proposed remedy appears to be more closely related to Palm's fears that Microsoft will pose a competitive threat to its dominance in the market for hand held device operating systems, than to any legitimate concern that Microsoft will engage in unlawful conduct.

reduction in the popularity of the PC and the ensuing reduction in the absolute demand for Microsoft's Windows operating system does not necessarily "pry open to competition" the market for PC operating systems. *Int'l* *Salt, 332 U.S. at 401*.

The testimony offered by Plaintiffs regarding handheld devices and Web services-technologies which are largely unrelated to the findings of liability **[**151]** in this case-reflects a fear that Microsoft will parlay its stronghold on the market for Intel-compatible PC operating systems into a position of power in other markets, such as the market for handheld computer operating systems or Web services. *See supra* Part III.B.3.d. In many respects, the concerns raised by Plaintiffs resemble allegations or predictions that Microsoft will attempt to monopolize these new markets or allegations that Microsoft is attempting to leverage its power in the market for Intel-compatible PC operating systems to obtain a competitive advantage in a secondary market. [55] Without addressing the validity of any such assertion, the Court observes that the concerns raised by Plaintiffs and their witnesses relevant to other markets are largely unconnected to the specific facts for which Microsoft has been found liable and, therefore, are more appropriately addressed as separate claims, in a separate suit, should Microsoft engage in such conduct and should Plaintiffs deem it appropriate to file one. Though it is plainly tempting to view this case as a means by which to curtail Microsoft's competitive conduct in a wide array of new markets, ***HN18***[] ***antitrust law*** does **[**152]** not authorize this Court to regulate the conduct of an antitrust violator in areas bearing little relation to the violation. *See* *Zenith Radio, 395 U.S. at 133*. In order to include remedy provisions addressing Web services and handheld devices, Plaintiffs must satisfy a minimum threshold: "The test is whether or not the required action reasonably tends to dissipate restraints and prevent evasions." *Bausch & Lomb, 321 U.S. at 726*. In short, the Court determines that, remedy provisions crafted to address Web services and handheld devices do not satisfy this test.

The Court's determination that Web services are not appropriately addressed by the remedy **[**153]** renders irrelevant a wide array of testimony regarding server-to-server interoperation and server-to-non-PC device interoperation. Similarly, the Court's determination that handheld devices are not appropriately addressed by the remedy renders irrelevant significant portions of testimony relating to interoperation between such devices and PCs or servers. Accordingly, to the extent that Plaintiffs presented testimony on these subjects, the Court concludes that the testimony is not relevant to the issue of a remedy in this case and, therefore, declines to address this testimony.

[*135] ***5. Middleware***

The Court returns at last to the discussion of "middleware" which prompted the Court's examination of the new technologies identified by Plaintiffs. In summary form, Plaintiffs argue that the vast expansion of "middleware" to include the technologies discussed above is demanded by the fact that the PC ecosystem, meaning generally the combination of PC hardware and software products, has changed significantly since the events of the mid-1990s that gave rise to liability in this case and continues to change. *See generally* Pl. Opp'n to Def. Mot. in Limine to Exclude Testimony on Products **[**154]** Unrelated to the Limited Ground of Liability Upheld by the Ct. of Appeals; Pl. Supp. Mem. in Opp'n to Def. Mot. in Limine to Exclude Testimony on Products Unrelated to the Limited Ground of Liability Upheld by the Ct. of Appeals. Because of this constant, fast-paced evolution, Plaintiffs contend that the remedy the Court imposes must reach beyond the "middleware threats" to the Windows monopoly of the liability era and search for new "platform threats." Conversely, Microsoft objects to the expansion of protection to these technologies, in part, on the grounds that Plaintiffs have failed to articulate any theory which forms a nexus between these technologies and the restoration of competition *in the relevant market*. *See generally* Def. Mot. in Limine to Exclude Testimony on Products Unrelated to the Limited Ground of Liability Upheld by the Ct. of Appeals; Def. Mot. in Limine to Exclude Testimony About Events That Allegedly Occurred Before June 24, 1999. Having considered these arguments, the Court concludes that Plaintiffs' treatment of middleware is flawed and, therefore, must be rejected. Concordantly, the Court determines to adopt Microsoft's treatment of middleware for use **[**155]** in the Court's order of remedy.

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[55] The Court notes as an aside that the viability of the latter theory, known as a "monopoly leveraging" theory, "is in serious doubt." *Microsoft, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485 at *26*. The district court in this case rejected an earlier attempt to advance a monopoly leveraging theory in this case on this basis. *Microsoft, 1998 U.S. Dist. LEXIS 14231 at [WL] *26-27*.

Undoubtedly, an effective remedy must be sufficiently forward-looking to extend beyond the specific middleware threats addressed during the liability phase, such that Microsoft cannot simply repeat the same conduct with respect to other existing and similar categories of middleware functionality and even to categories of middleware functionality which have not yet been conceived. *Zenith Radio, 395 U.S. at 132-33*. Notwithstanding the need and appropriateness of a forward-looking remedy, the Court treats every expansion of protection with great caution and makes every attempt to craft a remedy which is no more expansive than necessary. *See Bausch & Lomb, 321 U.S. at 728*. As elaborated in detail *supra*, it is clear that Plaintiffs seek to treat as "middleware" a wide variety of technologies to which the relationship of liability in this case is either remote or nonexistent. Although Plaintiffs have argued that such technologies are merely the most nascent "middleware platform threats," the Court finds that most of these technologies are fundamentally different from the "middleware threats" that have been discussed previously **[**156]** in this case.

Plaintiffs' definition of "middleware" and their ensuing definition of "Microsoft Middleware Product" are irreparably flawed in their attempt to capture within their parameters all software that exposes even a single API. [56] *See supra* Parts III.B.2.a-b, III.B.3, III.C.1-4. The commonality between all software products that expose **[*136]** APIs and the middleware addressed at the liability phase is insufficient, on its own, to justify expansion of the terms of the Court's remedy to address nearly every software product. *See Microsoft, 56 F.3d at 1460* ***HN19***[] ("Even where the government has proved antitrust violations at trial, the remedies must be of the 'same type or class' as the violations, and the court is not at liberty to enjoin 'all future violations of the antitrust laws, however unrelated to violations found by the court.'") (quoting *Zenith Radio, 395 U.S. at 132-33*). Such broad and unjustified expansion ignores the Supreme Court's caution that the Court must be "careful to avoid constructions of *§ 2* which might chill competition, rather than foster it." *Spectrum Sports, 506 U.S. at 458*.

[157]** Even where Plaintiffs' definitions of "middleware" and "Microsoft Middleware Product" are more specific in identifying software according to its functionality or brand name, rather than by the fact that it exposes APIs, Plaintiffs have included functionality in the definition which is sufficiently distinguishable from the middleware threats addressed during the liability phase such that these software products are not properly treated as "the same or similar" to the products addressed during the liability phase. *See supra* Parts III.B.2.a-b, III.B.3, III.C.1-4. For the vast majority of the software technologies identified in Plaintiffs' definitions of "middleware" and "Microsoft Middleware Product," Plaintiffs fail to offer evidence which the Court deems sufficient to support a conclusion that these technologies have the potential to evolve into platforms for other applications in a manner akin or equivalent to that possessed by Navigator and Java. *Id.* Indeed, many of these technologies are patently non-nascent and have yet to show any promise of evolving into substantial platforms for other applications. *Id.*

In addition, Plaintiffs include as "Microsoft Middleware Products" **[**158]** software which has never been included or "integrated" into Microsoft's PC operating system products. *Id.* Inclusion of a particular functionality in Windows is integral to the theory of liability, because it was this inclusion of middleware functionality in its Windows products in a manner that worked to the absolute exclusion of competing non-Microsoft middleware [57] **[**159]** that gave rise to significant portions of liability in this case. [58] For both Navigator and Sun's Java, Microsoft developed its own implementation or version of the technology, namely IE and the Microsoft JVM. Microsoft's "campaign" against

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[56] Reflecting Plaintiffs' view that middleware is any software which exposes APIs, many of Plaintiffs' witnesses testified throughout this proceeding that particular pieces of software are "middleware." The Court rejects this use of the term as fundamentally in conflict with the use of the term throughout the liability phase of this proceeding.

[57] The Court notes for the sake of clarity that the significance of Microsoft's incorporation of particular functionality into its operating system programs in conjunction with the liability findings pursuant to *§ 2* of the Sherman Act, though based upon a common set of facts, is unrelated to Plaintiffs' now-defunct claim that such incorporation constitutes illegal tying in violation *§ 1* of the Sherman Act. *See Microsoft, 253 F.3d at 84* ("The facts underlying the tying allegation substantially overlap with those set forth . . . in connection with the *§ 2* monopoly maintenance claim.").

[58] Admittedly, one might argue that some of the functionalities identified in Microsoft's definition of "Microsoft Middleware Product" have not been shown to be true middleware, but there exists no objection by either party to the inclusion of these functionalities in the scope of protections afforded by the remedy and, thus, no issue for the Court to resolve in this regard.

Navigator and Java included the bolstering of its own versions of these technologies to the exclusion of Navigator and Sun's Java. *See* Microsoft, 253 F.3d at 59-78. Far from a mere technicality, Microsoft software which has never been incorporated or "integrated" into Microsoft's operating system **[*137]** products warrants exclusion from treatment as the Microsoft counterpart to third-party middleware threats in the context of this remedy.

Beyond inaccurately reflecting the definition of "middleware" utilized in the liability phase, Plaintiffs' definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs' remedy which are reliant upon this definition to be largely unenforceable. *See supra* Part III.B.2.b. Therefore, this aspect of Plaintiffs' "middleware" definition is at odds with precedent on the subject of antitrust remedies, *see Int'l* Salt, 332 U.S. at 400, and the law of remedies in general*.* Fed. R. Civ. P. 65(d); Atiyeh v. Capps, 449 U.S. 1312, 1317, 66 L. Ed. 2d 785, 101 S. Ct. 829 (1981).

In sum, the Court finds that Plaintiffs' "middleware" definition, though a remarkable feat of semantic gymnastics, does not reflect **[**160]** accurately the use of that term throughout the earlier portion of this proceeding and includes products and technologies which are readily distinguishable from the middleware addressed earlier in this case. *See supra* Parts III.B.2.a-b, III.B.3, III.C.1-4. In essence, Plaintiffs have expanded the parameters of the defining characteristics of the middleware threat so as to include virtually any piece of software. *Id.* To do so in conjunction with a remedial decree impermissibly threatens to interfere with ordinary and legitimate commercial practices inherent in Microsoft's participation in the software industry. *See* Spectrum Sports, 506 U.S. at 458; Bausch & Lomb, 321 U.S. at 728. In addition, as Plaintiffs have included a great amount of software in their definition which has not been shown to possess the capability of serving as a "platform," there is no basis upon which the Court can conclude that remedial assistance for this wide array of software will lower the applications barrier to entry into the PC operating system market. Absent evidence that a remedy which addresses non-platform software will facilitate competition in the monopolized **[**161]** market, the Court sees little justification for inclusion of such software within the scope of the remedy. Ford Motor Co., 405 U.S. at 573. The Court, therefore, declines to use Plaintiffs' definition of "middleware" and the definitions related thereto in the remedial decree.

Conversely, the Court finds that the treatment of middleware and the related definitions in Microsoft's proposed remedy more closely reflect the meaning given to the term from the inception of this proceeding. Microsoft's treatment of middleware appropriately expands beyond the specific middleware addressed during the liability phase to address new potential platform threats which possess many of the defining characteristics of the middleware identified by Judge Jackson. *See supra* Part III.B.2.a. Accordingly, Microsoft's treatment of middleware, as addressed in its definitions of "Non-Microsoft Middleware" and "Non-Microsoft Middleware Product," as well as in its definitions of "Microsoft Middleware" and "Microsoft Middleware Product," accords with the notion that the remedial decree "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly **[**162]** through practices connected with acts actually found to be illegal." Gypsum, 340 U.S. at 88-89. The Court's remedial decree reflects this determination, adopting the treatment of middleware advanced by Microsoft in its remedy proposal. *See supra* Part III.B.2.a.

Notwithstanding this general conclusion, and over Microsoft's objection, the Court has determined that at least one of the technologies identified by Plaintiffs, server/network **[*138]** computing, is appropriately addressed in some respect by the remedy in this case, to the extent that the server operating systems host applications which will ultimately run "for" the desktop. Respecting the fact that the server/network computing model described above does not fit precisely within the middleware definition used in this proceeding up to this point, the Court determines not to manipulate the use of the term in order to address this area of computing. Rather, as discussed in greater detail *infra* Part IV.E, the Court's remedy will address the potential of server/network computing to aid in eliminating the consequences of Microsoft's illegal conduct without giving middleware a definition different than that employed **[**163]** during the earlier stages of this case. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 698.

The Court also notes that, to the extent that interactive television software can be proven, in the future, to have been ported from TV set-top boxes to run on a Microsoft PC operating system and expose a range of functionality to ISVs through published APIs, such technology would be included automatically in a number of the Court's remedy provisions.

D. Alleged "Bad" Acts by Microsoft

Throughout this phase of the proceeding, Plaintiffs have recited for the Court's benefit countless findings of fact entered by Judge Jackson during the liability phase regarding actions taken by Microsoft. These findings recount various actions taken by Microsoft which can be characterized as improper or unsavory in one respect or another and, at the very least, harmful to its competitors. Significantly however, many of these findings were ultimately not relied upon by the district court in conjunction with the imposition of liability for violation of *§ 2* of the Sherman Act. Concordantly, in its review of the district court's liability findings, the appellate court **[**164]** did not have occasion to rely upon the vast majority of factual findings entered by the district court, but not cited by the district court as a basis for *§ 2* liability. These factual findings, abundant and damning as they appear, have not, in fact, been weighed for competitive and anticompetitive effect. It has never been the contention of the parties that, during this remedy phase of the proceeding, the Court should undertake such a balancing of anticompetitive effect and procompetitive justification with regard to these factual findings. As a result, these factual findings, standing alone and unconnected to specific liability findings, cannot be utilized to justify specific remedial provisions.

It is tempting, as Plaintiffs' Proposed Findings of Fact illustrate, to rely upon the multiple accounts in Judge Jackson's *Findings of Fact* of Microsoft conduct that is harmful to its competitors, malicious, and severe, in order to justify the imposition of an equally severe remedy in this case. Such reliance, however, ignores the careful admonition of the appellate court that this ***HN20***[] conduct cannot be condemned as exclusionary, even where the intent behind it is anticompetitive, unless **[**165]** there has been a showing that the "monopolist's conduct on balance harms competition." *Microsoft, 253 F.3d at 59*. As the appellate court observed, "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ." *Microsoft, 253 F.3d at 58* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993))* (quotation marks omitted). The federal antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in **[*139]** interstate commerce.'" *Brooke Group Ltd., 509 U.S. at 225* (quoting *Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945))*. Harm to "one or more competitors," *however severe*, is not condemned by the Sherman Act in the absence of harm to the competitive process and thereby harm to consumers. *Microsoft, 253 F.3d at 58* (emphasis omitted).

The fact that Judge Jackson entered factual findings in the context of an antitrust suit is itself not sufficient to justify addressing with a remedy the conduct described **[**166]** in these findings. "Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern . . . ." *Id.* Therefore, because no court has yet found that the acts identified in the *Findings of Fact*, but not relied upon for the imposition of liability, visited *any* harm upon competition, let alone a harm which was not outweighed by the simultaneous procompetitive effect, this Court cannot presume that each of the acts identified in the *Findings of Fact* merits consideration equal with those acts which were found to be anticompetitive in violation of *§ 2*, nor that these acts merit any special weight.

In addition to Plaintiffs' reliance upon the portions of Judge Jackson's *Findings of Fact* in justifying the imposition of certain conduct restrictions upon Microsoft, Plaintiffs identify a number of new and, for lack of a better term, allegedly "bad" acts taken by Microsoft both prior and subsequent to the imposition of liability. Plaintiffs insist that they do not intend these "bad" acts to be viewed by the Court as new allegations of anticompetitive conduct. Rather, Plaintiffs offer these new examples **[**167]** as evidence of conduct which is similar to or a continuation of conduct identified during the liability phase of this proceeding. In some instances, Plaintiffs attempt to relate the new conduct to that which gave rise to the findings of liability in this case. However, in most instances, Plaintiffs relate this more recent conduct to conduct discussed by Judge Jackson in his *Findings of Fact*, but unaddressed in terms of liability. The Court, throughout this opinion, examines various examples of Microsoft conduct identified by Plaintiffs in order to determine whether it is sufficiently related to the liability imposed by the appellate court to justify consideration by this Court in conjunction with the crafting of a remedy. Notwithstanding this approach, because Plaintiffs identify an elaborate series of new "bad" acts by Microsoft relating to Microsoft's alteration and extension of industry standards, use of proprietary technology, disclosure of technical information, or lack thereof, and the ensuing effect of all of this conduct upon interoperability in the context of server/network computing, the Court will address these acts *en masse*. After reviewing the evidence in this **[**168]** regard, the Court concludes that the alleged "bad" acts are tenuously related to the liability findings and, therefore, are of little use in crafting a remedy.

1. Findings of Fact-Allegedly New "Bad" Acts Relating to Interoperation

a. Kerberos

Kerberos is a security protocol that provides a mechanism for "authenticating" a user to a computing network. Short P 67; Tr. at 5515 (Short); Tr. at 5831-32 (Madnick). Authentication is the process by which a server determines whether a client computer should be permitted to access the network (i.e., whether the user is who he/she says he/she is). Short P 67; Tiemann P 159; Tr. at 5515 (Short). Authentication is usually accomplished by the user **[*140]** entering a User ID and a password. Ledbetter P 52; Short P 67.

Authorization is a separate process by which a server determines whether a client computer is entitled to use a particular network resource (i.e., which files on the network the user can access). Ledbetter P 52; Shapiro P 179; Short P 68; Tiemann P 159. Authorization usually takes place after the user has successfully completed authentication. Ledbetter P 52; Shapiro P 179. The Kerberos specification does not address how **[**169]** users are authorized to access network resources. Short P 68.

When Microsoft implemented the Kerberos protocol, it added Windows-specific authorization data (in the form of a Privilege Access Certificate or "PAC") in the "Authorization Data" field of Kerberos "tickets." Short P 72. This addition permits the same Kerberos ticket to contain both authentication and authorization information. Short P 72. The addition constitutes a proprietary extension of the otherwise open standard, and thus, the extension cannot be utilized by third parties unless Microsoft discloses the extension. As a result, a non-Windows client interoperating with a Microsoft server cannot make use of all of the same authorization services as a Microsoft Windows client interoperating with a Microsoft server. Tr. at 5833-36 (Madnick).

It is undisputed that Microsoft's proprietary extension of the Kerberos open standard is not technically inconsistent with the open standard, because a portion of the open standard was left "undefined," with the expectation that software developers could use the field to extend the open standard to support their particular implementations. Tiemann PP 161-62; *accord* Madnick P 105. **[**170]** Microsoft's extension fulfills this expectation, but because Microsoft did not disclose its extension, Plaintiffs' witnesses complained that the extension violated the "spirit" of the open standard. *See, e.g.*, Tiemann P 162.

Microsoft presents testimony that Plaintiffs' complaints with regard to the undisclosed portions of Microsoft's Kerberos extension should have been resolved by Microsoft's February 2002 submission regarding the Kerberos extension to the Internet Engineering Task Force ("IETF"), a major standards-setting body. Madnick P 102; Short P 74; Tr. at 5519-20 (Short). Despite this testimony, on behalf of Plaintiffs, Michael Tiemann, Chief Technology Officer of Red Hat, Inc., Tiemann P 1, questioned the adequacy of the submission and argued that the issue is unresolved. Mr. Tiemann did not offer any evidence of the inadequacy of Microsoft's recent submission to the IETF and concedes that his doubts are speculative and hastily formed. *See id. PP 165-66*.

b. CIFS

In the early part of the last decade, Microsoft developed for use with Windows a protocol called SMB used for file and print sharing. SMB was a proprietary protocol which, as long as it remained **[**171]** undisclosed, could only be used by Microsoft. Tiemann P 136. Microsoft then developed as a subset of SMB the "Common Internet File System" ("CIFS") protocol, which is a file access protocol for use over the Internet that enables groups of users to share documents securely across the Internet or within corporate intranets. Short P 80. Eventually, third-party developers reverse engineered portions of the SMB and CIFS protocols, creating SAMBA, an open-source implementation [59] of the protocols **[*141]** that enables non-Microsoft servers to perform file and print sharing functions with Microsoft server and client operating systems. Tiemann P 137; Short P 83. Mr. Tiemann alleged that the proprietary nature of the SMB and CIFS protocols hinder interoperability between a Windows client and a Linux server. Tiemann P 136. Though he conceded that the SAMBA project has enabled some interoperability, Mr. Tiemann noted that such reverse-engineered solutions are effective only until Microsoft chooses to alter the technology. *Id. P 141*. Mr. Tiemann contended that "Microsoft's implementation of SMB and then CIFS was designed to defeat interoperability and protect its desktop operating system monopoly. **[**172]** " *Id. P 142*. Microsoft did not offer any evidence which explains its conduct with regard to CIFS and SMB. Robert Short, Vice President for Windows Core Technology at Microsoft, Short P 1, testified, however, that Microsoft has, or will license the CIFS and SMB protocols pursuant to Microsoft's settlement agreement with the United States. [60] *Id. P 84*.

[173]** ***c. Directory Services, LDAP, ADSI***

Server operating systems must have some type of directory to keep track of information about the network. Madnick P 113; Short P 88. A full-featured directory stores information about users, organizations, sites, systems, applications, files, printers and almost any other object that can exist in a computing network. Short P 88; *see also* Ledbetter P 51. "Active Directory" is the name given to the directory included in the Windows 2000 Server operating system. Bennett P 198; Madnick P 114; Short P 88. Server operating systems produced by other software companies have similar directories, including eDirectory in Novell NetWare, iPlanet Directory Server in Sun Solaris, and SecureWay Directory in IBM AIX. Madnick P 114; Short P 88; Tr. at 1497-98 (Ledbetter).

The Lightweight Directory Access Protocol ("LDAP") is an industry standard protocol for directory services. Tiemann P 151; Bennett P 198; Short P 89. The Active Directory Service Interfaces ("ADSI") are a set of interfaces that any software program running on different versions of Windows 2000 or on Windows XP Professional can use to access multiple directory services in addition **[**174]** to Active Directory. Short P 90. Mr. Tiemann alleges that Microsoft's ADSI constitutes a proprietary extension of LDAP that remains undisclosed and undocumented. Tiemann P 152. Mr. Tiemann therefore asserts that "Microsoft's extension of LDAP in Active Directory puts his firm, Red Hat, at a competitive disadvantage vis-a-vis Microsoft's offerings, not because Red Hat engineers are not capable of providing competing functionality, but because of a lack of **[*142]** disclosure that renders them unable to communicate that functionality to Microsoft clients and servers under the ADSI protocol." Tiemann P 153. On behalf of Microsoft, Mr. Short disputes Mr. Tiemann's assertion that LDAP is undisclosed and contends instead that the protocol is fully disclosed and documented on the Microsoft Developer Network ("MSDN"). Short P 91.

d. TDS

The SQL server is Microsoft's database server. Tiemann P 143. The Tabular Data Stream protocol ("TDS") is a proprietary, undocumented protocol that Microsoft uses to communicate between Microsoft desktop PCs and SQL servers. *Id.* TDS enables various Microsoft applications such as Office to view and access the data stored in a SQL server. *Id.* Like **[**175]** CIFS, TDS has largely been reverse engineered, but there remain portions which have not yet been reverse engineered. *Id. P 144*. Mr. Tiemann alleges that without a full implementation of TDS, Red Hat is

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[59] "Open source" refers to a "movement" or business model within the software community in which the source code for the software is made publicly available, often pursuant to terms which grant a license free of charge, with the proviso that any redistribution of the source code, whether modified or unmodified, must also be made publicly available for license free of charge. Tiemann P 33.

[60] The Court discusses the extent to which Microsoft will be required to disclose communications protocols pursuant to the remedy in this case *infra* Part IV.E. To the extent that the CIFS and SMB protocols are natively supported by Windows and are used to interoperate, or communicate, with a Microsoft server, they will be disclosed pursuant to the Court's remedial decree. *Id.* Such mandatory disclosure, however, is not based upon a determination that Plaintiffs' allegations of "bad" acts warrant a remedy, but upon the Court's determination that network/server computing is sufficiently akin to middleware that communications protocols used by Windows to interoperate natively with Microsoft servers should be disclosed in order to facilitate interoperation between Windows clients and non-Microsoft servers. *See supra* Part III.C; *infra* Part IV.E.

unable to provide applications that would allow Linux [61] clients to access information stored on Microsoft's SQL servers or to allow Linux servers to interoperate in a certain manner in a SQL server network. Tiemann PP 143-44. One of Microsoft's computer science experts, Dr. John Bennett, a professor in the Departments of Computer Science and Electrical and Computer Engineering at the University of Colorado at Boulder, Bennett P 1, does not directly dispute the allegation that Microsoft has not disclosed TDS for third party use. *Id. P 194*; Tr. at 7150-54 (Bennett). Dr. Bennett avoids the point with the assertion that there exists a reverse-engineered product, referenced by Mr. Tiemann, Tiemann P 144, which makes some of the TDS functionality available for use by non-Microsoft PC clients when interoperating with Microsoft's SQL server. Bennett P 194; Tr. at 7150-54 (Bennett). Dr. Bennett further observes that the product at issue is a "server application, not even an operating **[**176]** system." Bennett P 194.

e. MAPI

MAPI is a protocol designed by Microsoft and used for communication between the Microsoft Outlook client and the Microsoft Exchange server. Bennett P 157. Plaintiffs' witnesses identified MAPI as the industry standard for "server-based messaging system software." Ledbetter P 83. Since widespread use of MAPI was adopted, Microsoft has extended the standard and maintains proprietary, undisclosed portions of the MAPI protocol. Bennett P 159; Ledbetter P 84; Tiemann P 147. As a result, there are some functions that non-Microsoft servers cannot provide because of an inability to communicate through the MAPI protocol with a Microsoft Outlook client. Tiemann PP 148-49. Mr. **[**177]** Tiemann maintains that this inability to interoperate is the goal of Microsoft's proprietary extension. Tiemann P 149. Although Microsoft, through Dr. Bennett's testimony, concedes its reluctance to disclose certain information, Microsoft maintains that its implementation of MAPI is an innovation like any other, which enables the company to "distinguish its products from those of its competitors." Bennett P 159.

f. MUP

A portion of the Windows operating system is known as the Multiple UNC (Universal **[*143]** Naming Convention) Provider or MUP. Ledbetter P 122. The MUP is Microsoft's proprietary code that facilitates communications between clients and servers in a network. *Id. P 123*. The MUP facilitates communications between Windows clients and multiple servers in a network by directing calls from a client PC to the server that the customer has selected to provide the services requested by the call. *Id. P 123*; Short P 99. Microsoft revised the MUP code for its release of Windows NT 4.0 on August 9, 1996, and as a result of the revision, requests for services by Novell servers in those networks slowed significantly, creating the illusion that Microsoft servers could handle **[**178]** requests for remotely-stored files much faster than Novell servers. Ledbetter PP 127, 140; Bennett PP 163-64. Novell complained to Microsoft and was dissatisfied with the speed and manner in which Microsoft corrected the problem. Ledbetter PP 134-36.

Dr. Ledbetter suggested that Microsoft intentionally designed the MUP modifications to create a result detrimental to Novell. Tr. at 1795-97 (Ledbetter). On behalf of Microsoft, Mr. Short responded that such an implication is without basis. Short PP 99-101. Dr. Bennett further noted that the problem described by Dr. Ledbetter was not limited to non-Microsoft software and that similar delays could be experienced by Microsoft network service providers. Bennett PP 164-65. Microsoft appears to have fully resolved the MUP problem with the release of Windows NT 4.0 Service Pack 4.0 in September of 1998. Bennett P 165; *see also* Tr. at 1799 (Ledbetter).

In general, Microsoft denies that it ever seeks to frustrate interoperability by using proprietary technologies and standards, rather than industry standards, to disadvantage competitors. Instead, Microsoft insists that because it, like any firm, has some limitation on its resources, its **[**179]** decisions regarding interoperability merely reflect its decisions regarding resource allocation. In this regard, Microsoft contends that it does not intend to make

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[61] "Linux is an 'open source' operating system that was created, and is continuously updated, by a global network of software developers who contribute their labor for free." *Findings of Fact, 84 F. Supp. 2d at 23, P 50*. Mr. Tiemann's firm, Red Hat, claims to be "the leading distributor of the Linux operating system." Tiemann P 1.

technology incompatible, but that such outcomes may result from Microsoft's allocation of its own resources in response to the demands of the market. Tr. at 4559 (Gates).

2. Old "Bad" Acts Relating to Interoperation

In a similar vein, Plaintiffs point to specific factual findings entered by Judge Jackson regarding other "bad" acts in relation to Microsoft's disclosure of technical information. For example, Plaintiffs direct the Court to *Findings of Fact, 84 F. Supp. 2d at 33, PP 90-91*, wherein Judge Jackson found that Microsoft knowingly withheld "critical technical information" from Netscape, hindering Navigator's ability to interoperate with Windows 95. *Findings of Fact, 84 F. Supp. 2d at 33, P 90*. Judge Jackson also found that Microsoft withheld "a scripting tool that Netscape needed to make its browser compatible with certain dial-up ISPs." *Findings of Fact, 84 F. Supp. 2d at 33, P 92*. Lastly, Plaintiffs direct the Court to *Findings of Fact, 84 F. Supp. 2d at 42, P 129* in which Judge Jackson recounted that Microsoft offered IBM early access to its source code, a blandishment enjoyed by a handful **[**180]** of other OEMs, on the condition that IBM pre-install Microsoft's applications in place of competing applications. *Findings of Fact, 84 F. Supp. 2d at 42, P 129*. From these acts, Plaintiffs assert that "Microsoft has used the timing of disclosure of technical information needed to interoperate with the Windows platform for the purpose of directly disadvantaging its platform rival Netscape." Pl. Prop. Findings of Fact P 588. Judge Jackson did not ascribe any liability for the above-described acts. *See* *Microsoft, 87 F. Supp. 2d 34*.

[*144] ***3. Conclusions Regarding "Bad" Acts Evidence***

Pointing to both new and old "bad" acts, Plaintiffs argue that Microsoft's ability to hinder interoperability must be curtailed by mandating the disclosure of vast amounts of technical information and by requiring Microsoft to continue to support "industry standards" in any instance where Microsoft has made an alteration to such a standard. Plaintiffs attempt to justify such remedial provisions by relating all of the above "bad" acts, new and old, concerning the release of technical information to the appellate court's imposition of liability. *See, e.g.*, Pl. Prop. Findings of Fact PP 581-585, 1279. Upon review **[**181]** of Plaintiffs' allegations of "bad" conduct by Microsoft relating to interoperability and the liability findings in this case, the Court concludes that Plaintiffs' allegations in this area bear only a remote relationship to the liability findings. As a result, Plaintiffs' reliance upon this series of allegedly "bad" acts by Microsoft carries little weight, if any, in the Court's determination of the appropriate remedy in this case.

a. Insufficient Nexus to Java Developer Tools Deception

Seeking to link this "bad" act evidence to the liability findings in this case, Plaintiffs direct the Court to the appellate court's finding with regard to Microsoft's "software development tools . . . created to assist ISVs in designing Java applications" that Microsoft included in its "Java implementation." *Microsoft, 253 F.3d at 76*. These tools, like Microsoft's JVM, were incompatible with Sun's cross-platform aspirations for Java. *Id.* The appellate court expressly noted that such incompatibility was "no violation, to be sure," but deemed illegal Microsoft's deception of software developers regarding the Windows-specific nature of the tools. *Microsoft, 253 F.3d at 76-77.* **[**182]** As a result of the deception, developers who relied upon Microsoft's "public commitment to cooperate with Sun" and utilized the Microsoft Java tools unknowingly created applications that would only run on the Windows operating system. *Microsoft, 253 F.3d at 76*. Finding that the deception was no error on Microsoft's part, but instead was part of Microsoft's anticompetitive strategy to undermine cross-platform Java, and in the absence of any procompetitive justification for the action, the appellate court found Microsoft to be in violation of *§ 2* of the Sherman Act. *Microsoft, 253 F.3d at 76-77*.

While this was undoubtedly reprehensible behavior, of paramount significance in the Court's examination of this liability finding is the fact that the imposition of liability for Microsoft's Java tools concerned not the tools' incompatibility with cross-platform Java, but Microsoft's deceptive conduct. *Id.* The Court, therefore, rejects Plaintiffs' suggestion that the imposition of liability for Microsoft's deception regarding its Java developer tools in any way condemns Microsoft's decisions to depart from industry standards or to utilize a proprietary standard in the absence of deception **[**183]** regarding the departure. *See supra* Part III.D.1. The Court further observes that Plaintiffs' allegations regarding Microsoft's alteration of industry standards and use of proprietary technology more closely resemble conduct for which the appellate court expressly rejected liability, than conduct condemned by the appellate court. *Id.* In particular, the actions about which Plaintiffs complain are not unlike Microsoft's implementation of its own JVM incompatible with Sun's JVM. *Compare id.*, *with* *Microsoft, 253 F.3d at 74-75*. Microsoft proffered a procompetitive justification for its development of an incompatible JVM, which was found to outweigh the anticompetitive effect of the implementation. *Microsoft, 253 F.3d at 74, 75* . Similarly, Microsoft's inclusion of its **[*145]** own Java runtime in every copy of Windows so as to ensure ubiquity also was found not to violate the antitrust laws. *Microsoft, 253 F.3d at 75*.

Just as ***HN21***[] "a monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals," *id.*, little, if anything, in the liability findings of this case could be construed to indicate that, as a general **[**184]** rule, a monopolist's decision to alter industry standards or implement a proprietary version of such standards in its own product or technology, without more, violates the antitrust laws. This Court undoubtedly has the discretion to "uproot all parts of an illegal scheme-the valid as well as the invalid-in order to rid the trade or commerce of all taint of the [illegal conduct]." *Paramount Pictures, 334 U.S. at 148*. Still, "in resolving doubts as to the desirability of including provisions designed to restore future freedom of trade," this Court is instructed to weigh the "circumstances under which the illegal acts occur." *Gypsum, 340 U.S. at 89*.

In this instance, the appellate court was very clear as to which portions of Microsoft's conduct were anticompetitive in their effect so as to violate the antitrust laws and which portions of Microsoft's conduct were rendered legitimate by a procompetitive justification. This Court cannot ignore the careful and nuanced distinctions drawn by the appellate court in order to justify the prohibition of conduct which bears only a limited resemblance to a narrow part of an anticompetitive scheme. As a result, **[**185]** the Court finds Plaintiffs' focus on Microsoft's alteration of industry standards and reliance upon undisclosed proprietary technologies to be largely misplaced. Plaintiffs' focus ignores the totality of the circumstances, and it ventures into areas of conduct which, at best, are only tangentially related to the conduct for which Microsoft has been found liable.

b. Insufficient Nexus to First Wave Agreements

Plaintiffs also focus, in this context, upon Microsoft's treatment of technical information in conjunction with the First Wave Agreements it entered into with various ISVs. In this context, Microsoft was found to have provided preferential technical support and conditioned receipt of technical information in exchange for ISV promises to promote exclusively the Microsoft JVM and IE. *Microsoft, 253 F.3d at 71-72* (discussing Microsoft's First Wave Agreements with ISVs regarding the use of IE); *Microsoft, 253 F.3d at 75-76* (discussing Microsoft's First Wave Agreements with ISVs regarding Microsoft's JVM). In relation to both the Microsoft JVM and IE, the First Wave Agreements were deemed to violate the Sherman Act inasmuch as they effectively excluded **[**186]** the Sun-compliant JVM and Navigator from significant channels of distribution. *Microsoft, 253 F.3d at 72, 75-76*. Importantly, however, the appellate court expressly noted that the mere fact that Microsoft exchanged "costly technical support and other blandishments" in conjunction with the agreements was not a basis for the imposition of liability. *Microsoft, 253 F.3d at 75* (quoting *Findings of Fact, 84 F. Supp. 2d at 108, P 401)*; *see also* *Microsoft, 253 F.3d at 71-72* (describing Microsoft's use of "preferential support" and "technical information" as consideration). Rather, it was the exclusive effect of the agreements which led to the imposition of liability for Microsoft's First Wave Agreements with ISVs. *Microsoft, 253 F.3d at 71-72, 75-76*.

There are no liability findings in this case which condemn Microsoft solely for the use of valuable technical information as consideration in contracting with third parties; only where such agreements required the use of Microsoft technology to **[*146]** the exclusion of third-party technology did the appellate court find antitrust violations. The circumstances described above regarding Microsoft's alteration of industry standards, use of proprietary standards, and refusal **[**187]** to release technical information are readily distinguishable from Microsoft's conduct in relation to the First Wave Agreements. *Compare supra* Part III.D.1, *with* *Microsoft, 253 F.3d at 71-72, 75-76*. Notably, none of the new allegations of "bad" acts described above arise in the context of Microsoft entering into contracts or other negotiations predicated upon the provision of technological information. *See supra* Part III.D.1. Instead, Plaintiffs have merely identified a series of circumstances where Microsoft allegedly withheld proprietary technical information to the detriment of Microsoft's competitors. *Id.* As the Court previously observed,

HN22[] action which is harmful to competitors does not, by itself, violate the antitrust laws. *Microsoft, 253 F.3d at 58*.

Although "equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole," *Bausch & Lomb, 321 U.S. at 724*; *see also* *Paramount Pictures, 334 U.S. at 148*, Plaintiffs' focus on an entirely separate series of alleged withholdings of proprietary technical information unrelated to any exclusive **[**188]** deals with ISVs, far exceeds mere eradication of Microsoft's practice of promising technical information and other blandishments in conjunction with the First Wave Agreements. *Compare supra* Part III.D.1-2, *with* *Microsoft, 253 F.3d at 58*. The Court, therefore, does not regard the alleged withholding of technical information described in Plaintiffs' most recent allegations as synonymous with the anticompetitive conduct, or any part thereof, addressed by the appellate court in conjunction with its review of the First Wave Agreements. On the same grounds, the Court rejects the view that such alleged withholding of information be viewed as a mere continuation of conduct found in whole or in part to violate the antitrust laws.

c. Nexus to Old "Bad" Acts

At best, some of the allegedly new "bad" acts described above bear a limited similarity to the series of old "bad" acts from the liability phase because they concern the withholding of technical information. *See supra* Part III.D.1. Despite this limited similarity, Plaintiffs' allegations are not relevant to this phase of the litigation. Plaintiffs do not argue, nor does it appear, that these "old" bad **[**189]** acts gave rise to any findings of liability against Microsoft for violations of ***antitrust law***. While the factual findings of old "bad" acts identified by Plaintiffs are not benign acts by Microsoft, they were not found to violate the Sherman Act. There is no need to "remedy" conduct for which no liability was ascribed, nor is there a need to "remedy" new conduct which bears a mere tangential similarity to such previously identified conduct.

Despite Plaintiffs' protestations to the contrary, the Court finds that Plaintiffs' allegations with regard to Microsoft's conduct in the area of interoperability are, at their core, new allegations of anticompetitive conduct. *See id.* Notwithstanding the Court's authority to exceed the parameters of the precise conduct found to violate the antitrust laws in order to ensure an effective remedy, there is no dispute that the Court is not at liberty to remedy new "bad" conduct for which no liability has been ascribed. *See* *Microsoft, 56 F.3d at 1460*; *see also* *Yamaha Motor Co. v. FTC, 657 F.2d 971, 984 (8th Cir. 1981)* (rejecting injunction on the ground that its provisions extended "beyond any reasonable relationship **[**190]** to the violations found"). **[*147]** The parties have agreed throughout this proceeding that it would be inappropriate now, during the remedy phase of this proceeding, for the Court to consider and evaluate for anticompetitive effect new allegations against Microsoft. Accordingly, the Court finds that Plaintiffs' new allegations of bad" conduct relating generally to interoperation and more specifically, to Microsoft's alteration of industry standards, use of proprietary technology, and non-disclosure of technical information, are inapposite to the narrow task at hand.

E. Causation Analysis

1. Microsoft's Simple Injunction Argument

Inasmuch as Plaintiffs seek to expand the scope of the conduct to be addressed by the remedy in this case, Microsoft has sought to narrow the scope. In this regard, Microsoft contends that, if Plaintiffs are entitled to any remedy, [62] they are entitled to no more than a simple proscription against the offensive conduct. To justify its argument in this regard, Microsoft relies upon the appellate court's determination that "in devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient **[**191]** causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market." *Microsoft, 253*

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[62] Microsoft has maintained that Plaintiffs are not entitled to any remedy in this case. The Court rejected these arguments, which were primarily advanced in Microsoft's "motion to dismiss" in an earlier Memorandum Opinion. *State of New York, et al. v. Microsoft, 209 F. Supp. 2d 132*, slip op. (D.D.C.2002).

F.3d at 106. The appellate court further observed that "absent such causation, the antitrust defendant's unlawful behavior should be remedied by 'an injunction against the continuation of that conduct.'" *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67). Drawing from this language, Microsoft insists that:

> Establishing a causal connection sufficient to justify more than an injunction against the 12 acts the Court of Appeals found anticompetitive would require each of the following:
>
> 1. Proof that Navigator and Java would have been successful software products that would have achieved near ubiquitous distribution absent the 12 Microsoft acts found to be anticompetitive.
>
> 2. Proof that Navigator and Java then would have evolved into alternative software development platforms for general purpose applications.
>
> 3. Proof that so many applications would have been written to run on Navigator and Java (as opposed to running directly on Windows) that the applications barrier to entry into the market for Intel-compatible **[**192]** PC operating systems would have been significantly reduced.
>
> 4. Proof that once the applications barrier to entry had been significantly reduced, other vendors would have entered the market for Intel-compatible PC operating systems and thereby eliminated Microsoft's monopoly.

Microsoft Prop. Concl. of Law P 109. In so arguing, Microsoft demands of Plaintiffs precisely what the appellate court deemed to be largely unattainable. The appellate court stated without equivocation that "neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct." Microsoft, 253 F.3d at 79. Moreover, the **[*148]** district court had already determined as a factual matter that there was "insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems." Findings of Fact,84 F. Supp. 2d at 111, P 411. The appellate court was well aware of this finding, Microsoft, 253 F.3d at 107 (quoting Findings of Fact,84 F. Supp. 2d at 111, P 411), and did not indicate that Plaintiffs must overcome it **[**193]** in order to obtain a remedy exceeding a mere proscription of the illegal conduct.

In addition, Microsoft's arguments relating to causation overlook the context of the appellate court's analysis. Throughout its discussion of causation, the appellate court addressed the level of causation that must be established in order to justify a remedy of divestiture. Microsoft, 253 F.3d at 106-07. The treatise upon which the appellate court so heavily relied, Areeda and Hovenkamp's ***Antitrust Law***, clearly distinguishes the evidence of causation which is required for a divestiture order and the evidence of causation which is sufficient for injunctive relief. Areeda and Hovenkamp advise that **HN23**[] in cases like this **[**194]** one, where "a monopolist has consummated an exclusionary act . . . equitable relief beyond a mere injunction against repetition of the act is generally appropriate." 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653c, at 94-95. Recognizing the possibility that "the specific act under challenge may be unique to the circumstances and unlikely to be precisely 'repeated,'" and the need to "undo the various effects of the act," Areeda and Hovenkamp offer the precise advice advanced by the appellate court: the relief must be "tailored" to fit the wrong. *Id.*; Microsoft, 253 F.3d at 107. The treatise advises specifically that the tailoring must have "sufficient breadth to ensure that a certain 'class' of acts, or acts of a certain type or having a certain effect, not be repeated." 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653c, at 94-95.

Even if Microsoft were correct that a proper remedy in this case should only enjoin the specific conduct found to be anticompetitive, Microsoft overlooks the fact that any doubts as to the extent of even this narrow remedy are to be resolved against the defendant. Areeda and Hovenkamp advise that **HN24**[] "merely for purposes of enjoining the conduct itself, **[**195]** exclusionary conduct is best defined rather broadly in the sense of resolving against the monopolist any doubts concerning the significance of the conduct's contribution to the monopoly." *Id.* P 653c, at 91.

Inasmuch as Microsoft has proposed a remedy which plainly exceeds the bounds of the exclusionary conduct, Microsoft concedes that the Court may order such a remedy in this case. To the extent that the Court has rejected or altered portions of Microsoft's proposed remedy, it does so, in its discretion, to ensure that the conduct found to be exclusionary in violation of § 2 of the Sherman Act is, in fact, "broadly" defined, as Areeda and Hovenkamp instruct, and thereby fully enjoined. Accordingly, the Court finds unpersuasive Microsoft's argument that Plaintiffs are entitled to no more that a simple proscription against the conduct found to violate the antitrust laws.

2. Economic Testimony

In reviewing Judge Jackson's failure to hold an evidentiary hearing prior to imposition of the IFJ, the appellate court recounted the presence of substantial factual disputes, highlighting in particular the conflicting predictions proffered by Plaintiffs' expert economists and **[**196]** investment banking experts and Microsoft's experts in the same areas. *Microsoft, 253 F.3d at 101-02*. Based upon this account and the nature of the remedy proposals, this Court anticipated that substantial portions of the **[*149]** testimony in this phase of the proceeding would come from witnesses qualified by the Court as experts in one field or another. Along these lines, throughout the presentation of evidence in this phase of the proceeding, the Court has been particularly attentive to the testimony of the parties' economic experts with regard to the anticipated effect of particular remedial provisions on competition in the relevant market and for consumers.

Neither of the parties has taken the position that it would be improper for the Court to impose a particular remedial provision in the absence of an endorsement of such provision from one of the economists testifying in this proceeding. Notwithstanding this fact, the Court observes that where the changes that would result from the imposition of a particular remedial provision are dramatic, there is at least an expectation that the party proposing such changes will present an economic analysis of the effect of the changes **[**197]** upon competition in the monopolized market, as well as upon Microsoft, other industry participants, and the consumer. Such expert testimony is of particular use to the Court because the economist is capable of examining the anticipated effect of the provision upon all segments of the industry, rather than from a single perspective, such as that which is frequently offered by individual industry participants. Although the absence of economic analysis of any given remedy provision does not, by any means, require the rejection of the proposed provision, the Court is careful to note those occasions where expert economic testimony would have been particularly useful to the Court and where its absence is significant.

a. Dr. Shapiro's Causation Analysis

i. Factual Findings

Plaintiffs' sole presentation of expert economic analysis comes from Dr. Carl Shapiro, Professor of Business Strategy at the University of California at Berkeley. Dr. Shapiro offered an analysis of the appropriate remedy in this case and, not surprisingly, endorsed many, though not all, of the provisions in Plaintiffs' proposed remedy. Shapiro PP 1-207. Dr. Shapiro testified that his economic analysis **[**198]** rests upon the premise and belief that "restoring competition requires remedial provisions that will affirmatively lower the barriers to entry into the market for PC operating systems." Shapiro P 16 (emphasis omitted). Dr. Shapiro went on to explain that because he viewed the remedy in this case as seeking to "restore competition," the appropriate starting point is an "assessment of how Microsoft's illegal conduct harmed competition." *Id. P 17* (emphasis omitted).

Dr. Shapiro's "assessment" in this regard appears to have been based entirely upon his examination of the district and appellate courts opinions in this case. *Id. PP 18-20, 22-23*. In fact, Dr. Shapiro was unable to identify any source other than the district and appellate court opinions in this case upon which he relied to examine the effects of Microsoft's anticompetitive conduct upon the applications barrier to entry. Tr. at 3360-64 (Shapiro). In this regard, Dr. Shapiro admitted that his citation to Judge Jackson's *Findings of Fact* in order to illustrate the impact of Microsoft's anticompetitive conduct upon Navigator and Java included conduct which was found *not* to violate the antitrust laws. *Id.* at **[**199]** 3381-93 (Shapiro). Dr. Shapiro also conceded that he did not make any attempt to separate the effect of the illegal conduct from the effect of the conduct found *not* to be illegal. *Id.* at 3392, 3401. From his assessment of the record, Dr. Shapiro reached the conclusion that Microsoft's anticompetitive conduct "raised" the **[*150]** existing applications barrier to entry, and therefore, the remedy imposed by the Court, in Dr. Shapiro's opinion, "should lower entry barriers." *Id. P 25* (emphasis omitted).

Quite logically, Dr. Shapiro opined that "entry barriers should be lowered to compensate consumers for the elevation of entry barriers that has resulted from Microsoft's illegal conduct." *Id. P 46*; *see also id. P 58*. Dr. Shapiro readily conceded, however, a lack of any "precise measure" of the extent to which Microsoft's illegal conduct actually "raised" entry barriers. Shapiro P 46. Dr. Shapiro acknowledged his inability to define or even estimate the amount, or the "quantum," to which Microsoft's conduct augmented or fortified the existing applications barrier to entry to defend against the threat posed jointly by Navigator and Java. Tr. at 3359-60 (Shapiro). Dr. Shapiro **[**200]** opined that this uncertainty leaves the Court with the task of making "some judgment calls . . . in terms of how far the remedy should go." *Id.* at 3359. Nevertheless, Dr. Shapiro offered his "best estimate of the elevation of entry barriers caused by Microsoft's illegal conduct." Shapiro P 46. This "estimate" however, is little more than a rejection of the analysis of Microsoft's economic expert, Dr. Murphy, which the Court addresses below. *Id. PP 61-70*. Ultimately, Dr. Shapiro offered the conclusion that "the impact of the illegal acts was significant at the time, while their ongoing effects are very difficult to assess." *Id. P 62*. This "conclusion," of course, is little more than a reiteration of Dr. Shapiro's earlier determination that it is impossible to measure the extent to which Microsoft's anticompetitive conduct raised the existing barrier to entry. The Court observes, in this regard, that Dr. Shapiro does not appear have based this portion of his analysis on any additional empirical evidence or to have relied upon his own experience and expertise to assess the impact of Microsoft's illegal conduct. The remainder of Dr. Shapiro's testimony consisted largely of **[**201]** his assessment of the effectiveness of the two competing remedy proposals in lowering the applications barrier to entry.

ii. Conclusions

To the extent that Dr. Shapiro offered an analysis of whether Microsoft's illegal conduct raised the existing barrier to entry, that analysis is essentially a legal analysis, rather than an economic analysis. The Court reaches this conclusion because Dr. Shapiro's analysis relies entirely upon the judicial findings and conclusions entered in this case and the logical conclusions which can be drawn therefrom. *See supra* Part III.E.2.a.i. In conjunction with his analysis on this point, Dr. Shapiro does not appear to have gathered or synthesized empirical information or to have applied particular economic principles. *Id.* Likewise, Dr. Shapiro's ensuing analysis of the extent to which the remedy in this case should seek to affirmatively lower the existing barrier to entry does not appear to be based upon anything more than a logical reading of the judicial opinions in this case, as he offered no quantification to guide the Court beyond the view that the lowering of the barrier to entry should correspond roughly to the amount the barrier **[**202]** was raised by the illegal conduct. *Id.*

The Court can itself review the same judicial opinions reviewed by Dr. Shapiro and reach determinations regarding whether the remedy should seek to affirmatively lower the applications barrier to entry and the extent to which it should do so. Indeed, Dr. Shapiro himself expected as much, anticipating that the Court would exercise its judgment in deciding "how far the remedy should go." *Id.* Thus, the Court observes, as a preliminary matter, that Dr. Shapiro's ensuing analysis regarding **[*151]** the sufficiency of the two competing remedy proposals to lower the barrier to entry will be useful *only* to the extent that the Court agrees with Dr. Shapiro's interpretation of the appellate and district court opinions in this case.

b. Dr. Murphy's Causation Analysis

i. Factual Findings

One of Microsoft's economic experts, Dr. Kevin Murphy, Professor of Business Economics in the Graduate School of Business at the University of Chicago, provided a causation analysis from a very different perspective. Dr. Murphy concluded that Microsoft's anticompetitive conduct did not have a significant effect on Navigator, Java, or Microsoft's position **[**203]** in the market for Intel-compatible PC operating systems. Murphy PP 92, 104, 157. The Court finds that Dr. Murphy's conclusions as to the effect of Microsoft's conduct upon Navigator and Java are factually in conflict with the conclusions of the appellate court that gave rise to the findings of liability in this case. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. Dr. Murphy's conclusion with regard to the effect of Microsoft's anticompetitive conduct upon its monopoly is less directly in conflict with the appellate court's opinion because, as that court acknowledged, a mere inference of causation, *id. at 79*, rather than a "clear[] indication of a *significant causal connection* between the conduct and creation or maintenance of the market power," would support a finding of liability, *id. at 106* (emphasis in original). Still, Dr. Murphy's conclusion that the anticompetitive conduct identified in this case had *no* effect upon Microsoft's monopoly can be seen to undercut, if not directly contradict, the inference of causation necessary to the appellate court's imposition of liability. Although Dr. Murphy has protested any assertion that his analysis **[**204]** ignores, contradicts, or second-guesses the findings of the appellate court, the Court disagrees. *See, e.g.*, Tr. at 4068 (Murphy).

ii. Conclusions

The Court harbors serious concerns as to the usefulness of Dr. Murphy's causation analysis. Most troubling to the Court in examining Dr. Murphy's analysis is the fact that many of the conclusions reached by Dr. Murphy cannot be reconciled logically with significant portions of the appellate court's opinion. *See supra* Part III.E.2.b.i. Based upon the Court's concerns as to the basis for Dr. Murphy's causation analysis, the Court ascribes little, if any, weight to this portion of Dr. Murphy's testimony.

Notwithstanding the foregoing conclusions regarding the expert testimony offered by both Drs. Shapiro and Murphy, the Court notes that substantial portions of testimony from both of these expert witnesses, distinct from the portions described above, prove useful to the Court in its assessment of the parties' respective remedy proposals.

IV. REMEDY-SPECIFIC CONCLUSIONS

Having rendered the foregoing preliminary determinations regarding the appropriate scope of the remedy in this case, the Court, in the exercise of **[**205]** its broad discretion on the subject of remedy, enters the following determination on the issue of remedy. The Court's determination is based upon the entire factual and legal record in this case and is guided, in particular, by the factual findings on the subject of remedy entered by the Court and appended hereto as Appendix A. The Court's determination as to the remedy to be imposed in this case reflects the Court's assessment of the facts and application of the **[*152]** relevant law, as well as the exercise of the Court's broad discretion.

A. Original Equipment Manufacturer ("OEM") Configuration Flexibility

1. Windows Licenses

The remedy imposed by the Court will provide substantial freedom to OEMs in their configuration of Microsoft's Windows operating system by lifting Microsoft's illegal license restrictions. A significant portion of the liability findings concerns Microsoft's treatment of OEMs, specifically with regard to Microsoft's imposition of exclusionary restrictions in conjunction with the Windows operating system licenses provided to OEMs. *Microsoft, 253 F.3d at 60-62*. The licenses sharply limited OEMs' flexibility and choices in configuring **[**206]** the PC desktop. The limitations were exclusionary in that they bound OEMs' configuration of the desktop in a manner which tended to favor Microsoft software and services at the expense of software and services offered by other entities. Drawing upon these liability findings, there is little dispute as to the general proposition that the remedy imposed by the Court should terminate Microsoft's illegal and anticompetitive license restrictions and prevent Microsoft from imposing similar restrictions in the future.

Despite this limited agreement that the remedy should lift Microsoft's anticompetitive OEM license restrictions, the parties differ significantly as to the specific manner in which such restrictions should be lifted, as well as the extent to which greater flexibility, beyond that addressed at the liability phase, should be secured for OEMs. The first such disagreement concerns whether the remedy in this case will provide protection from restrictions for "ThirdParty Licensees." Plaintiffs argue that the lifting of the license restrictions should require Microsoft to license its Windows operating system to third parties, such as media companies or software developers, who will **[**207]** then distribute or otherwise use the licenses for commercial purposes. The third-party licensing portion of Plaintiffs' proposal would permit such third parties to "customize" the appearance of Windows to reflect the third party's input. *See* Appendix A, Part I.A.

Plaintiffs do not link this aspect of their request for a remedy to a finding of liability which concerns Microsoft's treatment of such "Third-Party Licensees." Plaintiffs argue instead that the protection of the ability of such licensees to customize Windows will increase the development and distribution opportunities for non-Microsoft middleware, aiding in unfettering the market from Microsoft's anticompetitive conduct. Plaintiffs, however, have failed to establish that such licensing will actually benefit or promote competition. *See id.* Additionally, Plaintiffs' proposal for third-party licensing does not reflect the appellate court's recognition that, to the extent that Microsoft's license restrictions prevented drastic alteration of the user interface, they did not violate the Sherman Act. *Microsoft, 253 F.3d at 63*. Rather, Plaintiffs' examples of third-party configuration unapologetically reflect **[**208]** precisely this type of a drastic alteration. *See* Appendix A, Part I.A. Plaintiffs' proposal in this regard will plainly limit Microsoft from engaging in conduct which has not been found to be in violation of the antitrust laws. *Id.*; *Microsoft, 253 F.3d at 63*.

While the case law permits the Court to address legitimate conduct as well as illegal conduct in order to ensure that the market is free from the effects of the anticompetitive scheme, *Nat'l Soc'y of Prof'l Eng'rs*, *435 U.S. at 698*, Plaintiffs have failed to make a showing that regulation of Microsoft's third-party licenses in order to enable "customization" **[*153]** will advance competition, *see* Appendix A, Part I.A. Indeed, the appellate court did not address any aspect of "third-party licensing" in its opinion. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. In addition, the testimony offered in support of Plaintiffs' proposal raises a concern that it has been included for the benefit of particular competitors, rather than for the benefit of competition itself. *See* Appendix A, Part I.A. Absent a clearer connection to the imposition of liability or a clearer showing that **[**209]** a remedy which regulates third-party licensing will benefit competition, the Court declines to impose a remedy which extends needlessly beyond the parameters of the liability findings in order to address license restrictions which Microsoft may impose in third-party licenses. *See* *Brunswick, 429 U.S. at 488* ("The antitrust laws, however, were enacted for 'the protection of competition not competitors.'") (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502*).

2. Installation and Display of Icons, Shortcuts, and Menu Entries

Rather than extend the terms of the decree haphazardly beyond the limits of the anticompetitive conduct as Plaintiffs suggest, the Court will tailor the remedy to fit the exigencies of this case, *Int'l* *Salt, 332 U.S. at 400-01*; *see also* *Bausch & Lomb, 321 U.S. at 727*, focusing initially upon terminating any existing practices deemed to be anticompetitive and ensuring that "there remain no practices likely to result in [illegal monopoly maintenance] in the future," *United Shoe, 391 U.S. at 250*. The remedy imposed by the Court therefore seeks primarily to address the specific conduct **[**210]** found to be anticompetitive with regard to OEM licenses. In order to address Microsoft's illegal prohibitions in OEM licenses, the remedy in this case will afford OEMs the freedom that they have been denied and will protect against any "back door" attempt by Microsoft to deny flexibility. The remedy imposed by the Court will secure for OEMs the general ability to install and display icons, shortcuts and menu entries for middleware-the type of software disfavored by Microsoft's anticompetitive restrictions-on the Windows desktop or in the Start menu. Importantly, however, rather than a blanket prohibition on licensing restrictions, the Court's remedy recognizes the care with which the appellate court separated anticompetitive restrictions from legitimate license restrictions and attempts to reflect that separation in its terms. *See generally* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*.

For example, the appellate court concluded that license restrictions preventing drastic alteration of Microsoft's copyrighted work were only marginally anticompetitive and on this basis, rejected a finding of liability for licenses that prohibit OEMs from launching an alternative user interface automatically **[**211]** at the end of the initial boot sequence. *Microsoft, 253 F.3d at 63*. Given this very specific recognition that Microsoft can legitimately protect its products from drastic alteration, the remedy imposed by the Court will prohibit anticompetitive practices but still enable Microsoft to protect its copyrighted products from drastic alteration. *Id.* Therefore, the provisions of the injunctive decree will balance preservation of the core elements of Microsoft's product design against the need to secure significant flexibility and protection for OEM configuration of the product.

The Court first strikes this balance in the context of the installation and display of icons, menu entries, and shortcuts. Microsoft will be enjoined from restricting by agreement any OEM licensee from installing an icon, menu entry, shortcut, product, or service related to "NonMicrosoft Middleware." **[*154]** *See supra* Part III.B-C.

(discussing definition of "Non-Microsoft Middleware"). Likewise, the Court will enjoin Microsoft from limiting the display of any such icon. However, the Court will not prevent Microsoft from imposing non-discriminatory limitations on the specific areas in which icons **[**212]** may be displayed, provided that such limitations cannot be used to favor Microsoft and, instead, exist as part of the Windows product design. There is no evidence that the minor limitations on OEM flexibility in this manner will permit illegal monopolistic practices to persist or harm competition. *See* Appendix A, Part I.A. The Court's remedy will also permit Microsoft to protect the design of its product from drastic alteration in a manner which is the substantial equivalent of a launching of a new user interface, such as OEM designation of an icon in such an extreme size or shape that it obscures the crucial elements of the Windows user interface. There has been no showing that the preservation of Microsoft's ability to impose license restrictions with regard to these kinds of extreme alterations of Windows will work to the detriment of competition, *see id.*, and in the Court's view, such license restrictions are more akin to the restrictions for which Microsoft was absolved of liability than those for which Microsoft was found to have acted unlawfully.

3. Insertion of Internet Access Provider ("IAP") Registration Offers

The insertion by OEMs of offers of service **[**213]** from IAPs during the initial boot sequence was found to provide an opportunity for the promotion of alternative middleware. *Findings of Fact, 84 F. Supp. 2d at 60, P 210*. Microsoft's limitation on the ability of OEMs to insert such offers was found to have an anticompetitive effect in violation of ***antitrust law***. *Microsoft, 253 F.3d at 61-64*. To remedy this finding, the remedial decree imposed by the Court will enjoin Microsoft from imposing license restrictions on the ability of OEMs to insert such offers.

Microsoft has argued that the insertion of IAP registration sequences should be subject to the imposition of Microsoft's "reasonable technical requirements" on the rationale that such requirements preserve a consistent user experience. In offering this concern as a justification, Microsoft ignores the fact that the same rationale was rejected by the appellate court when it imposed liability for Microsoft's license restrictions regarding the initial boot sequence. *Microsoft, 253 F.3d at 63-64*. Specifically, the appellate court concluded that Microsoft's concern for consumer confusion and the allegedly reduced value of its product did not outweigh the anticompetitive effect of the **[**214]** license restrictions. *Id.* Microsoft's argument was found to have merit only to the extent that the license restrictions were necessary to prevent "drastic alteration of Microsoft's copyrighted work." *Microsoft, 253 F.3d at 63*. Microsoft has not offered any additional justification for preserving its ability to impose "reasonable technical requirements" on the introduction of IAP registration offers during the initial boot sequence. *See* Appendix A, Part I.A. Accordingly, there is no basis upon which the Court can rationally conclude that the remedy should permit Microsoft to impose such specifications beyond the requirement that the registration sequence must return the user to the Windows user interface at its conclusion. *Id.*; *see also* *Microsoft, 253 F.3d at 63* ("We agree that a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work . . . ."). Even Microsoft concedes that, at a minimum, the final judgment in this case must address the specific acts found by the appellate court **[*155]** to constitute exclusionary practices in violation of *§ 2* of the Sherman Act. Hence, the remedy **[**215]** imposed by the Court will enable OEMs to offer IAP registration during the initial boot sequence.

4. Automatic Launching of Applications

In a related context, the Court's remedial order will secure the ability of OEMs to install applications which launch automatically, meaning without end-user invocation, in particular instances. Microsoft argues that the remedy imposed by the Court should not give OEMs complete autonomy with regard to the automatic launching of applications at start-up or upon accessing or departing the Internet. The Court recalls once again that the only Microsoft license restriction found to have competitive value outweighing its anticompetitive effect was the prohibition on the automatic launch of a program which *replaced* the Windows user interface with a substitute user interface. *Microsoft, 253 F.3d at 63*. The rationale for this holding rests upon the appellate court's conclusion that the "drastic alteration of Microsoft's copyrighted work" outweighed the "marginal anticompetitive effect" of the restriction. *Id.* By implication, therefore, the appellate court did not relieve Microsoft of liability for the imposition of license **[**216]** restrictions relating to the automatic launching of software where the automatically launched programs respected and functioned within the Windows user interface and thereby did not drastically alter

Microsoft's copyrighted work. *Compare* *Microsoft, 253 F.3d at 64* ("We hold that with the exception of the *one restriction* prohibiting automatically launched alternative interfaces, *all* of the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly . . . .") (emphasis added), with *Findings of Fact, 84 F. Supp. 2d at 61, P 213* ("Third, Microsoft prohibited OEMs from installing programs, including [but not limited to] alternatives to the Windows desktop user interface, which would launch automatically upon completion of the initial Windows boot sequence.").

Paying careful attention to the very specific reason for the appellate court's rejection of liability with regard to alternative user interfaces, the Court regards it as appropriate for the remedy in this case to permit the automatic launch of non-Microsoft programs upon the completion of the initial boot sequence where the automatically-launched program does not substitute the Windows user interface **[**217]** for a different interface or otherwise drastically alter Microsoft's copyrighted work. *See* Appendix A, Part I.A (describing programs that are automatically launched but do not replace Microsoft's user interface). The Court has tailored its remedy to permit the automatic launch of such programs because the ability to launch programs automatically will assist in the promotion of non-Microsoft software and middleware, resulting in an increased likelihood that a particular piece of middleware will reach its potential to serve as a multi-purpose platform for applications. *See id.*

The Court, therefore, specifically rejects the contention by Microsoft that automatic launching of software products should be limited to circumstances where Microsoft has chosen to launch automatically a competing middleware program. The benefit of the automatically launching program arises from the fact that the user need not do anything to invoke the program's capabilities. *Id.* The limitation proposed by Microsoft will cabin innovation to that which is led by Microsoft. *Id.* Whether or not Microsoft happens to have a product which provides similar functionality which would be launched automatically **[**218]** has little bearing upon the competitive advantages to be gained by enabling the automatic **[*156]** launching of new and innovative products. *Id.* Accordingly, the Court will enjoin Microsoft from limiting the automatic launch of software provided that such software does not replace the Windows user interface or otherwise drastically alter Microsoft's copyrighted work.

B. End-User Access

In addition to the lifting of Microsoft's illegal license restrictions, the Court's remedial order will require Microsoft to alter its Windows technology to ensure that OEMs and end users may disable end-user access to various types of Windows functionality. Much of the litigation in the remedy phase has focused upon the proper remedy for the imposition of liability upon Microsoft for its "commingling" of browsing-specific code with code that provides operating system functionality. *Microsoft, 253 F.3d at 65* (quoting *Findings of Fact, 84 F. Supp. 2d at 50, P 161)*. The appellate court, appearing to adopt the district court's rationale that a distinction could be drawn between browsing-specific code and operating system code, explained that such commingling "has an anticompetitive effect" because **[**219]** it "deters OEMs from pre-installing rival browsers [because doing so increases the OEM's product testing and support costs], [63] thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system." *Microsoft, 253 F.3d at 66*. This anticompetitive effect outweighed Microsoft's procompetitive justification and accordingly, resulted in the imposition of liability by the appellate court. *Id.*

In the case of commingling, the most appropriate remedy, in this Court's view, must place paramount significance upon addressing the exclusionary effect of the commingling, rather than the mere **[**220]** conduct which gives rise to the effect. By addressing the adverse effect of such commingling, the Court can more readily expand the remedy beyond the specific finding of liability for commingling browsing-related code with operating system-related code. Such expansion is inherently difficult, as there, indeed, exists great disagreement and confusion as to what aspects

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[63] "Preventing an OEM from removing IE deters it from installing a second browser because doing so increases the OEM's product testing and support costs; by contrast, had OEMs been able to remove IE, they might have chosen to pre-Install Navigator alone." *Microsoft, 253 F.3d at 66* (citing *Findings of Fact, 84 F. Supp. 2d at 49, P 159)*.

of Microsoft's product design, if any, would constitute commingling beyond the treatment of browser code and operating system code. *See* Appendix A, Part X.B.

Plaintiffs seek to broaden the view of commingling to encompass any circumstance in which operating system code is included in the same files as code that Plaintiffs have characterized as non-operating system or middleware code. *Id.* Such broadening, however, invokes a dilemma that has existed since the inception of this suit, namely whether certain functionalities can be identified as exclusive to the "operating system," while other functionalities are entirely unrelated to the operating system. Fundamental to the "commingling" finding by the district court and subsequent affirmance by the appellate court was the factual determination that there existed **[**221]** "a *consensus* in the software industry that [Webbrowsing] functionalities are distinct from the set of functionalities provided by an operating system." *Findings of Fact,84 F. Supp. 2d at 48, P 150* (emphasis added). Plaintiffs have failed to offer evidence which establishes that a similar consensus exists with regard to the other Microsoft middleware functionalities that Plaintiffs have proposed to make removable **[*157]** from Windows. *See supra* Part III.B-C; *see also* Appendix A, Part X.B. Nevertheless, even where such distinctions can be drawn between operating system and non-operating system, it is equally difficult to then separate various purported non-operating system functionalities into their own categories of functionality. [64] *See* Appendix A, Part X.B. Moreover, even if operating system and non-operating system functionalities are separable in concept, separation of the code, in practice, is far more difficult.*Id.*

[222]** Plaintiffs have advanced a remedy that requires the removal of Windows software code providing the "middleware" functionality of "Internet browsers," and a number of other types of "middleware" functionality, so as to leave only "operating system" code. Yet, Plaintiffs have been unsuccessful at distinguishing the code which comprises an "operating system" from the code which comprises a non-operating system "Microsoft Middleware Product," such as a browser. *Id.* Because of this failure, Plaintiffs have not offered a reasonable way for Microsoft to separate the code in order to comply with the code removal requirements in Plaintiffs' unbinding proposal. *Id.* This is not to say that, in the abstract, it is a technologically impossible task to separate the code. However, in the absence of clear definitions between the items to be separated, there is no way to know whether the required unbinding has been achieved. *Id.* Likewise, Plaintiffs have not shown that, even if they were able to define sufficiently the items which must be made separate, that such separation is attainable in the near future. *Id.* Microsoft presented significant evidence, which the Court credits, that **[**223]** such separation would not only degrade whatever remains, but would be a significant undertaking. *Id.*

Of even greater significance is the fact that the evidence does not indicate that the removal of software code is beneficial from an economic perspective. *Id.* Plaintiffs' sole economic expert declined to endorse a remedy requiring the removal of software code. *Id.* Both of Microsoft's economic experts testified that there was no economic rationale for removing software code as opposed to the removal of end-user access to any commingled functionality. *Id.* Therefore, Plaintiffs have offered no economic analysis of what may occur in the marketplace following a drastic remodeling of a product with over 95 percent of the market share. *Microsoft, 253 F.3d at 51, 54*; *Findings of Fact,84 F. Supp. 2d at 19, P 35*. This omission merely emphasizes for the Court the grievously inadequate nature of the evidence offered in support of a requirement that Microsoft remove software code from its Windows products.

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[64] This problem of technically separating the "operating system" from other functionality, such as browsing functionality, also arose in conjunction with Plaintiffs' claim, pursuant to *§ 1* of the Sherman Act, of illegal tying and, in fact, has its roots in the predecessor litigation: *United States v. Microsoft Corp., 331 U.S. App. D.C. 121, 147 F.3d 935 (D.C. Cir. 1998)*. In that case, the D.C. Circuit observed that "as was the case with Windows 95, the products--the full functionality of the operating system when upgraded by IE 4 and the 'browser functionality' of IE 4--do not exist separately." *Id. at 951-52*. In the instant case, Plaintiffs alleged that Microsoft illegally tied its browser, IE, to its operating system. Ultimately, the appellate court was unable to conclude that the two identified "products" were, in fact, separate. *Microsoft, 253 F.3d at 85-95*. In this regard, the appellate court noted that Plaintiffs had failed to provide precise definitions of "browser" and the browser market. *Microsoft, 253 F.3d at 95*. The appellate court made the same observation in the context of its discussion of Plaintiffs' attempted monopoly claim, noting Plaintiffs' "failure to articulate and identify evidence before the District Court as to . . . what constitutes a browser (*i.e.*, what are the technological components of or functionalities provided by a browser)." *Microsoft, 253 F.3d at 81-82*.

[*158] The Court also heard and credits extensive testimony that recounts the manner in which the forced removal of software code from the Windows operating system will disrupt the industry, **[**224]** harming both ISVs and consumers. *See* Appendix A, Part X.B. In this regard, the Court credits the testimony of various ISVs that the quality of their products would decline if Microsoft were required to remove code from Windows. *Id.* The Court also credits similar testimony which explained that the software products produced by ISVs would become larger, more complex, and slower to develop. *Id.* Plaintiffs have failed, in response to this testimony, to establish that their proposed system of replacing the removed Microsoft code with software code produced by other vendors, if the OEMs so chose, would prove to be either workable in practice or beneficial to competition and the market as a whole. *Id.* In short, the record is overwhelmed with significant unrebutted evidence that Plaintiffs' proposal of code removal would harm ISVs and consumers. *See id.*

The case law is unwavering in the admonition that ***HN25***[] it is not a proper task for the Court to undertake to redesign products. "Antitrust scholars have long recognized the undesirability of having courts oversee product design . . . ." *Microsoft, 147 F.3d at 948*. Accordingly, even if Plaintiffs had presented **[**225]** evidence sufficient to support their request that the Court require Microsoft to remove code from its products, the Court would be appropriately reluctant to enter a remedy that requires Microsoft to completely redesign its Windows products and places the Court in the role of scrutinizing whether Microsoft has done so without degradation of the ultimate product. Moreover, the D.C. Circuit has stated emphatically that "any dampening of technological innovation would be at cross-purposes with ***antitrust law***." *Id.* The evidence in this portion of the proceeding establishes not only that Microsoft's innovation would be stifled by the requirement that it redesign its products, but that the ability of ISVs to innovate would be slowed because of the detrimental effects of the presence in the marketplace of multiple versions of Microsoft's Windows operating system, each with different code and different APIs. *See* Appendix A, Part X.B. As explained in detail in Appendix A, the multiplicity of versions results from the fact that, once the purported "middleware" portions of Microsoft's operating system are removed, whether or not replaced by third-party software, the resulting product will **[**226]** vary significantly depending upon the particular piece of "middleware" that was removed and/or replaced by third-party software. *Id.*

End of Document

New York v. Microsoft Corp.

United States District Court for the District of Columbia

November 1, 2002, Decided

Civil Action No. 98-1233 (CKK)

Reporter

224 F. Supp. 2d 76 *; 2002 U.S. Dist. LEXIS 21185 **; 2002-2 Trade Cas. (CCH) P73,853; 2002-2 Trade Cas. (CCH) P73,854

STATE OF NEW YORK, et al., Plaintiffs v. MICROSOFT CORPORATION, Defendant.

Notice: [EDITOR'S NOTE: PART 2 OF 3. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

Subsequent History: Judgment entered by *New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 22862 (D.D.C., Nov. 6, 2002)*

Affirmed by *Massachusetts v. Microsoft Corp., 373 F.3d 1199, 362 U.S. App. D.C. 152, 2004 U.S. App. LEXIS 13489 (2004)*

Modified by *New York v. Microsoft Corp., 2006 U.S. Dist. LEXIS 95072 (D.D.C., Sept. 21, 2006)*

Prior History: New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 21125 (D.D.C., Nov. 1, 2002)
United States v. Microsoft Corp., 253 F.3d 34, 346 U.S. App. D.C. 330, 2001 U.S. App. LEXIS 14324 (2001)

Core Terms

Windows, software, operating system, license, products, middleware, retaliation, appellate court, platform, decree, functionality, interoperation, interface, technology, third-party, user, disclosure, non-Microsoft, default, ban, anticompetitive, competitors, compete, terms, provisions, consumers, intellectual property, innovation, configuration, terminate

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws do not condemn even a monopolist for offering its product at an attractive price, even where the monopolist offers valuable consideration in the form of technical information and "bounties."

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN27[] Public Enforcement, State Civil Actions

The court is not at liberty to enjoin all future violations of the antitrust laws, however unrelated to violations found by the court, nor is the court at liberty to interfere with ordinary commercial practices, even where those practices are malicious and injurious to particular competitors.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN28[] Public Enforcement, State Civil Actions

The "forward-looking" nature of the remedy cannot be so expansive as to be unduly regulatory or provide a blanket prohibition on all future anticompetitive conduct.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN29[] Public Enforcement, State Civil Actions

The court has the power to prohibit admittedly valid parts of an invalid whole, where such prohibition will further eradicate the harmful effects of the anticompetitive conduct.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > Judicial Officers > References

HN30[] Masters, Appointment of Masters

Fed. R. Civ. P. 53 generally empowers the court to appoint a special master, with the following proviso: A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. *Fed. R. Civ. P. 53(b)*.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > Judicial Officers > References

HN31[] Masters, Appointment of Masters

The presence of "some deep technological issue" related to interpreting a decree alone is not sufficient to render the issue "complicated" pursuant to *Fed. R. Civ. P. 53*. Moreover, the United States Court of Appeals for the District of Columbia Circuit has expressed disfavor for appointment of a special master in antitrust cases, though they are undoubtedly complex, because such complexity itself is an impelling reason for an experienced trial judge rather than a temporary substitute appointed on an ad hoc basis to preside over the issue presented therein. Additionally, references to special masters are improper where the master is called upon to determine the rights of the parties, rather than to enforce such rights.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Transportation Law > Interstate Commerce > Market Participant Doctrine

HN32[] **Public Enforcement, State Civil Actions**

While an appropriate remedy should open the doors to competition, favoritism of one market participant over another in a remedy provision places the court in the improper position of exerting too much control over the market. The court's role is to end the illegal conduct and to make every effort to protect against conduct of the same type or class, not to engineer a particular market outcome.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN33[] **Public Enforcement, State Civil Actions**

The court may not simply enjoin all future violations of the antitrust laws. Rather a remedy should be tailored to fit the wrong.

Antitrust & Trade Law > Sherman Act > General Overview

HN34[] **Antitrust & Trade Law, Sherman Act**

A monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals. In order to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN35[] **Public Enforcement, State Civil Actions**

A remedial decree should be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Legal Ethics > Professional Conduct > Frivolous Claims & Conduct

Civil Procedure > Sanctions > General Overview

HN36[] **Sanctions, Baseless Filings**

Truly frivolous claims are prohibited by *Fed. R. Civ. P. 11*. *Fed. R. Civ. P. 11*. The Federal Rules further prohibit the presentation of claims and court filings in general for any improper purpose, such as to harass. *Fed. R. Civ. P.*

11(b)(1). Violations of Rule 11 are punishable by the imposition of sanctions not only upon counsel, but upon the parties themselves. Fed. R. Civ. P. 11(c).

Judges: COLLEEN KOLLAR-KOTELLY, United States District Judge.

Opinion

[226] [*158]** Nothing in the rationale underlying the commingling liability finding requires removal of software code to remedy the violation. To the contrary, the evidence presented to the Court indicates that the ability to remove end-user access to any commingled functionality would sufficiently address the anticompetitive aspect of the conduct and would prove far less disruptive to consumers and industry participants. *See* Appendix A, Parts I.B, X.B. The concern of the district court, as well as the appellate court, was that commingling deterred preinstallation of rival browsers by OEMs. United States v. Microsoft Corp., 253 F.3d 34, 66, 346 U.S. App. D.C. 330; United States v. Microsoft Corp., 87 F. Supp. 2d 30, 39. The rationale for this deterrence rested upon the increased consumer support costs inherent in installation of more than one product in any given category. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 49, P 159. The evidence presented to the Court during the remedies phase continues to support the view initially espoused by Judge Jackson that although the "Add/Remove function did not delete all of **[**227]** the files that contain browsing specific code . . . . from the user's perspective, **[*159]** uninstalling Internet Explorer in this way was equivalent to removing the Internet Explorer program from Windows 95." *Findings of Fact,* 84 F. Supp. 2d at 50, P 165. Based on all of the foregoing conclusions, and in the exercise of the Court's discretion, the Court determines that the remedy in this case will not require removal of code from Microsoft's Windows operating system. *See* 2 AREEDA ET AL., ***ANTITRUST LAW*** P 325a, at 246 ("The decree . . . will not embody harsh measures when less severe ones will do.").

The more appropriate remedy, which the Court will impose, is a mandate that Microsoft permit OEMs to remove end-user access to aspects of the Windows operating system which perform middleware functionality. The requirement that Microsoft provide OEMs with the ability to add or remove the icons, menu entries, and shortcuts corresponding to a readily identifiable group of Microsoft technologies will address two distinct findings of liability. First, the provision of OEM flexibility to add and remove end-user access to certain Microsoft technologies will address directly the anticompetitive effect of Microsoft's commingling **[**228]** of code providing browsing functionality with operating system functionality. Specifically, the removal of end-user access to certain Microsoft technologies will eliminate, or at least substantially reduce, the deterrent effect of the presence of the Microsoft technology upon the OEM's inclination to install an alternative technology. *See* Appendix A, Part I.B; *see also Findings of Fact,* 84 F. Supp. 2d at 50, P 165. The Court notes in this regard that any argument that the removal of end-user access as a remedy to Microsoft's commingling is inadequate as a remedy is quickly stifled by the clear and certain harm to the entire personal computer ecosystem which would result from the alternative proposal of mandated code removal. *See* Appendix A, Part X.B. Second, allowing OEMs to remove end-user access to certain Microsoft technologies directly addresses the finding of liability against Microsoft for excluding IE from the "Add/Remove Programs" utility in Windows 98. Microsoft, 253 F.3d at 65. By extending the requirement that Microsoft preserve the removal of end-user access to Microsoft technologies beyond IE, namely to those technologies incorporated in Microsoft's definition of **[**229]** "Microsoft Middleware Product," *see supra* Parts III.B-C, the Court expands beyond the specific liability in this case to address conduct which is the substantial equivalent. This expansion helps to ensure that many of the "untraveled roads" to restraint of trade are not left open. *Int 'l* Salt v. United States, 332 U.S. 392, 400.

In remedying Microsoft's anticompetitive exclusion of IE from the "Add/Remove" utility by mandating that Microsoft provide OEMs and consumers with the ability to enable or disable end-user access to various Microsoft and non-Microsoft technologies, the Court expressly rejects Plaintiffs' definition of "end-user access." *See* Appendix A, Part I.B. Plaintiffs' proposal to regulate indirect invocation of IE and other middleware addresses conduct considered and ultimately rejected by the appellate court as a basis for antitrust liability. *See supra* Part II.A.5. Criticizing and appearing to reject Judge Jackson's "broad condemnation"of the "binding" of IE to Windows with "technological shackles," [65] **[**232]** the appellate court parsed the **[*160]** "three specific actions Microsoft took to weld IE to Windows" and ultimately imposed liability for only two such actions. **[**230]** *Microsoft, 253 F.3d at 64-67*. The appellate court rejected the imposition of liability for Microsoft's practice of overriding the user's choice of a "default browser." *Microsoft, 253 F.3d at 67*. Judge Jackson explained this Microsoft practice in paragraph 171 of his *Findings of Fact,* 84 F. Supp. 2d at 52:

> As shipped to users, Windows 98 has Internet Explorer configured as the default browser. [66] While Windows 98 does provide the user with the ability to choose a different default browser, it does not treat this choice as the "default browser" within the ordinary meaning of the term. Specifically, when a user chooses a browser other than Internet Explorer as the default, Windows 98 nevertheless requires the user to employ Internet Explorer in numerous situations that, from the user's perspective, are entirely unexpected. As a consequence, users who choose a browser other than Internet Explorer as their default face considerable uncertainty and confusion in the ordinary course of using Windows 98.

Findings of Fact, 84 F. Supp. 2d at 52, P 171. In response, Microsoft proffered the following "technical reasons" for the override:

> The Windows 98 Help system and Windows Update feature **[**231]** depend on ActiveX controls not supported by Navigator, and the now-discontinued Channel Bar utilized Microsoft's Channel Definition Format, which Navigator also did not support. Lastly, Windows 98 does not invoke Navigator if a user accesses the Internet through "My Computer" or "Windows Explorer" because doing so would defeat one of the purposes of those features--enabling users to move seamlessly from local storage devices to the Web *in the same browsing window*.

Microsoft, 253 F.3d at 67. (quoting Microsoft's "Opening Br." at 82 (internal citations omitted)) (emphasis in original). Based upon this proffer of "valid technical reasons" for the override described by Judge Jackson, and in the absence of evidence from Plaintiffs demonstrating that the "anticompetitive effect of the challenged action" outweighed the proffered justification *Microsoft, 253 F.3d at 64-67*. therefor, the appellate court determined that Microsoft's conduct with regard to the "default browser" would not support *§ 2* liability. *Id.*

Plaintiffs' proposal ignores the rejection of liability for Microsoft's practice of overriding the user's choice of a "default browser" where there exist "valid technical reasons" for doing so. *Id.* In particular, Plaintiffs' proposal to regulate the provision of "end-user access" includes "indirect invocation"of a particular Microsoft technology, meaning invocation by the operating system itself rather than directly by the end user. *See* Appendix A, Part I.B. The regulation of such "indirect invocation" would have the effect of prohibiting at least some of the conduct, such as Windows' indirect invocation of IE over **[*161]** Navigator to enable "users to move seamlessly from local storage devices to the Web *in the same browsing window*," which the appellate court refused to condemn, *Microsoft, 253 F.3d at 67* **[**233]** (quoting Microsoft's "Opening Brief" at 82) (emphasis in original). *See* Appendix A, Part I.B. Plaintiffs' exceptionally broad definition of "end-user access" threatens to regulate and prohibit significant amounts of ordinary operating system functionality. *Id.* Plaintiffs do not justify this regulation of Microsoft's legitimate conduct with evidence of a particular competitive benefit to be gained therefrom. *Id.* Accordingly, the Court regards a definition of "end-user

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[65] Microsoft, dubbing this technological binding more attractively as "integration," presented testimony extolling the virtues of integration for both consumers and other industry participants. *See, e.g.*, Sanders PP 11-40. The Court declines to enter any findings with regard to whether integration of new technology into Microsoft's PC operating system products is, as a general proposition, suitable or beneficial. Such determinations would have been more appropriate during the liability phase, in conjunction with the balancing of the pro- and anticompetitive benefits of technological binding or "integration," whereas a determination regarding the propriety of "integration" is not called for at this late stage in the proceeding. Instead, it is sufficient to note that the appellate court rejected Judge Jackson's broad condemnation of Microsoft's technological binding or "integration" as a violation of *§ 2*.

[66] "Default" in this context indicates that in some of the circumstances where the Windows operating system would invoke some aspect of browsing functionality, it would automatically rely upon the browsing functionality provided by IE, without first seeking input from the user.

access" which includes indirect invocation of a particular functionality as inadequately tailored to meet the circumstances of this case. *See* *Microsoft, 253 F.3d at 107*.

More appropriately tailored is a remedy which provides OEMs and ISVs with a substantial degree of confidence that a particular Microsoft functionality can be replaced with a non-Microsoft functionality. The remedy acknowledges that Microsoft may, in some instances, override the OEM's or end user's designation of a non-Microsoft Middleware Product when there exist "valid technical reasons," while simultaneously seeking to minimize the occasions when such an override occurs. *See* Appendix A, Part I.B. In his discussion of **[**234]** end-user access, Judge Jackson observed that "if OEMs removed the most visible means of invoking Internet Explorer, and pre-installed Navigator with facile methods of access, Microsoft's purpose in forcing OEMs to take Internet Explorer--capturing browser usage share from Netscape--would be subverted." *Findings of Fact,* 84 F. Supp. 2d at 59, P 203. In order to ensure that the free choice of third-party middleware is protected against subversion, the Court's remedial decree imposes a requirement that, in any instance where a Microsoft operating system launches a "Microsoft Middleware Product," [67] in its full form, rather than within another portion of the operating system, end users and OEMs must be afforded the opportunity, via an unbiased mechanism, to designate a nonMicrosoft middleware product that will launch in place of the "Microsoft Middleware Product." Such a provision enables the ready substitution of third-party products for functionality which would otherwise have been provided by the "middleware" functionality incorporated into Microsoft's operating system and encourages the installation and ultimately, the consumer use of third-party "middleware." *See* Appendix A, Part I.B.

[235]** A remedy which provides the ability to replace "middleware" functionality, which has been included in Microsoft's operating system products, offers protection beyond the mere cessation of the conduct which gave rise to the liability in this case. The appellate court did not enter any findings of liability with regard to whether Windows provided a means by which Microsoft functionality incorporated into the operating system could be readily replaced by third-party software. *See generally* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. In fact, the appellate court rejected liability for the aspect of Windows' design which provided for only the partial replacement of Microsoft browsing technology with third-party browsing technology. *Id. at 67*. Regardless, the Court considers the extension of the remedy beyond the specific liability findings in this instance to be appropriate, as such extension will help to "pry open to **[*162]** competition a market that has been closed by defendant's illegal restraints." *Int'l* *Salt, 332 U.S. at 401*.

Conversely, the Court regards a remedy which imposes more severe requirements with regard to the provision of "defaults," such as **[**236]** that proposed by Plaintiffs, as an unjustified regulation of Microsoft's product design. In particular, the Court has found that a remedy which adopts Plaintiffs' treatment of defaults would likely require the complete redesign of Microsoft's Windows product or, at the very least, vast amounts of design work by Microsoft. *See* Appendix A, Part I.B. Plaintiffs have failed to present evidence that such redesign would bring great returns, or any returns for that matter, in the form of increased competition within the monopolized market. *Id.* In fact, Plaintiffs have failed to present any economic analysis to support this provision in their remedy proposal, which would result in the complete modularization of Microsoft's operating system products. *Id.* On the present record, therefore, the Court declines to impose more sweeping regulation of Microsoft's product design with regard to the availability of replaceable defaults.

Notwithstanding the imposition of an affirmative measure to further competition, in order to respect the carefully drawn boundaries of liability, the Court, of necessity, will preserve Microsoft's ability to override the designation of third-party software **[**237]** (in place of Microsoft middleware functionality present in the operating system) where the third-party software fails to implement a reasonable technical requirement. *See* *Microsoft, 253 F.3d at 67*. Further unfettering the market, the Court will curtail any abuse of this freedom by requiring Microsoft to provide the relevant technical reasons, *in writing*, promptly upon the request of any ISV. The provision of this information will assist ISVs in designing their products so as to avoid any such overrides and thereby reduce the anticompetitive

[67] As noted earlier in this Opinion, the Court's remedial decree adopts the definition of "Microsoft Middleware Product" provided in Microsoft's remedy proposal. *See supra* Part III.B.

effect caused by the override. *See* *Microsoft, 253 F.3d at 65* ("Because the override reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive."), *Microsoft, 253 F.3d at 67* ("As for . . . causing Windows to override the user's choice of a default browser in certain circumstances[,] . . . . Microsoft may not be held liable for this aspect of its product design.").

In conjunction with the decision to impose a remedy that secures the removability of enduser access to certain Microsoft technologies, permits replacement of Microsoft technology with third-party technology, and provides more general flexibility to OEMs to **[**238]** configure Microsoft's operating system products, the Court must ensure that OEM (and consumer) choices in this regard are not devalued by other aspects of Microsoft's product design and configuration. For example, OEM configuration and removal of end-user access will be of little use in the promotion of non-Microsoft middleware if Microsoft is free to design its product to override the configuration before the end-user has an opportunity to utilize the settings. *See* Appendix A, Part I.B. Accordingly, the Court shall prohibit Microsoft from designing its operating system product so as to induce reconfiguration of an OEM's or consumer's formatting of icons, shortcuts, and menu entries in an attempt to favor Microsoft's own software. Pursuant to the Court's remedial decree, any Microsoft-invited alteration of preferences must be presented via an unbiased mechanism and only after the end-user has had sufficient time to utilize the PC as configured by the OEM. Moreover, any Microsoft-invited alteration of OEM configuration may not be imposed in such a manner so as to harass or coax the end user into accepting the alteration. Given the neutrality of the invitation to **[*163]** alter settings and **[**239]** the ability to retrieve the settings, the Court does not regard the amount of time during which Microsoft may not invite the consumer to alter his or her settings to be particularly significant. *Id.* In the absence of substantial evidence to the contrary or in support of a more viable alternative, the Court determines that two weeks following the initial boot-up shall be a sufficient amount of time during which to prohibit a neutral invitation to alter the configuration of the desktop. *Id.*

C. Additional Protection for OEM Flexibility

Because the OEM channel is such a significant channel of distribution for middleware, *Microsoft, 253 F.3d at 61*, the remedy in this case can further unfetter the market from the effects of Microsoft's unlawful anticompetitive behavior by protecting OEMs from retaliation by Microsoft based upon an OEM's support for alternative middleware or operating systems. [68] Given the power wielded by a monopolist like Microsoft, in the absence of protection against retaliation and threats of retaliation, industry participants whose survival hinges on their relationship with such a monopolist will be reluctant to exercise the **[**240]** new-found freedoms offered by the remedy in this case. *See* Appendix A, Part III. In addition, the OEM flexibility guaranteed by other portions of the remedial decree has the potential to lose its effectiveness if Microsoft is not restricted from using its power as a monopolist to coerce OEMs to act for Microsoft's exclusive benefit. *Id.*

The Court finds that protection of industry participants against **[**241]** threats of retaliation will have an effect similar to a ban on actual retaliation and, thus, will further the ultimate goal of promoting competition. *Id.* Microsoft has argued that where the retaliation itself is banned, there is little practical need to protect against threats of retaliation because to carry out the threat would violate the decree. While technically true, this analysis ignores the power wielded by a monopolist such as Microsoft and the resulting damage which can flow from a mere threat. *Id.* Moreover, the burden rests in the wrong place if Microsoft's competitors are required, when faced with such a threat, to gamble that Microsoft will not carry out the threat because doing so would violate the decree in this case. *Id.* The more prudent course is to enjoin both the threat and the retaliation itself and leave to Microsoft the task of acting carefully so as to ensure that it does not improperly threaten retaliation against other industry participants. *See* *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265, 90 L. Ed. 652, 66 S. Ct. 574 (1946)* ("The most elementary

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[68] The liability in this case is clear with regard to Microsoft's history of retaliation and threats of retaliation against other industry participants, such as ISVs and IHVs. *See, e.g.*, *Microsoft, 253 F.3d at 72-74* (discussing Microsoft's dealings with Apple); *Microsoft, 253 F.3d at 77-78* (describing Microsoft's "threat to Intel"). Although Microsoft has a history of retaliation against OEMs, *see, e.g.*, *Findings of Fact,* 84 F. Supp. 2d at 38-43, PP 115-32, such retaliation did not provide a clear basis for liability. *See generally* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*; *see also supra* Part II.B.

conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which **[**242]** his own wrong has created.").

Restrictions on Microsoft's freedom to retaliate or threaten retaliation must be carefully drawn so as not to unduly restrict legitimate business practices. *Id.* Such restrictions can dampen competition, *see* Appendix A, Part III, and thereby violate the principles which guide the imposition of a remedy in antitrust cases. *See* *Ford Motor Co. v. United States, 405 U.S. 562, 573* ("The relief in an antitrust case must **[*164]** be 'effective to redress the violations' and 'to restore competition.'") (quoting *United States v. E.I. Du Pont De Nemours & Co., 366 U.S. 316, 326)*. In particular, the remedy imposed by the Court is fashioned so as to prevent true "retaliation" rather than restrict all forms of action taken by Microsoft which might be characterized as "adverse" to competitors. Indeed, conduct that is in some respect adverse to competitors is almost implicit in the concept of competition. *See* Appendix A, Part III. There is neither justification in the record of this case, nor in the field of ***antitrust law***, for a far-ranging prohibition on conduct adverse to competitors, *id.*, and the Court rejects imposition of such a ban as part of the remedy in this **[**243]** case. However, because retaliation against OEMs for their support of competing products is conduct of the same "type or class," *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 132-33*; *see also* *United States v. Microsoft Corp., 56 F.3d 1448, 1460*, as conduct which was found to be anticompetitive in this case, [69] *see* *Microsoft, 253 F.3d at 77*, and because a ban on retaliation will enable OEMs to take advantage of other freedoms provided by the remedy in this case, *see* *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726* ("The test is whether or not the required action reasonably tends to dissipate restraints and prevent evasions."), the Court may properly limit Microsoft's ability to threaten and engage in retaliation against OEMs in certain circumstances.

[244]** Notwithstanding this conclusion, the remedial decree imposed by the Court will permit Microsoft to compensate OEMs based upon the absolute level or amount of the OEM's distribution, promotion, development, and other types of support for a particular Microsoft product. *See* Appendix A, Part III. In other words, Microsoft will be permitted to provide compensation for OEM action which promotes or supports Microsoft products, but Microsoft cannot withhold such consideration or other consideration based upon OEM action which tends to favor non-Microsoft products. While these two goals may appear to be somewhat at odds, the liability in this case all but demands this level of hair-splitting. The appellate court was very clear throughout its opinion that ***HN26***[] "the antitrust laws do not condemn even a monopolist for offering its product at an attractive price," even where the monopolist offers valuable consideration in the form of technical information and "bounties." *Microsoft, 253 F.3d at 67, 68* . [70] In addition, evidence presented during this phase of the proceeding emphasizes that there are often instances where compensation commensurate with the amount of support given **[**245]** to a particular product is not only a routine business practice, but it is "obviously beneficial." *See* Appendix A, Part III. The Court recognizes that, in the absence of some condition of fixed percentages **[*165]** or exclusivity, an attractive pricing scheme will not be condemned as anticompetitive and, indeed, may have procompetitive advantages. Based upon this recognition, the Court regards it as inappropriate for the remedy in this case to entirely prohibit Microsoft's ability to compensate OEMs commensurate with the actual level of OEM support of the Microsoft product.

[246]** Further protection for OEMs as a middleware channel of distribution is available through the implementation of uniformity in the licenses Microsoft provides in the monopoly market. *See* Appendix A, Part II. As evidenced by their respective remedies, the parties on both sides of this case acknowledge that uniformity in the Windows operating system licenses will bolster the protections for middleware in the OEM channel of distribution.

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[69] Retaliation or other forms of adverse action against industry participants for their support of products which compete with other product lines offered by Microsoft that are substantially unrelated to the monopoly market in this case, such as handheld devices and the like, *see supra* Part III.B-C, are too far removed from the liability in this case to be treated as "of the same type or class" as the illegal conduct in this case. *Zenith Radio, 395 U.S. at 132-33*.

[70] As illustrated in other portions of the appellate court's opinion, it is the conditioning of the receipt of consideration upon some degree of exclusivity which raises antitrust concerns. *See, e.g.*, *Microsoft, 253 F.3d at 75* ("Again, we reject the District Court's condemnation of low but non-predatory pricing by Microsoft. To the extent that Microsoft's First Wave Agreements with the ISVs conditioned receipt of Windows technical information upon the ISVs' agreement to promote Microsoft's JVM exclusively, they raise a different competitive concern.").

[71] **[**248]** *Id.* The parties' respective proposals for uniform licenses for Windows operating system products are remarkably similar, with each requiring uniformity in the terms and conditions of the licenses for the twenty OEMs with the highest volume of Windows operating system licenses. *Id.* Both proposed remedies further provide, in broad terms, [72] that a royalty schedule must be established, pursuant to which Microsoft may opt to charge a different royalty for different language versions of the Windows operating system and may provide reasonable volume discounts based upon the actual volume of licenses. SPR § 2.a; SRPFJ § III.B. There is little dispute that the imposition of uniformity in licensing will enhance the freedom of OEMs to support **[**247]** non-Microsoft products and thereby further the goal of "achieving freedom from the influence of the unlawful restraint of trade." *Bausch & Lomb, 321 U.S. at 726*.

Given this seeming lack of dispute over the appropriateness of a substantial degree of uniformity in Microsoft's Windows operating system licenses, the Court's remedy will require Microsoft to provide OEMs with such uniformity. However, in recognition of the potential negative side effects of complete uniformity in licensing as attested to by Drs. Murphy and Elzinga, *see* Appendix A, Part II, the uniform licenses mandated by the Court's remedy will allow some divergence in terms depending upon the volume of licenses provided. Specifically, the Court's remedial order will permit reasonable volume discounts based upon the actual volume of licenses for any Windows operating system product.

To further tailor the uniform licensing provision so as to provide OEMs with the greatest security, while minimizing the less desirable collateral effects of uniformity, **[*166]** the Court's order of remedy will not prohibit Microsoft's practice of awarding "market development **[**249]** allowances, programs, or other discounts" ("MDPs"), provided that the award of such benefits is based upon reasonable, objective criteria, which are enforced uniformly and without discrimination. The Court's determination that the remedy should not eliminate Microsoft's ability to offer MDPs reflects the fact that the affirmance of liability in this case by the appellate court did not condemn Microsoft's use of MDPs and, in fact, steadfastly refused to condemn practices which, at their core, "offered a customer an attractive deal." *Microsoft, 253 F.3d at 68*; *see also* *Microsoft, 253 F.3d at 78* ("The only specific acts to which the court refers are Microsoft's expenditures in promoting its browser, which we have explained are not in themselves unlawful.") (internal citation omitted). The Court's determination is further based upon the finding that MDPs are procompetitive in many instances. *See* Appendix A, Part II. Indeed, Plaintiffs' witnesses testified that so long as MDPs cannot be used to improperly influence OEM choices-for example, through discriminatory or retaliatory terms or enforcement-there remains little basis for objection to their use. *Id.* Accordingly, **[**250]** the Court declines to prohibit this legitimate aspect of Microsoft's licensing agreements, but instead shall limit Microsoft's ability to use MDPs to impede competition.

Additional protection for OEMs and their ability to exercise their rights under the remedy imposed in this case can be derived from limited regulation of Microsoft's ability to terminate an OEM's Windows license. The Windows license is fundamental to an OEM's ability to conduct business, and hence, the threat of termination is a powerful tool which Microsoft can utilize to exert undue influence over a particular OEM. *See* Appendix A, Part IV. To leave such a tool available for Microsoft's abuse would detract from the ability of the other provisions of the remedy in this

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[71] Though not clearly implicated in actions that gave rise to liability addressed by the appellate court, Judge Jackson's *Findings of Fact* reflect that Microsoft manipulated the terms of its license agreements in conjunction with its attempt to quash the middleware threat posed by Navigator. *See, e.g.*, *Findings of Fact,* 84 F. Supp. 2d at 67, P 234 ("In return for Compaq's capitulation and revival of its commitment to support Microsoft's Internet strategy, Microsoft has guaranteed Compaq that the prices it pays for Windows will continue to be significantly lower than the prices paid by other OEMs. . . . Compaq's license fee for Windows is so low that other OEMs would still pay substantially more than Compaq even if they qualified for all of the royalty reductions listed in Microsoft's Market Development Agreements ('MDAs'). What is more, while Microsoft requires other OEMs to verify actual compliance with particular milestones in order to receive Windows 98 royalty reductions, Microsoft has secretly agreed to provide the full amount of those discounts to Compaq regardless of whether it actually satisfies the specified conditions.").

[72] Admittedly, there are minor differences in the two remedies even on these common points. *Compare* SPR § 2.a, *with* SRPFJ § III.B.

case to unfetter the market from Microsoft's illegal monopoly maintenance. *Id.* However, the limitation on Microsoft's ability to terminate an OEM's Windows license must not be so broad as to curb Microsoft's ability to enforce its intellectual property rights such that the terms of the license are rendered meaningless. *Id.* As a result, Microsoft shall not be permitted to terminate an OEM's license without having first provided the OEM with **[**251]** notice and opportunity to cure. When Microsoft has provided two such notices, Microsoft may terminate the license without any further notice or opportunity to cure. This limitation on Microsoft's ability to terminate an OEM's Windows license appropriately provides additional protection to OEMs, further securing the likelihood that they will engage in vigorous competition. *Id.* Importantly, however, this limitation does not interfere significantly with Microsoft's legitimate business practices. *Id.* The Court further concludes that the addition of a requirement that Microsoft may terminate only for "good cause" is unnecessary as termination of a license for an improper purpose, such as retaliation, is prohibited by other portions of the Court's remedy. *Id.* In this regard, the Court observes that, in the event that Microsoft terminates a license in the absence of "good cause," such termination will likely be subject to careful scrutiny to ensure that Microsoft has not terminated an OEM license for a purpose inconsistent with the terms of the final judgment.

D. Other Participants in the Ecosystem

1. Ban on Retaliation

The factual and liability findings **[**252]** in this case evidence a practice by Microsoft **[*167]** of threatened and actual retaliation against Apple and Intel, each of which is both a hardware vendor and software developer, *Microsoft, 253 F.3d at 71* (Apple), *Findings of Fact,* 84 F. Supp. 2d at 34, P 95 (Intel), for engaging in action which promoted or supported non-Microsoft middleware. *See, e.g.*, *Microsoft, 253 F.3d at 72-73* (discussing Microsoft's dealings with Apple); *Microsoft, 253 F.3d at 77* (describing Microsoft's "threat to Intel"). [73] The immediate and most apparent remedy for this anticompetitive conduct is a prohibition on Microsoft's ability to retaliate not only against these particular firms, but generally against software developers and hardware vendors. *See* Appendix A, Part III. As with the prohibition on retaliation against OEMs described above, the Court must tailor any prohibition on retaliation against ISVs and IHVs to address actions which are of the same type or class as that which was found to be in violation of the antitrust laws, while still preserving Microsoft's ability to engage in legitimate competitive conduct that is only remotely related to the relevant anticompetitive conduct. **[**253]** In this regard, the Court again determines that a prohibition on all action "adverse" to industry participants "based upon" their support for competing products is not sufficiently tailored to address the conduct found to be anticompetitive. *Id.* Such a broad prohibition threatens to eliminate conduct which may have significant procompetitive value. *Id.*

[254]** Similarly too, the prohibition on retaliation for the support of competing products must be tied to the monopoly market in this case and cannot appropriately prohibit Microsoft from engaging in conduct in markets unrelated to the monopoly market. As previously noted, ***HN27***[] this Court is "not at liberty to enjoin 'all future

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[73] The appellate court devoted a section of its analysis to Microsoft's treatment of Intel in response to Intel's development of a "high performance, Windows JVM," *Microsoft, 253 F.3d at 75* (quoting *Findings of Fact,* 84 F. Supp. 2d at 107, P 396), recounting the numerous ways in which Microsoft "pressured Intel not to support cross-platform Java," *Microsoft, 253 F.3d at 77*. Microsoft's pressure in this regard was based upon the threat to the Windows monopoly posed by cross-platform Java. *Id.* The appellate court found Microsoft's pressure tactics to be clear in their anticompetitive effect and wholly without procompetitive justification. *Microsoft, 253 F.3d at 77-78*. Because of the exclusionary effect of Microsoft's threats to Intel, which Microsoft "lamely characterized . . . as 'advice,'" the appellate court deemed Microsoft's conduct in this context to violate *§ 2* of the Sherman Act. *Id.*

In a similar section, the appellate court examined Microsoft's dealings with Apple, which included an agreement by Apple not to "position icons for nonMicrosoft browsing software on the desktop of new Macintosh PC systems or Mac OS upgrades," as well as an agreement prohibiting Apple from "encouraging users to substitute another browser for IE." *Microsoft, 253 F.3d at 73* (quoting *Findings of Fact,* 84 F. Supp. 2d at 95-96, PP 350-52). These promises not to support competing products had the effect of exclusivity, the anticompetitive effect of which was unmitigated by procompetitive justification. *Microsoft, 253 F.3d at 73-74*. In the absence of procompetitive justification, the appellate court deemed this conduct to violate *§ 2* of the Sherman Act. *Id.*

violations of the antitrust laws, however unrelated to violations found by the court,'" *Microsoft, 56 F.3d at 1460* (quoting *Zenith Radio, 395 U.S. at 132-33*), nor is the Court at liberty to "interfere with ordinary commercial practices," *Bausch & Lomb, 321 U.S. at 728*, even where those practices are malicious and injurious to particular competitors, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225*. While retaliation is an unsavory method of competition which the Court does not condone, the liability ascribed to Microsoft for its threats of retaliation directed at Intel and Apple will not support broad regulation of *any* Microsoft **[*168]** conduct, though it might be characterized as retaliatory, in markets wholly unrelated to the monopoly market, particularly where Microsoft's dominance in such markets, or lack thereof, **[**255]** has not been assessed. The mere fact that particular conduct can be characterized as retaliation does not necessarily render such conduct sufficiently related to the liability in this case so as to justify inclusion of such conduct in the remedy. *See* Appendix A, Part III. To be sufficiently related to the liability in this case, a ban on retaliation must have some nexus to the monopoly market identified for purposes of this proceeding. *See* *Microsoft, 56 F.3d at 1460*.

By utilizing the term "competes" in the remedial decree, the Court's prohibition on retaliation for the support of non-Microsoft software is broad, but still reflective of the necessary nexus. For example, inasmuch as a server operating system serves as a platform for applications running "for" the PC, in a manner similar to true middleware, the server operating system can be said to "compete" with Microsoft's PC operating system software. *See supra* Parts III.B.3.a, III.C.1. In this regard, then, the Court's remedy extends well beyond the specific targets of Microsoft's previous retaliation, to provide forward-looking protection for any firm that produces software or hardware posing any competitive **[**256]** threat to Microsoft's monopoly in the market for Intel-compatible PC operating systems.

Further, like the ban on retaliation against OEMs, the prohibition on Microsoft retaliation against ISVs and IHVs for their support of platform software that competes with Microsoft's PC operating system software will prohibit threats of retaliation, which have the capacity to chill ISV and IHV support for competing products even where the retaliation itself is prohibited. *Id.* Such protection is particularly appropriate given that both examples of Microsoft's retaliatory conduct against IHVs and ISVs during the liability phase concerned threats of retaliation. *Microsoft, 253 F.3d at 73* (describing a call from Mr. Gates to Apple's CEO "to ask 'how we should announce the cancellation of Mac Office'") (quoting *Findings of Fact,* 84 F. Supp. 2d at 95, P 349); 77 (describing Microsoft's "threat to Intel").

2. Agreements Limiting Support for Competing Products

In a related vein, but specific to ISVs, the appellate court affirmed the district court's finding of liability with respect to the effectively exclusive nature of the "First Wave Agreements." The First Wave Agreements "required developers **[**257]** to make Microsoft's JVM the default in the software they developed" to the exclusion of the Sun-compliant JVM. *Microsoft, 253 F.3d at 75*. The appellate court found that the agreements had the effect of "foreclosing a substantial portion of the field for JVM distribution" and were without procompetitive justification. *Microsoft, 253 F.3d at 76*. In response to this finding of liability, the Court's remedy will preclude Microsoft from entering into agreements predicated upon an ISV's promise to refrain from developing, promoting, or distributing any software which competes with the platform capabilities of Microsoft software. Such a provision will ensure that Microsoft is unable to chill the development of competing software products which may provide a platform for PC applications. *See* Appendix A, Part V.A.

Inherent in such a remedy provision, however, exists a danger that a blanket ban on agreements predicated on a promise not to support a competing product will interfere with collaborative ventures between Microsoft and ISVs. *Id.* It is often the case that, in conjunction with a joint venture or work-for-hire agreement, the **[*169]** parties of the venture agree not **[**258]** to compete with the scope of the venture. *Id.* This type of agreement provides the participants to the venture some assurance that their respective efforts will be used collaboratively, as the agreement intends, rather than competitively. *Id.* Such collaborative ventures foster the advancement of technology, promoting innovation and ultimately competition. *Id.* Because a remedy which "dampens . . . technological innovation would be at cross-purposes with ***antitrust law***," *United States v. Microsoft Corp., 147 F.3d 935, 948*, and because Plaintiffs have not offered any valid justification for prohibiting such agreements, the remedy in this case is carefully tailored so as not to hinder Microsoft's ability to enter into legitimate joint ventures and work-for-hire agreements. In particular, the remedy imposed by the Court will reserve for Microsoft the ability to limit an ISV's support for a competing platform product where such limitation is reasonably necessary and of a reasonable scope and duration in relation to the contractual obligation of the ISV to support Microsoft's software or to jointly develop software for Microsoft.

3. Exclusive Agreements

In two different portions **[**259]** of its opinion, the appellate court considered the exclusive effect of the First Wave Agreements Microsoft entered into with ISVs, and in each portion, the appellate court determined that the exclusive effect of the agreements violated *§ 2* of the Sherman Act. *Microsoft, 253 F.3d at 71-74* (discussing the effect of the agreements upon Navigator), *Microsoft, 253 F.3d at 75-76* (discussing the effect of the First Wave Agreements upon Java). Elsewhere in its opinion, the appellate court examined Microsoft's exclusive agreement with Apple and determined that the agreement violated *§ 2* of the Sherman Act. *Microsoft, 253 F.3d at 72-74*. In yet another portion of its opinion, the appellate court considered Microsoft's exclusive agreements with internet access providers and determined that these too violated *§ 2* of the Sherman Act. *Microsoft, 253 F.3d at 67-71*. Considering as a whole Microsoft's treatment of these segments of the industry, it is appropriate to curtail sharply Microsoft's capacity to extract promises of exclusivity or support of a Microsoft product in a fixed percentage. Nevertheless, even where a broad prohibition on exclusive deals with multiple industry participants is justified **[**260]** by the findings of liability, the Court must take care not to ban those fixed-percentage and exclusive agreements that serve a procompetitive purpose. *See* *Microsoft, 253 F.3d at 69*. Some types of fixed-percentage and exclusive agreements may be beneficial to other participants in the ecosystem and often fall outside of the parameters of anticompetitive conduct. *See* Appendix A, Part V.B. Indeed, even in its condemnation of Microsoft's exclusive agreements, the appellate court noted that exclusive contracts themselves are not without their usefulness, *Microsoft, 253 F.3d at 69*, and are "commonplace--particularly in the field of distribution--in our competitive, market economy," *Microsoft, 253 F.3d at 70*.

Accordingly, the Court's remedial decree will limit Microsoft's ability to enter into agreements in which the other party agrees to support Microsoft's operating system products exclusively or in a fixed percentage. This provision will address those industry participants with whom Microsoft entered into unlawful and anticompetitive exclusive agreements, namely ISVs, IAPs, and OEMs, as well as those industry participants, such as ICPs and IHVs, **[**261]** who are ready targets for the imposition of similarly unlawful exclusive agreements. The extension of this prohibition beyond ISVs, IAPs, and OEMs, and beyond agreements concerning Web browsers and Java, to any software which competes **[*170]** with the platform capabilities of Windows, will serve to "uproot all parts of [the] illegal scheme--the valid as well as the invalid--in order to rid the trade or commerce of all taint." *United States v. Paramount Pictures, Inc., 334 U.S. 131, 148*.

While furthering the effort to "uproot" all of Microsoft's illegal conduct and conduct similar thereto, the Court will again tailor its prohibition on Microsoft's use of exclusive and fixed percentage agreements so as to permit those agreements which are beneficial to competition, but might otherwise have been prohibited by a blanket ban. In particular, in recognition of the benefit to technology and to competition derived from cooperative agreements between industry participants, *see* Appendix A, Part V.B., the Court's remedy takes pains not to discourage Microsoft from entering into legitimate joint ventures and joint development agreements. In this regard, Microsoft will have some limited ability to prohibit **[**262]** competition with the object of the joint venture or joint agreement, where both parties have contributed significant resources to the venture. In addition, because the goal of this remedy provision is to curtail the exclusive effect of fixed percentage agreements, the remedy imposed by the Court will not prohibit fixed percentage agreements where there is evidence, in the form of a good faith representation from the other party to the agreement, that the fixed percentage will *not* have an exclusive effect. *See id.*

In addition, the Court's remedy balances the need not to discourage Microsoft from entering into procompetitive licenses for the use of third-party technology against the competitive advantages to be gained by limiting Microsoft's imposition of exclusivity terms in its other agreements with industry participants. The Court's remedy, therefore, permits Microsoft to include a term of exclusivity in conjunction with an intellectual property license. However, the Court observes that a broad authorization to include a provision of exclusivity in all agreements in which Microsoft licenses intellectual property from a third party would invite circumvention of the prohibitory **[**263]** portion of the remedy. To do so, Microsoft need only add to its agreements with industry participants an unnecessary license of intellectual property and thereby garner exclusion of the agreement from the purview of the prohibitory portion of the decree. *See id.* Rather than foster such an outcome, the Court will permit inclusion of an exclusivity provision in such agreements only in limited circumstances. In particular, Microsoft's ability to impose an exclusive term in an agreement in which Microsoft licenses intellectual property shall be limited to agreements wherein the license of the third-party technology constitutes the principal purpose of the agreement.

4. Agreements Regarding Placement on the Desktop

In the case of IAPs, the appellate court condemned Microsoft's contracts which extracted from IAPs a promise of exclusivity-meaning a promise to refrain from and/or sharply limit promotion or distribution of a non-Microsoft Web browser in exchange for prominent placement of the IAP's product in the configuration of the Windows operating system. *Microsoft, 253 F.3d at 68-71*. The Court's order of remedy will address this holding in two ways. First, **[**264]** the provision described above, which provides a general prohibition on Microsoft's ability to enter into agreements with a wide variety of industry participants, including IAPs, predicated upon a promise of exclusive support for a Microsoft product, will be restricted. *See supra* Part IV.D.3. In addition, the Court's remedy will include a provision which addresses the particular means of leverage **[*171]** Microsoft used to induce IAPs to enter into these agreements; namely, special placement on the desktop or elsewhere in Microsoft's PC operating system products of a visible means of end-user access to the third-party product. Therefore, the remedy imposed by the Court will prohibit Microsoft from granting special placement within the Windows operating system on the condition that the IAP refrain from supporting software that competes not only with Microsoft's Web-browsing technology, but also with a number of technologies incorporated into Windows that have middleware characteristics such that they are properly treated as "Microsoft Middleware." *See supra* Part III.B-C. This extension beyond a promise not to compete with Microsoft's Web-browsing functionality reflects an extension of **[**265]** the remedy beyond the specific liability findings to address conduct which is of the "same type or class" as the conduct which was found to be anticompetitive. *Zenith Radio, 395 U.S. at 132-33*.

In a further extension beyond the specific parameters of liability in this case, notwithstanding the fact that the appellate court declined to impose liability for Microsoft's similarly exclusive agreements with ICPs, the Court will extend to ICPs the protections afforded to IAPs in this portion of the remedy. This extension is justified, in particular, because ICPs are similarly susceptible to the influence of prominent placement in the Microsoft PC operating system products, *Findings of Fact,* 84 F. Supp. 2d at 45, 87-88, PP 139, 313-17.

E. Explicitly Forward-Looking Remedies

The parties' remedy proposals in this case reflect an agreement that effective interoperation between the software running on two or more devices will play an integral role in the successful emergence of new software products and platforms and that fostering such interoperation is an appropriate remedial objective in this case. *See* SPR § 4; SRPFJ § III.D-E. This view is consistent with the case law, *Zenith Radio, 395 U.S. at 133*; **[**266]** *United States v. United States Gypsum Co., 340 U.S. 76, 89*, so long as ***HN28***[] the "forward-looking" nature of the remedy is not so expansive as to be unduly regulatory or provide a blanket prohibition on all future anticompetitive conduct. *See Zenith Radio, 395 U.S. at 133*. The Court agrees that the goal of facilitating interoperation between Microsoft's PC operating system products and third-party middleware, as well as between Microsoft's PC operating system products and third-party server operating systems, is consistent with the goal of "ensuring that there remain no practices likely to result in monopolization in the future." *United States v. United Shoe Machinery Corp., 391 U.S. 244, 250*.

The remedy proposals implicitly recognize that the key to interoperation between software products and the devices upon which they run rests with the ability to utilize effectively the APIs exposed by a particular software product. *See* SPR § 4; SRPFJ § III.D. Likewise the proposals acknowledge that the disclosure of the specific method of communication between PCs and servers will foster interoperation between the two. Such interoperation, in turn, will advance the ability of the server operating system to serve **[**267]** as a middleware-like platform upon which applications can run "for" the PC. Accordingly, both proposed remedies recommend the mandatory disclosure of certain Microsoft APIs, technical information, and communications protocols for the purposes of fostering interoperation.

1. API Disclosures (Interoperation between Windows and Microsoft Middleware)

The remedy imposed by the Court with regard to the disclosure of APIs will require **[*172]** Microsoft to disclose those APIs, along with related technical information, which "Microsoft Middleware" utilizes to interoperate with the Windows platform. [74] To repeat what is, by now elemental, Plaintiffs proceeded to trial on the theory that Microsoft had acted anticompetitively in an effort to boost its own middleware and stifle rival middleware because those products posed a potential "platform threat." Because the hallmark of the platform threat is the ability to operate on multiple platforms, the disclosure of the interfaces and related technical information relied upon by Microsoft's own middleware fosters the ability of rival middleware platforms to work well with the ubiquitous Windows. The ready ability to interoperate with the already **[**268]** dominant operating system will bolster the ability of such middleware to support a wide range of applications so as to serve as a platform. *See* Appendix A, Part VI. In this regard, the API disclosures mandated by the Court's remedy will further the remedial goal of restoring competition to the market. *Ford Motor Co., 405 U.S. at 573*; *see also Int'l* *Salt, 332 U.S. at 401*. Furthermore, the disclosures can help to ensure that developers of rival middleware platforms are not disadvantaged, with respect to Microsoft's own middleware developers, in their ability to create products that interoperate with the Windows operating system. *See* Appendix A, Part VI. Such disclosures have the potential to increase the ability of competing middleware to threaten Microsoft's PC operating system monopoly. Disclosures of APIs relied upon by Microsoft software beyond these parameters will not be required because, as discussed in greater detail below (and *supra* Part III.B-C), such disclosures are unrelated to the basis for liability and have not been shown to advance the objectives of a remedy in this case.

2. Communications Protocols (Interoperation **[**269]** ***Between PC Operating Systems and Server Operating Systems)***

The remedy imposed by the Court will mandate disclosure and licensing of protocols used by clients running on Microsoft's Windows operating system to interoperate with Microsoft servers. As the Court concluded *supra*, Parts III.B.3.a, III.C.1, server operating systems can perform a function akin to that performed by traditional middleware because they provide **[**270]** a platform for applications running "for" use on a PC. The mandatory disclosure of the communications protocols relied upon by Microsoft's PC operating system to interoperate with its server operating systems will advance the ability of non-Microsoft server operating systems to interoperate, or communicate, [75] with the ubiquitous Windows **[*173]** PC client. Advancement of the communication between non-Microsoft server operating systems and Windows clients will further the ability of these non-Microsoft server operating systems to provide a platform which competes with Windows itself. *See* Appendix A, Part VI. Through the disclosure of select communications protocols, the Court's remedy extends to the most apparent frontier in "platform" threats to Microsoft's PC operating system monopoly. *Id.* Far from seeking to "return the market to the status quo ante," *Ford Motor Co., 405 U.S. at 573 n.8*, this aspect of the Court's remedy contributes to the elimination of the consequences of Microsoft's illegal conduct, *Nat'l Soc'y Prof'l Eng'rs v. United States, 435 U.S. 679, 698*.

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[74] The Court determined *supra*, Part III.B.3.a, that the term "interoperate" encompasses a continuum, rather than an absolute standard of information exchange. *See also* Appendix A, Part VI.A. Because Microsoft's disclosure obligations in this portion of the Court's remedial decree are fixed by the definition of "API" and are merely circumscribed by the requirement that the disclosures be provided for the "sole purpose of interoperating," the Court does not limit the definition of "interoperate" to any particular degree of interoperation within the reasonable scope of the continuum.

[75] Recalling again that the term "interoperate" captures a continuum, rather than an absolute standard, *see supra* Part III.B.3.a., in the mandating the disclosure of communications protocols relied upon by Windows clients to interoperate natively with Microsoft servers, the Court's remedial decree utilizes a very simple definition of the term which is intended to capture the reasonable spectrum of the continuum. Hence, the Court's remedial decree requires that Microsoft disclose communications protocols necessary for a Windows client to "interoperate, *or communicate*, natively" with a Microsoft server. *See* Appendix B.

[271]** In all likelihood, the requirement that Microsoft disclose and license the communications protocols utilized by its PC operating systems to communicate with Microsoft's servers is the *most* forward-looking provision in the Court's remedy. *See supra* Parts III.B.3.a, III.C.1. Importantly, however, pursuant to the Court's remedial decree, Microsoft need only disclose and license those protocols which are supported "natively" by Microsoft clients and, hence, do not require the addition of software code to the client in order to interoperate. This limitation is appropriate given the market in this case-Intel-compatible personal computer operating systems. Interoperation made possible by software added onto Microsoft's PC operating system products is less clearly related to the facts of this case because it expands beyond the relevant market of Intel-compatible PC operating systems to address the ability of an *application* to interoperate with a server. Having concluded that such interoperation bears an insufficient nexus to the market in which liability was imposed, the Court need not address non-native interoperation in its remedy. *See supra* Part III.B-C.

3. Plaintiffs' [**272] Flawed Arguments for Overly Broad Disclosures

a. Insufficient Connection to the Liability Findings

Extending their arguments in favor of broader disclosures, Plaintiffs contend that Microsoft will hinder interoperability between clients and servers, as well as between non-PC devices, by the use of its own proprietary technology. The Court addressed the two underlying premises of Plaintiffs' arguments in this regard, *supra* Part III.B-D, in conjunction with the Court's determination of the proper scope of the remedy in this case. The Court first determined that interoperation between devices outside of the PC-to-server/network computing context is too far removed from the theory of liability in this case and that addressing such segments of computing via the remedy would be inappropriate and unjustified given the liability imposed in this case. *See supra* Part III.B-C. The Court next determined that Plaintiffs' attempt to link interoperability as a general concept to the findings of liability in this case is similarly flawed. *See supra* Part III.D. As the Court's conclusion with regard to the latter of these points addresses a significant portion of Plaintiffs' **[**273]** evidence, it bears repeating at this juncture.

Plaintiffs urge the Court to order vast disclosures and royalty-free licensing of technical information based upon their assertion that Microsoft intends in the future, and has previously taken action, to impede developers attempting to achieve cross-platform interoperability by the adoption of proprietary protocols instead **[*174]** of industry standard protocols, through the proprietary extension of industry standards, and through the non-disclosure of certain technical information. [76] *See, e.g.*, Pl. Prop. Findings of Fact PP 169-78. As the Court recounted above, Plaintiffs support their request for such disclosures with testimony describing numerous instances in which Microsoft has implemented proprietary technology much to the consternation of its competitors. *See supra* Part III.D. At their core, Plaintiffs' allegations with regard to Microsoft's conduct in the area of interoperability are new allegations of anticompetitive conduct. *Id.* As such, these allegations must be subjected to the rigorous four-part test outlined by the appellate court in this case before the Court can find that Microsoft's conduct violates ***antitrust law*** **[**274]** and demands a remedy. *See supra* Part II.A.3 (describing four-part test); *see also supra* Part III.D; *Microsoft, 253 F.3d at 58-59*.

Plaintiffs insist that the Court can remedy Microsoft's conduct relating to industry standards, interoperation, and information disclosure in the absence of any such balancing of anticompetitive effect against procompetitive justification because **[**275]** Microsoft's conduct with regard to this technical information is closely related or "the same or similar" to the conduct which gave rise to liability in this case. While the Court does not quibble with the notion that a remedy can address conduct beyond the specific acts found to be anticompetitive, Plaintiffs are unable to establish a satisfactory link between the interoperability disclosures they seek and the liability in this case. *See supra* Part III.D; *see also* Appendix A, Part VI. The Court fails to see the necessary relationship between any

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[76] Plaintiffs further argue that broad interoperability disclosures are necessary to "lessen the potential that Microsoft will be able to lock in developers, consumers, and businesses through undisclosed proprietary interfaces and protocols." Pl. Prop. Finding of Fact P 629. This justification for broad interoperability disclosures is flawed, as it is essentially a new, and vastly unsupported, allegation of attempted monopolization, or a resurrection of the previously Courtrejected "monopoly leveraging" argument. *See supra* Part III.C; *Microsoft, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485* (D.D.C. Sept. 14, 1998), at *26-28.

conduct which gave rise to liability in this case and Plaintiffs' allegations of Microsoft's new "bad" acts relevant to communications protocols and other industry standards. Plaintiffs' reliance upon old "bad" acts is similarly unavailing. Plaintiffs cite to factual findings entered during the liability phase of the case which conclude that Microsoft selectively disclosed technical information to third parties, but cannot identify any liability sustained by the appellate court which flows directly from these findings. *See, e.g.*, Pl. Prop. Findings of Fact PP 171-72.

Plaintiffs make a better argument regarding the relationship **[**276]** between new examples of "selective disclosure of technical information" and liability finding related to the "First Wave Agreements," as these agreements included the promise of technical information in exchange for exclusivity in browser distribution. *Microsoft, 253 F.3d at 71-72*. This argument, however, also falls short. Tellingly, the appellate court sustained liability for this action only upon a finding that the exclusivity provision in the First Wave Agreements foreclosed a substantial share of the market and thereby had a substantial effect upon the market. *Microsoft, 253 F.3d at 72*. Therefore, it is not the preferential provision of technical information that the appellate court condemned, but the exclusive effect of the agreements. *Id.*; *see also supra* Part III.D.

Similarly, the extension of industry standard protocols and the use of proprietary technology could be said to bear a limited **[*175]** connection to the imposition of liability for Microsoft's deception of software developers regarding the Windows-specific nature of its Java development tools. *Microsoft, 253 F.3d at 76-77*. Still, the appellate court's focus in this context concerned deception, rather **[**277]** than the "incompatibility with Sun's cross-platform aspirations for Java [which was] no violation to be sure." *Microsoft, 253 F.3d at 76*. Bearing a far clearer relationship to Microsoft's alteration of industry standards and use of proprietary technology is the appellate court's rejection of liability for Microsoft's development of its own, incompatible, non-crossplatform, JVM. *Microsoft, 253 F.3d at 74-75*.

Plaintiffs' theory of a close relationship between this new "bad" conduct and liability is significantly flawed by the appellate court's explicit rejection of liability for conduct similar to this allegedly "bad" conduct now identified in the context of communications protocols and industry standards. *Id.* The appellate court carefully weighed each action taken by Microsoft for anticompetitive effect and procompetitive justification and in doing so, the appellate court refused to paint liability with broad strokes. The appellate court instead considered the precise effect of each Microsoft action. In short, Plaintiffs fail entirely to recognize the appellate court's refusal to condemn Microsoft's proprietary extensions and alterations, even where such extensions and alterations **[**278]** hindered interoperability and the development of cross-platform products.

Once again, the Court acknowledges that ***HN29***[] it has the power to prohibit "admittedly valid parts of an invalid whole," *Bausch & Lomb, 321 U.S. at 724*; *see also* *Paramount Pictures, 334 U.S. at 148*, where such prohibition will further eradicate the harmful effects of the anticompetitive conduct. The Court disagrees, however, that Microsoft's practice of utilizing undisclosed proprietary extensions of communications protocols and its similar use of proprietary technology can be accurately characterized as a part of the conduct which gave rise to the imposition of liability in this case. Plaintiffs' concern with Microsoft's use of proprietary technology is substantially more far reaching and is, at best, tangentially related to the provision of technical blandishments in exchange for a promise of exclusivity or a limited instance of Microsoft deception regarding a particular Microsoft technical implementation. *See supra* Part III.D. As a result, the Court declines to address this new conduct on the grounds that it more closely resembles the basis for a new allegation of anticompetitive **[**279]** conduct than a mere extension or "part" of conduct previously deemed to violate ***antitrust law***.

Stripped of the support drawn from Plaintiffs' flawed view of the technologies which properly may be characterized as middleware concordant with the liability phase and Plaintiffs' allegations of new anticompetitive conduct in the area of interoperation, Plaintiffs' plea that the Court impose a remedy broadly facilitating interoperation in markets unrelated to the monopoly market is without basis. Even confined to the parameters identified by the Court; namely, interoperation between Windows and "Microsoft Middleware" and interoperation between Windows and Microsoft server operating systems, Plaintiffs' expansive interoperability disclosures are largely unjustified and present a host of problems which warrant their rejection by the Court. *See* Appendix A; Part VI.

b. Harmful Effects of Cloning

Over-broad disclosure, such as that proposed by Plaintiffs, must also be avoided because it will likely enable wholesale copying or cloning of Windows without **[*176]** violating Microsoft's intellectual property rights. *See id.* By cloning, the Court means the creation of a piece of software **[**280]** which replicates the functions of another piece of software, even if the replication is accomplished by some means other than the literal repetition of the same source code. *Id.* In most instances, where a clone is created without a copyright violation, the clone emerges from a process of reverse engineering-which consists of the study of functionality in the original product and the attempt to produce a product which accomplishes the same end. *Id.* The process of cloning the functionality of a competitor's product is usually an expensive and timeconsuming undertaking which, if successful, will enable the cloned product to function as a replacement for the original product. *Id.* To impose a remedy which facilitates the cloning of Microsoft's products-a far simpler task than the creation of a new product-would provide a windfall to Microsoft's competitors. *Id.*

Plaintiffs have been very clear that they seek to terminate the "vicious cycle" of Microsoft dominance in the operating system market by "enabling would-be competitors to support some of the thousands of applications created for Windows." Pl. Prop. Findings of Fact P 608. Plaintiffs explain that this goal can be **[**281]** achieved by providing competing software platform developers with sufficient disclosures to provide a substitute, or clone, platform that exposes the same APIs as those which are exposed by Windows. *Id.* Although innocently characterized by Plaintiffs as mere "interoperation" between devices, the evidence establishes that, rather than achieving the goal of "interoperation" as it is understood by most in the industry, and discussed by the Court *supra* in Part III.B.3.a, Plaintiffs seek to achieve a result of perfect interchangeability. *See* Appendix A, Part VI.A. In other words, Plaintiffs seek the disclosure of vast amounts of technical information for purposes of enabling the creation of functional substitutes for various pieces of Microsoft's products. *Id.* The result Plaintiffs envision is nothing other than cloning, which itself is not necessarily "bad" or illegal-but in this Court's view-is not a legitimate goal for the remedy in this case.

Plaintiffs fail entirely to offer economic evidence to support the enabling of the wholesale cloning of Microsoft's PC operating system or virtually any other Microsoft software product. None of the economists who testified, including **[**282]** Plaintiffs' own economist, Dr. Shapiro, could find any economic benefit to or justification for enabling the cloning of the Windows platform. *Id.* In fact, Dr. Shapiro testified that, even in the context of this proceeding, Microsoft has a legitimate interest in protecting itself against the cloning of its products by competitors. *Id.* To broadly enable the cloning of Microsoft's operating system and portions thereof, as well as Microsoft products unrelated to Microsoft's monopoly, runs contrary to the theory of protection of intellectual property rights. In general, the protection of intellectual property rights encourages innovation by rewarding the innovator's investment in creating something new, while making the innovation available to the public. *See* *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974)*. To enable the cloning of Microsoft's products sets this scheme askew by denying Microsoft the returns from its investment in innovation and effectively divesting Microsoft's intellectual property of its value. *See* Appendix A, Part VI. Such a scheme inherently decreases both Microsoft's incentive to innovate as well as the incentive for other software **[**283]** developers to innovate, since they can simply create clones of Microsoft's technology. *Id.* In addition, the homogeneous **[*177]** set of features that would result from the broad availability of Microsoft product clones would defeat some aspects of competition. *See id.*

Plaintiffs' demand for extensive technical information for the purpose of fostering Plaintiffs' skewed view of "interoperation" would provide an unearned windfall to Microsoft's competitors and an unjustified divestiture of Microsoft's intellectual property. *Id.* These undesirable results are not countervailed by evidence that such a remedy would foster competition in the monopolized market. *Id.* To the contrary, the cloning of Microsoft's technology carries the potential to hinder some aspects of competition and discourage innovation. As ***antitrust law*** does not exist for the protection of competitors, but for the protection of competition, the Court does not regard this end as a legitimate one. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 320*.

c. Harmful Effects of Disclosing Internal Interfaces Beyond the Court's concern with cloning, the Court rejects any definition of the parameters of API disclosure **[**284]** which would risk disclosure of an inordinate number of internal interfaces. Microsoft's PC operating systems, like most software, have numerous "internal" interfaces, meaning interfaces that are not documented and disclosed for use by applications. *See* Appendix A, Part VI. There exist a number of technical justifications for operating system vendors to decline to make such internal interfaces public. *Id.* For example, internal interfaces remain internal so that the software developer has the freedom to modify the interface over time. *Id.* Once the interface is disclosed, the developer effectively has a contract with other software developers, who might rely on the interface, that the interface will not be changed. *Id.* Hence, the disclosure of interfaces which the developer intended to maintain internally threatens to stifle innovation and product flexibility. *Id.* In addition, internal interfaces are often unstable, meaning that they will not perform effectively when relied upon by third-party applications. *Id.* The Court finds that there is sufficient harm which flows from the mandated disclosure of a vast quantity of internal interfaces which is not countermanded **[**285]** by competitive benefit such that it is best not to require Microsoft to disclose a multitude of internal interfaces. Accordingly, the Court declines to adopt a remedy provision requiring the extensive disclosure of internal interfaces.

4. Reasonable, Non-Discriminatory Licenses

Although the Court has rejected Plaintiffs' request for the broad disclosure of technical information relating to Microsoft's products, the Court's remedial decree will require Microsoft to make more limited disclosures of APIs, communications protocols, and related technical information in order to facilitate interoperation. Such information constitutes valuable Microsoft intellectual property-one of Microsoft's primary assets. *See* Appendix A, Part VII. Plaintiffs take the view that Microsoft should not be permitted to charge a reasonable royalty in exchange for the license of its intellectual property. [77] To require Microsoft to license intellectual property in the absence of a reasonable royalty, as Plaintiffs suggest, constitutes a **[*178]** divestiture of one of Microsoft most valuable assets. *Id.* Such a divestiture is only appropriate where Plaintiffs have adduced evidence of "a clearer indication **[**286]** of a *significant causal connection* between the conduct and . . . maintenance of the market power." *Microsoft, 253 F.3d at 106* (emphasis in original). Plaintiffs have failed to provide the Court with any such evidence. *See* Appendix A, Part VII. As a result, the Court remains unconvinced that the causal connection between the anticompetitive conduct and Microsoft's continued dominance in the Intel-compatible PC operating system market supports a divestiture remedy. *See* *Microsoft, 253 F.3d at 107*. Moreover, given the indirect connection between the interoperability portions of the remedy and the liability findings in this case, there is very little justification for transforming the most forward-looking portion of the remedy into a drastic structural remedy.

[287]** Nevertheless, the Court recognizes that the effectiveness of the disclosure provisions in the Court's remedy is dependent upon the provision of the relevant technical information on terms which are consistent with the goal of fostering competition. In this regard, the Court must restrict the terms of the mandatory license so as to ensure that the goal of the remedial provision is not thwarted by discriminatory or oppressive license terms. Accordingly, the Court shall prohibit Microsoft from imposing unreasonable or discriminatory license terms, but shall permit Microsoft to require a reasonable royalty for the licenses necessary to exercise the rights guaranteed by the final judgment. The reasonableness standard is appropriate and likely necessary in this context because it avoids "involving the judiciary in the administration of intricate and detailed rules" relating to specific licenses. *Paramount Pictures, 334 U.S. at 163* ("The judiciary is unsuited to affairs of business management . . . ."). At the same time, however, the requirement of reasonableness imposes upon Microsoft an objective standard which curtails Microsoft's ability to manipulate the terms of the **[**288]** intellectual property licenses in an attempt to circumvent the licensing and disclosure mandates of the remedial decree.

5. Protection Against Hackers, Viruses, and Piracy

Despite mandatory disclosure of technical information, it is appropriate to protect Microsoft and, more importantly, consumers, against disclosures which would assist hackers enable the creation of harmful viruses, and promote piracy. *See* Appendix A, Part VIII. Hackers and viruses pose threats both to consumers, as well as to Microsoft's

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[77] The combination of Plaintiffs' unjustifiably broad disclosure provision and the royaltyfree license would effect a drastic expropriation of substantial amounts of Microsoft's intellectual property in the absence of *any* compensation to Microsoft and despite the absence of additional evidence of a causal connection.

business, while piracy protection recognizes Microsoft's copyrights and its subsequent entitlement to protect itself from copyright violation. *Id.* Protection against these threats is appropriate in the context of a remedy and must be factored into any decree. However, these protections must be sufficiently limited so as not to eliminate the value in the above-described disclosure provisions by allowing Microsoft to withhold information selectively and for its own benefit. Balancing the potential benefit of the disclosure provisions in the Court's remedy against the likely harm which could be caused by allowing this information to fall into the wrong hands, the **[**289]** Court's remedy will exempt certain material from disclosure in order to preserve the security of Microsoft products against hackers and viruses. Similarly, Microsoft will not be forced to disclose valuable information to firms with a history of piracy, so long as Microsoft does not use claims of piracy as a means by which to discriminate.

In providing a security exemption for some of the disclosures required by the **[*179]** Court's remedial decree, the Court rejects Plaintiffs' witnesses' criticisms of Microsoft's model for ensuring security for users of its software. *See* Appendix A, Part VIII. These criticisms of Microsoft's security model misunderstand the purpose of this proceeding. The task presently before the Court is not the redesign of Microsoft's products to conform to Plaintiffs' views regarding what product design would be best for consumers and competitors alike. Rather, this Court's sole concern is to craft an effective remedy to redress Microsoft's antitrust violations identified by the appellate court and restore competition to the monopolized market. *Int'l* *Salt, 332 U.S. at 400-01*. Even in an antitrust suit, there is little justification, and even less **[**290]** desire, to extend this Court's judgment to issues of product design. *Microsoft, 147 F.3d at 948*; *see also* *Bausch & Lomb, 321 U.S. at 728*. Having credited the testimony of Microsoft's witnesses regarding the need for a security exemption, *see* Appendix A, Part VIII, the Court will permit Microsoft to forego its obligations to disclose and license certain technical information where the disclosure of such information would compromise the security of particular installations of Microsoft's software products. Additionally, as there is no benefit to be derived by advancing the improper interests of industry participants who fail to respect the intellectual property laws, the Court will not require Microsoft to disclose technical information to entities who are, or are likely to be, seeking such information for an improper purpose.

F. Compliance and Enforcement Provisions

The parties have differing visions of the most effective manner of enforcement of the injunctive decree entered as the remedy in this case. The scheme envisioned by Plaintiffs is marked by its reliance upon a special master, appointed pursuant to *Rule 53 of the Federal* ***[**291]*** *Rules of Civil Procedure*. SPR § 18. ***HN30***[] *Rule 53* generally empowers the Court to appoint a special master, with the following proviso:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Fed. R. Civ. P. 53(b). The D.C. Circuit has interpreted this portion of *Rule 53* strictly, holding that ***HN31***[] the presence of "some deep technological issue" related to interpreting a decree alone is not sufficient to render the issue "complicated" pursuant to *Rule 53*. *Microsoft, 147 F.3d at 954-55*. Moreover, the D.C. Circuit has expressed disfavor for appointment of a special master in antitrust cases, though they are undoubtedly complex, because such complexity itself "is an impelling reason" for an experienced trial judge rather than a "temporary substitute appointed on an *ad hoc* basis" to preside over the issue presented therein. *Id. at 955* (quoting **[**292]** *La Buy v. Howes Leather Co., 352 U.S. 249, 259, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957))* (quotation marks omitted). Additionally, the D.C. Circuit clearly stated that references to special masters are improper where the master is called upon to determine the rights of the parties, rather than to enforce such rights. *Microsoft, 147 F.3d at 954*. In this regard, the appellate court has likened assessment of rights under a remedial decree to contract interpretation, a matter reserved for the trial judge. *Id.*

Plaintiffs envision the special master in a role which assumes a number of significant **[*180]** functions. Plaintiffs' proposal provides broadly that the special master is empowered to "monitor Microsoft's compliance with [the remedial decree] including taking all acts and measures he or she deems necessary or proper for the efficient performance of the special [m]aster's duties." SPR § 18.b. The special master in Plaintiffs' proposed remedy is specifically charged with receiving third-party complaints regarding Microsoft's compliance with the remedial decree. *Id.* § 18.f. Thereafter, pursuant to a strict time schedule, the special master is obliged to "determine if an investigation is warranted." *Id.* **[**293]** Should the special master decide to investigate, again pursuant to a stringent time schedule, the complainant and Microsoft are each required to file any documentation and argument on the issue with the special master, who will then schedule and conduct a hearing. *Id.* Within fifteen days of such hearing, the special master must file with the Court its report of factual findings and a proposed order. *Id.*

In light of the applicable law, the Court harbors serious concerns as to the propriety of Plaintiffs' proposed use of a special master. Plaintiffs fail to explain how, in assessing Plaintiffs' or a third party's complaint for merit, the special master will not determine the rights and obligations of the parties under the final judgment in this case-a role reserved exclusively for the district court. To empower the special master to engage in a determination of rights and obligations contravenes the parameters of appropriate use of a special master, as set forth by the D.C. Circuit. *Microsoft, 147 F.3d at 954*. Accordingly, the Court concludes that Plaintiffs' proposed use of a special master to enforce the final judgment entered in this case is legally improper.

[294]** Even if the Court were confident that Plaintiffs' proposed use of a special master was legally sound, such a conclusion would not allay the Court's remaining concerns with regard to the logistical difficulties in Plaintiffs' special master proposal. Most troubling to the Court is the manner in which Plaintiffs propose to abdicate responsibility for enforcement of the remedial decree. [78] The first significant aspect of this abdication is the effective provision of enforcement authority to third-parties. Plaintiffs have gone to great lengths to ensure that third-parties have access to the enforcement mechanisms so that such third parties can bring issues to the attention of Microsoft and the Court. As originally proposed, Plaintiffs do not involve themselves in the process of assessing and addressing the complaints of third-parties. Instead, Plaintiffs leave that role to the special master, who is responsible for filtering third-party complaints and assessing their merit. In their Proposed Findings of Fact, Plaintiffs offer an amendment **[*181]** which would inject Plaintiffs into the process by requiring them to determine whether they support further investigation of a third-party complaint. **[**295]** Pl. Prop. Findings of Fact P 1391. This determination, however, does not bind or even influence the special master's assessment of the need for investigation. Accordingly, even if amended as Plaintiffs belatedly suggest, Plaintiffs' remedy proposal remains structured such that Plaintiffs will play a limited and non-integral role in enforcement of the remedial decree.

[296]** In the Court's view, Plaintiffs, having initiated and litigated this suit, are the proper parties to evaluate complaints by non-parties regarding alleged violations of the Court's decree. While there is no inherent flaw in giving third parties a voice in this process, as very often such third parties will be most immediately aware of Microsoft's conduct, non-parties should not be allowed direct access to the enforcement mechanisms. Rather, if Plaintiffs want to rely upon the assistance of third parties in monitoring Microsoft's compliance with the Court's decree, it is appropriately Plaintiffs' duty to assess the assertions of such third parties for merit.

In a related vein, the Court perceives discord between the notion that the same individual is to be responsible for the initial screening of complaints of non-compliance, the investigation of such complaints, and the initial

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[78] Of additional concern to the Court is the schedule pursuant to which the special master would be required to proceed through his or her many duties. The Court finds this schedule to be rigid and inflexible, as it does not take into account the volume of complaints which the special master must assess, or the degree of complexity of the issues raised in these complaints. The Court is cognizant of the need for expediency in resolving complaints of non-compliance and lauds Plaintiffs' attempt to ensure their prompt resolution. Still, the Court remains unconvinced that Plaintiffs' desire for structure and certainty has materialized into a workable scheme. Accordingly, the Court declines to adopt the stringent deadlines proposed by Plaintiffs for the resolution of complaints of non-compliance. Mindful of the rapid pace of change in the industry and the harm which will be caused by violations of the Court's remedial decree, the Court assures the parties that complaints of non-compliance will be handled by the Court with the understanding that time is of the essence.

adjudication of the merits of such complaints. Plaintiffs have, in effect, charged the special master with the duties of detective, prosecutor, and judge. The Court has little faith that such a scheme would prove to be workable in practice. In addition, in response to the Court's concern regarding the absence **[**297]** of any provision permitting alternative dispute resolution, Plaintiffs have proposed to empower the same special master as mediator. Pl. Prop. Findings of Fact P 1393. This proposal, in the Court's view, serves only to compound the problem of the special master proposal, not resolve it, by adding "mediator" to the already present special master duties of detective, prosecutor, and judge. Plaintiffs propose a special master as a panacea that will relieve them of the burden of enforcing the decree for which they so tirelessly fought and will relieve the Court of the burden of assessing complaints of noncompliance . In short, the Court views such wholesale reliance upon a special master as not only improper, but unworkable.

Plaintiffs' proposal for a special master also presumes that Microsoft will constantly fail to be in compliance with the decree, requiring the persistent involvement of a special master to receive complaints and adjudicate compliance issues. [79] The Court neither agrees, nor sees the basis for this presumption. Generally, courts presume that parties will adhere to orders of the Court. In this case, the Court has taken great care to provide the parties with a decree **[**298]** which is unambiguous in its terms so as to ensure that Microsoft's compliance is readily achieved. Microsoft requested as much, Tr. at 4984 (Gates), and the law demands such an outcome. *Int'l* Salt, 332 U.S. at 400; *see also* Fed. R. Civ. P. 65(d). The decree adopted by the Court, to borrow Mr. Gates' words, provides "clarity of [Microsoft's] obligations that allows [the company] to direct [its] **[*182]** employees . . . to steer absolutely clear of ever violating one of these things." Tr. at 4984 (Gates). Of course, if Microsoft finds itself repeatedly unable "to steer absolutely clear" of violating the decree, the occasion may arise when a special master's assistance would be appropriate. *Id.* If such an occasion should arise, the Court will revisit the issue. Nevertheless, the Court declines, at this juncture, to appoint a special master.

[299]** The remedy in this case will charge Plaintiffs with the obligation of monitoring Microsoft's compliance. While Plaintiffs may rely upon the views of third parties to guide them in this task, the duty of enforcement belongs to Plaintiffs. To ease the burden on the Court and on Microsoft in addressing Plaintiffs' concerns, the Court will require Plaintiffs to form a committee to coordinate enforcement of the remedial decree. Such a committee will serve to minimize duplication of enforcement activities and requests of the Court and Microsoft.

Beyond the special master provision of Plaintiffs' proposed remedy, the parties' proposed remedial decrees differ in that Microsoft's proposal provides for a largely independent "technical committee" responsible for monitoring enforcement, reporting to Plaintiffs, and facilitating to a 1995 consent decree with the Department of Justice in which Microsoft was alleged to have violated the decree. Although a contempt proceeding commenced, Microsoft was ultimately absolved of the contempt charge because the relevant portion of the decree was found to be ambiguous. *See* Microsoft, 331 U.S. App. D.C. 121, 147 F.3d 935. dispute resolution. SRPFJ § IV.B, D. Plaintiffs **[**300]** have been unwaveringly critical of Microsoft's proposal for a technical committee. *E.g.*, Pl. Prop. Findings of Fact PP 1380-87. As the technical committee provision exists largely to assist Plaintiffs in enforcing the provisions of the final judgment in this case, if Plaintiffs do not want to rely upon a technical committee, the Court sees little reason to require them to do so. Accordingly, the Court declines to appoint a technical committee in the form proposed by Microsoft.

The remaining enforcement provisions in the parties' respective remedy proposals, as Plaintiffs readily acknowledge, are not widely divergent. For example, both suggest a requirement that Microsoft employ an officer with duties to ensure Microsoft's compliance with the decree. Despite this general similarity, however, the parties envision a conceptually different role for the compliance officer. Plaintiffs envision the compliance officer as a high-level Microsoft employee who retains a significant amount of autonomy and independence from the corporation. As a result, the compliance officer position proposed by Plaintiffs is appointed by a committee comprised of at least three members of the Microsoft board **[**301]** of directors who are neither present, nor former, Microsoft employees. SPR § 17.a-b. The compliance officer in Plaintiffs' proposal is protected against abrupt termination by a

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[79] Plaintiffs have not directed this Court to any evidence that Microsoft has a history of non-compliance with judicial decrees. In this regard, the Court notes that Microsoft was a party

provision which permits removal only by the Chief Executive Officer of Microsoft with the concurrence of the committee that appointed the officer. *Id.* § 17.d. The compliance officer reports to the Chief Executive Officer and to the committee which appointed him or her. *Id.* § 17.b. In addition, Plaintiffs' proposed compliance officer is responsible for reporting to Plaintiffs regarding Microsoft's compliance with the Court's remedial decree. *Id.* § 17.c.

In contrast, while the compliance officer position proposed by Microsoft has similar duties to those identified in Plaintiffs' proposed remedy, the role of the compliance officer is more clearly that of a Microsoft employee, rather than a semi-independent monitor. As a result, Microsoft's proposed enforcement provision does not specify the details of the compliance officer's hiring or termination. SRPFJ § IV.C. Likewise, the Microsoft version of the compliance officer is not required to report on compliance matters to Plaintiffs. *Id.*

[*183] While **[**302]** either provision would likely prove to be workable in practice, the Court sees merit in the safeguards of impartiality imposed by Plaintiffs' version of a compliance officer. Of course, Microsoft is always free, and even encouraged, to dedicate additional employees, whose role more closely resembles that suggested by Microsoft's proposed remedy, to perform additional compliance functions. Such dedication, however, will not alter the compliance officer's responsibilities.

The Court remains concerned, however, with the particular aspect of Plaintiffs' remedy proposal requiring the compliance officer to deliver a copy of the order of remedy in this case to, and obtain a certification of understanding and compliance from, "each officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs, IHVs, or Third-Party Licensees." SPR § 17.c.i. In contrast, Microsoft's remedy proposal requires the compliance officer to distribute the decree to and obtain a similar certification of understanding and compliance only from Microsoft's officers and directors. SRPFJ § IV.C.3. The Court finds this aspect of Plaintiffs' proposal to be largely **[**303]** unnecessary and somewhat at odds with Plaintiffs own emphasis on the extent to which Microsoft's "senior executives . . . were actively involved in and/or directed conduct found to be anticompetitive." Pl. Prop. Findings of Fact P 1326. Plaintiffs have not identified any evidence which indicates that lower-level employees were responsible for Microsoft's illegal acts and strategies. In light of this absence of evidence, there seems little justification for requiring each such employee to certify compliance with the remedial decree in this case and risk contempt for violation of the decree. Far more appropriate is to charge Microsoft's directors and officers with ensuring that their business strategy, as implemented by their subordinates in the corporate structure, does not violate the Court's remedial decree. Moreover, to the extent that such lower-level employees engage in conduct which violates the Court's remedial decree, Microsoft, as a corporation, will remain liable for such violation. Accordingly, the remedy imposed in this case will not require the over-broad certification of compliance by subordinate employees proposed by Plaintiffs.

Reflecting the similarities in the remaining **[**304]** portions of the two proposed remedial decrees, the remedy adopted by the Court will provide Plaintiffs, acting only after consultation with their enforcement committee, reasonable access to Microsoft's source code, books, ledgers, accounts, correspondence, memoranda, and other correspondence, access to Microsoft employees for interview, and the right to request and receive written reports from Microsoft on any matter contained in the Court's remedial decree. Plaintiffs will, of course, be bound to limit any use of information obtained through these means for the purpose of ensuring Microsoft's compliance with the remedial decree, or as otherwise required by law. Similarly, should information and documents provided to Plaintiffs be subject to disclosure to a third party, Microsoft will not be deprived of the opportunity to claim protection pursuant to *Federal Rule of Civil Procedure 26(c)(7)*.

G. Term of the Decree

Evidence on the subject of the proper term for the Court's behavioral remedy in this case is sparse and largely unenlightening. *See* Appendix A, Part IX. One fact, however, is abundantly clear from the record: there exists substantial uncertainty as to the **[**305]** future demands of the software industry. Due to rapid pace of change in this arena, it is particularly difficult in this case to predict what effect **[*184]** the present remedy will have a decade from now. The appellate court voiced precisely this concern in its opinion last August:

> By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second. Conduct remedies may be unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless).

Microsoft, 253 F.3d at 49.

There is little dispute that many of the acts which gave rise to the imposition of liability in this case have long since ceased. Similarly, there is no dispute that the industry at issue in this case is remarkable for its constant and rapid change. Nevertheless, Plaintiffs argue that the "there is no reason for an **[**306]** effective forward-looking remedy to depart from the standard 10-year term of antitrust decrees." Pl. Prop. Concl. of Law at 79. In making this assertion, Plaintiffs place substantial importance upon the contention that ten years is the "standard" in antitrust decrees. Plaintiffs derive this "standard" argument from the fact that ten years is the "standard term for antitrust consent decrees" entered into by the Antitrust Division of the United States Department of Justice. Pl. Prop. Findings of Fact P 1441 (emphasis added). While the Court has not doubt that the official policy of the Antitrust Division is both logically and legally sound, the Court is neither bound, nor persuaded by Plaintiffs' reliance upon Antitrust Division policy to justify the ten-year term of their proposed decree.

Imposing a remedy in this case is not unlike trying to shoe a galloping horse. Were the Court to impose a ten-year term, it is likely that, by the latter half of the term, the market will have long since sent the horse to pasture in favor of more advanced technology. Thus, although the remedy crafted by the Court is undoubtedly forward-looking, it is beyond the capacity of this Court, counsel, or **[**307]** any witness, to craft a remedy in 2002, for antitrust violations which commenced in the mid-1990s, which will be appropriately tailored to the needs of a rapidly changing industry in 2012. An antitrust decree should endure only so long as necessary to ensure competition. The Court is unconvinced that the imposition of a decree for greater than five years will further that goal. Accordingly, the Court's remedial decree will persist for five years from its effective date. As an incentive for Microsoft to comply with the terms of the decree, however, the Court specifically reserves the right to extend the term of the decree for up to two years upon a finding that Microsoft has engaged in a pattern of willful and systemic violation of the Court's decree.

H. Other Provisions in Plaintiffs' Proposed Remedy

Plaintiffs' remedy proposal includes a number of provisions that the Court has considered but rejected variously as unsupported by the evidence, unconnected to the appellate court's findings of liability, or potentially harmful to the industry and to consumers. In the following paragraphs, the Court sets forth more specifically the fatal flaws in these portions of Plaintiffs' **[**308]** proposed remedy. In particular, the Court emphasizes, where applicable, the absence or inadequacy of an economic analysis of the effect of a particular remedy **[*185]** proposal. Where a remedy inflicts drastic change upon Microsoft or its products that is likely to broadly affect the industry, as well as consumers, the complete absence, or gross inadequacy, of an economic analysis of the impact of the provision upon competition is conspicuous and troubling.

1. Open-Source IE and Mandatory Auction of Office

Two sections in Plaintiffs' proposed remedy suggest a divestiture of two of Microsoft's most valuable assets, IE and Microsoft Office. Plaintiffs fail entirely to justify the inclusion of these purportedly "innovative" provisions. *See* Appendix A, Part X.A. First and most striking, the theory pursuant to which Plaintiffs propose these provisions ignores the theory of liability in this case. The divestiture provisions serve to directly benefit non-Microsoft operating systems, in particular Linux and Apple. It is well recognized that the theory of liability in this case concerns Microsoft's response to cross-platform applications, not operating systems, that displayed the potential **[**309]** to offer platform services such that their popularity would greatly simplify the porting of applications *en masse* from operating system to operating system. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. To offer a remedy which directly benefits other operating systems ignores the direction and impact of Microsoft's anticompetitive behavior and advances a theory of competition discounted during the liability phase of this case. Indeed, Judge Jackson concluded, and Plaintiffs do not dispute, that the naturally existing applications barrier to entry hindered the ability of Apple and Linux to compete with Windows. *Findings of Fact,* 84 F. Supp. 2d at 22, PP 47, 50,51 . The district court did not conclude that Microsoft engaged in any anticompetitive action which directly hindered these operating systems' ability to compete with Windows; instead, that difficulty existed as a function of the *applications* barrier to entry. [80] The harm-if any-to competing operating systems is indirect, arising from the unfulfilled potential of middleware to reduce the applications barrier to entry. Given these facts, it is difficult to understand what role the bolstering of particular operating systems will play in redressing **[**310]** anticompetitive conduct directed at middleware.

Similarly antithetical to the goal of the remedy in this case is the fact that the divestiture remedies relevant to IE and Microsoft Office proposed by Plaintiffs will provide significant benefit to competitors, but have not been shown to benefit competition. *See* Appendix A, Part X.A. It is fundamental that "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110* (quoting *Brown Shoe, 370 U.S. at 320*) **[**311]** (emphasis in original); *see also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488*. Rather than rectify injury to consumers caused by diminished competition, Plaintiffs' proposed divestitures of IE and Office merely serve to shield Microsoft's competitors from the rigors of the marketplace. [81] *See* Appendix A, Part X.A.

[*186] Finally, the Court concludes **[**312]** that these proposals, as divestitures of Microsoft's primary asset-intellectual property-are "structural remedies" as discussed by the appellate court. *See id.*; *Microsoft, 253 F.3d at 105-06*. The appellate court advised that where the Court was unconvinced of the causal connection between the conduct found to be anticompetitive and the company's position in the relevant market, "it may well conclude that divestiture is not an appropriate remedy." *Microsoft, 253 F.3d at 107*. In this instance, not only is the Court unconvinced that there exists a sufficient relationship between the liability findings and this aspect of the proposed remedy, but the Court is unable to conclude that Plaintiffs have sufficiently bolstered the "causal connection" referenced by the appellate court to justify divestiture, in any form, as an appropriate remedy in this case. *Microsoft, 253 F.3d at 107*. Accordingly, the Court declines to adopt the open-sourcing of IE or the mandatory auction of Office licenses as remedies in this case. *See also* *Yamaha Motor Co. v. Federal Trade Com., 657 F.2d 971, 984* (rejecting injunction on the ground that its provisions extended "beyond any reasonable **[**313]** relationship to the violations found").

2. Ban on Knowing Interference

Citing to the series of new "bad" acts the Court described *supra*, Part III.D, Plaintiffs suggest that the remedy imposed by the Court should prohibit Microsoft from engaging in any action that interferes with the compatibility of a non-Microsoft product and Microsoft Windows or other Microsoft software products. SPR § 5. Plaintiffs would exempt from this prohibition action which is justified by "good cause." *Id.* Because the Court has already determined that most of the new "bad" acts identified by Plaintiffs are not appropriately treated as being of the same type or class as those acts which gave rise to the liability in this case, *see supra* Part III.D, imposition of this proposed provision is not justified by the Supreme Court's now familiar holding in *Zenith Radio, 395 U.S. at 133*. Furthermore,

[80] Although Microsoft's dealings with Apple did play a role in the imposition of liability, the act for which Microsoft was found to have violated *§ 2* concerned Microsoft's targeting of Navigator, rather than Microsoft's direct competition with Apple. *Microsoft, 253 F.3d at 72-74*. Microsoft's conduct relating to Apple was found to be anticompetitive because it excluded Navigator from a significant portion of the market. *Microsoft, 253 F.3d at 73-74*.

[81] In particular, Plaintiffs' counsel offered the argument that the divestiture of IE was an appropriate remedy based upon the theory that it is the "fruit" of Microsoft's illegal conduct. *See* Pl. Prop. Findings of Fact P 1116 (citing *Microsoft, 253 F.3d at 103*). Neither the evidentiary record from the liability phase, nor the record in this portion of the proceeding, establishes that the present success of IE is attributable entirely, or even in predominant part, to Microsoft's illegal conduct. *See* Appendix A, Part X.A. Accordingly, the Court rejects Plaintiffs' argument that IE should be divested as the "fruit" of Microsoft's illegal conduct.

Plaintiffs have not established that a ban on "knowing interference" will foster competition in the monopolized market or among software with the capacity to threaten Microsoft's monopoly. *See* Appendix A, Part X.C.

Of greatest concern to the Court, however, is the interference **[**314]** with Microsoft's product design that is invited by the proposed provision. *Id.* Enforcement of the provision would engage the Court in an analysis of whether "good cause," as a technical matter, existed for Microsoft's product design decisions. The evidence indicates that such a provision, because of its breadth and potential ambiguity, has the potential to hinder technological innovation. *Id.* Heeding the admonition that courts should not involve themselves in product design and that hindrance of technological innovation contravenes the purposes of ***antitrust law***, *Microsoft, 147 F.3d at 948*, the Court rejects Plaintiffs' proposed ban on "knowing interference" with compatibility.

3. Support for Predecessor Versions

Plaintiffs also propose a remedy provision requiring Microsoft to maintain full support and licensing for immediate predecessors to the most recent version of **[*187]** its Windows operating system. Plaintiffs argue that such a provision will encourage the customization of versions of Windows by ensuring that Microsoft will not undermine such customization with new releases of its operating system. Not only did the Court find Plaintiffs' concern **[**315]** in this regard to be without basis in fact, *see* Appendix A, Part X.D, but the Court has already concluded that customization will not be mandated by the remedy in this case, *see supra* Part IV.A. As the Court discussed *supra* Part IV.A, a remedy in this case that forces Microsoft to permit "drastic alteration" of its copyrighted work runs afoul of the appellate court's opinion that Microsoft did not act anticompetitively in restricting such alteration. *Microsoft, 253 F.3d at 63*. Furthermore, support for predecessor versions was shown to have a great likelihood of imposing significant costs upon Microsoft, slowing the pace of development, reducing beneficial network effects, and increasing consumer confusion. *See* Appendix A, Part X.D. The slowing of innovation cannot be squared with the objectives of ***antitrust law***. *Microsoft, 147 F.3d at 948*. Because there is no evidence that the benefit to competition would outweigh any of the substantial costs of such a provision and given the absence of a connection between this aspect of Plaintiffs' proposed remedy and the liability findings in this case, *see* Appendix A, Part X.D, the Court rejects **[**316]** mandatory support of predecessor versions of Windows as a remedy. *Ford Motor Co., 405 U.S. at 573* (holding that antitrust relief should "restore competition"); *see also* *Yamaha Motor, 657 F.2d at 984*.

4. Ban on Contractual Tying

Plaintiffs suggest that the remedy in this case should include a provision which bans Microsoft from conditioning the grant, to any species of licensee, of a Windows license upon an agreement to license, promote, distribute, or otherwise support, a Microsoft middleware product. The broad ban proposed by Plaintiffs is not directly connected to any finding of liability. Rather, the ban appears more appropriate as a remedy for a finding of § 1 liability for the illegal tying of products. The appellate court rejected a *per se* analysis for tying in this case and accordingly, reversed the district court's imposition of § 1 liability for the integration of Windows and IE. *Microsoft, 253 F.3d at 84-95*. In doing so, the appellate court noted that there are often efficiencies and other benefits to be gained from a tie. *Microsoft, 253 F.3d at 87-88*. The complete ban on contractual tying proposed by **[**317]** Plaintiffs not only ignores this significant observation, but it proceeds as if *per se* liability had been imposed for Microsoft's integration of IE and Windows. In this regard, the proposed ban on contractual tying is wholly unrelated to any finding of liability affirmed by the appellate court in this case.

Plaintiffs do not offer sufficient evidence to explain the benefit to competition to be gained by this regulation of predominantly, if not entirely, lawful conduct. *See* Appendix A, Part X.E. The evidence presented to the Court establishes that tying in the software market often produces a benefit to consumers. *Id.* Consequently, a ban on *all* such tying will not benefit consumers. *Id.* Because Plaintiffs have not shown that a blanket ban on all contractual tying of products to Windows will benefit competition, and because it appears that such a ban has the likelihood of harming consumers, the Court determines to exclude any such provision from the remedy in this case.

5. Ban on Retaliation for Participation in This Case

Plaintiffs propose that the remedy imposed by the Court should regulate Microsoft's conduct with regard to participants **[*188]** in this lawsuit **[**318]** and the suit simultaneously filed by the United States against Microsoft. Although touted as a ban on retaliation, Plaintiffs' proposal is written far more broadly, applying to "any action adversely affecting [participants]. . . based directly or indirectly, in whole or in part, on . . . participation" in this litigation. SPR § 9; *see* Appendix A, Part X.F. As a practical matter, the Court observes that almost any action contrary to the interests of the multitude of Microsoft competitors that participated in this litigation could be subject to a claim that such action was "based on" participation in this litigation. *See id.* Undoubtedly, competitors regularly engage in action adverse to one another without violating the law, or even widely accepted norms of business ethics. Given the breadth of conduct implicated in Plaintiffs' proposed provision, the Court has little doubt that such a ban would curtail significant amounts of legitimate conduct and subject Microsoft to countless accusations of improper "adverse[]" action arising out of such legitimate conduct. *Id.*

While the Court by no means condones retaliatory conduct by Microsoft, the Court fails to see the necessity **[**319]** for a provision of the type proposed by Plaintiffs. Plaintiffs have failed to justify this provision with any showing that Microsoft has or would retaliate against the participants in this suit. *Id*. Although the liability in this case demonstrates a consistent practice of retaliation against other industry participants, this retaliation has been confined to Microsoft's response to the business decisions of its competitors. *See* *Microsoft, 253 F.3d at 72-74* (describing Microsoft's threat of retaliation against Appel), *Microsoft, 253 F.3d at 77-78* (describing Microsoft's threat of retaliation against Intel). Indeed, Microsoft has been engaged in litigation in this District for seven years, and Plaintiffs were unable to proffer the testimony of a single witness that his or her firm had actually suffered any adverse action by Microsoft attributable to its participation. Moreover, for the great majority of witnesses who participated in this proceeding, their firms will receive protection from retaliation by Microsoft pursuant to the anti-retaliation provisions described *supra*. [82]

[320]** Having weighed the very limited evidence provided in relation to this portion of Plaintiffs' proposed remedy, the Court finds that the balance of the evidence is grossly insufficient to justify an unmitigated ban on Microsoft taking any action which might be adverse to the multiple participants in this litigation. Based upon these findings, the Court determines that there is no reason to impose such a restriction upon legitimate business conduct. As a ban on adverse action like the one suggested by Plaintiffs would likely inflict greater harm than benefit upon competition, and the ban itself is not connected to any specific conduct by Microsoft which was found to violate ***antitrust law***, the Court finds that this relief is not properly tailored to the liability imposed. *Microsoft, 253 F.3d at 107*.

6. Mandatory Java Distribution

Plaintiffs next propose that Microsoft should be required to distribute a Sun-compliant **[*189]** JVM with each copy of its Windows operating system. This proposed remedial provision is broadly related to the fact that Microsoft's illegal conduct in this case was aimed, in large part, at the Sun-compliant Java platform. *See* *Microsoft, 253 F.3d at 74-78*. **[**321]** Notwithstanding this general connection to the liability phase, the evidence presented by Plaintiffs fails to show that the proposal for mandatory support for Sun-compliant Java would provide a substantial benefit to competition. *See* Appendix A, Part X.G. The evidence does, however, indicate that one of Microsoft's primary competitors, Sun Microsystems, has a vested interest in such a remedy provision and would benefit greatly from the same. *Id.*

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[82] The only testimony that touched on this topic was the testimony of Anthony Fama, of Gateway. Mr. Fama alleged that Microsoft had "threatened" retaliation against his firm in response to Mr. Fama's participation in this litigation. *See* Appendix A, Part X.F. Although the Court cannot agree with Mr. Fama that Microsoft's conduct was, in fact, a threat, *see id.*, the Court observes that, pursuant to the Court's remedial decree, Gateway will receive protection from any true retaliation or threat thereof which is based upon its support for products competitive with Microsoft's monopoly product, as well as the many other protections afforded to OEMs which the Court described above. The Court regards such protections as entirely sufficient to address the concerns raised by Mr. Fama.

Plaintiffs regard the Sun-compliant Java platform as a significant competitive threat to Microsoft's operating system dominance and view the mandatory distribution of the Suncompliant Java platform as a means by which to bolster the platform's ability to break through the applications barrier to entry and challenge Microsoft's monopoly. In this regard, Plaintiffs contend that the Court's mandate of distribution is necessary, as there is no other means by which Java can achieve sufficient distribution to provide a viable platform. The Court rejects this assertion as unsupported by the record. *See id.* Once Microsoft's anticompetitive restraints on channels of Java distribution are lifted by other portions of the Court's remedy, any **[**322]** continuing lack of industry interest in Sun-compliant Java is not a problem appropriately resolved by this Court in this litigation. It is the problem of a particular competitor and not competition itself and, therefore, not appropriate for redress under ***antitrust law***. *See* *Spectrum Sports v. McQuillan, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884* ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.").

Even if the Court regarded Plaintiffs' view of the potential of the Java platform as accurate, the Court would nevertheless reject the mandatory distribution of a Sun-compliant JVM as a remedy in this case. The Court does not regard an appropriate remedy in this case as one which singles out particular competitors and anoints them with special treatment not accorded to other competitors in the industry, thereby providing an advantage to those particular firms **[**323]** in their efforts to compete with Microsoft. *See* Appendix A, Part X.G. The economic testimony presented in this proceeding uniformly rejected restoration of competition for particular competitors. *See id.* Rather, such restoration should be "technology neutral." *Id.* Plaintiffs' proposal in this regard is devoid of such neutrality. ***HN32***[] While an appropriate remedy should open the doors to competition, favoritism of one market participant over another in a remedy provision places the Court in the improper position of exerting too much control over the market. *See* *Spectrum Sports, 506 U.S. at 458-59*; *Cargill, 479 U.S. at 110* (quoting *Brown Shoe, 370 U.S. at 320*); *see also* *Brunswick, 429 U.S. at 488*. The Court's role is to end the illegal conduct and to make every effort to protect against conduct of the same type or class, not to engineer a particular market outcome. *Zenith Radio, 395 U.S. at 132*; *Ford Motor Co., 405 U.S. at 573*; *Gypsum, 340 U.S. at 88-89*. For all of these reasons, the **[*190]** Court will not impose a mandatory Java distribution requirement upon Microsoft.

[324]** ***7. Adherence to Industry Standards***

Based almost entirely on complaints and fears regarding Microsoft's history and ability to alter standards which affect interoperation, *see supra* Part III.D, Plaintiffs propose a provision which requires that whenever Microsoft claims to support a particular industry standard, it shall be bound to support the standard until it publicly disclaims such support or the standard itself expires or is rescinded by the standard-setting body. In addition, Plaintiffs propose that this same portion of the remedy mandate that Microsoft continue to support an industry standard any time it makes a proprietary alteration to the standard.

To justify these proposals, Plaintiffs rely heavily upon the appellate court's imposition of liability for Microsoft's deception of software developers regarding the Microsoft-specific nature of its Java development tools. *Microsoft, 253 F.3d at 76* This deception led software developers to believe that Microsoft's development tools would produce cross-platform Java-based software, rather than software that ran only on Windows. *Id.*

The former portion of this provision is little more than an **[**325]** attempt to order Microsoft to obey the antitrust laws, as Plaintiffs propose a provision which says quite simply to Microsoft: "Don't deceive anyone." Plaintiffs have appropriately referred to this provision as a "truth-instandards " provision. Such a provision, however, is an inappropriate way to remedy anticompetitive conduct. The Supreme Court, in *Zenith Radio*, held that ***HN33***[] the Court may not simply enjoin "all future violations of the antitrust laws." *395 U.S. at 133*. Rather a remedy "should be tailored to fit the wrong." *Microsoft, 253 F.3d at 107*. If the deception were ongoing, of course, the obvious remedy would be an order requiring Microsoft to cease that conduct. However, there is no evidence that this deception, or any similar deception, has persisted. *See* Appendix A, Part X.H. Accordingly, the Court finds that there is no showing that the broad order to obey the antitrust laws by not engaging in any deception similar to that of the Java developers is either appropriate or necessary.

Turning to the other significant aspect of this provision, the requirement that Microsoft maintain support for industry standards where it has made proprietary **[**326]** modifications to the standards, the Court observes that this aspect of the proposal is unrelated to any finding of liability. Instead, Plaintiffs seek to prevent Microsoft from engaging in conduct which was found, at least in the specific instance addressed in this proceeding, to have competitive benefits which outweigh the anticompetitive effect of the conduct. *Microsoft, 253 F.3d at 74-75* ***HN34***[] ("[A] monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals. In order to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design.") (citation omitted). In complete disregard of this holding, Plaintiffs seek to restrict Microsoft's ability to engage in such conduct by requiring that Microsoft continue to support standards which it has chosen to modify. Although the Court has the power to address with its remedy conduct beyond that which was found specifically to violate the antitrust laws, such expansion beyond the liability findings must be justified by a showing that the regulation of lawful conduct will advance **[**327]** the interests of competition. Plaintiffs' "truth-in-standards" proposal **[*191]** does not meet this threshold, as even when viewed generously, it is likely to have only a modest effect on competition, if it has any effect at all. *See* Appendix A, Part X.H.

Plaintiffs' proposal regarding adherence to industry standards suffers from an additional, and potentially more serious, flaw in that it imposes unworkable conditions. ***HN35***[] A remedial decree should be "as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know[] their duties and unintended contempts may not occur." *Int'l Salt, 332 U.S. at 400*. The evidence shows that compliance with "industry standards" is difficult to determine and that such a determination is largely a subjective undertaking. *See* Appendix A, Part X.H. Given this fact, a requirement that Microsoft adhere to industry standards will likely prove unenforceable. *Id.* Such a provision has the potential of subjecting Microsoft to countless claims of non-compliance which may never be resolved with any certainty. *Id.* As a result, the Court regards such a provision, which will produce minimal benefit **[**328]** to competition, as undesirable.

8. Monitoring of Microsoft's Intellectual Property Claims

Plaintiffs propose that, in conjunction with the Court's enforcement of the remedial decree, the Court should review evidence raised by Plaintiffs or other third parties that Microsoft has brought or threatened to bring a "groundless" claim of intellectual property infringement. Plaintiffs fail entirely to establish any rational connection between this proposed provision and the imposition of liability for violations of *§ 2* of the Sherman Act. *See* Appendix A, Part X.I. Likewise, Plaintiffs have not established that Microsoft has, or is likely to, engage in such conduct, or that review of Microsoft's intellectual property claims for "groundlessness" will benefit consumers or competition. [83] *Id.* Of additional concern is the fact that, on its face, this provision in Plaintiffs' remedy proposal threatens to chill Microsoft's legitimate enforcement of its intellectual property rights. *Id.* Because Microsoft is an intellectual property company, *see* Appendix A, Part VII, such a chill could, in contravention of the goals of ***antitrust law***, stifle Microsoft's innovation and **[**329]** investment. *Microsoft, 147 F.3d at 948*; *see also* *Spectrum Sports, 506 U.S. at 458*. In short, Plaintiffs have not established that the proposed monitoring of Microsoft's intellectual property claims is anything other than improper "interference with [Microsoft's] ordinary commercial practices." *Bausch & Lomb, 321 U.S. at 728*. Given the overwhelming lack of evidentiary support and legal justification for the imposition of such a provision, the Court declines to incorporate this aspect of Plaintiffs' remedy proposal into the remedy in this case.

9. Investment Reporting

Plaintiffs have also suggested that the remedy in this case should require Microsoft to report its investments, regardless of size or significance, in a wide array of technologies and businesses. Plaintiffs argue that such

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[83] ***HN36***[] Truly frivolous claims are prohibited by *Rule 11 of the Federal Rules of Civil Procedure*. *Fed. R. Civ. P. 11*. The Federal Rules further prohibit the presentation of claims and court filings in general for "any improper purpose, such as to harass." *Fed. R. Civ. P. 11(b)(1)*. Violations of *Rule 11* are punishable by the imposition of sanctions not only upon counsel, but upon the parties themselves. *Fed. R. Civ. P. 11(c)*. Plaintiffs have not established that additional protections against groundless claims of intellectual property infringement are either appropriate

reporting will **[*192]** assist law enforcement authorities in monitoring Microsoft's investment activities for violations of the antitrust laws. Plaintiffs, however, have not presented evidence that any law enforcement authorities would be interested in receiving such information. *See* Appendix A, Part X.J.

[330]** This suggested provision is so far removed from any liability in this case, it is difficult to understand the manner in which Plaintiffs believe such a provision will satisfy the objectives of an antitrust remedy. Plaintiffs acknowledge that their proposed provision will not actually prohibit any conduct, but will only provide information to law enforcement authorities. *Id.* or necessary. *See* Appendix A, Part X.I. Plaintiffs do not offer any testimony which indicates that this proposed provision will have any effect on competition in the relevant market. *Id.* Therefore, there is neither evidence nor argument that competition will benefit, nor is there any showing that conduct related to anticompetitive activity will cease as a result of the proposed provision. *Id.* Based upon this evidence, or more accurately, the lack thereof, and in light of the lack of any relationship to the liability imposed in this case, the Court declines to adopt Plaintiffs' view that such a provision is either appropriate or useful as part of a remedy in this case.

V. CONCLUSION

Recognizing, as they must, the confluence of the rapid pace of change in the software industry and the delays **[**331]** inherent in antitrust litigation, Plaintiffs sought to gather all existing complaints regarding Microsoft's business practices and bring them before the Court at this late stage in the case. In doing so, Plaintiffs attempted to circumvent the arduous process which necessarily precedes the imposition of antitrust liability and, instead, proceeded directly to seek a remedy for the readily identifiable aspects of Microsoft's business conduct that other industry participants find objectionable. Though an appropriate remedy may be forward-looking and address conduct beyond the specific acts found to be anticompetitive, Plaintiffs are mistaken in thinking that the imposition of *§ 2* liability under the Sherman Act for unlawful monopoly maintenance in the market for Intel-compatible PC operating systems permits the Court to impose a remedy in areas unrelated to the monopoly market. This suit, however remarkable, is not the vehicle through which Plaintiffs can resolve all existing allegations of anticompetitive conduct which have not been proven or for which liability has not been ascribed.

The appellate court could not have been clearer in its admonition that this Court's decree should be **[**332]** "tailored to fit the wrong creating the occasion for the remedy." *Microsoft, 253 F.3d at 107*. Yet despite this admonition, in their request for relief, Plaintiffs have shown little respect for the parameters of liability that were so precisely delineated by the appellate court. In many instances, therefore, this Court has had little choice but to reject Plaintiffs' remedial suggestions on the grounds that they are unjustifiably in conflict with the imposition as well as the rejection of liability in this case.

Additionally, the Court observes that a number of the remedial provisions proposed by Plaintiffs would require drastic alterations to Microsoft's products, as well as to aspects of its business model which do not involve illegal conduct. Plaintiffs present little, if any, legitimate justification for these remedies, and in most instances, these proposals are not supported by any economic analysis. Instead, it appears that these types of remedial provisions seek to convert certain legitimate aspects of Microsoft's business model and/or product design into a model which **[*193]** resembles that of other industry participants simply for the sake of changing the status quo. **[**333]** Certain of Microsoft's competitors appear to be those who most desire these provisions and, concomitantly, are the likely beneficiaries of these provisions, while other competitors in the relevant market would not necessarily benefit. In bringing these types of proposals before the Court, Plaintiffs again misunderstand the task presently before the Court-to *remedy* Microsoft's antitrust violations. General changes to the lawful aspects of Microsoft's business model or product design of the type proposed by Plaintiffs do not themselves provide a remedy, nor have Plaintiffs established that such changes are required, or even appropriate, in conjunction with a remedy. Accordingly, the Court has rejected those aspects of Plaintiffs' remedy proposal which would impose such changes.

Instead, the appropriate remedy, which the Court has devised and explained at length in this Memorandum Opinion, is carefully tailored to fit the wrong creating the occasion for the remedy. The Court's remedy exceeds a mere proscription of the precise conduct found to be anticompetitive and is forward-looking in the parameters of the relief provided. Moreover, the remedy imposed by the Court is crafted to **[**334]** foster competition in the monopolized market in a manner consistent with the theory of liability in this case.

In particular, the Court's remedy addresses, to the extent appropriate, Plaintiffs' desire that Microsoft disclose technical information to foster interoperation between Microsoft's PC operating system software and third-party products, as well as between Microsoft's PC operating system products and server operating systems. The mandatory disclosures between Microsoft's monopoly product and server operating systems acknowledge the competitive significance of server/network computing as the newest type of "platform threat" to Microsoft's dominance in the relevant market. The disclosures mandated by the Court will likely prove beneficial to the development of middleware platforms and the functional equivalent of the middleware platform provided by server operating systems.

Likewise, the Court's remedy satisfies Plaintiffs' demand for remedial provisions which address OEM flexibility in the configuration of Microsoft's operating system products, but is tempered by the necessary respect for Microsoft's intellectual property rights. In this regard, the Court has largely rejected **[**335]** Microsoft's paternalistic view that it can determine what is best for consumers with regard to the configuration of the Windows operating system. In rejecting this view, the Court's remedy affords OEMs the freedom to configure Microsoft's operating system products in a manner which promotes third-party middleware through the prominent display of icons, shortcuts, and menu entries, and such configuration will be protected against automatic alteration resulting from Microsoft's product design. In addition, OEMs will have the freedom to remove all prominent means of end-user access to portions of middleware functionality integrated into Microsoft's operating system so as to encourage the installation of third-party middleware. The Court's remedial decree also ensures that OEMs may introduce subscription services during the boot sequence without restriction by unjustified Microsoft technical requirements. Further secured by the terms of the Court's decree is the automatic launching of innovative software programs limited only by the requirement that the programs not drastically alter the Windows user interface.

[*194] In its order of remedy, the Court has heeded Plaintiffs' call for broad protection **[**336]** for OEMs, ISVs, and IHVs against retaliation and threats of retaliation by Microsoft for the support of products that compete with Microsoft's monopoly product. The Court's remedy further curtails Microsoft's ability to enter into agreements that have the effect of excluding competitors from the marketplace. The Court's prohibition on exclusionary contracts is carefully drawn, however, so as to foster, rather than prohibit, procompetitive joint ventures, work-for-hire agreements, and intellectual property licenses. Notwithstanding these affirmative measures, the Court's remedy, of necessity, stops short of any measure which will substantially discourage procompetitive joint ventures, require the substantial redesign of Microsoft's products, or otherwise interfere in Microsoft's lawful use of proprietary technology.

Throughout all of its provisions, the Court's remedial order is generous in its treatment of middleware platform threats. The defined terms in the Court's order are appropriately grounded in the theory of liability and the treatment of middleware platform threats during the liability phase, while simultaneously prescient in that they are not confined to technology which **[**337]** exists today. Most notable is the scope of the term "Non-Microsoft Middleware," which captures a wide array of existing platform technology, as well as technology not yet developed. In this regard, even the technologies which Plaintiffs have identified as future potential platform threats, such as interactive television middleware-whose success is but a prediction, will be addressed by the Court's remedial order, provided the aspirations of these technologies become reality.

Plaintiffs are correct that Microsoft has a tendency to minimize the effects of its illegal conduct. Yet this minimization, however frustrating, does not require a remedy which prodigiously exceeds even an expansive view of the illegal conduct. The remedy in this case addresses the conduct found by the district and appellate courts to violate the antitrust laws and is imposed without regard to Microsoft's minimalist view of its own illegal conduct. More importantly, the behavioral remedy imposed by this Court neither bends nor softens simply because Microsoft refuses to acknowledge the extent of its own wrongdoing.

During this litigation, promises have been made on behalf of Microsoft that the company will change **[**338]** its predatory practices which have been part of its competitive strategy in order to comply with the remedial decree. The Court will hold Microsoft's directors, particularly those who testified before this Court, responsible for implementing each provision of this remedial decree. Let it not be said of Microsoft that "a prince never lacks legitimate reasons to break his promise," [84] for this Court will exercise its full panoply of powers to ensure that the letter and spirit of this remedial decree are carried out.

November 1, 2002

COLLEEN KOLLAR-KOTELLY

United States District Judge

APPENDIX A

REMEDY-SPECIFIC FINDINGS OF FACT

The Court has considered the evidence submitted by the parties, made determinations as to its relevancy and materiality, assessed the credibility of the testimony of the witnesses, both written and oral, and ascertained the probative significance of the documentary and visual evidence presented. Based upon the Court's **[**339]** consideration of the entire record in this case and all of the reasonable inferences to be **[*195]** drawn therefrom, the Court enters the following factual findings.

I. ORIGINAL EQUIPMENT MANUFACTURER ("OEM") FLEXIBILITY

The district court concluded, and the appellate court agreed, that a number of Microsoft's restrictions on an OEM's flexibility in configuring Windows products, from both a licensing and a technological standpoint, were anticompetitive in violation of *§ 2* of the Sherman Act. *See* *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 59-67 (D.C. Cir. 2001)* (*en banc*). In general terms, both proposed remedies include similar mechanisms for the lifting of Microsoft's exclusionary licensing restrictions and attempt, through other restrictions on Microsoft's conduct vis-a-vis OEMs, to secure for the OEMs a substantial degree of flexibility in the configuration of PCs with Windows installed as the operating system. *See, e.g.*, Plaintiff States' Proposed Remedy ("SPR") §§ 2.c, 10; Microsoft's Second Revised Proposed Final Judgment ("SRPFJ") § III.C, H. The remedy proposals include significant provisions to ensure OEM flexibility based upon the undisputed **[**340]** recognition that OEM flexibility will facilitate the distribution of software which, like the middleware threats posed by Navigator and Java addressed in the liability phase, has the potential to develop into a "middleware platform threat." In the paragraphs below, the Court examines the evidence presented with regard to the operation of the OEM flexibility provisions in Plaintiffs' and Defendant's respective remedy proposals.

A. License Provisions

1. Plaintiffs' Third-Party Licensing Proposal

The two remedy proposals take a similar approach, enumerating various ways in which Microsoft may not limit original equipment manufacturer ("OEM") flexibility in the configuration of Windows operating system products through license restrictions. *Compare* SPR § 2.c, *with* SRPFJ § III.C. Despite this similarity, the proposals differ substantially in one respect; namely, Plaintiffs' proposal secures protection not only for OEMs, but also for "thirdparty licensees." Plaintiffs offer testimony explaining that third-party licensing would require Microsoft to

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[84] NICCOLO MACHIAVELLI, THE PRINCE, ch. 18 (1514).

license its Windows operating system not only to OEMs, but also to third parties, such as media companies, **[**341]** software developers, and others interested in developing customized versions of the Windows operating system to resell to OEMs and consumers. Borthwick P 12. The primary focus of Plaintiffs' third-party licensing provision appears to be the replacement of the Windows user interface with a more "customized" third-party interface. *See, e.g.*, Ashkin P 84; Borthwick PP 2-3, 12-13, 19-35. This customization, predicted Plaintiffs' witnesses, will promote distribution of non-Microsoft software products, including middleware. *See, e.g.*, Ashkin P 102; Borthwick P 2.

John Borthwick, Vice President of AOL Advanced Services, a division of AOL Time Warner, maintained that the remedy in this case should secure for OEMs and third parties "control over the interface and over the applications that can be included in the PC experience (in particular the post-purchase setup or what is referred to in the industry as the Out-Of-Box-Experience')." Borthwick P 15. Touting Plaintiffs' proposal as more beneficial to OEMs and consumers because it allows for this kind of third-party "customization," Mr. Borthwick offered examples of such customization in the "Harry Potter PC," the "Lego Station," and **[**342]** the "AOL Station." Borthwick PP 19, 31-32; Pl. Ex. **[*196]** 1709. These examples illustrate that third-party customization, as envisioned by Plaintiffs, consists of the replacement of the Windows user interface by a user interface designed to promote the products of the third-party participant, such as Lego or AOL. Pl. Ex. 1709. To facilitate such customization, Plaintiffs' proposed remedy expressly prevents Microsoft from limiting the replacement or alteration of its user interface and from limiting the automatic launching of alternative middleware and operating systems. SPR § 2.c.iii-iv.

In its opinion, the appellate court expressly rejected a finding of liability predicated upon Microsoft's restrictions on the substitution of the Windows user interface so as to "prevent[] the Windows desktop from ever being seen by the user." *Microsoft, 253 F.3d at 63*; *see also* *United States v. Microsoft Corp., 84 F. Supp. 2d at 61, P 211 (D.D.C. 1999)* (hereinafter cited as "*Findings of Fact*"). The appellate court declined to find restrictions of this type to be exclusionary because the substitution of the Windows user interface constitutes a "drastic alteration of Microsoft's **[**343]** copyrighted work." *Microsoft, 253 F.3d at 63*. Mr. Borthwick did not distinguish the alteration or replacement of the Windows user interface, which is integral to his vision of customized PCs, from the alteration of the user interface described in *Findings of Fact,* 84 F. Supp. 2d at 61, P 211 and addressed by the appellate court at page 63 of its reported opinion. Trial Transcript ("Tr.") at 2296-99 (Borthwick). In this regard, Plaintiffs' vision for third-party licensing, as presented through the testimony of their witnesses, is inconsistent with the appellate court's opinion because it would limit Microsoft's ability to impose license restrictions which have been found not to be exclusionary. *Compare* *Microsoft, 253 F.3d at 63*, *with* SPR § 2.c. As a direct result, the lone economic endorsement of third-party customization, that of Plaintiffs' economic expert, Dr. Carl Shapiro, appears to be predicated on a clear misreading of the provision-as Dr. Shapiro understood § 2.c. to permit Microsoft to impose license restrictions *consistent* with the appellate court's ruling regarding alternative user interfaces. Tr. at 3650-52 (Shapiro).

Because § 2.c of Plaintiffs' **[**344]** remedy proposal would curtail conduct which has been found by the appellate court *not* to violate the Sherman Act, the Court is particularly attentive to whether a particular benefit will accrue to competition from the imposition of such a provision. Regrettably, the testimony presented by Plaintiffs does not explain to the Court's satisfaction the manner in which third-party licensing of the type described above will enhance and encourage competition in the monopolized market. Mr. Borthwick did not offer any such explanation in his direct testimony and, when asked during cross-examination to provide an explanation, conceded that the only substantial effect of third-party licensing would be increased competition between Microsoft's version of Windows and the various customized versions of Windows created by OEMs or third-party licensees. Tr. at 2294-96 (Borthwick). Similarly, Mr. Peter Ashkin, President of AOL Brand Products, a division of AOL, in claiming a "need" for third-party licensing, did not explain to the Court's satisfaction the connection between such licensing and the anticompetitive conduct in this case, nor did Mr. Ashkin explain coherently the manner in which third-party **[**345]** licensing would not create an unjustified expropriation of Microsoft's intellectual property. Absent any such explanation, the evidence is insufficient to support a conclusion that third-party licensing, as presented in **[*197]** Plaintiffs' proposed remedy, will benefit competition. [85]

[346]** ***2. Icon Design and Placement*** The appellate court held that the provision in Microsoft's license agreements preventing OEMs "from adding icons or folders [to Windows] different in size or shape from those supplied by Microsoft" was anticompetitive in violation of *§ 2* of the Sherman Act. *Microsoft, 253 F.3d at 62*. The parties' respective remedy proposals are quite similar in remedying this finding by limiting Microsoft's ability to impose such restrictions. In particular, both remedy proposals include provisions which secure an OEM's ability to install and display icons, menu entries, and shortcuts for non-Microsoft products. *See* SPR § 2.c.ii; SRPFJ § III.C.1.

The significant difference between the two remedy proposals with regard to the provision of flexibility in such installation and display rests upon a reservation of rights by Microsoft in § III.C.1 of Microsoft's proposed remedy. This provision reserves for Microsoft the ability to "restrict an OEM from displaying icons, shortcuts and menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide **[**347]** particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products." SRPFJ § III.C.1. A number of Plaintiffs' witnesses criticized this exception, *see, e.g.*, Ashkin PP 67-68; Barksdale P 77; Schwartz P 179, arguing that Microsoft can "limit the addition of icons, shortcuts and menu entries for non-Microsoft products to only those places where Microsoft has decided to promote a Microsoft product with similar functionality," Schwartz P 179; *see also* Ashkin PP 67-68; Barksdale P 77.

The criticisms of Plaintiffs' witnesses on this point do not withstand scrutiny. The limitation in § III.C.1 of Microsoft's remedy proposal serves only to permit Microsoft to designate certain areas of Windows as limited to the provision of particular types of functionality. For example, where there is an entry for "Printers and Faxes" on the right-hand side of the start menu, § III.C.1 would allow Microsoft to prevent an OEM from placing an icon for unrelated functionality, such as AOL's Instant Messenger software, which does not provide printing or faxing functionality, in the list of "Printers and Faxes." Jones PP 43-45. This **[**348]** limitation on OEM flexibility applies not to the general ability of an OEM to insert a particular icon into the Windows system, but only to the ability of an OEM to *locate* a particular icon within "any list . . . specified in the Windows documentation." SRPFJ § III.C.1. Limitations imposed by Microsoft pursuant to this provision must be unbiased with regard to Microsoft and third-party products. *Id.* As a result, Microsoft cannot limit the parameters of functionality so as **[*198]** to exclude competing products entirely. *Id.* Therefore, contrary to the view of Plaintiffs' witnesses, the exception to OEM flexibility with regard to the placement of icons, shortcuts, or menu entries in certain areas of Windows does not provide an advantage for Microsoft products over third-party products. Plaintiffs do not present sufficient evidence to establish that the minor limitation in § III.C.1 of Microsoft's remedy proposal would hinder an OEM's ability to configure Windows to promote third-party middleware.

Further differentiating the proposals is another exception or limitation in Microsoft's proposed remedy which permits Microsoft to limit an OEM's freedom to install and display desktop **[**349]** shortcuts which "impair the functionality of the user interface." *Id.* § III.C.2. Pursuant to this provision, Microsoft's remedy proposal permits OEMs to add icons of virtually any shape or size, but restricts the ability to add an icon which is so oversized that it covers the entire user interface, or so ill placed that it covers integral portions of the interface, such as the "start" menu. Jones P 46. Microsoft Vice President in charge of the Windows Client Team of the Platforms Group, Christopher Jones, explained the language in § III.C.2, recounting that the preservation of Microsoft's ability to prohibit impairment of the functionality of the user interface attempts to balance Microsoft's product design concerns with OEM freedom.

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[85] The clear discord between this aspect of Plaintiffs' proposed remedy and the appellate court's opinion, as well as the absence of a coherent explanation of the anticipated benefit to competition in the monopolized market, calls attention to the substantial involvement of Microsoft's competitors in drafting this portion of Plaintiffs' remedy proposal. This involvement raises a concern that the provision will accrue to the benefit of specific competitors, rather than to the benefit of competition. Indeed, Mr. Borthwick readily conceded that AOL had proposed the inclusion of the alternative user interface and "third-party licensing" aspects of *§ 2* of Plaintiffs' proposed remedy and that the provision was plainly beneficial to AOL's business. Tr. at 2263-65, 2273-74 (Borthwick); *see also* Def. Ex. 692.

Id. Plaintiffs do not offer any evidence that the ability of OEMs to install icons or shortcuts which "impair the functionality of the user interface," SRPFJ § III.C.2, will have any positive effect upon competition. [86]

[350]** ***3. Automatically Launching Software***

In his *Findings of Fact*, Judge Jackson described the manner in which some OEMs "developed programs that ran automatically at the conclusion of a new PC system's first boot sequence" such that the "programs replaced the Windows desktop either with a user interface designed by the OEM or with Navigator's user interface." *Findings of Fact,* 84 F. Supp. 2d at 61, P 211. Although Judge Jackson originally condemned Microsoft's prohibition of the addition of such automatically launching programs, the appellate court reversed this holding on the grounds that replacement of the Windows user interface works a "drastic alteration of Microsoft's copyrighted work[, which] outweighs the "marginal anticompetitive effect" of the prohibition. *Microsoft, 253 F.3d at 63*.

Notwithstanding this holding, Plaintiffs presented evidence of other types of software programs which could launch automatically, but did not replace the Windows user interface. [87] Two examples of such automatically launched programs are Gateway's **[*199]** "Go-Back" technology, *see* Ashkin PP 55-56, and RealNetworks' "Tinkerbell," *see* Richards P 119. The "Go Back" software, developed **[**351]** by Gateway in 1999 and 2000, enabled a consumer to restore his or her computer to a previous state if the computer "crashed" or if the consumer made an error that he or she wanted to reverse. Ashkin P 55. To get the full benefit of "Go Back," it was Gateway's intention to have the application always running in the background on the computer, as its "automatic" ability to reverse errors or restore the system would be ineffective if it wasn't activated. *Findings of Fact,* 84 F. Supp. 2d at 25, P 56. In a similar vein, RealNetworks devoted significant engineering resources and time to the design of a new media player that included a utility, referred to internally at RealNetworks as "Tinkerbell," that automatically launches when the computer is started after the initial boot sequence. Richards P 119. Mr. Richards, Vice President, Consumer Systems, of RealNetworks, Inc., *id.* P 1, explained that "Tinkerbell" remains "dormant" on the computer during most use, but "wakes up" at certain intervals to trigger certain functions. *Id. P 119*. For example, "Tinkerbell" triggers the messaging technology in RealOne Player to receive notifications that content or software updates are available. *Id.*

[352]** Products such as RealNetworks' "Tinkerbell" utility and Gateway's "Go Back" feature are most effectively utilized when they are automatically launched. *See* Ashkin P 56; Richards P 119; Tr. at 897-98 (Ashkin). A remedy provision which secures for OEMs the ability to install programs which launch automatically will provide a strong means by which to promote new and innovative software which may evolve into a middleware platform threat. Accordingly, Plaintiffs' witnesses criticized Microsoft's proposed remedy because it does not secure for OEMs the ability to freely install such automatically launching programs.

The remedy provision about which Plaintiffs complain, § III.C.3 of Microsoft's remedy proposal, secures for OEMs the ability to install automatically launching software only where a "Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically." SRPFJ § III.C.3. The provision further permits Microsoft to require that the automatically launched third-party middleware appear either without a user interface or with a user interface of a "similar size and shape" to the Windows user interface which would have otherwise appeared. **[**353]** *Id.* Plaintiffs' witnesses observed that § III.C.3 of Microsoft's remedy proposal will do little to assist the most innovative new middleware products for which Microsoft has not yet developed a competing functionality.

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[86] Indeed, in their criticism of § III.C.2, the only *evidence* upon which Plaintiffs focus in their Proposed Findings of Fact is the inability of one of Microsoft's economic experts to identify a "real world" example of a shortcut that would impair the functionality of the user interface. Pl. Prop. Findings of Fact P 496. In the Court's view, the inability of an economist to envision examples of extreme conduct in the context of software design is of little consequence. Moreover, Mr. Jones offered a rather clear example of product design which would be covered by the language in § III.C.2 of Microsoft's proposed remedy. Jones P 46.

[87] Mr. Jones of Microsoft explained that when a program launches automatically, at the end of the initial boot sequence, for example, the result is that once the computer has turned on and is presented for use by the end user, the automatically launched program is already started for the user, and the user need not take any action in order to invoke that program's capabilities. Tr. at 5129 (Jones).

Microsoft bristles at even the automatic launching of software which runs within the Windows user interface and offers testimony, as it did during the liability phase, that such automatic launching is harmful to consumers. Jones P 51. Through the testimony of Mr. Jones, Microsoft insists that it should be permitted to limit the software running at the conclusion of the initial boot sequence in order to preserve a consistent and pleasant "out-of-box" experience." *Id.* Mr. Jones claimed that consumer satisfaction will decrease and consumer frustration will increase if OEMs possess greater flexibility with regard to software launched automatically. *Id.* The appellate court effectively rejected these same arguments by Microsoft as a justification for other restrictions on OEM flexibility in configuring Windows which did not substantially alter Microsoft's copyrighted product. *Microsoft, 253 F.3d at 63-64*. Mr. Jones' arguments in this regard **[*200]** are **[**354]** indistinguishable from those rejected by the appellate court.

Plaintiffs' remedy proposal adopts a position nearly as extreme as Microsoft's with regard to the automatic launching of software. Section 2.c.iv of Plaintiffs' remedy proposal does not permit Microsoft to impose any limitation upon the automatic launch of software or even the automatic launching of an alternative operating system. SPR § 2.c.iv. The flexibility provided to OEMs in this portion of Plaintiffs' remedy proposal would permit conduct previously prohibited by a Microsoft license term which was expressly reviewed by the district and appellate courts and found by the appellate court *not* to be exclusionary. *Microsoft, 253 F.3d at 63*. As a result, the Court finds that Plaintiffs' remedy proposal would permit OEMs to alter substantially Microsoft's copyrighted product. Plaintiffs do not offer any evidence that such drastic alteration will promote competition, and the appellate court has already concluded that the competitive benefit derived from such alteration is "marginal," *id.* Moreover, Plaintiffs do not offer evidence which supports a conclusion that the limitation of Microsoft's legitimate **[**355]** restriction on the drastic alteration of its software products is necessary to the effective functioning of other remedial provisions which will clearly benefit competition.

The Court finds that innovative concepts in software design will benefit from a remedy provision which requires Microsoft to permit OEMs to install products which launch automatically, but do not replace the Windows user interface. The pro-competitive value of such a remedy would be significantly hampered if Microsoft were permitted to limit such automatic launching to circumstances in which Windows would launch a competing Microsoft software product. To permit Microsoft to impose such a restriction denies the new software product the advantage it rightfully deserves by being first to market. However, the Court finds that there is no factual basis upon which to conclude that Microsoft should be prohibited from protecting its copyrighted products from drastic alteration.

4. Registration Sequences

Both remedy proposals include a provision which enables OEMs to insert registration programs in the initial boot sequence. *See* SPR § 2.c.iv; SRPFJ § III.C.5. This provision serves to address the appellate **[**356]** court's holding that "Microsoft's prohibition on any alteration of the boot sequence" was anticompetitive because it "prevented OEMs from using that process to promote the services of IAPs, many of which-at least at the time Microsoft imposed the restriction-used Navigator rather than IE in their Internet access software." *Microsoft, 253 F.3d at 61-62, 64*. Evidence from the liability phase of the case establishes that the inclusion of IAP registration offers in the initial boot sequence provides a means by which OEMs can promote middleware with the potential to challenge the Windows platform. *Findings of Fact,* 84 F. Supp. 2d at 60, P 210. Microsoft's remedy proposal in this regard is once again limited in that it reserves for Microsoft significant control over OEM ability to insert such registration sequences. SRPFJ § III.C.5. Specifically, § III.C.5 of the SRPFJ permits Microsoft to impose "reasonable technical specifications" upon the presentation of IAP registration in the initial boot sequence. SRPFJ § III.C.5. Not surprisingly, Plaintiffs offer testimony critical of this limitation which asserts that Microsoft may effectively take back precisely what the remedy purports to give. **[**357]** That is, Plaintiffs' witnesses complained that when Microsoft is permitted to impose "reasonable technical specifications," Microsoft will do **[*201]** so in a manner which effectively prevents OEMs from utilizing the purported freedom to include IAP registration programs from the initial boot sequence. *See, e.g.*, Ashkin PP 52, 58-59.

Over Plaintiffs' complaints, Microsoft, again through the testimony of Chris Jones, insists that it must be permitted to impose "reasonable technical specifications" upon IAP presentations in the boot sequence in order to protect the user experience and avoid consumer confusion. *See* Jones P 50. Microsoft's user experience argument in favor of the "reasonable technical specifications" limitation essentially repeats the argument offered by Microsoft during the liability phase to justify this very limitation. The appellate court rejected this same "consumer confusion argument" during the liability phase, based upon the observation that "to the extent the OEMs' modifications [during the boot sequence] cause consumer confusion, of course, the OEMs bear the additional support costs." Microsoft, 253 F.3d at 64 (citing *Findings of Fact,* 84 F. Supp. 2d at 49, P 159 **[**358]** ("OEMs bear essentially all of the consumer support costs for the Windows PC systems they sell.")). The appellate court further observed that because OEM "promot[ion of] programs in the boot sequence does not affect the code already in the product, the practice does not self-evidently affect either the 'stability' or the 'consistency' of the platform." Microsoft, 253 F.3d at 63-64. [88] Microsoft, through the testimony of its witnesses, fails to offer any new justification for the imposition of restrictions upon the ability of OEMs to offer IAP registrations during the initial boot sequence. Based upon the evidence presented to the Court, the Court is unable to conclude that there exists a legitimate justification for the continued restriction on the ability of OEMs to introduce IAP registration offers during the initial boot sequence of PCs running Windows.

[**359] B. Remedies Related to the "Binding" of IE and Windows

1. "Add/Remove" Utility

The parties' respective remedy proposals once again offer somewhat similar remedies to redress Microsoft's anticompetitive exclusion of IE from the "Add/Remove Programs" utility-an act which discouraged OEMs from distributing rival products. *See* SPR § 2.c.iv; SRPFJ § III.H.1. Both remedy proposals secure the ability of OEMs to remove end-user access to various types of Microsoft software. The provision of a mechanism by which an OEM can control the availability of end-user access to certain portions of functionality included in the Windows operating system will redress, from both a technical and an economic perspective, the finding of liability against Microsoft for its failure to provide such a mechanism with regard to its integrated Web-browsing functionality. Madnick P 177; Murphy P 200. In particular, the provision of a mechanism by which OEMs can hide end-user access to Microsoft functionality encourages OEMs to install middleware which competes with the concealable portions of Windows. *Findings of Fact,* 84 F. Supp. 2d at 49, 50, PP 159, 165.

The significant difference between the two remedy **[**360]** proposals on this point results **[*202]** from the differing definitions in Plaintiffs' and Defendant's respective remedy proposals. Plaintiffs' proposed remedial decree incorporates a problematic definition of the term "end-user access." Plaintiffs' remedy proposal defines "end-user access" as "the invocation of Middleware directly or *indirectly* by an end user of a computer, or the end user's ability to invoke Middleware . . . . including invocation of Middleware that the Operating System Product's design requires the end user to accept." SPR § 22.j (emphasis added). By including indirect invocation of middleware in the definition of "End-User Access," Plaintiffs' proposed remedy permits the disabling of potentially vital software code from Windows about whose invocations the user is unaware. *See* Bennett P 87. In the course of normal operation, operating systems routinely invoke software code that falls within Plaintiffs' overly broad definition of "middleware." *See* Bennett P 87; *see* Memorandum Opinion, Parts III.B.2.b; III.C (discussing Plaintiffs' treatment of middleware). As Plaintiffs have defined "middleware" and "Microsoft Middleware Products," very small blocks of software **[**361]** code, rather than portions of software code which are generally regarded as "products," fall within these definitions. *See* Memorandum Opinion, Part III.B.2.b; Bennett PP 30, 35-36; Gates P 165; Madnick P 136. As a result, the very basic invocation of these blocks of software code falls within the purview of Plaintiffs' definition of "end-user access." *See* Bennett P 87. Attempting in some way to limit the "indirect invocation" of these blocks of code, is a substantial interference with the ordinary and expected design and functioning of *any* operating system. *See id.*

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[88] The appellate court noted that Microsoft's claims regarding the need to preserve Windows' "principal value . . . as a "stable and consistent platform . . . that is familiar to users," were unsubstantiated. Microsoft, 253 F.3d at 63-64 (quoting Microsoft's "Opening Br." at 102). This observation continues to be true. Microsoft has not offered any evidence beyond the largely self-serving testimony of its own software designers that instability and consumer confusion would result from the inclusion of IAP registration offers during the initial boot sequence. *See* Jones P 50.

Furthermore, the inclusion of "indirect invocation" in Plaintiffs' definition of "end-user access" would result in the regulation of conduct, by § 2.c.iv of Plaintiffs' proposed remedy, for which the appellate court declined to ascribe liability. The appellate court rejected Judge Jackson's finding of liability against Microsoft for designing its Windows product to launch IE in certain circumstances, thereby overriding the "user's choice of a default browser." *Microsoft, 253 F.3d at 67*. In this rejection, the appellate court recognized that Microsoft had offered a justification for the **[**362]** override, namely that the "seamless[]" operation of the Windows product in some instances relies upon the invocation of Windows software code, rather than third-party code, and that this justification was unrebutted by Plaintiffs. *Id.* The appellate court further noted that Plaintiffs had not provided evidence demonstrating that this aspect of the Windows design had an anticompetitive effect. *Id.* Plaintiffs do not offer testimony which sufficiently explains the competitive benefit to be derived from regulating this otherwise legitimate Microsoft conduct.

The comparable portion of Microsoft's remedy proposal adopts a more straightforward view of the provision and removal of end-user access to various software products. Section III.H.1 of Microsoft's remedy proposal secures for OEMs and end users the ability to display or remove icons, shortcuts, and menu entries throughout Windows. SRPFJ § III.H.1. Plaintiffs, through the testimony of their witnesses, object to this portion of Microsoft's proposal primarily [89] because it includes **[*203]** a reservation of rights similar to that which appears in § III.C.1 of Microsoft's remedy proposal. *See* Barksdale P 77; Schwartz P 179. As **[**363]** with § III.C.1, discussed *supra* Part I.A, § III.H.1 permits Microsoft to limit the ability of OEMs and end-users to insert icons, shortcuts, and menu entries into areas of Windows which are reserved for particular types of functionality. SRPFJ § III.H.1. Pursuant to this provision, therefore, Microsoft would be able to prohibit installation of an icon, shortcut, or menu entry where the product accessed by such icon, shortcut, or menu entry does not provide the functionality for which that area of Windows has been reserved. *See supra* Part I.A. Section III.H.1 would only permit Microsoft to impose limitations in a way that is non-discriminatory with respect to Microsoft and non-Microsoft products. As with § III.C.1, Plaintiffs have not proffered evidence that this aspect of Microsoft's proposal can be used to benefit Microsoft products over non-Microsoft products, nor have Plaintiffs established that there is any benefit to competition to be gained by denying Microsoft the ability to control this limited aspect of its product configuration.

[364]** ***2. Default Settings***

The appellate court did not ascribe liability for Microsoft's use of default settings, nor for Microsoft's design of its product to override a user's preference of a non-Microsoft product as a default where Microsoft had a "valid technical reason" for doing so. *Microsoft, 253 F.3d at 67*. Notwithstanding this fact, both proposed remedies address the use of default settings in Windows, albeit to substantially differing extents. Section III.H.2 of Microsoft's remedy proposal addresses Microsoft's use of default settings to invoke functionality provided by "Microsoft Middleware Products." SRPFJ § III.H.2. This provision provides that, in any instance where Windows invokes the full functionality of a Microsoft Middleware Product in a "Top-Level Window," Microsoft shall allow end users and OEMs to designate a "Non-Microsoft Middleware Product" to be used in place of the "Microsoft Middleware Product." SRPFJ § III.H.2. Pursuant to § III.H.2, Microsoft reserves the right to restrict such replacement where the "Microsoft Middleware Product" has been invoked solely for interoperation with a Microsoft server or where the non-Microsoft product **[**365]** fails to implement a "reasonable technical requirement." *Id.* The substantial equivalent in Plaintiffs' remedy, § 10, provides far more broadly that Microsoft may not designate "Microsoft Middleware" as the default unless OEMs and third-party licensees can override that designation and the "OEM, Third-Party Licensee, or non-Microsoft Middleware" has the ability to provide the end user with a neutral opportunity to designate other middleware as a default. SPR § 10.

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[89] To the extent that Plaintiffs' witnesses offered testimony critical of § III.H.1 because it incorporates Microsoft's more narrow definition of "Microsoft Middleware Product," *see, e.g.*, Barksdale PP 78-79; Kertzman P 85, these concerns are resolved by the Court's preliminary discussion of appropriate treatment of "middleware" in the remedy for Microsoft's anticompetitive conduct. *See* Memorandum Opinion, Part III.B-C.

As a direct result of the broad definition of "middleware" contained in Plaintiffs' remedy proposal, [90] many of the ordinary functions of Windows, far removed from specifically identified functionality such as Web-browsing, require treatment as a "default" pursuant to Plaintiffs' remedy proposal. Bennett P 122. Microsoft's witnesses **[*204]** testified consistently that Windows is not designed in accordance with Plaintiffs' concept of "defaults." *Id. PP 122-23*; Gates P 372; Jones P 124. This testimony is essentially a re-framing of the testimony which explains why Plaintiffs' concept of middleware is flawed. *See* Memorandum Opinion, Part III.B-C; Gates P 372. Just as Plaintiffs sought to parlay the limited **[**366]** distinction between Web-browsing functionality and operating system functionality into a more general distinction between middleware functionality and operating system functionality, *see* Memorandum Opinion, Part III.B-C, Plaintiffs propose to extend the notion that there can exist a "default browser" to mean that there exists a similar "default" for all "middleware." SPR § 10. The notion of a "default browser" is grounded in Judge Jackson's *Findings of Fact*, which explain that Windows 98 provided the ability to select browsers other than IE as the "default" for a number of tasks. *Findings of Fact,* 84 F. Supp. 2d at 52, P 171. Judge Jackson observed, however, that even this ability to set a browser "default" was imperfect, as some portions of Windows were not designed to accept a browser other than IE. [91] *Id.*

[367]** Plaintiffs do not present evidence which establishes that Windows is similarly designed, with regard to the ability to set a default, for all of the pieces of software identified as "middleware" in Plaintiffs' remedy proposal. Quite to the contrary, Microsoft offers repeated testimony that most of the blocks of software code which Plaintiffs have defined as "middleware" are not designed to be removed or replaced with alternate third-party software code. [92] *See* Bennett P 122; Gates P 372; Jones P 124. As Mr. Jones of Microsoft testified, the Windows operating system is not designed like an " la carte restaurant menu" from which blocks of software may be included or excluded at the whim of the OEM. Jones P 124. Rather, in predominant part, Windows is designed with the assumption that all blocks of software code that provide functionality to other parts of the operating system (as well as to software products running on top of the operating system) will be present in the product. *Id. P 123*; *see also* Gates PP 369-73. This assumption cannot simply be removed or ignored so as to render the "middleware" replaceable. Jones P 124. To do so in an attempt to accomplish **[**368]** the goal of § 10 of Plaintiffs' proposed remedy, even assuming Plaintiffs had provided a well-defined list of components which comprise "middleware," *see* Memorandum Opinion, Part III.B.2.b, "would require an enormous engineering effort--by no means assured of success given the varying designs of third-party products." Jones P 122; *see* *id. PP 123-26*; Bennett PP 122-23; Gates PP 372-79; Tr. at 4917-21 (Gates). "Assuming that it could be accomplished . . . such a complete 'modularization' of existing Windows operating systems would require all of the Windows development resources **[*205]** for years, halting work on new products and services." Jones P 126.

[369]** Plaintiffs present scant justification for a remedy provision which would require at least vast amounts of work by Microsoft to implement and more likely a complete redesign of Microsoft's Windows product. Plaintiffs do not present any economic analysis regarding the benefit or harm to competition which will result from a redesign of Windows so as to permit the replacement of the various pieces of software code Plaintiffs identify as "middleware." Indeed, Plaintiffs' own economic expert, Dr. Shapiro, testified that a determination as to the procompetitive benefit of the broad provision of such defaults could not be ascertained without a balancing of the pro- and anticompetitive effects and a judgment akin to the liability judgment of the appellate court. Tr. at 3654-55 (Shapiro). Plaintiffs present only the testimony of Microsoft's competitors, who observed as the appellate court did, though it declined to

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[90] As the Court concluded in Part III.B.2.b of the attached Memorandum Opinion, Plaintiffs' definition of "middleware" renders essentially any block of software code that exposes an API to be "middleware."

[91] It is noteworthy, once again, that the appellate court rejected any imposition of liability based upon the aspect of Microsoft's product design which overrode the user's "default browser" based upon the "valid technical reasons" advanced by Microsoft to justify such an override. *Microsoft, 253 F.3d at 67*.

[92] There are, however, limited portions of Windows unrelated to Web-browsing functionality, for which there already exists the mechanism, like that described by Judge Jackson in P 171 of the *Findings of Fact,* 84 F. Supp. 2d at 52, to designate non-Microsoft software for invocation. Tr. at 5242-45 (Jones). This ability exists because Windows was designed to permit the designation of a non-Microsoft software to perform a particular function. *Id.*

impose liability on this point, *Microsoft, 253 F.3d at 65*, that the override of the user's default choices by a Microsoft product reduces the usage share of the non-Microsoft software and thereby reduces likelihood that such software will develop into a middleware **[**370]** platform threat. *See* Schwartz P 160; *see also* Richards P 158; Ashkin P 145-47.

Although the anticompetitive effect of Microsoft's override of the user's default choices was not enough to result in a finding of liability because of Microsoft's procompetitive justification, *Microsoft, 253 F.3d at 67*, Microsoft includes in its proposed remedy a provision which roughly corresponds to § 10 of Plaintiffs' proposed remedy and seeks to curtail the anticompetitive effect of the override. Microsoft's proposed remedy identifies the precise circumstances in which Microsoft must enable the substitution of a non-Microsoft software product to perform a function which would ordinarily be performed by a portion of Windows. SRPFJ § III.H.2. These instances are identified by the appearance of a "Microsoft Middleware Product in a separate Top-Level Window and [the] display [of] either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product." *Id.* This provision offers greater certainty to OEMs, as well as ISVs, regarding the functionalities in Windows for which non-Microsoft software may be invoked. This certainty should render **[**371]** the use of a nonMicrosoft middleware product in place of Windows functionality a less "jolting experience," *Findings of Fact,* 84 F. Supp. 2d at 52, P 172; *see also* *Microsoft, 253 F.3d at 65*, as the occasions wherein the nonMicrosoft middleware may be invoked will be far more predictable. This increased certainty and predictability, in turn, will enable middleware developers to draw attention away from the "middleware" functionalities included in Microsoft's operating system products. *See* *Microsoft, 253 F.3d at 65*.

A number of Plaintiffs' witnesses offered somewhat general criticism of § III.H.2 of Microsoft's proposed remedy because it does not require what § 10 of Plaintiffs' remedy proposal would require. *See, e.g.*, Ashkin PP 145-47; Barksdale P 81; Richards P 159; Schwartz PP 182-83. These criticisms are addressed largely, if not entirely, by the above determination that § 10 of Plaintiffs' remedy proposal has been shown to be neither workable nor beneficial to competition. Advancing a not dissimilar criticism, Mr. Richards of RealNetworks testified that § III.H.2 denies protection to the newest and most innovative software. Richards P 141. Mr. Richards' **[**372]** testimony in this regard, however, fatally ignores the structure of Microsoft's proposed remedy provision. The provision **[*206]** provides "protection" only when a Microsoft product would have otherwise been invoked because that is the only time "protection" would logically be needed. Where there exists no Microsoft product to invoke, there is no chance that anything other than the "innovative" product referenced by Mr. Richards will appear as the "default" in conjunction with the invocation of its innovative functionality. In other words, where the new product is truly innovative and unique, Microsoft will be unable to offer its own software as a "default." In this light, Mr. Richards' initial criticism is unfounded.

Mr. Richards' second criticism is somewhat more salient, but still unpersuasive. Mr. Richards complained that § III.H.2 of Microsoft's remedy proposal permits Microsoft to continue to control whether substitution of a particular Windows functionality will be permitted. Richards P 142. In particular, Mr. Richards observed that "even if Microsoft does have competing middleware . . . Microsoft can simply choose not to launch its middleware in a separate top level window, or, even **[**373]** if it does, can choose to display only some of the user interface elements and no trademark (as Microsoft defines that term)." *Id. P 143*. With this capability, argued Mr. Richards, Microsoft could avoid the obligation to substitute a nonMicrosoft product for the Microsoft functionality which would have otherwise been invoked. *Id.* While Mr. Richards' observations about the functioning of § III.H.3 are correct, neither Mr. Richards, nor any other witness for that matter, explained with any clarity why Microsoft should not be permitted to have such control in the first instance. The Court notes in this context that although the appellate court examined Microsoft's design of its products to override the selection of the default browser in certain instances for anticompetitive effect, the appellate court did not examine Microsoft's decisions with regard to the availability of defaults in general. *See* *Microsoft, 253 F.3d at 59-78*. Therefore, there has been no conclusion by any court, thus far, that the failure to render replaceable particular portions of Windows unrelated to Web browsing is either anticompetitive or a violation of ***antitrust law***.

Plaintiffs' **[**374]** computer science expert, Dr. Andrew Appel, joined Mr. Richards in offering an additional criticism of § III.H.2, observing that it permits Microsoft to override a user's choice of a "Non-Microsoft Middleware Product," *i.e.*, to replace it with a "Microsoft Middleware Product," when the designated "Non-Microsoft Middleware Product fails to implement a reasonable technical requirement," SRPFJ § III.H.2. Appel P 139; Richards P 145. Both witnesses contended that Microsoft may utilize this language to impose a requirement that the replacement software support a piece of Microsoft's proprietary technology, such as an Active X control. Appel P 140; Richards P 145. Dr. Appel argued, in this regard, that the "reasonable technical requirement" imposed by Microsoft may be unnecessary. Appel PP 13941 .

This testimony Plaintiffs proffer regarding the "reasonable technical requirement" exception to § III.H.2 of Microsoft's remedy proposal ignores the manner in which the exception tracks the appellate court's opinion. Once again, the appellate court held that, in the face of unrebutted technical justifications proffered by Microsoft, it could not find that Microsoft acted anticompetitively **[**375]** by enabling Windows 98 to override the choice of Navigator as the default browser upon the invocation of "the Windows 98 Help system and Windows Update feature" because both features depended on ActiveX controls that **[*207]** Navigator did not support. *Microsoft, 253 F.3d at 67* (quoting Microsoft's "Opening Br. at 82). The appellate court deemed the absence of Active X controls to be a "valid technical reason[]" for overriding Navigator as the default browser. *Id.* Dr. Appel's and Mr. Richards' testimony cannot be squared with the appellate court's finding that the absence of "Active X controls" constitutes a "valid technical reason[]" sufficient to justify the override of default settings, *id.*

In sum, the Court finds that § III.H.2 of Microsoft's proposed remedy, in stark contrast to § 10 of Plaintiffs' remedy proposal, provides clear and workable rules for determining the instances in which Microsoft must provide the opportunity to substitute non-Microsoft software to perform a task ordinarily performed by a portion of Windows, despite the absence of a finding of liability with regard to Microsoft's use of "defaults" in Windows. Section III.H.2 further tracks **[**376]** the careful imposition of liability by the appellate court by permitting Microsoft to impose "reasonable technical requirements" in conjunction with providing the ability to replace the Microsoft functionality with third-party software in certain, well-defined circumstances. Conversely, the Court finds that § 10 of Plaintiffs' proposed remedy is largely unworkable. Even presuming that § 10's definitional flaws could be resolved, compliance with § 10 would still require the substantial redesign of Microsoft's Windows operating system products, the economic effect of which is uncertain at best and likely to be of minimal benefit to competition itself.

3. Respect for OEM Settings

In conjunction with other provisions designed to ensure OEM flexibility in the configuration of Windows, both remedy proposals contain provisions which prevent Microsoft from designing its product in a manner which will automatically reset an OEM's choices to favor Microsoft's software. *See* SPR § 10; SRPFJ § III.H.3. Section III.H.3 of Microsoft's remedy proposal permits Microsoft to offer the end user an automatic, rather than user-initiated, alteration of an OEM's configuration, but requires **[**377]** Microsoft to ensure such alteration is not executed without first obtaining authorization from the end user for the change. SRPFJ § III.H.3. This automatic request for alteration must be unbiased with respect to Microsoft and non-Microsoft products and may not activate in Windows until 14 days after the initial boot-up of a new PC. *Id.* In contrast, the second paragraph in § 10 of Plaintiffs' proposed remedy prohibits Microsoft from virtually all "prompting" of the user to change his or her configuration of defaults. SPR § 10. The lone exception for such "prompting" arises when the end user has installed a "Microsoft Middleware Product." *Id.* In such a circumstance, the new product may neutrally ask the end user to designate that product as the default middleware. *Id.*

Plaintiffs' witnesses explained that, in the absence of protection from automatic changes by Microsoft, ISVs will be hindered in their ability to strike deals with OEMs for desktop placement. Barksdale P 85; Richards P 161. In this regard, Plaintiffs, through their witnesses, criticize Microsoft's proposed remedy because it permits Microsoft to neutrally offer a change in settings after 14 days. Barksdale **[**378]** P 82; Richards P 161. The current version of Windows includes a utility provided by Microsoft which offers to place the least used desktop icons into a folder, so as to, in effect, sweep the desktop clear of unused icons. Jones PP 34-38. The relevant Microsoft technology is activated **[*208]** 14 days after the end user turns on his or her computer. *Id. P 35*. Plaintiffs' witnesses complained that the 14-day time period is too short for the user to have an opportunity to use and familiarize him/herself with a new product for which a corresponding icon was placed by an OEM on the desktop. *See, e.g.*, Barksdale P 82. However, beyond a prohibition of this kind of service entirely, Plaintiffs do not offer any suggestions as to what would be a more appropriate time period. Microsoft presents testimony which offers a contrary conclusion, primarily that the 14-day time period is sufficient and that even novice end users will understand that they are not obligated to allow the program to "clean-up" the desktop by moving icons into a folder, from which the icons can be retrieved later. Tr. at 5115 (Jones).

Plaintiffs' witnesses similarly raised a concern that there is no limitation upon the number **[**379]** of times Windows may prompt the end user to alter his or her configurations in a manner which will coerce the user to switch. *See, e.g.*, Ashkin P 152; Barksdale P 85; Borthwick P 39; Richards P 160. The Court finds that Plaintiffs' concern in this regard is unsupported by fact and, instead, is based upon an inaccurate reading of Microsoft's proposed decree. The relevant portion of Microsoft's proposed remedy requires that any prompt presented to a user be "unbiased" with respect to Microsoft and non-Microsoft products. SRPFJ § III.H.3. Therefore, even if a consumer is "likely to respond" to such prompts, as Plaintiffs' witnesses have testified, there is no evidence that such a "response" would favor Microsoft given that the prompt must be unbiased. For example, it would not be "unbiased" for the prompt to be presented only when the user has chosen a non-Microsoft product as the default. SRPFJ § III.H.3. Rather, the request for alteration must function equally with regard to Microsoft and non-Microsoft products. Moreover, even if the icon for a product is swept from the desktop, the product does not disappear from the system entirely, but instead, the icon is simply moved to a **[**380]** different location. Jones P 38. As a result, an end user may always reverse the alteration to which he or she agreed by retrieving the icon.

The Court finds that the evidence presented by Plaintiffs fails to establish a justification for a blanket prohibition on the inclusion of such a desktop clearing functionality in Windows. Rather, the Court concludes that so long as there are protections against Microsoft using the utility to undermine OEM flexibility in configuration by favoring Microsoft products, disfavoring OEM configuration, and pressuring end-users into changing OEM settings, there is insufficient evidence to justify a prohibition against inclusion of the utility. The Court further concludes that, although there is conflicting evidence regarding the propriety of the 14-day time period, there is no evidence with regard to the appropriateness of any other time period. With the evidence in equipoise and given the other safeguards provided in § III.H.3, the Court declines to find that the 14-day time period will devalue OEM ability to freely configure the Windows desktop.

II. UNIFORM OEM LICENSES

To provide security to OEMs in contracting with Microsoft, both proposed **[**381]** remedies include a provision which imposes a substantial degree of uniformity in Microsoft's Windows operating system licenses. SPR § 2.a; SRPFJ § III.B. Of all of the competing sections in the two proposed remedies, it is arguable that these two provisions bear the greatest likeness to each other. Plaintiffs' and Defendant's **[*209]** proposals for uniform licenses for Windows operating system products are remarkably similar, with each requiring uniformity in the terms and conditions of the licenses for the twenty OEMs with the highest volume of Windows operating system licenses. Both proposed remedies provide, in broad terms, [93] that a royalty schedule must be established, pursuant to which Microsoft may opt to charge a different royalty for different language versions of the Windows operating system, and Microsoft may provide reasonable volume discounts based upon the actual volume of licenses. SPR § 2.a; SRPFJ § III.B.

[382]** Despite these notable similarities, Plaintiffs have presented testimony which criticizes the first iteration of uniform licenses [94] as less favorable to at least one OEM, Gateway, than the previous licenses which were individually negotiated. *See generally* Fama PP 46-114; Tr. at 1178-1273 (Fama). Nothing in this testimony, however, evidences any impropriety by Microsoft. *Id.* Anthony Fama, Group Counsel, Partner Management at Gateway, Inc., Fama P 1, complained that the new uniform terms were imposed without input from Gateway, *id. P*

[93] Admittedly, there are minor differences in the two remedies even on these common points. *Compare* SPR § 2.a, *with* SRPFJ § III.B.

[94] Pursuant to its settlement agreement with the United States, on December 16, 2001, Microsoft commenced the use of uniform licenses. The terms of the settlement agreement match the terms of Microsoft's proposed remedy.

30, but acknowledged that Gateway did not provide Microsoft with the input it requested for over a month and even then, a few days after Microsoft had requested return of the *signed* agreement, Tr. at 1207-12 (Fama); Def. Ex. 1145; Pl. Ex. 59. Microsoft informed Gateway that it could not change the terms in response to Gateway's complaints because the terms had to be uniform, but Microsoft indicated that it would seek Gateway's input before issuing the next set of uniform licenses. Tr. at 1212-13 (Fama); *see also id. at 1215-22, 1235-38*.

[383]** Mr. Fama also complained about the timing of the imposition of the new licenses. Prior to the imposition of uniform licenses, Microsoft developed and implemented a system of interlocking licenses to govern OEM licenses for the Windows operating system, the use of certain Microsoft logos and certifications, as well as for the provision of discounts through marketing development programs. Fama PP 7-13; *see also* Ashkin P 47. Mr. Fama described the interrelationship of the licenses as a "a hub and spokes arrangement, with the hub being the Business Terms Document ('BTD')." Fama P 8. "The BTD contains the base legal terms that apply to all license agreements that incorporate the BTD by reference." *Id.* Rather than devise an entirely new system of licenses, Microsoft incorporated its new uniform licenses into its interlocking license system. Mr. Fama complained that Microsoft did not impose the new uniform terms on all OEMs simultaneously, but instead imposed the new terms for each particular OEM as soon as one of that OEM's interlocking licenses was due for renewal. Fama P 44; Tr. at 1219-22 (Fama). Despite his complaint, Mr. Fama acknowledged that Microsoft could not simultaneously **[**384]** comply with the proposed consent decree it had entered into with the United States and continue to offer Gateway the same terms it had been working under once one of its licenses expired. Tr. at 1219-22 (Fama).

[*210] Lastly Mr. Fama complained about the levels for volume discounts established by Microsoft, charging that Microsoft unreasonably set the parameters for the discount tiers, such that only three OEMs would fall into the highest volume tier. *Id. at 1267-72*; Fama PP 105-08. Mr. Fama, however, could not articulate what was unreasonable about the tier, given that the first licensing tier, in fact, applied to the three highest volume OEMs. Tr. at 1267-72 (Fama). In sum, Mr. Fama's testimony, though framed as an accusation, merely acknowledges that Microsoft has complied with the uniform licensing provision in the settlement agreement it entered into with the United States. Plaintiffs neither assert nor explain, through Mr. Fama or any other witness for that matter, the manner in which their proposal for uniform terms would lead to a more satisfactory outcome. [95]

[385]** The most notable point of divergence between the two proposed uniform license provisions arises in relation to Microsoft's practice of using "Market Development Agreements" ("MDAs"), which are more recently referred to as "Market Development Programs" ("MDPs"), in conjunction with the royalty rates charged in OEM licenses. [96] Plaintiffs' proposed remedy does not permit the use of such discounts, while Microsoft's proposed remedy permits the use of MDPs where they are non-discriminatory, non-retaliatory, and are objectively verifiable. *Compare* SPR § 2.a, *with* SRPFJ § III.B. Microsoft implemented MDPs to provide substantial economic incentives for OEMs to meet Microsoft-imposed conditions in their configuration of Microsoft's Windows products. *See* Ashkin P 46. Participation in MDPs is voluntary, but some OEMs regard participation as imperative given the financial benefits which are available through participation. *See id. PP 46, 109*; Fama P 123. MDPs provide financial rebates to OEMs for reaching "milestones" established by Microsoft. The milestones vary from year to year, but generally include non-marketing, substantive restrictions on OEMs regarding, for example, **[**386]** "boot-times, computer memory allocation, and product configuration." Ashkin P 109; *see generally* Fama PP 115-32. The appellate court did not ascribe liability for Microsoft's use of MDPs. *See Microsoft, 253 F.3d at 59-78*.

Plaintiffs contend that Microsoft's remedy is flawed because it permits Microsoft to utilize MDPs. Specifically, Plaintiffs argue that Microsoft's use of MDPs allows Microsoft to favor certain OEMs. Mr. Fama testified that OEMs, like Gateway, could be coerced by the use of MDPs because they fear retaliation in the implementation of the

[95] Mr. Fama reluctantly acknowledged that the gross royalty rates Gateway would pay under the new uniform licenses were lower than those previously paid by Gateway. Tr. at 124445 (Fama). Mr. Fama also acknowledged that the new uniform licenses included provisions which Gateway considered to be more favorable than under the negotiated licenses, but Mr. Fama insisted that such benefits were negligible. *Id. at 1245-46*.

[96] For ease of reference, the Court refers to MDAs, MDPs, and similar discount programs collectively as "MDPs."

discounts. Fama PP 109-12. This disapproval of MDPs is based entirely upon the view that Microsoft can use the terms and enforcement of the MDPs to retaliate against OEMs and exert other forms of control over OEMs in response to OEM action which favors non-Microsoft products. *See* *id. PP 125, 130-31*; Tiemann P 82.

[387]** The MDPs which would be permissible under Microsoft's remedy proposal and the **[*211]** discounts provided thereunder must be made available uniformly, [97] based on "objective, verifiable criteria," and may not be awarded or imposed in a manner inconsistent with other terms of the remedy proposal. SRPFJ § III.B.3. By implication then, pursuant to these terms, Microsoft would not be able to use MDPs to discriminate or retaliate against OEMs, as such action would be inconsistent with other portions of the SRPFJ. *Id.* § III.A, B. Accordingly, Plaintiffs' complaints regarding the availability of MDPs in Microsoft's remedy proposal do not withstand scrutiny.

The economic testimony offered on the subject of uniform licenses and MDPs, from both Plaintiffs' and Defendant's **[**388]** witnesses, was tepid, at best. Plaintiffs' economic expert, Dr. Shapiro, testified that uniform licenses would prevent Microsoft from rewarding or punishing OEMs based on whether they use, support, or distribute rival middleware, noting that reasonable, uniform volume discounts, in such a scheme are appropriate, as they are "pro-competitive." Shapiro P 157. Dr. Shapiro did not indicate that there was any benefit to be derived from an elimination of uniform, non-discriminatory MDPs in conjunction with the imposition of uniform licenses. *Id.* One of Microsoft's economic experts, Dr. Kevin Murphy, acknowledged that the provisions requiring uniform licenses in both proposed remedies could be viewed as "a kind of 'fencing in,' designed to reduce the potential for [Microsoft's] evasion" of other portions of the remedial decree. Murphy P 174. Dr. Murphy noted that such "fencing in" comes at the price of economic inefficiency resulting from the denial of the ability of Microsoft and OEMs to negotiate alternative terms that would benefit both parties. *Id. P 175*. Another economic expert presented by Microsoft, Dr. Kenneth Elzinga, testified that, while he understood the rationale for **[**389]** uniform licenses, they were not particularly beneficial. Tr. at 6711-12 (Elzinga). Dr. Elzinga noted that if uniform licenses were to be imposed, they would be more economically favorable, in his view, if they permitted uniform, non-discriminatory MDPs. *Id.* at 6712. In sum, the economic testimony in favor and against the imposition of uniformity in Microsoft's Windows licenses rests in equipoise, as there is substantial uncertainty as to whether "the gains from constraining Microsoft's opportunities for subtle pressure or coercion" are outweighed by the loss of "the ability to customize deals and the inability to negotiate discounts." Tr. at 4021 (Murphy). However, one conclusion is clear; the weight of the economic testimony favors preservation of Microsoft's ability to offer MDPs, provided that Microsoft cannot impose the MDPs in a discriminatory or retaliatory manner.

Given the slim profit margins under which OEMs function, Barksdale P 98, a limitation, through mandatory uniformity, on Microsoft's ability to manipulate licensing prices will provide significant protection for OEMs, freeing them to exercise the other options provided in the remedy ultimately imposed by the Court. **[**390]** While certainly some OEMs would be happier with negotiated agreements, *see generally* Fama PP 46-87, there is insufficient evidence to conclude that Microsoft has used or will use the uniform license terms contained in its proposed remedy to

"increase **[*212]** its leverage," *id. P 46*, over OEMs. In more general terms, there is similarly

insufficient evidence to support a finding that MDPs themselves, when applied in the absence of coercion, retaliation, or non-uniform enforcement, have any anticompetitive effect. Rather, MDPs, when applied uniformly and in the absence of coercion, retaliation, and the like, can benefit consumer welfare. The evidence supports a further finding, however, that if completely unregulated, the use of MDPs can effectively override provisions which strive to ensure uniform and non-discriminatory licensing terms.

III. PROTECTION FROM RETALIATION

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[97] The uniformity specified for MDPs is subject to two volume discounts: one uniform discount for the ten largest OEMs and the second for the eleventh through twentieth largest OEMs, with the size of the OEM measured by volume of licenses. SRPFJ § III.B.3.

A. Independent Software Vendors ("ISVs") and Independent Hardware Vendors ("IHVs")

The factual and liability findings in this case portray a practice by Microsoft of threatened and actual retaliation against software and hardware vendors for engaging in action which promotes or supports non-Microsoft **[**391]** middleware. *See, e.g.*, Microsoft, 253 F.3d at 72-73 (discussing Microsoft's dealings with Apple), Microsoft, 253 F.3d at 77 (describing Microsoft's "threat to Intel" [98]). To remedy this action, Microsoft offers § III.F.1 of its remedy proposal which prohibits retaliation against ISVs and independent hardware vendors ("IHVs") for "developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software" or for "exercising any of the options or alternatives" secured by the injunctive decree entered in this case. SRPFJ § III.F.1. Plaintiffs propose a similar prohibition, but because Plaintiffs' proposal bans action which "adversely affects" industry participants "based . . . on" their support for competing products, it addresses substantially more Microsoft conduct. SPR § 8. Plaintiffs' proposed ban applies to action adverse to IAPs, ICPs, IHVs, ISVs, OEMs, and third-party licensees. *Id.*

[392]** Microsoft raises the concern that, although touted as an "anti-retaliation provision," § 8 of Plaintiffs' proposed remedy covers far more than "retaliation" and "could be read to ban Microsoft from competing in any product category." Gates P 355; *see also* Elzinga P 118 (incorporating PP 33-34 by reference). In this regard, William H. Gates, III, Microsoft's Chairman of the Board and Chief Software Architect, Gates P 1, testified that:

> Under [SPR § 8], nearly any act of competition could be seen as an adverse act. Competing means attempting to maximize sales, which often entails taking sales from a rival (adversely affecting them). At the very least, Microsoft would have no comfort that routine business acts would not violate Section 8.
>
> Under Section 8, Microsoft would be subject to legal risk anytime it entered into any contract relating to the development or promotion of any Microsoft product--even if that contract was silent as to non-Microsoft products. If Microsoft entered into such a relationship, it could be charged with taking "adverse actions" against any competitors in the relevant category that it did not enter into the same relationship with, and thus did **[**393]** not receive the same "consideration" from, Microsoft. Section 8 explicitly states that Microsoft may not withhold **[*213]** "consideration" from a third party that uses, develops, etc. any non-Microsoft product or service.

Id. P 356-57 (emphasis omitted); *see also* *id. PP 358-66*. Although extreme, the concerns raised by Mr. Gates are not unfounded. Plaintiffs' witnesses' description and characterization of § 8 of Plaintiffs' proposed remedy as a bar on retaliation, *see, e.g.*, Ashkin P 138; Barksdale P 106; Borthwick P 61; Kertzman PP 61-62; McGeady PP 86-87, cannot change the fact that the provision is written far more broadly as a bar on "adverse[]" action. SPR § 8. [99] The distinction is a fine one, but significant because retaliation implies an illegitimate basis for the adverse action, unlike "based directly or indirectly . . . on" which connotes only a cause and effect relationship. *Id.*

[394]** Notably too, § 8 of Plaintiffs' remedy proposal is not limited in any way to actions by Microsoft that relate to its PC operating system products, the only segment of the software industry in which Microsoft has been found to have a monopoly. *Id.*; *see also* Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34. As a result, § 8 will regulate Microsoft's business dealings in *all* aspects of its business, however unrelated to its monopoly product. *See* Elzinga P 118 (incorporating PP 33-34 by reference). Plaintiffs' witnesses have not offered any particular explanation or reasonable justification for § 8's breadth in this regard. *See, e.g.*, Ashkin P 138; Barksdale PP 105-06; Kertzman PP 61-62; McGeady PP 86-90; Tiemann P 76. The Court observes, however, that if properly limited to *retaliation* in

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[98] In his *Findings of Fact,* Judge Jackson noted that Intel is both an IHV and an ISV. *Findings of Fact,* 84 F. Supp. 2d at 34, P 95 ("Although Intel is engaged principally in the design and manufacture of microprocessors, it also develops some software.").

[99] Plaintiffs' arguments that § 8 is not intended to address the conduct cited as an example by Mr. Gates, along with Plaintiffs' insistence that § 8 would not apply in such a circumstance, indicate that the provision is, if not overly broad, at least ambiguous on this point.

relation to the promotion of products which compete with Microsoft's monopoly product, inasmuch as Plaintiffs' remedy § 8 applies to ISVs and IHVs, [100] § 8 begins to resemble § III.F.1 of Microsoft's proposed remedy.

[395]** Plaintiffs' economic expert, Dr. Shapiro, criticized § III.F.1 of Microsoft's remedy proposal by arguing that it does not address a wide enough range of products. To reiterate,

§ III.F.1 of Microsoft's remedy proposal prohibits retaliation by Microsoft against ISVs and IHVs for their support of products which "compete[] with Microsoft Platform Software." [101] SRPFJ § III.F.1. Dr. Shapiro criticized § III.F.1 based upon the assertion that "truly innovative middleware that Microsoft simply does not yet offer is not afforded protection from such retaliation by Microsoft." Shapiro P 199. Dr. Shapiro testified further, in this regard that, "under Microsoft's Proposed Remedy[,] Microsoft can threaten to withdraw support from an ISV that develops new, cool software that Microsoft **[*214]** has not yet developed on its own." *Id.*

[396]** The Court cannot discern the basis for Dr. Shapiro's complaint. Dr. Shapiro did not assert that the term "Microsoft Platform Software" is too narrowly drawn, nor did he offer any logical explanation for why protection would be needed for new software which does not "compete" with Microsoft Platform Software. If the "new, cool software" *competed* with Microsoft's operating system, it would be protected. [102] The liability record in this case is limited to Microsoft's actions in response to competing software platforms. If the software does not "compete" in some sense with Microsoft Platform Software, it bears little relation to the facts of this case. Moreover, the terms of § III.F.1 are broadly drawn to protect not only software which itself competes with Windows, but software which runs on top of software competing with Windows. Accordingly, the Court rejects Dr. Shapiro's criticism of § III.F.1 as unsubstantiated.

[397]** A number of Plaintiffs' witnesses criticized Microsoft's proposed anti-retaliation provision relating to ISVs and IHVs because it does not prohibit *threats* of adverse action. *See, e.g.*, Barksdale P 101; McGeady P 87. In response, Microsoft's economic expert, Dr. Elzinga, asserted that there is no need to protect against such threats. *See* Elzinga P 140. In this regard, Dr. Elzinga reasoned that "if Microsoft is enjoined from retaliating, and potential targets are aware of this, any threats would be empty." *Id.* In the Court's view, Dr. Elzinga expects too much of third-parties that must do business with Microsoft. As Mr. Tiemann, explained, if an industry participant feels intimidated by threats or veiled threats, it will never take the action necessary to test whether Microsoft would actually retaliate. *See* Tiemann P 80. Accordingly, the Court finds merit in Plaintiffs' criticism of the failure of § III.F.1 of the SRPFJ to prohibit Microsoft from threatening the same retaliation which is prohibited by that section.

B. Original Equipment Manufacturers ("OEMs")

A ban on Microsoft's ability to retaliate against other industry participants, namely **[**398]** OEMs, for their support of competing products will assist in securing the ability of industry participants to support products which compete with Microsoft's monopoly product. Borthwick P 61. A prohibition on retaliation against OEMs will also bolster the

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[100] The Court considers the effect of SPR § 8 on OEMs *infra*.

[101] "Microsoft Platform Software," as a defined term in Microsoft's remedy proposal, means "(i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product." SRPFJ § VI.L. In the attached Memorandum Opinion, the Court has addressed the definition of "Microsoft Middleware Product" in detail and determined that it is not inappropriately narrow. *See* Memorandum Opinion, Part III.B. The term "Windows Operating System Product," is defined in the SRPFJ as the software code which constitutes the Windows operating system family of products including Windows 2000 Professional, Windows XP Home, Windows XP Professional, and "their successors, including upgrades, bug fixes, service packs, etc." SRPFJ § VI.U.

[102] For example, as the Court concluded in the attached Memorandum Opinion, Parts III.B.3.a, III.C.1, server operating systems-in the context of server/network computing-can be said to "compete" with Microsoft's operating system because they serve as a platform for applications running for the PC. As a result, Microsoft's proposed anti-retaliation provision would protect server operating systems from retaliation for supporting server capabilities which facilitate use of the server as a platform for applications running "for" the PC. *See* Memorandum Opinion, Parts III.B.3.a, III.C.1.

effect of the freedom provided to OEMs in configuring Windows. Accordingly, both proposed remedies include provisions which bar retaliation by Microsoft against OEMs for exercising the other options provided in the final judgment, as well as, in general terms, for supporting software that competes with Windows or any aspect thereof. SPR § 8; SRPFJ § III.A. In the absence of such a ban, industry participants may be reluctant to engage in the very conduct which Microsoft was found to have prohibited with anticompetitive practices. [103]

[399]** **[*215]** In particular, § III.A of Microsoft's remedy proposal prohibits Microsoft from retaliating against an OEM because that OEM is or is contemplating (i) supporting a product that competes with Microsoft Platform Software, (ii) shipping a PC that includes both Windows and a non-Microsoft operating system, or (iii) exercising any option or alternative under Microsoft's remedy proposal. SRPFJ § III.A. The same section further limits Microsoft's ability to terminate a Windows operating system license unless the OEM has received two notices of termination and an opportunity to cure. *Id.* The provision is limited in that it authorizes Microsoft to compensate an OEM commensurate with the absolute level of the OEM's support of the Microsoft product or service. *Id.* By comparison, Plaintiffs offer § 8 of their proposed remedy which, as discussed above, prohibits Microsoft from withholding any form of consideration "based directly or indirectly, in whole or in part, on any actual or contemplated action" by OEMs (and numerous other entities) to support a non-Microsoft offering or to exercise any of the options provided under the remedy in this case. SPR § 8.

Microsoft's criticisms of **[**400]** § 8 of Plaintiffs' proposed remedy apply equally with regard to the manner in which § 8 regulates Microsoft's conduct toward OEMs. *See supra* Part III.A. Most apparent from the language of § 8 is the fact that it covers "adverse" action taken by Microsoft which bears no relation to Microsoft's Windows operating system products and thus, is largely unrelated to the monopoly market. *See* Elzinga P 118 (incorporating PP 33-34 by reference); Gates PP 176, 355. Moreover, § 8's ban on "adverse[]" actions will affect conduct beyond the parameters of "retaliation" as that word is commonly used. In short, a ban on adverse action is not the equivalent of a ban on retaliation. *See* Gates PP 356-66; *see also* Tr. at 2525-28 (Mace). As a result, § 8 of Plaintiffs' proposed remedy threatens to prohibit vast amounts of legitimate business conduct because it is crafted too broadly. Dr. Elzinga cautioned that over-broad restrictions on Microsoft's business dealings would hinder pro-competitive conduct. Tr. at 6749-52 (Elzinga) Plaintiffs have not established that the breadth of § 8 is either necessary or appropriate to achieve the goal of preventing Microsoft from retaliating against **[**401]** third-parties for their support of competing products.

James Barksdale, former President and Chief Executive Officer of Netscape Communications Corporation, Barksdale P 1, complains that the latter portion of § III.A of Microsoft's remedy proposal, which reserves Microsoft's right to "provide Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that Microsoft product or service," is an exception which swallows the rule. Barksdale P 98. Citing to the slim profit margins under which OEMs function, a fact acknowledged by Judge Jackson, *Microsoft, 87 F. Supp. 2d at 39*, Mr. **[*216]** Barksdale argues that because OEMs generally cannot afford to pass up even a slight reduction in the price for a Windows license, to permit Microsoft to provide consideration or price reductions to OEMs for carrying, supporting, or promoting the "middleware" portions of Microsoft's operating system products is tantamount to coercing the OEMs to carry, support, and promote these same Microsoft products. Barksdale PP 98-99. Mr. Barksdale translates **[**402]** this allegedly effective coercion into the capacity "to prevent rival middleware from being distributed through the OEM channel." *Id. P 100*.

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[103] Although liability was not clearly ascribed by the appellate court for this conduct, *see* Memorandum Opinion, Part II.B, it is noteworthy that Microsoft has a history of using threats and retaliation as a means to coerce OEMs to prefer Microsoft products over non-Microsoft products. *See Findings of Fact,* 84 F. Supp. 2d at 68, P 236 (finding that Gateway's refusal to switch internal use to IE and stop shipping Navigator has resulted in the payment of higher prices for Windows by Gateway than its competitors), Findings of Fact, 84 F. Supp. 2d at 59, P 203 ("Microsoft threatened to terminate the Windows license of any OEM that removed Microsoft's chosen icons and program entries from the Windows desktop or the 'Start' menu. It threatened similar punishment for OEMs that added programs that promoted third-party software to the Windows 'boot' sequence.").

Mr. Barksdale's criticism in this regard fails to account for the fact that the appellate court persistently declined to impose liability upon Microsoft for "offering a customer an attractive deal," *Microsoft, 253 F.3d at 68*, even where this "attractive deal" included the payment of "bounties," *Microsoft, 253 F.3d at 67*, "costly technical support[,] and other blandishments," *Microsoft, 253 F.3d at 75* (quoting *Findings of Fact,* 84 F. Supp. 2d at 108, P 401), to industry participants for conduct which favors Microsoft products. *Microsoft, 253 F.3d at 67-68, 75*. Additionally, Microsoft's economic expert Dr. Elzinga explained without contradiction that the proviso in the latter part of § III.A of Microsoft's remedy proposal is necessary to preserve "an obviously beneficial and routine type of business practice." Elzinga P 141. Dr. Elzinga testified, by way of example, that were the Court to reject the abovedescribed proviso, "an OEM who shipped 10 percent as much Microsoft software as another and consequently received only 10 **[**403]** percent as much marketing support could nonetheless claim 'retaliation' on a theory that the reason it received that level of marketing support was that it shipped more non-Microsoft software in the relevant category." *Id.* Hence, absent the exception for "consideration commensurate with the absolute level of [an] OEM's development, distribution, promotion, or licensing," practices like the one described above, which are not true "retaliation," might nevertheless be prohibited. *Id.*; *see also* Tr. at 6766 (Elzinga) ("I think it is within my competence to evaluate the merits of having the 'nothing in this provision' clause as part of III.A, because as an economist, I can see the importance of making explicit that Microsoft and the OEMs can still engage in contracts where there are differences between OEMs that are commensurate with that OEM's . . . input into the process. That to me seems procompetitive and important to preserve.").

To require Microsoft to provide equal compensation to all OEMs in complete disregard of the amount of support for Microsoft software products provided by the OEM would create an absurd result. The alternative-a complete ban on the provision of **[**404]** compensation for support of Microsoft products-is similarly absurd, as it prohibits routine, procompetitive business practices. A better result is produced by a provision which permits such compensation, but limits the permissible compensation to the absolute level of support for Microsoft products provided by the OEM. On these grounds, the Court rejects Mr. Barksdale's complaint.

One of Plaintiffs' witnesses' central criticisms of § III.F.1 of Microsoft's remedy proposal is repeated with regard to § III.A, namely that threats of retaliation are not prohibited. *See, e.g.*, McGeady PP 88-89; Tiemann P 80. The Court's analysis with regard to § III.F.1 of Microsoft's remedy proposal is equally applicable to § III.A. Once again, the Court finds that Plaintiffs make a salient point, and the Court therefore rejects the Microsoft assertion that protection from threats of retaliation is superfluous where the retaliation **[*217]** itself is prohibited. *See supra* Part III.A.

Michael Mace, Chief Competitive Officer of PalmSource, Inc., a wholly owned subsidiary of Palm, Mace P 1, levied criticism at both of the non-retaliation provisions in Microsoft's remedy proposal, SRPFJ §§ III.A.1 and **[**405]** III.F.1.a., arguing that the types of industry participants that are protected against retaliation by Microsoft are too narrowly drawn. Mace PP 85-86. In particular, Mr. Mace expressed a concern that the parent company of his employer, Palm, is not protected against retaliation. *Id. P 85*. Mr. Mace's basis for this complaint is his assertion that Palm's operating system, which is an operating system for handheld computing devices, competes with Windows. *Id. P 86*. The Court addressed the general underpinning for Mr. Mace's assertion in the attached Memorandum Opinion, Parts III.B.3.c; III.C.3, and rejected such assertion based upon the conclusion that Plaintiffs have *not* established that the Palm operating system competes with Microsoft's PC operating system, Windows. [104] **[**406]** Moreover, Mr. Mace's argument in this regard contradicts his own view that handheld computing devices are, in

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[104] Mr. Mace acknowledged that Palm does not manufacture or distribute an Intel-compatible PC desktop operating system, nor any PC desktop operating system for that matter. Tr. at 1858-59 (Mace). Mr. Mace did not testify that Palm manufactured middleware with the potential to perform as a multi-purpose platform across multiple operating systems, nor that there exists middleware which enables applications written for a handheld device to run on a personal computer. *See* Memorandum Opinion, Part III.B.3.c. Instead, Mr. Mace argued that the handheld device has the capacity to supplant the personal computer as more applications become available on handheld devices. *See generally* Mace PP 12-18. As such replacement of products in the marketplace has not been shown to have an impact upon Microsoft's monopoly in the market for Intel-compatible PC desktop operating systems, what Mr. Mace describes is not true competition with the Windows operating system. *See* Memorandum Opinion, Parts III.B.3.c, III.C.3.

fact, distinct from personal computers and provide an "alternative platform" to that of personal computers. [105] Mace P 12 (text and heading). Accordingly, the Court finds Mr. Mace's repeated criticism unavailing.

In summary, the Court finds that § 8 of Plaintiffs' remedy proposal, despite Plaintiffs' apparent intent to prohibit retaliation by Microsoft, as presently drafted, is likely to curtail a significant amount of conduct which is not truly retaliation. That conduct which exceeds the parameters of retaliation is likely to be legitimate business conduct, the prohibition of which is without justification. The Court further finds that § 8 of Plaintiffs' remedy proposal, unlike Microsoft's proposed anti-retaliation provisions, §§ III.A and III.F.1, is not tailored to reflect the monopoly market and, instead, addresses all segments of Microsoft's business. Likewise, Plaintiffs' proposed bar on "adverse" action would unjustifiably prohibit compensation for OEMs which is commensurate with the **[**407]** OEM's absolute level of support for a Microsoft product. Compensation of this sort has been shown to be a procompetitive practice which the appellate court itself condoned. Lastly, the Court finds that industry participants will feel more secure in supporting products which compete with Microsoft's monopoly product if, along with a ban on retaliation, the remedy **[*218]** prohibits threats of retaliation by Microsoft.

IV. TERMINATION OF AN OEM'S WINDOWS LICENSE

In conjunction with its proposal to prohibit Microsoft's ability to retaliate against OEMs for their support of products that compete with Microsoft's monopoly product, Microsoft's proposed remedy suggests a restriction on Microsoft's ability to terminate an OEM's Windows license. SRPFJ § III.A. Plaintiffs' proposed remedy contains a similar provision which would also regulate Microsoft's ability to terminate an OEM's Windows license. SPR § 2.a. As there are few alternative PC operating systems presently available, to remain in business, an OEM must license and distribute the Windows desktop operating system. Fama P 21. A Windows operating system license is necessary to the ability of an OEM to legitimately distribute computers **[**408]** containing copies of Windows. Tr. at 1218 (Fama). Therefore, without the necessary Windows license, an OEM would, in effect, be unable to continue selling PCs.

The necessity of the Windows license to OEM viability gives Microsoft great leverage over OEMs. Fama P 22. Mr. Fama described a fear, arising from the inescapable dependence upon a license from Microsoft, that Microsoft will terminate the necessary license and effectively put the OEM out of business. [106] *See* Fama P 52; *see also* Ashkin P 142. The provision of some degree of protection for OEMs against sudden termination of their Windows license will free the OEMs from this fear and enable them to engage in competition in which they might otherwise have been to fearful to consider.

[409]** Specifically, Microsoft's proposed remedy prohibits Microsoft from terminating an OEM's Windows license without first having given the OEM reasonable notice of the reasons for the proposed termination and opportunity to cure. SRPFJ § III.A. Where Microsoft has provided two or more such notices, even if the breach has been cured, Microsoft may immediately terminate the license. *Id.* While similar, the comparable provision in Plaintiffs' proposed remedy provides that Microsoft may only terminate a Windows license for "good cause" and specifies that Microsoft may not do so without giving notice of the breach and an opportunity to cure. SPR § 2.a. The rather absurd effect of

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[105] The Court observes that, notwithstanding Mr. Mace's assertions as to what should be deemed a "personal computer," the definition of "personal computer" § VI.Q of Microsoft's proposed remedy is consistent with Judge Jackson's treatment of personal computers in this proceeding. *See Findings of Fact,* 84 F. Supp. 2d at 12, PP 1, 3.

[106] Mr. Fama attempted to illustrate this fear by reference to Gateway's receipt, in a single day, of four notices of termination of a license agreement with Microsoft. Fama P 53; Pl. Exs. 1243-46 (all filed under seal). Mr. Fama's example is of limited relevance, as the notices of termination did not concern Windows or any part thereof, but instead concerned a separate Microsoft product. Tr. at 1260-62 (Fama). Moreover, the notices merely notified Gateway of its violation and demanded that Gateway cure the violation or face termination of the license. *See* Pl. Exs. 1243-46 (all filed under seal). Notably, Mr. Fama did not deny that Gateway, was in fact, in breach of the license, nor did Mr. Fama offer any evidence of bad faith on Microsoft's part in issuing the notices. Tr. at 1261-62 (Fama). Ultimately, no license was terminated as a result of the notices referenced by Mr. Fama. *Id.* at 1262.

this provision in Plaintiffs' proposed remedy is that it would prohibit Microsoft from terminating a Windows license, even where the licensee is persistently in material breach, so long as the licensee cures the breach within the specified period. *Id.*; *see also* Tr. at 1258-60 (Fama). Such a circumstance would, of course, be detrimental to Microsoft's ability to enforce valid provisions in its licenses and, thereby, the ability to protect its intellectual **[*219]** property from misuse. *See* Tr. at 1258-60 (Fama).

[410]** Mr. Fama of Gateway, whose complaints are echoed by various other of Plaintiffs' witnesses, complained that the limitation in Microsoft's remedy proposal on Microsoft's ability to terminate an OEM's Windows operating system license is insufficient to protect OEMs from Microsoft's use of a termination threat as a tool for coercion. *See* Fama PP 49-50; *see*

also Ashkin P 142; Barksdale P 101. Mr. Fama argued that Microsoft's proposed provision, unlike the comparable portion of Plaintiffs' proposed remedy, does not require a "material breach" before Microsoft may terminate an OEM's Windows license, and hence, Microsoft may terminate for a mere "ministerial" breach. Fama P 50-51. As the Windows operating system licenses are essential to the viability of an OEM, a persistent fear that Microsoft may cancel the licenses for a non-material breach [107] may have a chilling effect on an OEM's willingness to engage in any action which displeases Microsoft, such as the promotion of software which competes with Windows or a Windows component. Fama P 56. Mr. Fama's complaint in this regard ignores the fact that both remedy proposals would prohibit Microsoft from cancelling a Windows license **[**411]** in response to an OEM's support for a competing product, or for any other reason inconsistent with the other terms of the final judgment. *See* SPR § 8; SRPFJ § III.A. Accordingly, the Court finds that the "good cause" requirement proposed by Plaintiffs is largely redundant of other proposed protections.

[412]** V. OTHER PARTICIPANTS IN THE ECOSYSTEM

A. Agreements Limiting Support for Competing Products

The appellate court imposed liability upon Microsoft for its First Wave Agreements inasmuch as they extracted a promise from ISVs to "refrain from distributing to Windows users JVMs that complied with Sun's standards" and the corresponding promise that the ISVs would create their Java applications to be reliant upon the Windows-specific JVM. *Microsoft, 253 F.3d at 75* (quoting *Findings of Fact,* 84 F. Supp. 2d at 108, P 401). Although the district court "did not enter precise findings as to the effect of the First Wave Agreements upon the overall distribution of rival JVMs," the appellate court agreed with the district court that the exclusionary effect of the agreements was significant. *Id.* Microsoft offered no procompetitive justification for this portion of the First Wave Agreement. *Microsoft, 253 F.3d at 76*.

To remedy this finding, both parties propose injunctive provisions which prohibit Microsoft from entering into agreements predicated upon a promise by an ISV to refrain from taking action to advance the development of software which will compete with Microsoft platform **[**413]** software. In general, a prohibition on Microsoft's ability to extract promises from ISVs not to support software platforms which compete **[*220]** with Microsoft's PC operating system products will promote the ability of non-Microsoft software platforms to develop and compete with Microsoft's PC operating system products.

Section 11 of Plaintiffs' proposed remedy proffers a complete ban on *all* agreements that exchange consideration for a promise to refrain from "developing, licensing, promoting or distributing any Operating System Product or

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[107] The Court observes that Mr. Fama's testimony refers only to a "material breach," despite the fact that the comparable provision in Plaintiffs' remedy proposal, § 2.a, does not include any requirement of materiality, but instead requires "good cause" for termination. In this regard, Mr. Fama appears to have conflated the concept of "good cause" with the separate and distinct concept of a "material breach." This conflation is again reflected in Plaintiffs Proposed Findings of Fact. *See, e.g.*, Pl. Prop. Findings of Fact P 410. The concept of "good cause" is broader than that of "material breach." For example, a company which discontinues a particular product line has "good cause" to terminate its supply contract, despite the absence of a "material breach."

Middleware product competitive with any Windows Operating System Product or Microsoft Middleware Product." SPR *§ 11*. [108] The substantial counterpart to this provision is § III.F.2 in Microsoft's proposed remedy. Like *§ 11* in Plaintiffs' proposed remedy, § III.F.2 of Microsoft's proposed remedy prohibits Microsoft from entering into agreements predicated on a promise not to support competing software. Microsoft's proposed remedy, however, is substantially more circumscribed, as it only limits agreements between Microsoft and ISVs relating to a "Windows Operating System Product," as that term is defined in Microsoft's proposed remedy. SRPFJ § III. **[**414]** F.2. In addition, this portion of Microsoft's proposed remedy permits agreements wherein Microsoft limits an ISV's support for competing software "if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft." *Id.*

Microsoft, through the testimony of its witnesses, complains vigorously **[**415]** that *§ 11* of Plaintiffs' proposed remedy is overly broad and will prohibit legitimate competitive behavior, and Plaintiffs correspondingly complain that § III.F.2 of Microsoft's proposed remedy is too narrowly drawn and contains significant exceptions. In particular, Microsoft, through the testimony of its witnesses, complains that *§ 11* of Plaintiffs' remedy impinges upon Microsoft's ability to enter into routine "work-for-hire" agreements with ISVs. *See, e.g.*, Gates P 384. Under a typical "work-for-hire" arrangement, Microsoft hires an ISV to create software for Microsoft according to particular Microsoft specifications, and when the software is complete, Microsoft retains full ownership of the resulting "work-for-hire" code. *Id.* In many instances, Microsoft will include the resulting code in its own products. *Id.* In conjunction with such an agreement, it is not uncommon for Microsoft to provide the ISV with access to Microsoft's source code and other intellectual property in order to facilitate the creation of the new software. *Id.* This mode of "outsourcing" software design is facilitated by an agreement that the ISV's employees who worked on the project would **[**416]** be prohibited, for a reasonable period of time, from developing for the benefit of Microsoft's platform competitors software similar to the work-for-hire project. *Id; see also* Elzinga P 142.

Plaintiffs do not dispute that such "work-for-hire" arrangements would be prohibited by *§ 11* and notably, Plaintiffs' economic expert, Dr. Shapiro, conceded that by doing so, *§ 11* of Plaintiffs' proposed **[*221]** remedy would likely deter procompetitive business agreements. *See* Tr. at 3290-91 (Shapiro). For this reason, Plaintiffs' economist refused to endorse *§ 11* as an economically beneficial remedy in this case. *Id.* The testimony offered by Plaintiffs' fact witnesses in support of *§ 11* is cursory and, therefore, unpersuasive. *See, e.g.*, Barksdale P 141; Richards PP 2, 209; Tiemann P 125. None of this testimony specifically explains the justification for prohibiting clearly procompetitive conduct. In short, Plaintiffs have failed to provide evidence which indicates that the benefit to be gained by *§ 11* of their proposed remedy outweighs the potential harm which will likely result from the elimination of a significant amount of legitimate business conduct.

Conversely, Plaintiffs **[**417]** criticize § III.F.2 of Microsoft's proposed remedy on the grounds that it does not go far enough in remedying the clearly established anticompetitive conduct. Plaintiffs first complain, through testimony such as that of Mr. Barksdale, that the exception in § III.F.2 which permits the kind of "work-for-hire" agreements discussed above has the capacity to nullify the restrictive portion of the provision. Barksdale P 114 ("This exception means that Microsoft is permitted to do precisely what the first part of [§] III.F.2 says Microsoft cannot do-to enter into a contract with an ISV that requires the ISV to use, distribute, or promote Microsoft software and to limit its use, distribution, or promotion of non-Microsoft software."). Mr. Barksdale's reading of this provision overstates the parameters of the exception and fails to take note of the significant fact that an acceptable limitation on an ISV's support for competing products is permissible *only* where such limitation is "reasonably necessary . . . and of reasonable scope and duration in relation" to the work-for-hire agreement with Microsoft. SRPFJ § III.F.2. Beyond his misguided reading of § III.F.2, Mr. Barksdale did **[**418]** not offer any explanation for why Microsoft should be

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[108] Strikingly similar to *§ 11* of Plaintiffs' proposed remedy is § 6.a, which prohibits Microsoft from entering into agreements "in which another party agrees, or is offered or granted consideration to . . . restrict its development, production, distribution, promotion or use of (including its freedom to set as a default), or payment for, any non-Microsoft product, service, feature or technology." SPR § 6.a. Plaintiffs do not offer testimony which distinguishes the specific effect of § 6.a from *§ 11* in their proposed remedy.

limited in its ability to enter into "work-for-hire" agreements, which would be permitted pursuant to § III.F.2 of Microsoft's proposed remedy. Mr. Richards, on behalf of Plaintiffs, offered the same unsupported criticism as Mr. Barksdale and, likewise, failed to explain the benefit to be derived by competition from a severe limitation on Microsoft's ability to enter into "work-for-hire" and similar agreements. Richards P 209.

In the absence of the exception in § III.F.2 of Microsoft's remedy proposal, observed Dr. Elzinga, "it would be difficult or impossible for Microsoft to enter into lawful joint ventures relating to platform software." Elzinga P 142. Joint development agreements in the software industry typically provide that the parties to the agreement will not develop, promote or distribute products that compete with the products being jointly developed and/or marketed. *See* Elzinga P 142; Jones P 128. Such limitations are often necessary to enable beneficial commercial transactions to occur, Elzinga P 142, as they provide the participants to the agreement some assurance that their contributions to the joint venture **[**419]** will not be turned against them. Jones P 128. As even one of Plaintiffs' witnesses admitted, legitimate joint development programs advance innovation and benefit competition. *See* Ashkin P 132; *see also* Elzinga P 142; Jones P 128.

Mr. Barksdale also complained about the scope of § III.F.2 of Microsoft's proposal, noting that Microsoft's ability to enter into agreements is limited only with regard to agreements related to a "Windows Operating System Product" as that term is used in Microsoft's proposed remedy. Barksdale P 115. Mr. Barksdale interpreted **[*222]** the provision to mean that what "Microsoft could not accomplish using inducements related to Windows, it could still accomplish using inducements related, for example, to Internet Explorer." *Id.* Mr. Barksdale's complaint in this regard is based upon a misunderstanding of the use of the term "Windows Operating System Product" in the SRPFJ. "Windows Operating System Product" as defined in Microsoft's proposal *includes* IE and any other so-called "middleware" functionality which is distributed as part of the products known as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and all of their successors. **[**420]** SRPFJ § VI.U; *see also* Tr. at 5212 (Jones). Accordingly, the Court rejects Mr. Barksdale's above-described complaint.

In sum, there is little disagreement that a remedy which curtails Microsoft's ability to enter into agreements wherein another industry participant agrees not to support any products competitive with Microsoft's monopoly product will foster competition. The Court finds, however, that a prohibition drawn too severely will hamper Microsoft's incentive to enter into joint venture, joint services, and work-for-hire agreements. These agreements have been shown, without dispute, to be valuable tools for the industry and beneficial to competition and, therefore, should not be discouraged.

B. Exclusive Agreements

1. Independent Software Vendors ("ISVs") and Original Equipment Manufacturers ("OEMs")

As the findings of liability with regard to Microsoft's agreements with ISVs and Apple, which is both an ISV and an OEM, *Microsoft, 253 F.3d at 71*, in conjunction with the First Wave Agreements, are predicated upon the First Wave Agreements' effect of exclusivity, *Microsoft, 253 F.3d at 75-76*, both remedy proposals **[**421]** offer provisions which curtail substantially Microsoft's ability to enter into agreements that include an exclusivity provision. Microsoft's remedy proposes a general limitation on Microsoft's ability to enter into exclusive agreements relating to "Microsoft Platform Software" not only with ISVs and OEMs, but also with IAPs, ICPs, and IHVs. SRPFJ § III.G.1. Similarly, Plaintiffs' remedy proposal includes a provision which would ban Microsoft from entering into contracts in which another party agrees to "distribute, promote or use any Microsoft product, service, feature or technology exclusively or in a minimum percentage." SPR § 6.c. In contrast to the corresponding provision in Microsoft's remedy proposal, however, the provision in Plaintiffs' proposed remedy is meant to eradicate Microsoft's use of exclusivity in any aspect of the corporation's contracting, whether or not related to its operating system products. *Id.*

Plaintiffs have not offered testimony specific to § 6.c of their proposed remedy. In fact, Plaintiffs presented only very limited testimony from three witnesses regarding § 6 in general. Mr. Richards of RealNetworks testified broadly that "Section 6 . . . contains **[**422]** an unconditional ban on exclusive dealing that is widely drawn to extend to the setting of defaults and restrictions on the use of redistributable code." [109] Richards P 195. Similarly, Mitchell Kertzman, the Chief Executive Officer of Liberate Technologies, a company **[*223]** which supplies interactive television software, Kertzman P 1, testified that § 6 "broadly prohibits any Microsoft exclusive contracts, including those to 'distribute, promote or use any Microsoft product or service, feature or technology exclusively or in a minimum percentage.'" *Id. P 58* (quoting SPR § 6.c). The only justification for this admittedly broad provision was offered by Plaintiffs' economist, Dr. Shapiro, who testified that "the broad language of Provision # 6 should help make it more easily, and effectively, enforceable." Shapiro P 167. Dr. Shapiro could not, however, endorse § 6 as written without noting that the provision "could be narrowed so that it does not cover agreements wholly unrelated to Microsoft Platform Software." *Id.* n.147. Upon further inquiry Dr. Shapiro acknowledged that the unnecessary breadth of § 6 rendered the provision inconsistent with his view, **[**423]** as an economist, of the principles which should guide the crafting of a remedy in this case. Tr. at 3655-59 (Shapiro). The sum of this testimony is wholly inadequate to explain the need for, and usefulness of, a remedy provision which would ban many legitimate and likely procompetitive contracts in markets unrelated to Microsoft's monopoly in the market for Intelcompatible PC operating systems. *See id.*; *see also* Gates PP 338-52; Murphy P 237.

The closest counterpart to § 6 of Plaintiffs' remedy proposal is § III.G.1 of Microsoft's proposed remedy, which prohibits Microsoft from entering into agreements that require fixedpercentage or exclusive distribution, promotion, use, or support **[**424]** of "Microsoft Platform Software." SRPFJ § III.G.1. The general prohibition extends beyond ISVs and OEMs and thereby extends beyond the specific liability findings entered in this case. Murphy P 173. The provision excepts from this prohibition "agreements in which [the third party] agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software." SRPFJ § III.G.1. For example, SRPFJ § III.G.1 would permit an agreement with a particular Web site to offer 100 percent of its music content in Microsoft's media formats because such an agreement would not limit the site's ability to offer the content in other formats as well. Elzinga P 132. Such contracts, testified Dr. Elzinga, are unlikely to have an exclusive effect. *Id.*

Both Mr. Barksdale and Mr. Richards raised concerns that, if imposed, the exception in § III.G.1 would undercut the effectiveness of the provision and would enable Microsoft to foreclose channels **[**425]** of distribution through the use of fixed percentage agreements. *See* Barksdale P 117; Richards P 196. In particular, Mr. Richards intimated that the "commercially practicable" representation provision in § III.G.1 is problematic, because Microsoft, as a powerful monopolist, can forcefully obtain such a representation. Richards P 196. This complaint, of course, ignores the requirement that Microsoft obtain the representation in "good faith." SRPFJ § III.G.1. Were Microsoft to take any action, whether subtle or overt, to improperly induce the "commercially practicable" representation required by § III.G.1, it would violate the "good faith" provision in the remedy proposal and render the representation ineffective for compliance with the proposed decree. *Id.*

Taking a different tack, Mr. Barksdale contended that the "commercially practicable portion" of § III.G.1 of Microsoft's **[*224]** remedy proposal is "rather meaningless" because it requires only a "representation" and does not affect whether the entity will, in fact, "provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software," SRPFJ § III.G.1. Barksdale P 117. **[**426]** In response, Dr. Elzinga observed that an ISV's provision of such a representation indicates that a fixed percentage agreement will not have any exclusive effect. *See* Elzinga P 132. As Mr. Barksdale's complaint fails to explain the benefit to competition to be derived from a ban on fixed percentage agreements which do not have an exclusive effect, the Court rejects Mr. Barksdale's criticism on this point.

Mr. Barksdale further complained about the latter portion of § III.G of Microsoft's remedy proposal, which permits Microsoft to enter into bona fide joint ventures or joint development agreements with third-party industry participants wherein such third parties agree not to compete with the object of the joint venture. Barksdale P 116. As with Mr.

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[109] Plaintiffs' remedy proposal uses the term "redistributable code," but does not define the term. SPR § 6.b. "Redistributable code" is understood to be the code that Microsoft distributes separately from its Windows operating system in order to update portions of the operating system. *See* Tr. at 5166-67 (Jones).

Barksdale's criticism of § III.F.2, the Court observes that Mr. Barksdale failed to explain the benefit to be derived by limiting Microsoft's ability to enter into legitimate joint venture agreements. As the Court observed previously, limitations on a third party's distribution or use of competing software are often necessary to enable beneficial commercial transactions to occur and are not unusual in the context of a bona fide joint **[**427]** development or joint services agreement. Elzinga P 142; Gates P 383; Jones P 128. There is insufficient evidence to support a finding that a complete ban of all such joint ventures would benefit competition.

Mr. Richards raises a concern that a proviso at the end of § III.G of Microsoft's proposal threatens to nullify the prohibition in § III.G.1 on exclusive deals. *See* Richards P 198. The relevant portion of Microsoft's proposed remedy provides that "this section does not apply to any agreements in which Microsoft licenses intellectual property in [sic] from a third party." SRPFJ § III.G. Although he did not criticize the general principle that Microsoft should be permitted to include an exclusivity provision in conjunction with the license of intellectual property, Mr. Richards, observing that "many software deals involve the licensing of intellectual property as a matter of course," testified that Microsoft could utilize this exception to "legitimize any deal in which intellectual property is licensed by Microsoft from a third party, even if it is a very small or incidental part of the overall transaction." Richards P 198.

The proviso in the latter part of § III.G ensures **[**428]** that Microsoft is not discouraged from licensing third-party software, which is conduct that is beneficial to competition. However, Mr. Richards makes a salient point that, as written, § III.G may be readily circumvented by the gratuitous inclusion of a license of third-party intellectual property in an agreement so as to avoid the restrictions that § III.G would otherwise impose. Microsoft does not proffer any testimony which explains the necessity of such a broadly drawn exception in § III.G. As Mr. Richards testified, the exception can be narrowed so as to prevent Microsoft from evading the restrictions imposed by the earlier portion of the provision.

As the Court concluded with regard to agreements that limit competition, discussed above, a prohibition on agreements containing a term of exclusivity will benefit competition, provided that such a prohibition addresses only those agreements with an actual effect of exclusivity. Moreover, there are undoubtedly instances where a **[*225]** joint development agreement or license of intellectual property is appropriately accompanied by a term of exclusivity. Such exclusive terms are often the norm in the industry and have not been shown to have **[**429]** a detrimental effect upon competition. Accordingly, the Court finds that such agreements should be preserved, and even encouraged.

2. Internet Access Providers ("IAPs")

In the case of IAPs, the appellate court condemned Microsoft's contracts which extracted from IAPs a promise of exclusivity-meaning a promise to refrain from and/or sharply limit promotion or distribution of a non-Microsoft browser, in exchange for prominent placement of the IAP's product in the configuration of Microsoft's Windows operating system. *Microsoft, 253 F.3d at 68-71*. To remedy this finding, in general terms, the parties propose similar injunctive provisions specifically aimed at Microsoft's use of valuable placement on the desktop in conjunction with exclusionary contracts. Plaintiffs offer § 6.e of their remedy proposal, which provides that Microsoft may not enter into agreements "in which another party . . . [is] granted consideration to[,] . . . in the case of an agreement with an IAP or ICP, distribute, promote, or use a Microsoft product, service, feature or technology in exchange for placement with respect to any aspect of a Microsoft Platform Product." SPR § 6.e. **[**430]** Microsoft's remedy proposal suggests language which prohibits Microsoft from entering into any agreement with "any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware." SRPFJ § III.G.2.

Because of the broad definitions used in Plaintiffs' proposed remedy, § 6.e is not limited to the placement of icons and the like within the Windows operating system products, but concerns placement in virtually any Microsoft software product. *See* SPR § 6.e; Gates P 352. As a result, contends Microsoft, "Section 6.e would make it much harder for IAPs and ICPs to obtain promotional opportunities in a wide range of Microsoft software products." Gates P 352. Again, Plaintiffs' economist, Dr. Shapiro acknowledged the unnecessary breadth of § 6 and its inclusion of products and markets unrelated to the liability in this case. Tr. at 3655-59 (Shapiro). Based on this fact, Dr. Shapiro conceded that § 6 did not comport with his expert view of the principles which should guide the crafting of a remedy **[**431]** in this case. *Id.* Notably too, § 6.e of Plaintiffs' remedy proposal does not contain any reference to exclusivity or other forms of limiting competition. SPR § 6.e. Instead, the provision simply identifies a particular form of consideration-placement on the desktop-with which Microsoft may not trade. Plaintiffs have not offered sufficient evidence to justify the breadth of this particular provision in their remedy proposal.

As noted above, § III.G.2 of the Microsoft's remedy proposal addresses Microsoft's use of placement on the desktop in conjunction with exclusionary agreements. Like the pertinent portion of Plaintiffs' proposal, Microsoft's proposed remedy extends beyond agreements with IAPs and includes agreements with ICPs as well. Unlike Plaintiffs' proposal, however, § III.G.2 of Microsoft's remedy proposal prohibits the use of placement on the desktop as consideration only in agreements in which the IAP or ICP promises not to promote, distribute, or use software which **[*226]** competes with "Microsoft Middleware." SRPFJ § III.G.2. In this regard, the provision does not completely prohibit Microsoft from offering placement in a Windows product as consideration, but focuses **[**432]** instead upon those agreements which were found to have a substantial anticompetitive effect. [110] In short, § III.G.2 appropriately addresses the finding of liability against Microsoft for entering into exclusive agreements with IAPs regarding the placement of icons on the desktop, but the provision does not unnecessarily curtail legitimate competitive behavior.

[433] VI. DISCLOSURE OF APIs AND COMMUNICATIONS PROTOCOLS**

Both proposed remedies include provisions mandating that Microsoft disclose certain technical information for purposes of enabling interoperation. The term or concept of "interoperation" can apply both to the exchange of information and/or services between two different devices, as well as to the exchange of information and/or services between two different software programs running on the same device. Neither side maintains that the interoperability disclosures which appear in the two competing proposals are directly related to the imposition of liability. Rather, the disclosure provisions are aimed at the broader goals of unfettering the market and restoring competition.

A. Plaintiffs' Disclosure Proposal

Plaintiffs' interoperability-related provision is substantially more broad in scope than the comparable portions of Microsoft's proposed remedy. *Compare* SPR § 4, *with* SRPFJ § III.D-E. Plaintiffs' proposed remedy mandates the disclosure of "all APIs, Technical Information and Communication Interfaces" used by Microsoft to enable interoperation between any Microsoft application and Microsoft **[**434]** Platform Software on the same personal computer; each Microsoft Middleware Product and Microsoft Platform Software on the same personal computer; and each Microsoft software program installed on any type of computing device, including personal computers, servers, handheld devices, and set-top boxes, and the Microsoft Platform Software installed on any of these devices. SPR § 4. Most notable from even a cursory review of § 4 of Plaintiffs' proposed remedy is the fact that it mandates disclosures relating to interoperation between software which is not part of the Windows operating system and a number of non-PC devices. *See* Gates P 296; Madnick PP 148-49, 151. This Court addressed, as a preliminary matter, the relevance of these non-PC devices to the instant proceeding and concluded that, with one significant exception, these non-PC devices bear little relevance to the instant proceeding and, therefore, will not be addressed in the remedy. *See* Memorandum Opinion, Parts III.B.3, III.C. Nevertheless, the Court examines the

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[110] Mr. Richards, of RealNetworks, asserts that § III.G.2 of Microsoft's proposed remedy is flawed because it does not extend its terms to software developers. Richards P 210. Mr. Richards argues that the provision would not stop Microsoft from offering an ISV placement on Windows for the ISV's software on the condition that it refrain from promoting middleware that competes with a Microsoft offering. *Id.* Mr. Richard's criticism, though technically accurate, ignores the fact that such agreements, because they condition consideration on refraining from supporting a competing product, would be prohibited pursuant to § III.F.2 of Microsoft's proposed remedy. *See infra* Part V.A; Tr. at 6753-54 (Elzinga).

impact of any portions of § 4 of Plaintiffs' proposed remedy **[*227]** which survive the Court's preliminary determination as to the scope of the remedy.

As the Court **[**435]** observed earlier, the definition in Plaintiffs' proposed remedy of "Microsoft Middleware Product" appears to include almost every Microsoft software product, without regard to the relationship of such software to Microsoft's PC operating system. *See* SPR §§ 4; 22.x; *see also* Memorandum Opinion, Part III.B.2.b. Plaintiffs incorporate the definition of "Microsoft Middleware Product" into the definition of "Microsoft Platform Software." SPR § 22.y. As a result, the requirement in § 4 of Plaintiffs' remedy proposal that Microsoft document and disclose the technical information that enables interoperation between a "Microsoft Middleware Product" and "Microsoft Platform Software" effectively requires Microsoft to document and disclose information relating to the exchange of services between virtually *any* two pieces of Microsoft software which run on a PC. Gates P 296; Madnick PP 148-49, 151. Addressing only this aspect of § 4 of Plaintiffs' proposed remedy, the breadth of the definition in Plaintiffs' proposal would require Microsoft to disclose vast amounts of its intellectual property across product lines unrelated to the relevant market in this case. *See* Gates PP 281, **[**436]** 294-302; Madnick P 152.

The breadth of these disclosures is reinforced, and expanded, if possible, by Plaintiffs' definition of "interoperate." Section 22.q of Plaintiffs' proposed remedy defines "interoperate" to mean "the ability of two products to effectively access, utilize, and/or support the full features and functionality of one another." SPR § 22.q. As this Court found in the attached Memorandum Opinion, Part III.B.3.a, the term "interoperate" is understood generally as the ability to exchange information and to use the information that has been exchanged. *See* Ledbetter P 65; Madnick P 46. Implicit in the term, as it is commonly used in the industry, is the concept that interoperability encompasses a continuum, rather than an absolute standard. *See* Madnick P 46, Tr. at 7108-09 (Bennett); Tr. at 5782-83 (Madnick); Tr. at 5477 (Short); *see also* Ledbetter PP 65-66; Tiemann P 179. Plaintiffs' definition of "interoperate" describes an aspiration of perfect interoperation, *see* Tr. at 5480-83 (Short), which does not exist in most contexts, particularly in a heterogeneous context. *See* Madnick PP 86-89.

The concept evoked by Plaintiffs' definition of "interoperate" **[**437]** equates interoperability with "interchangeability." Madnick P 86; *see also* Gates P 305; Tr. at 3229 (Appel) ("The disclosure [in § 4] would be helpful in making things that are . . . functional substitutes for the Microsoft platform software."); Tr. at 7111-12 (Bennett) ("Well, if you read, it says: Effectively, access, utilize and/or support the full features and functionality of one another. That, to me, taken in its entirety, which is the only way I can consider this definition, means the ability to clone."); Tr. at 2930-31 (Schwartz) ("I believe that [the definition of 'interoperate' and its use in Plaintiffs' remedy proposal] is designed to enable the creation of substitutes."). The definition of "interoperate" in Plaintiffs' remedy proposal serves to further Plaintiffs' apparent goal of enabling "drop-in" or "plug-in" replacements for Microsoft's products, or portions thereof. Madnick P 86; *see also* Tr. at 3229-31, 3168-75 (Appel); Tr. at 2930-31 (Schwartz). Pursuant to Plaintiffs' definition of "interoperate," a Windows client would not be "interoperable" with a non-Microsoft server unless Microsoft's competitors have the information necessary to ensure that their **[**438]** server operating systems can provide Windows **[*228]** clients with every service that a Microsoft server operating system provides. Madnick P 86; *see also* Gates P 305. If the definition of "interoperate" includes the ability to use all of the features that are in a Microsoft system on a third party's system that has not yet implemented those features, the expectation would be that Microsoft has to provide sufficient information to enable the third party to develop in its own product an implementation of the features in the Microsoft system. Tr. at 5483 (Short); *see also* Tr. at 3229-31 (Appel); Tr. at 2930-31 (Schwartz).

This kind of "interchangeability" exceeds the normal industry usage of the term "interoperate." *See* Madnick PP 86-90. The presently existing lack of interchangeability of products reflects "a host of technical and business factors on both the vendor-and customer-side of the equation." *Id. P 91*. From a technical perspective, the fact that there are many different ways to accomplish any given task means quite basically that different vendors will often accomplish the same task, however complex, in a different manner, such that the differing solutions **[**439]** are not typically interchangeable. *Id. P 92*. From a business perspective, there is an incentive to develop a product with features that are distinct from other products, such that the new features appeal to consumers and generate sales. *Id. P 93*. In addition, differences in consumer demand often lead to the creation and success of a product with strengths and weaknesses different from those of another product. *Id. PP 93-94*. Uniformity in features among the products of various firms and complete interchangeability defeat these aspects of competition. *Id.*

If implemented, the consequences of § 4 would be substantial and far reaching, such that the disclosures required under § 4 would enable the cloning of Windows. Gates PP 285, 289; Tr. at 6027-28 (Madnick). A "clone" is a piece of software that replicates the functions of another piece of software, even if that replication is accomplished by something other than the literal repetition of the same source or binary code. Madnick P 160. "Clone" is not necessarily a technical term, but it can be described as action which makes one piece of software function identically to, or fully **[**440]** replicate, another piece of software without copying the precise code to enable that function. Madnick PP 33, 160. Cloning is typically accomplished through reverse engineering, meaning studying the functionality of the other products and attempting to produce products that have similar functionality. Tr. at 6027 (Madnick).

The most obvious negative consequence of a provision which facilitates the cloning of Microsoft's technology is that it reduces Microsoft's incentive to innovate. Plaintiffs' own economic expert, Dr. Shapiro, acknowledged that the mandated release of technology can have the undesirable side effect of reducing the monopolist's return on innovation. Shapiro P 92. Dr. Shapiro went on to say that he did not think that the remedy imposed in this case should enable the cloning of Microsoft's technology. Tr. at 3321 (Shapiro). However, Microsoft presents ample testimony illustrating that the mandatory disclosures in § 4 of Plaintiffs' proposed remedy will have precisely that undesirable effect.

Microsoft's intellectual property is one of its primary assets. *See* Elzinga P 104; Gates PP 124-25; Murphy P 221; *see also* Tr. at 3329 (Shapiro). Microsoft does not appear **[**441]** to have substantial assets in the form of factories or natural resources, traditional revenue drivers of "old economy" firms, *Microsoft, 253 F.3d at 49*. In fact, Mr. Gates testified that Microsoft does not have *any* physical assets which he considers **[*229]** to be "important" to the success of the company. Gates P 124. Instead, Microsoft's products consist almost entirely of information Microsoft creates-"primarily instructions to microprocessors on how to perform various functions." *Id.* Absent protection for intellectual property, there exists little reason to invest in developing software. Gates P 126; *see also* Frei P 24; Ulmer P 21.

Enabling cloning is a windfall for competitors. *See* Elzinga P 85-86; Tr. at 3478 (Shapiro). Even absent literal copying of software code, software innovations developed by one firm can be implemented by competitors writing their own code. [111] Gates P 127. The more information one firm has about a competitor's product, the easier it is to replicate the key features and other innovations of the product. *Id.*; *see also* Bennett P 117. The broad API disclosures required by § 4 would likely provide other software companies **[**442]** with the equivalent of the blueprints not only to the Windows operating system for PCs, but also to the server version of Windows. Gates P 289; *see also* Tr. at 3168-75 (Appel). Once provided with the equivalent of the blueprints for Windows, competitors would have little trouble, and comparatively less cost, writing their own implementation of everything valuable in Windows, including the capabilities it provides to developers via APIs. Gates PP 289-90; Tr. at 3168-75 (Appel).

In the software industry, some information about competitors' products is available and other information is protected by intellectual property laws. The mandated disclosures in § 4 of Plaintiffs' proposed remedy (and the **[**443]** related enabling provisions) would enable Microsoft's competitors to clone many features without violating intellectual property laws. *See* Elzinga P 86. Competitors could thus develop products that implement Microsoft's Windows technology at a far lower cost since they would have access to all of Microsoft's research and development investment. Gates PP 124-27, 289-90. Moreover, technological advancement would be largely simplified for Microsoft's competitors because it is comparatively easier to mimic all the functionality rather than to create something new. Gates PP 289-90. In this light, § 4 of Plaintiffs' proposed remedy is exposed as an intellectual property "grab" by Microsoft's competitors. Elzinga P 85. Such a "grab" has been shown to assist

[111] Plaintiffs' computer science expert, Dr. Appel, coyly avoids the cloning issue by utilizing the term "copy" in his testimony. Appel PP 99-100. As a "clone," meaning a replicate functionality, can be created in the absence of literal copying, Dr. Appel's selective word choice serves only to obscure the issue.

competitors by relieving them of the costly burden of reverse engineering and new innovation, far more than has been shown to advance competition.

Plaintiffs' economic expert, Dr. Shapiro, acknowledged that Microsoft has a legitimate interest in protecting against a technology grab and that such an interest should be protected. Tr. at 3315 (Shapiro). Although Dr. Shapiro, in his direct testimony, endorsed the notion of API and communications **[**444]** protocol disclosures because such disclosures would assist the performance of networks with non-Windows servers and Windows clients and would facilitate the platform capabilities of cross-platform middleware and server operating systems, *see* Shapiro PP 145-51, 184, he did so without any real understanding of what § 4 of Plaintiffs' remedy proposal would entail in practice, Tr. at 3314-15 (Shapiro). Dr. Shapiro acknowledged Microsoft's "interest" in protecting **[*230]** against the "misappropriation" of its technical information and conceded a complete inability to understand the effect of § 4 of Plaintiffs' remedy upon that "interest." *Id.* at 3315. Indeed, seeming somewhat aware of the significant ambiguities in Plaintiffs' remedy proposal, Dr. Shapiro envisioned a kind of ongoing negotiation between the parties regarding the implementation of § 4 of Plaintiffs' proposed remedy in practice. *Id.* at 3317-18. Further, Dr. Shapiro viewed § 4 as a mere extension of the type of disclosures already made by Microsoft as part of its usual course of business, Shapiro PP 147-48, and could not envision or understand the depth of change which would be required by the extremely broad disclosures **[**445]** required by § 4 of Plaintiffs' remedy proposal, Tr. at 3314-15 (Shapiro). This lack of understanding rendered Dr. Shapiro wholly unable to value the quantum of intellectual property which Microsoft would be required to relinquish as a result of § 4 of Plaintiffs' remedy proposal. Tr. at 3320-22 (Shapiro). Dr. Shapiro's lack of economic analysis of § 4 renders uncontroverted the analyses of Drs. Elzinga and Murphy, who concluded that § 4 of Plaintiffs' remedy proposal works an expropriation of substantial amounts of Microsoft's intellectual property which is harmful to both consumers and competition. Elzinga P 113; Murphy PP 219-21; Tr. at 4028, 4059-60 (Murphy).

Beyond the clearly negative economic consequences of § 4, the disclosures mandated by § 4 of Plaintiffs' proposed remedy will have significant negative effects on Microsoft's technology. There is no dispute that it is presently Microsoft's practice to publish APIs after they have been tested and where they have broad applicability. *See* Shapiro P 148; *see also* Borduin PP 35-37; Frei P 19; Gates P 99; Hofstader P 58; Short P 27. Likewise there is little dispute that Microsoft chooses not to publish APIs where the **[**446]** interfaces are unstable. *See* Shapiro P 148. Reliance upon such interfaces has the potential to cause third-party software not to work or Windows to crash. Frei P 25; Gates P 323; Hofstader P 59; Madnick P 153. It is a well-understood rule in the industry that once an API is published, the software developer publishing the interface guarantees a certain result when it is called with certain parameters such that it cannot be substantially altered without effectively "breaking" applications which rely on the API. *See* Short P 8; *see also* Bennett PP 92-93; Madnick P 153; Tr. at 4214-15 (Borduin); Tr. at 174-76 (Green).

Because of this rule, not every interface in a particular software product is "published." Instead, it is common to implement two versions of an interface, a private interface for "trusted" software components, meaning the components that are known to behave in a particular manner, and a public interface for "untrusted" components that are not presumed to be so well behaved. Bennett P 91. In this model, trusted components are typically other parts of the operating system, while untrusted components are more likely third-party programs, such as applications, written **[**447]** to call upon operating system services. *Id. PP 91-92*. One of Microsoft's computer science experts, Dr. John Bennett, explained in this framework:

> System calls that directly access critical operating system components would typically be part of the private interface; system calls that indirectly access critical operating system components in a restricted manner would typically be part of the public interface. One of the advantages of this approach to software development is that the internal details **[*231]** of data representation are hidden from the user of that data representation. The operating system developer is free to make changes to this internal data representation as long as the external interfaces relied upon by third parties are preserved. There is also an advantage to having information about the private interface be closely held. If the number of modules using the private interface is small, it is easier to make changes in the private interface in order to improve system performance or reliability, or to add new functionality.

Once published, it is difficult to change the public interface used to access operating system services. This is because programmers who have **[**448]** written code that relies on that public interface expect it not to change. Significant changes to the public interface may even necessitate a complete rewriting of the original application program, a costly and time-consuming undertaking.

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[New York v. Microsoft Corp.](#)

United States District Court for the District of Columbia

November 1, 2002, Decided

Civil Action No. 98-1233 (CKK)

Reporter

224 F. Supp. 2d 76 *; 2002 U.S. Dist. LEXIS 21185 **; 2002-2 Trade Cas. (CCH) P73,853; 2002-2 Trade Cas. (CCH) P73,854

STATE OF NEW YORK, et al., Plaintiffs v. MICROSOFT CORPORATION, Defendant.

Notice: [EDITOR'S NOTE: PART 3 OF 3. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

Subsequent History: Judgment entered by *New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 22862 (D.D.C., Nov. 6, 2002)*

Affirmed by *Massachusetts v. Microsoft Corp., 373 F.3d 1199, 362 U.S. App. D.C. 152, 2004 U.S. App. LEXIS 13489 (2004)*

Modified by *New York v. Microsoft Corp., 2006 U.S. Dist. LEXIS 95072 (D.D.C., Sept. 21, 2006)*

Prior History: New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 21125 (D.D.C., Nov. 1, 2002)
United States v. Microsoft Corp., 253 F.3d 34, 346 U.S. App. D.C. 330, 2001 U.S. App. LEXIS 14324 (2001)

Core Terms

Windows, operating system, Middleware, software, functionality, license, products, non-Microsoft, interoperation, technology, platform, compliance, witnesses, disclosures, distributed, protocols, interface, Communications, developers, provisions, Documentation, consumers, removal, intellectual property, server, Embedded, enabling, economic expert, terms, promoting

Judges: COLLEEN KOLLAR-KOTELLY, United States District Judge.

Opinion

[448] [*231]**

Bennett PP 92-93; *see also* Jones P 108. The computer science experts that testified in this case universally agree that the broad disclosure of purely unpublished, or "internal," interfaces is a dangerous undertaking because of the potential to destabilize applications and the operating system. *See* Bennett PP 93-94; Madnick P 153; Tr. at 3179-80 (Appel). Furthermore, the broad disclosure of internal interfaces eliminates the operating system designer's ability to alter the interface, which in turn will impede product flexibility and innovation. *See* Madnick P 153. Lastly, a number of witnesses agreed that the broad disclosure of internal interfaces, as enforced by examination of Microsoft's source code, SPR § 4.c, could pose a substantial threat to the security and stability of Microsoft's software. Allchin P 39; Bennett PP 100, 139-40; Gates P 326; Tr. at 4639-43 (Gates); *see also* Tr. at 1555-56 (Ledbetter).

Microsoft **[**449]** is not unusual in that it maintains internal interfaces, Tr. at 1555-56 (Ledbetter), nor is the number of such undisclosed interfaces unusual. Madnick P 153. Section 4 of Plaintiffs' proposed remedy would mandate that the documentation and disclosure of a vast number of Windows' internal interfaces. [112] Bennett P 96; Gates P 323; Madnick P 152. The Court heard extensive technical testimony detailing why such a result is highly undesirable. Moreover, the lone economist to endorse § 4 of Plaintiffs' proposal did so pursuant to the misconception that the provision would "not require Microsoft to publish unstable, internal APIs." Shapiro P 148. Given this evidence, the Court finds that the broad disclosures, including the disclosure of internal interfaces, advanced by Plaintiffs pose a risk of substantial harm not only to Microsoft, but to other participants in the industry, as well as to consumers.

[450]** Having concluded that there are substantial, negative consequences which are likely to result from the broad disclosures required pursuant to § 4 of Plaintiffs' remedy proposal, the Court turns its attention to whether the justification proffered for requiring such disclosures as part of a remedy in this case outweighs this harm. Plaintiffs' economic expert advances the "parity principle" as the economic rationale underlying the disclosures. Shapiro P 122. The parity principle posits that information should be shared to ensure that **[*232]** a non-Microsoft product interoperates with Windows as effectively as does a Microsoft product. *See id.* PP 122, 139. "Applying the parity principle," argues Dr. Shapiro, "will clearly improve the performance of non-Microsoft middleware, to the benefit of consumers and, thus, make it easier for innovative middleware to lower the applications barrier to entry." *Id.* P 146.

The "parity principle" advocated by Dr. Shapiro is borrowed from the telecommunications context. Tr. at 3680 (Shapiro). In that context, for example where "there has historically been a monopolist controlling local telephone service," pursuant to the "parity principle," long distance **[**451]** carriers are ensured equal access to "whatever services" the local carrier provides to its own "long distance arm." *Id.* Dr. Shapiro noted that the "parity principle" in the telecommunications context applied as part of a regulatory scheme, rather than a context of "pure antitrust." *Id.* at 3681. Although Dr. Shapiro borrowed his guiding economic principle from another field, he offered little testimony to explain why such borrowing was appropriate. Dr. Shapiro's explanation provided, in full, that "here in a remedy phase we are putting in some rules that are not completely dissimilar to regulatory rules." *Id.* at 3681.

Despite his certainty that application of the "parity principle" is appropriate in this case, Dr. Shapiro was unable to assess the "competitive effects and consumer welfare effects, to understand exactly what the operation of [the 'parity principle'] in practice is going to mean, not just for Microsoft, but for Microsoft's customers, for Microsoft's competitors, and for the marketplace as a whole." Tr. at 3315 (Shapiro). This uncertainty exists despite Dr. Shapiro's own acknowledgment that the "remedy ultimately should be judged based on its impact on consumers. **[**452]** " Shapiro P 49.

Defendant's economic expert, Dr. Elzinga, disputed that the "parity principle" is an appropriate guide to the parameters of a remedy in this case. Elzinga PP 50-52; Tr. at 6868 (Elzinga). Dr. Elzinga took the view that the principles applicable in the field of public utility regulation were unlikely to be particularly appropriate for application to the software industry, which presents its own unique dynamics. Tr. at 6868 (Elzinga). Dr. Elzinga expressed concern that adherence to the "parity principle" would result in a massive regulatory regime. *Id.* Such a regime threatens to place the judiciary in a role for which it is not well-suited. *United States v. Paramount Pictures, 334 U.S. 131, 163, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)* (noting that a remedy which "involves the judiciary in the administration of intricate and detailed rules" is undesirable because "the judiciary is unsuited to affairs of business management . . . .").

Given the testimony of all of the economic experts, the Court cannot conclude that the parity principle is appropriately applicable to this case. Most troubling is the lack of explanation for why a principle which has been applied in the field of telecommunications **[**453]** is appropriate for consideration in the software market, which is more often noted for its unusual features than for its similarity to other markets. Compounding this concern is Dr.

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[112] The disclosure provisions in Microsoft's remedy proposal, § III.D, would result in the documentation disclosure of some interfaces which are presently "internal" or undisclosed but plainly this disclosure would not be of a quantum comparable to that associated with Plaintiffs' remedy proposal. *See* Jones P 107.

Shapiro's inability to foresee the precise manner in which the principle would operate. In at least one regard, the disclosure of APIs, for example, Dr. Shapiro's assumption that disclosures made pursuant to the "parity principle" would not require Microsoft to disclose internal interfaces has been shown to be erroneous. Given these concerns, the Court cannot subscribe to the "parity **[*233]** principle" as the appropriate guide for a remedy in this case.

Aside from the now-rejected "parity principle," Plaintiffs have not offered any other justification for the creation of a market wherein Microsoft's technologies, or portions thereof, can be cloned by competitors so as to enable the ready substitution of these cloned technologies for the Microsoft technologies. Jonathan Schwartz, Chief Strategy Officer for Sun Microsystems, Inc. ("Sun"), Schwartz P 1, testified that Sun adheres to a business model wherein competing companies produce multiple implementations of a standard set of Sun APIs. Tr. at 2931 (Schwartz). **[**454]** Mr. Schwartz testified that the disclosures required by § 4 of Plaintiffs remedy proposal were intended to implement just such a model for Microsoft's APIs. *Id.* Similarly, Dr. Appel testified that the purpose of enabling the creation of functional substitutes is to permit the sale of "platform software to a user who might have otherwise bought the Microsoft platform software," because the functional substitute "could run the set of applications that the end-user wants to run." Tr. at 3229 (Appel). Neither witness, however, nor any witness with economic expertise, testified that there exists any economic justification for enabling the creation of functional substitutes (clones) of Microsoft's technology. Indeed, Plaintiffs' own economic expert, Dr. Shapiro, expressly rejected the creation of functional substitutes as an appropriate goal for the remedy in this case:

> I would not favor remedies in this case permitting rival operating systems to clone Windows or to copy the Windows source code. . . . My refusal to support such remedies . . . flows from my view that permitting the cloning of Windows would go beyond "restoring competition" in the monopolized market.

Shapiro **[**455]** P 87 (footnote omitted). In sum, Plaintiffs have not established that the creation of functional substitutes of Microsoft technology in a variety of product markets, as implemented through § 4 of Plaintiffs remedy proposal will enhance competition in the monopolized market in any way.

B. Microsoft's Disclosure Proposals

Microsoft's proposed interoperability disclosures are two-fold. Section III.D of Microsoft's remedy proposal requires Microsoft to make disclosures of "APIs and related Documentation that are used by Microsoft Middleware" which are to be used "for the sole purpose of interoperating with a Windows Operating System Product." SRPFJ § III.D. Section III.E of Microsoft's remedy proposal mandates that Microsoft disclose "for the sole purpose of interoperating or communicating with a Windows Operating System Product . . . any Communications Protocol that is . . . (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (*i.e.,* without the addition of software code to the client operating system product) with a Microsoft server operating system product." SRPFJ § III.E.

[456]** "Communications protocols," as that term is used in the computing industry, refers to the rules for the transmission of information between different systems or devices. *See* Appel P 54; *see also id.* P 55; Gates P 101; Ledbetter P 31; Tr. at 170 (Green); Tr. at 5498 (Short). A protocol can be comprised of several layers, with the lower layers providing simple, low-level, basic services, and the upper layers repackaging the lower-layer services into higher-level, more complex and detailed services. Appel P 54. By using communications protocols supported in Windows, or other communications protocols that developers **[*234]** can add to Windows, via the installation of software, information can be exchanged between Windows-based PCs and computers running other operating systems. Gates P 102.

"Native" communication is one of at least five basic approaches to achieving interoperability between Windows client operating systems and non-Microsoft server operating systems. Short P 35. Native means without the addition of software code to the client. Tr. at 975, 1146 (Tiemann); *see also* Short PP 36-38. Hence, where communication between a Windows client and a particular server is native, **[**457]** there is no additional software code running on Windows which is necessary to the communication. Likewise, where a particular communications protocol is "supported natively," the implication is that the device can communicate or interoperate with another device using that protocol without the addition of software to assist in the communication.

Despite Microsoft's inclusion of §§ III.D and III.E in its remedy proposal, Microsoft presented the testimony of Dr. Elzinga that the inclusion of the provisions merely reflects the "give-and-take" of Microsoft's settlement with the United States in *United States v. Microsoft*, No. 98-1232 (D.D.C.). Elzinga P 138. In contrast to this "party line," however, Dr. Elzinga acknowledged that the provisions in Microsoft's remedy which concern interoperation are "designed to look forward to restore a middleware threat" to Microsoft's PC operating system dominance and "to ensure a level of interoperability between clients and servers that would . . . restore, promote, enable that threat to be effectuated in the marketplace, but . . . without requiring Microsoft to give up all of its intellectual property." Tr. at 6873 (Elzinga).

Beyond their general **[**458]** complaints that Microsoft's proposed remedy does not accomplish the cloning enabled by Plaintiffs' remedy proposal, Plaintiffs' witnesses criticized § III.E of Microsoft's proposed remedy more specifically based upon the view that the disclosures which are required by Microsoft's proposed remedy are unjustifiably limited to *native* communication with a Microsoft server operating system product. *See, e.g.*, Schwartz P 165; Tiemann P 184. As the Court recounted above, "native" communication, means communication that is accomplished without the addition of software code to the client. In other words, where Windows provides "native" support for a particular communications protocol, no additional software must be added to the operating system in order to enable interoperation between the Windows client and the server. *See* Tr. at 1146 (Tiemann). Mr. Tiemann testified that he is aware of only limited instances where Windows communicates natively with a server. Tiemann P 184*.* Of course, where the communication is not "native" it does not exclusively involve a Windows client and a Microsoft server, but incorporates another software product that is added to run on "top" of Windows. **[**459]** *See, e.g.*, Tr. at 1155-56 (Tiemann) (discussing communication between Microsoft's "Outlook" software product installed on a Windows client and a "Microsoft Exchange Server").

Underlying the disclosure of technology which enables interoperation in a network context is the theory that the alternative platform provided by a non-Microsoft server operating system will not develop into a platform threat if it is unable to interoperate well with Windows clients. *See* Shapiro P 144 (treating server operating systems as "middleware"). Because Microsoft can ensure successful interoperation between Windows clients and its own server operating systems, the disclosure of the protocols used for such interoperation **[*235]** will enable similarly successful interoperation between Windows clients and non-Microsoft server operating systems. *Id. P 145*. However, where software code is added to Windows to achieve interoperation with Windows servers, the means of interoperation no longer involves the capabilities of the monopoly product-the PC operating system, but instead involves some other software product which runs on Windows, but is not part of Windows itself. In this light, the limitation to "native" **[**460]** interoperation in § III.E appears to flow directly from a recognition of the fact that Microsoft's anticompetitive behavior in this case is tied to its monopoly in a carefully defined market, rather than to some more general dominance in the broader software industry.

Finally, Plaintiffs' witnesses were critical of Microsoft's proposed disclosure provisions because the Microsoft remedy proposal does not define "interoperate." *See, e.g.*, Barksdale P 133; Pearson P 67; Richards P 91; Tiemann P 179. The concerns raised in this context derive from the fact that interoperation generally encompasses a continuum. *See* Memorandum Opinion, Part III.B.3.a. As Mr. Barksdale testified, for example, there is a concern that Microsoft will not recognize all portions of the continuum in determining what information to disclose pursuant to § III.D and E. *See* Barksdale P 133. With regard to § III.D of Microsoft's proposal, the term "interoperate" is used to circumscribe the appropriate use for which the technical information must be disclosed, and therefore, the term is not central to Microsoft's understanding of its obligations under that provision. SRPFJ § III.D; Tr. at 6128 (Poole). **[**461]** The obligations imposed by § III.D are determined by the definition of "API," which is provided in Microsoft's remedy proposal. SRPFJ § III.D; Tr. at 6128 (Poole). With regard to § III.E, Microsoft's proposal includes a concise definition of "interoperate" in its text, stating that Microsoft shall make available communications protocols used to "interoperate, or communicate," with a Microsoft server operating system product. SRPFJ § III.E. This use of a basic definition incorporates the continuum of what is reasonably understood in the industry to constitute "interoperation." *See* Tr. at 7110 (Bennett). This continuum, of course, stops short of requiring the type of perfect interchangeability connoted by Plaintiffs' definition of "interoperate." See Madnick PP 86, 88. Based on the foregoing, the Court finds the criticism of the absence of a definition of the term "interoperate" in Microsoft's remedy proposal to be without merit. [113]

[462] [*236] VII. ENABLING LICENSES**

Both remedy proposals contain provisions which address the issue of licenses and appropriate royalties for the use of intellectual property released pursuant to the dictates of the remedy in this case. Not surprisingly, however, the two proposals are polar opposites in the way they resolve the issue. Pursuant to § 15 of Plaintiffs' remedy proposal, "all intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives provided" under the Final Judgment are to be licensed on a royalty-free basis. SPR § 15. In contrast, § III.I of Microsoft's remedy proposal requires that the intellectual property rights "required to exercise any of the options or alternatives expressly provided to them" under the Final Judgment must be licensed pursuant to "reasonable and non-discriminatory" terms. SRPFJ § III.I. Therefore, § III.I leaves open the possibility that Microsoft may charge a "reasonable and non-discriminatory" royalty for such licenses. *Id.* Both proposed provisions can be viewed as "enabling provisions" in that they serve to ensure that the other provisions in the remedy function as expected. **[**463]** *See* Tr. at 3292-93 (Shapiro).

It is undisputed that one of Microsoft's primary assets, probably its primary asset, is its intellectual property. Elzinga P 104; Tr. at 3329 (Shapiro). Indeed, as noted earlier, Mr. Gates testified that Microsoft does not have *any* physical assets which he considers "important" to the success of the company. Gates P 124. Royalty-free licensing would divest Microsoft of intellectual property assets without the provision of compensation to Microsoft. Elzinga P 104. Plaintiffs' economic expert, Dr. Shapiro concedes that any forced divestiture of assets is a structural remedy. Tr. at 3328-29 (Shapiro); *see also Elzinga* P 104. Section 15 is an unusual structural remedy in that it does not provide Microsoft with *any* compensation for its forced relinquishment of assets. *See* Elzinga P 104.

In his direct testimony, Dr. Shapiro did not offer an opinion with regard to § 15 of Plaintiffs' remedy. Tr. at 3292-93 (Shapiro). When asked, Dr. Shapiro indicated that he viewed § 15 of Plaintiffs' proposed remedy as an "important enabling provision" which "did not have a life of its own." *Id.* at 3293. Dr. Shapiro explained that the provision

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[113] The vast majority of Plaintiffs' criticisms of § 4 are rendered irrelevant by the Court's ruling regarding the scope of the remedy, *see* Memorandum Opinion, Part III.B-C. Plaintiffs offer one additional, very narrow criticism of § III.D of Microsoft's proposed remedy, however, which is not addressed by the Court's rulings on the issue of the scope of the remedy. This criticism rests upon the assertion that, at present, Microsoft will not be required to make disclosures of APIs relied upon by the most recent version of the Windows Media Player, which was included with Windows XP. Richards P 87. This criticism arises from the fact that, despite its inclusion in Microsoft's most recent version of the Windows operating system, Windows Media Player XP (also known as Windows Media Player 8.0) has not been distributed separately from Windows. As a result of the definition of "Microsoft Middleware," *see* Memorandum Opinion, Part III.B.2.a.iv, complain Plaintiffs, the APIs which permit "Windows Media Player" to interact with other portions of Windows do not fall within the API disclosure requirements in Microsoft's proposed remedy.

In the Court's view, this criticism overstates the issue. The fact that Microsoft has not yet distributed Windows Media Player XP separately from Windows XP will not excuse Microsoft from providing API disclosures with regard to the APIs used by the separately distributed code from Windows Media Player 7.0 to interact with Windows 2000 Professional. As a factual matter, Windows Media Player XP uses essentially the same interfaces to interoperate with Windows XP that Windows Media Player 7.0 uses to interoperate with Windows 2000 Professional. Poole P 75. Microsoft is already in the process of identifying those interfaces for disclosure. *Id.* Microsoft's Vice President of Media Platforms, Will Poole, *id.* P 1, testified that Microsoft will "distribute the next major version of [Windows Media Player], code-named the 'Corona player,' separately from the rest of the Windows operating system." *Id.* P 76. The "Corona player," which will be called Windows Media Player 9.0, is the successor to both Windows Media Player 7.0 and Windows Media Player XP. *Id.* Mr. Poole testified that the commercial release of Windows Media Player 9.0 will occur during the second half of this year. *Id.* By virtue of its separate distribution, the APIs relied upon by Windows Media Player 9.0 to interact with Windows would have to be disclosed pursuant to § III.D. *Id.* P 77. Based upon this testimony, there appears to be little, if any, impact flowing from the fact that Windows Media Player XP has not been distributed separately from Windows XP.

existed **[**464]** so as to prevent Microsoft from having "the ability to inhibit [the] proper operation [of other remedial provisions] through certain terms and conditions **[*237]** of intellectual property licenses." *Id.* In addition to Dr. Shapiro's testimony regarding § 15, Plaintiffs present the testimony of three industry participants. Mr. Richards of RealNetworks offered the rationale that the royalty-free nature of the license would "ensure that Microsoft cannot use royalty schemes to thwart the development of middleware capable of lowering the applications barrier to entry." Richards P 110. Mr. Schwartz from Sun, though he did not offer any independent justification for the denial of royalty payments to Microsoft, attempted to bolster Mr. Richards' view by noting that "Microsoft does not typically charge anything for licenses of APIs and protocols, as opposed to software products." Schwartz P 141. Finally, Larry Pearson, Associate Director of Product Design and Strategic Marketing for SBC Operations, Inc., [114] Pearson P 1, observed quite basically that the royalty-free nature of § 15 would be useful to competitors because it makes competition with Microsoft less costly. *Id.* P 89.

[465]** Neither Dr. Shapiro, nor any of the other witnesses who offered testimony regarding § 15, explained why the mandate of non-discriminatory and reasonable license terms provided in § III.I of Microsoft's remedy proposal was insufficient to accomplish Dr. Shapiro's goal of preventing Microsoft from imposing terms and conditions upon its intellectual property licenses which would inhibit the effectiveness of the other remedy provisions. In fact, none of Plaintiffs' witnesses explained the manner in which *competition* would be enhanced by royalty-free licenses of Microsoft's intellectual property. In contrast, the testimony makes very clear that Microsoft's competitors stand to benefit greatly from royalty-free licenses.

VIII. SECURITY EXEMPTION

Just as § III.I of Microsoft's remedy proposal and § 15 of Plaintiffs' proposed remedy can be viewed as enabling provisions, § III.J of Microsoft's remedy proposal serves a similar enabling purpose. [115] Pursuant to § III.J.1 of Microsoft's remedy proposal, Microsoft is relieved of its obligations to "document, disclose or license [portions of APIs or Documentation or portions or layers of Communications Protocols] to third **[**466]** parties" where such documentation, disclosures, or licenses would "compromise the security of a particular installation . . . of antipiracy, anti-virus, software licensing, digital rights management, encryption or authentication systems." SRPFJ § III.J. Concomitantly, § III.J.2 entitles Microsoft to place certain conditions on its licenses of "any API, Documentation, or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third-party intellectual property protection mechanisms of any Microsoft product." *Id.* § III.J.2. Pursuant to § III.J.2 Microsoft may condition a license on the requirement that the licensee:

> (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own **[*238]** expense, any computer program using such APIs, Documentation or Communication **[**467]** [sic] Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

Id. This provision, observed Dr. James Allchin, Group Vice President for Platforms at Microsoft, Allchin P 1, enables Microsoft to protect the security of computer installations by addressing "three major security concerns, all of which pose serious problems for both Microsoft and its customers: (i) hackers; (ii) viruses; and (iii) piracy." *Id.* P 17; *see generally* Allchin PP 18-38. That hackers, viruses, and piracy pose substantial security concerns to Microsoft and consumers is not disputed.

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[114] SBC Operations, Inc. is a wholly-owned subsidiary of SBC Communications Inc. Pearson P 1

[115] Plaintiffs' remedy contains no substantial counterpart to § III.J of the SRPFJ.

Dr. Allchin explained Microsoft's view that "security mechanisms must walk a careful balance between being **[**468]** open for review and being secret to protect specific information." Allchin P 20. In this regard, Dr. Allchin acknowledged, as Plaintiffs' witnesses have asserted, Appel P 122; McGeady PP 71-72, 74-77, that "many 'eyes' examining the specification of a security protocol or a reference implementation of that protocol will eventually lead to a better protocol." Allchin P 20. Dr. Allchin, however, insisted that there is another "side of the balance" which dictates that non-disclosure of the "specifics of the implementation of a security mechanism" is also a good practice. Allchin P 21. As an example, Dr. Allchin pointed to Microsoft's Digital Rights Management (DRM) systems, wherein a "standard or proprietary algorithm is implemented in an 'obfuscated' way to protect digital content." Allchin P 27. In this model, the encoding format may be widely known, while the algorithms and keys used to decode that data remain secret. *Id.*

Plaintiffs' witnesses criticized § III.J of Microsoft's remedy proposal largely because they disagree with Dr. Allchin's and Microsoft's philosophical approach to security. Steven McGeady, a former software developer and Vice President of Intel Corporation, **[**469]** McGeady P 1, who testified on behalf of Plaintiffs and in opposition to § III.J of the SRPFJ, stated:

> It is well understood in the software industry that Microsoft's security system relies on the secrecy of the underlying APIs and protocols. If this secret is discovered, either by a software hacker or through other means, the security of tens or hundreds of millions of computer systems is compromised. In my experience in developing security and authentication protocols, it is rarely advantageous to employ this type of "security through obscurity" mechanism.

Id. P 76. Mr. McGeady instead advocated a model of security which Microsoft acknowledges, but to which Microsoft does not adhere exclusively. *Id.*; Allchin P 21. "The most secure information systems," testified Mr. McGeady, "do not rely on the secrecy of the APIs or protocols, but rather rely on the underlying mathematical algorithms-algorithms that are available in the public domain." McGeady P 74. Plaintiffs' computer science expert echoed this preference, asserting that "the best and most prevalent method for achieving secure communication is public disclosure of the APIs and communications protocols underlying **[**470]** a security algorithm in conjunction with the issuance of private authentication keys." Appel P 122. In this regard, Dr. Appel testified that exceptions from disclosures, even the broad disclosures mandated by Plaintiffs' proposed remedy, **[*239]** would not be necessary to protect "the security of a *properly designed* computer software or system." Appel P 128 (emphasis added). Notwithstanding this testimony, Mr. McGeady acknowledged that "Microsoft is correct" that there are instances in which disclosure of certain algorithms will defeat security. McGeady P 77.

Dr. Appel testified that § III.J.1 of Microsoft's proposed remedy is broader than necessary, Appel P 126, and that if broadly interpreted, the provision could "exempt Microsoft from disclosing interfaces that are needed for interoperation based on technically unjustified 'security' issues," *id.* P 128. Dr. Appel's fear that Microsoft will rely upon "unjustified 'security' issues" ignores the language of the provision. As Dr. Allchin noted repeatedly, § III.J.1 protects from disclosure only that information which "*would compromise* the security of a particular installation . . . of anti-piracy, anti-virus, software licensing, **[**471]** digital rights management, encryption or authentication systems." SRPFJ § III.J.1 (emphasis added); Tr. at 6451, 6459, 6466 (Allchin). The provision will not excuse disclosures based upon hypothetical concerns of a security compromise. SRPFJ § III.J.1. If the "security issue" is truly unjustified, Microsoft will not be able to claim, much less establish, that release of the particular information "would compromise" security. SRPFJ § III.J.1. Having heard the testimony with regard to § III.J.1, the Court finds that Microsoft presents a legitimate concern with regard to protecting security and that there is insufficient evidence to establish that § III.J.1 is more broadly drawn than appropriate.

Plaintiffs' witnesses also criticized § III.J.2 of Microsoft's proposed remedy, asserting that it would enable Microsoft to discourage or delay disclosures required in other portions of Microsoft's remedy proposal. *See generally* Shapiro P 195; Barksdale P 136. The Court finds these criticisms to be vague and speculative. Plaintiffs' own economic expert acknowledged that the inclusion of the "some checks," such as those in § III.J.2, is "reasonable." Shapiro P 195. Absent more, the **[**472]** criticisms advanced by Plaintiffs' witnesses are insufficient to engender a conclusion that § III.J.2 undermines the affirmative obligations imposed in the remainder of Microsoft's remedy proposal.

IX. TERM OF THE DECREE

The parties offer limited evidence on the subject of the proper term for the remedial decree in this case. Plaintiffs' economic expert, Dr. Shapiro, testified that the "current strength and likely durability of Microsoft's monopoly" counsels in favor of "a relatively long" term for the remedy. Shapiro P 203. This lengthy term, argued Dr. Shapiro, is appropriate because, in the presence of network effects, entry into the market for Intel-compatible PC operating systems "may well occur through a multi-stage process." *Id. P 204*; Tr. at 3415 (Shapiro). Dr. Shapiro asserted that a decree which curtails Microsoft's ability to stifle competition in the monopolized market for a substantial amount of time will provide the necessary assurances to industry participants that attempts at entry into the market are worthwhile and will not be hampered by Microsoft. *See* Shapiro P 204; Tr. at 3415 (Shapiro). Based upon these assertions, Dr. Shapiro opined that five **[**473]** years is an insufficient amount of time in which to encourage competition in the monopolized market. *See* Shapiro P 204; Tr. at 3415 (Shapiro). Despite his conviction that more than five years is appropriate to permit new "technologies . . . to evolve," Dr. Shapiro did not offer any basis for a determination as to what number of years, if not five, would be more appropriate. Tr. at 3415-16 (Shapiro) ("I don't **[*240]** know how to say it really, whether five is the right number or eight or ten. . . . Ten is a round number. I can't say that its obviously better than eight.").

Notably, in his assessment of the appropriate term of the conduct restrictions imposed by this Court, Dr. Shapiro did not allude to the undisputed fact that the pace of development in the relevant industry is exceedingly rapid. In stark contrast, Dr. Murphy, one of Microsoft's economic experts, based his assessment of the appropriate term for a remedial decree almost entirely upon the rapid pace of development and change in the industry. Murphy P 242. Dr. Murphy observed that it is exceedingly difficult to anticipate the nature of the "important issues" in the industry five years from now, let alone ten. *Id.* Mr. **[**474]** Gates echoed this view, observing the dramatic change in the PC industry in the past ten years and predicted that the industry will experience still greater change in the ten years to come. Gates P 463.

Based upon this testimony, the Court finds that Dr. Shapiro's ultimate conclusion that five years is insufficient is flawed in that it does not take into account the unusually rapid pace of change in this industry. *See* Shapiro P 203. Dr. Shapiro correctly articulates a primary goal of the remedial decree-to foster competition-and appropriately raises the concern that the network effects [116] at play in the relevant market will make that goal difficult. *See id.* However, the network effects upon the relevant market do not necessarily outweigh consideration of the rapid pace of change in the industry. Indeed, Dr. Shapiro does not appear to have balanced the two in reaching his determination as to the appropriate term of the remedial decree. *See id.* Conversely, Dr. Murphy does not appear to have considered entirely the interaction between network effects and the rapid pace of technological development, and so, his testimony also is flawed in this limited respect. *See* Murphy **[**475]** P 242. In this regard, the evidence regarding the propriety of a five-year term rests in equipoise, and there is a dearth of evidence regarding the imposition of some term other than a five-year term.

[476] X. OTHER PROVISIONS IN PLAINTIFFS' REMEDY PROPOSAL**

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[116] Judge Jackson explained network effects as follows:

> Consumer demand for Windows enjoys positive network effects. A positive network effect is a phenomenon by which the attractiveness of a product increases with the number of people using it. The fact that there is a multitude of people using Windows makes the product more attractive to consumers. The large installed base attracts corporate customers who want to use an operating system that new employees are already likely to know how to use, and it attracts academic consumers who want to use software that will allow them to share files easily with colleagues at other institutions.

Findings of Fact,84 F. Supp. 2d at 20, P 39. The appellate court referred to this phenomenon as the "chicken-andegg " situation: "This 'chicken-and-egg' situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems." *Microsoft, 253 F.3d at 55*.

Plaintiffs' proposed remedy includes a number of provisions for which there is no substantial counterpart in Microsoft's proposed remedy. In this portion of the opinion, the Court examines the factual testimony offered for and against the imposition of each such provision.

A. Plaintiffs' Proposed Remedy §§ 12, 14

In addition to § 15 of Plaintiffs' proposed remedy, Plaintiffs have proposed **[*241]** two other injunctive provisions that have the direct and indirect effect of divesting Microsoft of its valuable intellectual property assets. *See* SPR §§ 12, 14. Section 12 of Plaintiffs' proposed remedy requires Microsoft to "disclose and license all source code for all Browser software." *Id.* § 12. Plaintiffs' witnesses referred to this provision as a mandatory "open-source" of IE. When software is "open-sourced," the source-code for the software is made publicly available, often pursuant to terms which grant a license free of charge, with the proviso that any redistribution of the source code, whether modified or unmodified, must also be made publicly available for license free of charge. Tiemann PP 12-14, 33. **[**477]** For example, the Linux operating system, discussed *infra*, is open-sourced. *Id.* P 33.

Section 14 of Plaintiffs' proposed remedy also imposes a forced divestiture of assets upon Microsoft, but this provision is slightly different from § 12 in that it holds the possibility that Microsoft will receive some compensation for its intellectual property. This portion of Plaintiffs' proposed remedy obligates Microsoft to "continue to port or otherwise make available Office [117] to the Macintosh Operating System" and to "offer for sale, at an auction . . . [at least three] licenses to sell Office for use on Operating Systems other than Windows and Macintosh, without further royalty beyond the auction price." SPR § 14. Pursuant to § 14 of Plaintiffs' remedy proposal, the "winning bidders" at such an auction shall receive "all information and tools required to port Office to other Operating Systems." *Id.* Although the licenses to port Office will be auctioned, there is no guarantee that Microsoft will obtain substantial revenue from such an auction. Elzinga PP 79, 81; *see also* Tr. at 1044, 1051-52 (Tiemann).

[478]** Plaintiffs do not offer testimony which establishes a clear link between the liability in this case and the open source of IE or the required porting of Office. Instead, Plaintiffs' witnesses have testified somewhat generally that both provisions will affirmatively "lower" the applications barrier to entry, Tiemann P 85, and restore competition to the market. Shapiro P 86; *see also* Shapiro PP 101-04, 110-18; Tiemann PP 85, 87-95, 112. [118] In this regard, both Mr. Tiemann and Dr. Shapiro focus upon two existing non-Microsoft operating systems available for personal computers, namely the Linux operating system and Apple Mac OS, and the potential benefits which would accrue to these systems if Microsoft were divested of IE and forced **[*242]** to port Office. *See* Shapiro PP 98-101, 105-118; Tiemann PP 85-114. Dr. Shapiro identifies Apple and Linux as "the two most promising direct competitors" to Windows, Shapiro P 5, but Plaintiffs acknowledge that of the two, only Linux actually falls within the monopoly market of Intelcompatible personal computer operating systems. Pl. Prop. Findings of Fact P 32. In the relevant market, Linux has a market share of less than 2 percent. Tiemann P 31. **[**479]** In the *Findings of Fact*, Judge Jackson acknowledged the presence of Linux and observed that "Linux's open-source development model shows no signs of liberating that operating system from the cycle of consumer preferences and developer incentives that, when fueled by Windows' enormous reservoir of applications, prevents non-Microsoft operating systems from

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[117] "Microsoft Office" is software which provides an "'office productivity suite,' which typically includes a word processor, a spreadsheet application, a database, and presentation software." Tiemann P 86; *see also* *Microsoft, 253 F.3d at 73*.

[118] Other witnesses testifying on behalf of Plaintiffs contend that the release of IE into the public domain will ensure that Microsoft does not use its control over the browser market to control other technology markets, such as the market for Web services. Schwartz P 159; Pearson PP 10, 48, 96 (asserting that § 12 of Plaintiffs' proposed remedy "ensures" that Microsoft will not "modify IE by adding proprietary or other non-disclosed protocols or extensions in such a way that they would prevent or degrade interoperability with non-Microsoft server operating systems."). These assertions reflect an attempt to argue either a new attempted monopolization claim or the previously court-rejected "monopoly-leveraging" theory of liability by extending that "leveraging" argument to emerging areas of technology. *United States v. Microsoft Corp., 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485 (D.D.C. Sept. 14, 1998), at *26-28*. The Court therefore declines to enter factual findings relating to this testimony on the grounds that it is irrelevant. *See* Memorandum Opinion, Parts III.B.3.d, III.C.4; III.D.

competing." *Findings of Fact, 84 F. Supp. 2d at 23, P 50*. Judge Jackson observed more generally that "the open-source model of applications development may increase the base of applications that run on non-Microsoft PC operating systems, but it cannot dissolve the barrier that prevents such operating systems from challenging Windows." *Findings of Fact, 84 F. Supp. 2d at 23, P 51*. Michael Tiemann, Chief Technology Officer and Senior Executive of Red Hat, Inc., Tiemann P 1, the largest distributor of the Linux operating system, *id.* P 36, confirmed the continued accuracy of Judge Jackson's findings with regard to Linux and the open-source movement. Tr. at 1102 (Tiemann).

[480]** Despite the acknowledgment that Linux, on its own merits, has not shown the ability to compete with Windows for developer attention, Mr. Tiemann testified that the open-sourcing of IE and the auction to port Microsoft Office will enable Linux to mount a more promising challenge to Microsoft's monopoly. Tiemann P 85. Mr. Tiemann expounded upon the benefits which would accrue to Linux if it is able to support Microsoft Office, but did not contend that the portion of the applications barrier to entry which exists because of the success of Microsoft Office is attributable in any way to Microsoft's anticompetitive conduct. *See id.* PP 99-105. Similarly, Mr. Tiemann noted the success of IE and contended that its porting to Linux will "lower" the applications barrier to entry. [119] *Id.* PP 6, 106-107, 112. Yet, Mr. Tiemann does not explain how the direct porting of Microsoft applications, like Microsoft Office and IE, comports with the "middleware" theory of competition which gives rise to the liability in this case. Once again, the "middleware" theory, pursuant to which Plaintiffs prevailed, posits that third-party middleware which runs on multiple operating systems can overcome the **[**481]** existing applications barrier to entry by serving as a platform for other applications, such that the applications will run on any operating system where the middleware is present. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*.

[482] [*243]** It appears that §§ 12 and 14 of Plaintiffs' remedy have been proposed for the benefit of Linux, specifically Red Hat Linux, and to a similar-though lesser-extent, for the benefit of Apple. For example, if Red Hat purchases one of the auctioned Office licenses, as it plans, *see* Tiemann P 100, Red Hat will benefit from Microsoft's twenty years of heavy investment in Microsoft Office. Gates P 418. Such a benefit relieves Red Hat of the burden of developing its own office productivity suite. Red Hat would receive this benefit despite the fact that it has not devoted any effort or money to the development of an office productivity suite to compete with Microsoft Office and run on Linux. Tr. at 1034-35 (Tiemann). [120] Similarly, to make Microsoft's IE and Office technologies available on a Linux platform relieves Red Hat of the need to devote significant resources "evangelizing" or promoting the benefits of Linux to applications developers in an effort to induce developers to write applications for the Linux platform. *Id.* at 1021 (Tiemann). "Evangelizing" is an activity in which Red Hat scarcely engages, *id.*, despite the fact that it is recognized in the industry as one of the **[**483]** primary means by which to advance a platform, Tr. at 3555-56 (Shapiro). This evidence raises a concern that Red Hat looks to this proceeding as a means by which to alleviate some of the burdens inherent in vigorous competition.

The economic testimony presented in support of §§ 12 and 14 of Plaintiffs' remedy proposal focuses almost exclusively upon the benefit to particular competitors from the imposition of these proposed remedy provisions, specifically Red Hat Linux. *See* Shapiro PP 110-17. Dr. Shapiro conceded in his direct testimony that § 14a, which specifically requires that Microsoft continue to port Office to the Apple Mac OS "will not do a great deal to affirmatively enhance competition." Shapiro P 98. Rather, testified Dr. Shapiro, the provision would "assure actual

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[119] Mr. Tiemann testified further that the divestiture of IE was an appropriate kind "justice" because, "Microsoft never had the right to the intellectual property of the dominant browser; they secured the rights to the dominant browser through illegal tactics." Tiemann P 113. Mr. Tiemann argued that "Microsoft should not be heard to complain when restoring the right to the dominant browser to the community." *Id.* Mr. Tiemann's position in this regard is unsupported. Mr. Tiemann does not offer or identify any empirical evidence which quantifies the success of IE and attributes that success to Microsoft's violations of *§ 2* of the Sherman Act. Contrary to Mr. Tiemann's unsupported implication, the precise factors which led to IE's present success are unclear on the existing record. *See* *Findings of Fact, 84 F. Supp. 2d at 98, P 358*. At a minimum, the present record belies this attempt to attribute IE's success *entirely* or predominantly to Microsoft's illegal conduct. *Id.*

[120] In this regard, the Court observes that if Microsoft Office is truly the "albatross around Red Hat's neck," Tiemann P 87, it appears it is so largely because of Red Hat's own business decisions. Tr. at 1034-35 (Tiemann).

and potential **[**484]** users of Apple computers that a very popular and important application, Microsoft Office, will continue to be available on Apple computers" and, thereby, "help prevent Microsoft from weakening a direct rival." *Id.* This testimony, similar to that offered by Mr. Tiemann, illustrates that Plaintiffs' remedy singles out particular participants in the industry and offers provisions which will ease the difficulty of competing against Microsoft for these participants.

Plaintiffs offer the additional *argument* that divestiture of IE is appropriate because it is the "fruit" of Microsoft's illegal conduct. *See, e.g.*, Pl. Prop. Findings of Fact P 1112. In so arguing, Plaintiffs do not direct the Court to any new *evidence* to support this assertion, but instead rely exclusively upon Judge Jackson's factual findings from the liability phase. Contrary to Plaintiffs' assertion, Judge Jackson's factual findings do not make "clear" that IE's success is the "fruit" of Microsoft's illegal conduct. *Id.* Judge Jackson found that:

> The period since 1996 has witnessed a large increase in the usage of Microsoft's browsing technologies and a concomitant decline in Navigator's share. **[**485]** This reversal of fortune might not have occurred had Microsoft not improved the quality of Internet Explorer, and some part of the reversal is undoubtedly attributable to Microsoft's decision to distribute Internet Explorer with Windows **[*244]** at no additional charge. The relative shares would not have changed nearly as much as they did, however, had Microsoft not devoted its monopoly power and monopoly profits to precisely that end.

Findings of Fact, 84 F. Supp. 2d at 98, P 358. Many of the acts which comprised Microsoft's "devotion of its monopoly power" to promoting IE to the detriment of Navigator, *id.*, including the free provision of IE along with Windows, were found by the appellate court *not* to violate ***antitrust law***. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. This fact, in conjunction with Judge Jackson's express finding that Microsoft's qualitative improvements to IE were a necessary factor in IE's rise to dominance, renders Plaintiffs' assertion lacking in basis in the factual record of the case. [121]

[486]** Dr. Elzinga observed that the forced auction of Microsoft Office appears to be a "textbook example of a measure designed to help competitors, not competition." Elzinga P 79. The auction would provide a "windfall for competitors" who would subsequently lose their "incentive to continue development of competing office productivity applications apart from their versions of Office, because that would require more effort, developing features from scratch, rather than porting features already developed by Microsoft." *Id. P 80*. Simultaneously, the auction of Office discourages innovation by setting the "bad precedent" that the "fruits of R&D and development investments can be expropriated on the grounds that it would help competitors compete in a complementary product market." *Id. PP 83*. This outcome, concluded Dr. Elzinga, is expressly "bad for competition." *Id.* The same is true with regard to the purported open-source of IE mandated by § 12 of Plaintiffs' proposed remedy, as this provision "is the most transparent 'IP grab'" by Microsoft's competitors. *Id. P 85*.

Dr. Shapiro, Plaintiffs' economic expert, conceded that §§ 12 and 14 **[**487]** of Plaintiffs' proposed remedy mandate the divestiture of Microsoft's assets and are appropriately labeled as structural remedies. Tr. at 3324, 3328 (Shapiro); *see also* Elzinga P 104 (describing Plaintiffs' proposed remedy as "a 'structural remedy,' albeit an unusual one."). Plaintiffs do not offer additional evidence regarding a causal link between Microsoft's illegal conduct and its maintenance of its monopoly to support their proposal of these divestiture provisions. Dr. Shapiro unsuccessfully attempted to distinguish the "structural" nature of the forced divestiture of intellectual property assets from the reorganization of a company with the testimony that the structural effect of §§ 12 and 14 means "putting in place something that will change the structure of the industry in the sense that . . . market structure will be changed." Tr. at 3325. (Shapiro). Ultimately, however, Dr. Shapiro could not offer any basis for his insistence that the forced divestiture of intellectual property assets is no less significant for a software company like Microsoft than the forced divestiture of tangible assets from an industrial line of business. *Id.* at 3327-29. Indeed, Dr. Shapiro

[121] Moreover, Plaintiffs did not offer any testimony in the remedy phase to establish that IE was the "fruit" of the anticompetitive conduct affirmed by the appellate court. *See, e.g.*, Tr. at 3596 (Shapiro) ("I understand a significant-a component of how-why it's in the remedy is under the notion of denying Microsoft the fruits of its illegal activity, and I'm not addressing that part of it, and I'm discussing how I think it will affect competition going forward.").

agreed **[**488]** even in his direct testimony that he could conceive of **[*245]** "no economic reason why copyrights and patents should receive any special treatment in comparison with other commercial assets." Shapiro P 85.

Another of Microsoft's economic experts, Dr. Murphy, agreed with Dr. Shapiro that §§ 12 and 14 were structural remedies. However, Dr. Murphy observed with regard to § 12, the open-source of IE, that this type of structural remedy is "even more severe than a typical divestiture requirement" because the provision requires divestiture "at a zero price." Murphy P 222. Dr. Murphy further testified that § 12 merely "engineers a specific outcome, the opensource model of software development." *Id. P 223*. With regard to § 14, Dr. Murphy testified that "the *form* of the Office auction . . . violates basic economic principles." *Id. P 227* (emphasis in original). The result of the auction, testified Dr. Murphy, would be an effective "subsidy," at Microsoft's expense, for the provision of Office on other operating systems, a result which lacked "rational economic reason." *Id.* PP 227, 229.

In sum, the Court finds that the testimony offered by Plaintiffs on the subject of the opensource **[**489]** of IE and the mandatory auction of Office licenses is insufficient to establish that such remedy provisions would accrue to the benefit of competition. Nothing in the testimony presented by Plaintiffs' witnesses in support of §§ 12 and 14 articulates coherently the manner in which the forced divestiture of Microsoft-created technology will foster the development of cross-platform middleware. Instead, Plaintiffs' evidence offers a subsidy for competing operating systems-a benefit to particular competitors, wholly unrelated to the middleware theory of liability in this case.

B. Plaintiffs' Proposed Remedy § 1

Section 1 of Plaintiffs' remedy proposes that Microsoft be required to unbind any "Microsoft Middleware Product," as Plaintiffs define the term, from the "Windows Operating System." SPR § 1. The provision mandates that if Microsoft chooses to sell a "bound" version of its PC operating system, meaning its Windows operating system as presently configured, it must also provide an "unbound" version of the operating system from which the "binary code for each Microsoft Middleware Product . . . may be readily removed," such that this identical but "'unbound' Windows **[**490]** Operating System Product performs effectively and without degradation (other than the elimination of the functionalities of any removed Microsoft Middleware Products)." *Id.* Section 1 further sets forth a pricing schedule, pursuant to which, the price of the "unbound" Windows will be reduced for each "Microsoft Middleware Product" that is removed. *Id.* Plaintiffs offer § 1 in the absence of any economic analysis of the effect of § 1 upon the monopolized market.

Plaintiffs' basis for the "unbinding remedy" rests upon the view that there exist some characteristics which are exclusive to "operating systems" and some characteristics which are exclusive to "middleware" such that the two can be clearly divided. Plaintiffs' remedy, in this regard, builds upon the separation identified by Judge Jackson in his *Findings of Fact*:

> While the meaning of the term "Web browser" is not precise in all respects, there is a consensus in the software industry as to the functionalities that a Web browser offers a user. Specifically, a Web browser provides the ability for the end user to select, retrieve, and perceive resources on the Web. There is also a consensus in the software industry **[**491]** **[*246]** that these functionalities are distinct from the set of functionalities provided by an operating system.

Findings of Fact, 84 F. Supp. 2d at 48, P 150. Because of this separation of functionality, Judge Jackson and the appellate court were able to ascribe liability to Microsoft for its act of commingling the code that enables Web-browsing "functionality," imprecisely defined, and the code that enables "operating system" functionality in its Windows operating system. *Microsoft, 253 F.3d at 65-66*; *see also* *Microsoft, 87 F. Supp. 2d at 39*; *Findings of Fact, 84 F. Supp. 2d at 49-50, 53, 56, PP 159-64, 174, 192*. As is apparent from the language of the proposed remedy, Plaintiffs seek to parlay the distinction between Webbrowsing functionality and operating system functionality into a far broader distinction between middleware functionality, as Plaintiffs define it, and operating system functionality. Plaintiffs fail, however, to establish that there exists any agreement, let alone a "consensus," that all such middleware functionality, again as defined by Plaintiffs, is distinct from operating system functionality.

Plaintiffs' computer science expert, Dr. Appel, advanced Plaintiffs' view, defining **[**492]** an operating system generally as "software that manages and controls a computer's hardware and provides a platform on which application programs (or middleware) can run." Appel P 26. Dr. Appel identified a component of the Windows operating system called the "kernel" which operates in "privileged mode" on the computer hardware, meaning that it "has access to all of the computer hardware devices so that it can mediate services to applications." *Id.* P 27. From this definition, Dr. Appel espoused the view that software code in Windows that is not part of the operating system kernel can be viewed as a species of "application or middleware or . . . library code." Tr. at 2969 (Appel); *accord* Appel P 28. Nevertheless, Dr. Appel acknowledged that applications that "perform general utility functions" are often included with an operating system and are conventionally identified as part of the operating system product. Appel P 28. Though he articulated a certainty regarding the distinction between operating system and application, Dr. Appel wavered throughout his testimony on the subject of whether the kernel constitutes the entire operating system once the middleware is removed, or whether **[**493]** the kernel is merely a portion of the operating system, such that even after removal of the middleware, the operating system would consist of kernel and other software code.

Uncertainty as to which functionalities and their corresponding code comprise the true "operating system," assuming for purposes of discussion there is such a thing, is not unique to Dr. Appel. For example, Windows includes software which provides the function of "HTML rendering." Tr. at 3084 (Appel). The function of HTML rendering is "one of the several functions of the [Internet] browser," and therefore, removal of the "browser" would result in removal of the HTML renderer. *Id.* at 3084-85. Tom Greene, Assistant Attorney General of California, testified that he viewed the functionality provided by the HTML rendering engine in Windows to be "pretty much a basic utility in a sort of laymen's sense in the operation of most operating systems." Def. Ex. 1530 at 83 (Greene). Nevertheless, concluded Mr. Greene, § 1 of Plaintiffs' remedy proposal requires the removal of the HTML renderer from Windows because it is part of the "Internet browser," SPR §§ 1 (requiring the unbinding of "Microsoft Middleware Products), **[**494]** 22x (defining "Microsoft Middleware Product" to include as "Internet browsers"). *See* *id. at 83-84*. Once removed, **[*247]** remaining portions of Windows, such as the "Windows Help" system and "Windows Explorer," both of which rely upon the HTML rendering engine included in Windows for necessary functionality, would not function. *See* Madnick P 183. If the HTML renderer was added back into Windows, Microsoft would be subject to a claim that it had not truly removed all of the "Internet browser." Conversely, if removed, Microsoft would be subject to a claim that it had provided a "degraded" operating system because Windows Help and Windows Explorer would not function, even though the OEM had requested only the removal of the "Internet browser." SPR § 1.

From the example of the HTML rendering engine, which arises in conjunction with the unbinding of the "Internet browser," some of the difficulties inherent in Plaintiffs' unbinding proposal become clear. Mr. Greene acknowledged the difficulty in complying with Plaintiffs' proposed unbinding of the Internet browser and attempted to minimize the significance of this difficulty with the assertion that Internet browsing functionality is somehow **[**495]** a "peculiar" example of how the unbinding proposal would work. Def. Ex. 1530 at 83 (Greene). Tellingly, however, it is only with regard to Web-browsing functionality that Judge Jackson determined there to exist a "consensus" with regard to a distinction between that functionality and "operating system" functionality. *Findings of Fact, 84 F. Supp. 2d at 48, P 150*. Based on this finding, the appellate court was able to impose liability for the commingling of code related to operating system and browsing functionality, two seemingly separate types of functionality. Given the close relationship between IE and the liability imposed for commingling, in comparison to the lack of a direct relationship between other middleware and the commingling liability, there is little comfort to be taken from an assertion that the remedy for the commingling of browsing specific code with operating system code is merely a "peculiar" example. Def. Ex. 1530 at 83 (Greene). Quite to the contrary, if Plaintiffs' unbinding remedy is at all workable, the "unbinding" of browsing functionality should be a *good* example of the remedy's operation. Instead, the example of the "Internet browser" serves only to illustrate the inherent **[**496]** flaws in § 1 of Plaintiffs' remedy proposal. Plaintiffs' witnesses could not establish with any certainty the manner in which Microsoft could comply with § 1 with regard to its "Internet browser." Concomitantly, there is no basis upon which to conclude that the unbinding of all of the other types of "Microsoft Middleware Products" specified in Plaintiffs' remedy proposal will prove more readily attainable.

Section 1 of Plaintiffs' remedy proposal is deficient in that it does not provide any rule, or even guidance to Microsoft, for determining which code within Windows constitutes the various "Microsoft Middleware Products," both individually and as a group. Dr. Appel was unable to offer a hard and fast rule for distinguishing operating system functionality from application (or middleware) functionality. Instead, he offered a "rule of thumb" for distinguishing applications from the "kernel" of an operating system. Appel P 29. This "rule of thumb" divides applications from the "kernel" on the basis that application programs execute in an unprivileged hardware mode (meaning they cannot directly access the computer hardware, but must rely on the operating system to provide hardware **[**497]** services), and the kernel executes in privileged mode (meaning it can directly control computer hardware). *Id.* Even adhering to this "rule of thumb," **[*248]** however, Plaintiffs' expert displayed significant uncertainty as to the exact line between the "operating system" and "middleware" applications. *See* Tr. at 3123 (Appel). In sum, the evidence presented in the remedial phase does not support a finding that there exists anything close to a "consensus" that all of the other types of "middleware" [122] identified by Plaintiffs can be similarly distinguished from the "operating system."

Even if there were such a consensus, there is little doubt that the physical distinction between modules of code for such middleware and the operating system would be far more difficult to define **[**498]** than the conceptual distinction between types of functionality. Compounding this difficulty would be the need to distinguish among and between various types of middleware functionality in order to enable the removal of particular pieces of middleware (as opposed to all of the middleware at once) as required by § 1 of Plaintiffs' remedy proposal. Plaintiffs' proposed remedy does not identify the boundaries between particular middleware products, nor does it provide Microsoft with a rule for doing so. Dr. Appel conceded that "at the moment, there is no way to draw boundaries around the components that correspond to a particular Microsoft middleware product," as that term is used in Plaintiffs' proposed remedy. *Id.* at 3217; *accord* Bennett P 65; Gates P 168; Madnick P 134; *see also* Memorandum Opinion, Parts III.B.2.b, III.C.5. In the absence of such guidance, § 1 of Plaintiffs' proposed remedy is ambiguous, as there is no clear path for Microsoft to follow in order to comply with this aspect of Plaintiffs' proposed remedy. Such vagueness renders § 1 largely unenforceable.

Microsoft's witnesses were broadly critical of this portion of Plaintiffs' proposal, insisting that **[**499]** it proceeds on the faulty premise that Windows consists of a "small, self-contained and fully functional operating system (which [Plaintiffs] sometimes refer to as the 'kernel' or the 'core operating system') and a collection of readily identifiable, add-on middleware products that might just as easily be distributed separately from the operating system." Gates P 168; *see also* Jones PP 65-70; Madnick PP 143-47. The theory of § 1 fails to account for the fact that, pursuant to this view, nearly all, meaning in excess of 90 percent-likely 98 percent-of the Windows operating system is "middleware," as Plaintiffs have defined it. *See* Madnick P 142; *see also* Tr. at 2971 (Appel); Tr. at 5915-16, 5929-30 (Madnick). Within this large majority of the Windows operating system there exist countless interdependencies between the various "Microsoft Middleware Products." Because of the vast interdependencies in Windows, Microsoft's witnesses insist that the portion of Plaintiffs' remedy proposal which requires the remaining unbound operating system to function "without degradation" following the removal of the "Microsoft Middleware Products," renders compliance with § 1 virtually **[**500]** impossible. *See* Bennett P 33; Gates P 193; Jones P 62.

Dr. Appel contended that the unbinding of Microsoft "middleware" without degradation to the remaining operating system is feasible because Windows adheres to a "modular" construction, which means that related functions are contained within the same unit of programming code while unrelated functions reside in separate units **[*249]** of code. Microsoft does not deny that its Windows code is modular, Madnick P 167, but insists that this aspect of the product's design does not render § 1 of Plaintiffs' proposed remedy workable. *Id.* PP 167-188. As one of Microsoft's computer science experts, Dr. Stuart Madnick, explained, and the Court credits his testimony, Windows has many functional "components," meaning subsets of functionality which are accessible through APIs. *Id.* P 167. Each component will likely rely on several modules of code, and the same module of code is often used by multiple components to provide various functionalities. *Id.* P 168. A more componentized system includes a greater number of interdependencies. *Id.*; *see also* Tr. at 3157-58 (Appel). Because of these interdependencies, the removal of a

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[122] As the Court observed previously, *see* Memorandum Opinion, Part III.B.2.b, Plaintiffs' proposed remedy defines middleware very broadly, such that virtually any block of software code which exposes an API constitutes middleware.

particular **[**501]** component may cause the failure of other components that relied upon the removed component, such that the remaining components do not function "without degradation," SPR § 1. Bennett PP 37-73; Madnick PP 177-79; Tr. at 3157-58 (Appel).

Plaintiffs' witnesses responded to this dilemma with the assertion that Microsoft should be able to identify the interdependencies within Windows and account for them in a manner which renders code removal possible. Plaintiffs' witnesses contended that the "component definitions" created by Microsoft in its XP Embedded product and identified by a tool called the "Target Designer" are useful for defining which software code constitutes the middleware components that Plaintiffs' remedy proposal would require Microsoft to make "removable" from Windows. Windows XP Embedded is an operating system that Microsoft markets for OEMs to support applications that perform a very specific function for a non-PC, limited use device, Bennett PP 61, 68; Short PP 108, 110; Tr. at 3212-13 (Appel), such as a video game console or a set-top box. Tr. at 3212-13 (Appel); *see also* Bennett P 61 Short PP 108, 110; *see generally* Bennett PP 59-73. Windows XP Embedded, **[**502]** and the suite of tools which accompany the product, enable the creation of a smaller, specialized operating system that provides only the necessary functionality for the particular limited use device. Short P 110; *see also* Tr. at 3212-13 (Appel). Microsoft created Windows XP Embedded from the "binary code," rather than the "source code" of Windows XP Professional. Short P 111. Binary code is the product which results when the underlying source code is compiled and linked together. *Id.*; *accord* Bennett P 62. The "binaries" in Windows XP Embedded are "identical" to those in Windows XP. Tr. at 5639 (Short).

The developers of Windows XP Embedded identified "component definitions" which identify the individual files that comprise a particular component and the cross-dependencies that the component has on other blocks of software code in Windows XP. Bennett P 66; Short P 112. The Target Designer tool supplied with the Windows XP Embedded operating system identifies the cross-dependencies that a component has upon other components of Windows XP Embedded. Short P 113; *see also* Bennett P 67. Having identified these dependencies, in order to enable proper functioning, the Target **[**503]** Designer ensures that when a particular component of the embedded operating system is selected, all of the other components upon which the selected component depends will be included in the runtime. Short P 113; *see also* Bennett P 70. Therefore, the Target Designer does not remove the interdependencies, when a particular component is selected for inclusion in an embedded runtime. Bennett PP 62, 70; *see also* Short P 113; Tr. at 3216-17 (Appel). Instead, **[*250]** it merely ensures that all of the necessary code accompanies the designated component. *See* Bennett P 70; Short P 113; Tr. at 3216-17 (Appel). Even assuming that the component definitions in Windows XP Embedded would comport with Plaintiffs' definition of "Microsoft Middleware Product," and there is no evidence that they would, Plaintiffs have not established that Microsoft's embedded operating system and the tools which accompany that embedded operating system will enable the removal of a single such component at the behest of an OEM in a manner compliant with § 1 of Plaintiffs proposed remedy. This is so because the embedded operating system does not remove interdependencies among components. If a component were removed **[**504]** and that component provided a service to any other component remaining in the operating system, the remaining component would likely cease to function. *See* Bennett PP 70-71. Such a result would violate the requirement in § 1 of Plaintiffs' proposed remedy that the "unbound" operating system must function "without degradation." SPR § 1.

Plaintiffs' witnesses speculated that the very existence of the XP Embedded operating system and the accompanying tools are a significant first step toward the "unbinding" of the "middleware" from the "core operating system." *See, e.g.*, Appel P 138; Tr. at 1806-10, 1814-15 (Ledbetter). In this regard, however, Plaintiffs' computer science expert, Dr. Appel, conceded that the basic and fundamental assumption built into the XP Embedded operating system and Target Designer that "if you're going to include one component, then you also need to include any other component on which it depends," Tr. at 3216 (Appel), would have to change for the system and the tools to be useful in complying with § 1 of Plaintiffs' proposed remedy. *Id.* at 3216-17. None of Plaintiffs' witnesses convincingly explained how the tools would have to be changed or "adjusted, **[**505]** " nor do any witnesses establish that such changes could be made within a reasonable time and with a reasonable amount of effort. In contrast, Microsoft offers evidence, which the Court credits, that notwithstanding the existence of the embedded operating system and its tools, it would be "exceedingly difficult" to remove "middleware" from Windows "without causing serious malfunctions." Bennett P 73. Based upon this evidence, the Court is not satisfied that Microsoft can readily account for the existing interdependencies so as to render various "Microsoft Middleware Products" removable without degrading the remaining portion of the operating system.

Dr. Appel identified four other ways, apart from relying upon Windows XP Embedded, in which Microsoft could comply with § 1 of Plaintiffs' proposed remedy. [123] **[*251]** Each of these propositions is flawed significantly. The first option, "to simply let the Microsoft middleware product be removable," Tr. at 3208 (Appel), does not itself explain how the remaining portions of Windows will continue to function effectively in the absence of an interdependent middleware product. *See* Bennett P 80; Gates P 218. The second proposition is "to let the **[**506]** subcomponents of the Microsoft middleware products be removable" such that the subcomponent remains after the "middleware" is removed. Tr. at 3208-09 (Appel). While this solution potentially resolves the interdependency issue, it creates a compliance issue, as it is possible, if not likely, that the subcomponent which has been left behind is itself a "Microsoft Middleware Product," pursuant to Plaintiffs' very granular definition, *see* Memorandum Opinion, Part III.B.2.b, which must be made removable at the option of the OEM. *See* Bennett P 80. Accordingly, the second solution creates as many problems as it solves. The third potential solution offered by Dr. Appel is to move the necessary pieces of code into other portions of Microsoft's operating system product such that they are present, but do not expose APIs. Tr. at 3209 (Appel). This solution also creates more problems than it solves, as it would require Microsoft to create multiple copies of the same functionality and include those multiple copies in the Windows operating system. *See* Bennett P 80; Madnick PP 180-85. This solution would result in significant and inefficient code duplication, increase the size of the operating **[**507]** system, and impair the performance of the operating system by slowing its operation. *See* Bennett P 80; Jones P 69; Madnick P 180; *see generally* Madnick PP 180-85. In addition, this solution would render the resolution of problems and "bugs" in the repeated components far more difficult. Bennett P 80; Madnick P 184. Dr. Appel himself acknowledged that such a scheme "could lead to a waste of system resources." Tr. at 2995 (Appel). Finally, Dr. Appel proposed "just reducing the inherent . . . interdependence between Microsoft middleware products." *Id.* at 3209. This last solution was accompanied by little explanation, particularly with regard to how Microsoft would accomplish this task without completely redesigning its product. *See* Gates P 218. Moreover, inasmuch as the interdependencies are considered an advancement in technology, *see, e.g.*, MadnickPP 180, 184, Dr. Appel's solution in this regard proposes backward motion. Therefore, the Court finds that, although unbinding as required by § 1 may not be technologically impossible, it has not been shown to be a reasonable option, as it would likely require the complete or substantial redesign of Windows.

[508]** Ignoring all of these difficulties for purposes of discussion, Plaintiffs' witnesses theorized that ready removal of all of the "middleware" in Windows will enable the substitution of the Microsoft middleware with third-

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[123] The colloquy proceeded as follows:

> Q. (by Plaintiffs' Counsel Mr. Hodges): Could you explain what ways in your opinion Microsoft could comply with Section 1 of the States' proposed remedy?
>
> A. (by Plaintiffs' computer science expert Dr. Appel): One way is to simply let the Microsoft middleware product be removable.
>
> Another way is to let subcomponents of the Microsoft middleware products be removable. The States remedy doesn't require that, but it permits that. And then in the case of, for example, MS HTML, the rendering engine the subcomponent of the browser, an OEM might choose to leave that component in even if they want to substitute a different browser, and then there's no chance of degradation of the functionality of other components that depend on that HTML rendering.
>
> Another option, as I have explained, is to take necessary fragments of functionality and embed them in other products, other than Microsoft middleware products, so they don't expose APIs.
>
> Another kind of way to comply is just to reduce the inherent commingling, or I should say interdependence between the Microsoft middleware products. This would be not really a mechanical engineering task; one requiring some design to make the Microsoft middleware products a little less dependent on each other, and Microsoft might choose to do this, for example, if it doesn't like the other options because it doesn't want to be dependent for functionality on a non-Microsoft substitute.

Tr. at 3208-09 (Appel).

party middleware. *See, e.g.*, Appel PP 131, 138; Schwartz P 158; Tr. at 427 (Barksdale); Tr. at 1547 (Ledbetter); *see also* Tr. at 4825 (Gates) (discussing Dr. Appel's testimony). While an attractive **[*252]** notion in theory, Dr. Madnick, one of Microsoft's computer science experts made clear that this model of computing is largely unworkable in practice. Dr. Madnick explained:

> The concept of a completely modular operating system has been a "holy grail" for computer scientists for decades, one frequently sought but never found. Even in their dreams, however, computer scientists have not imagined a modularity as granular as that embodied in [Plaintiffs'] Proposal. Modularity has generally meant being able to replace major elements, such as the file system or the graphical user interface, not the code supporting arbitrary combinations of individual APIs. And even the far more modest vision has largely failed in practice. Although the idea of building an operating **[**509]** environment with "best of breed" components obtained from various vendors has some superficial appeal, getting them all to work together smoothly requires an enormous effort that creates ongoing support problems. Each time one component changes, it may create incompatibilities with others. When things go wrong, as they inevitably do, it is hard to figure out where the problem lies or which vendor is at fault. Often the fault lies not in any individual component, but in the interactions among them.

Madnick P 187 (footnote omitted). The Court credits this portion of Dr. Madnick's testimony, which is unrebutted. Plaintiffs fail to offer evidence that modularity of the type contemplated by § 1 of Plaintiffs' proposed remedy has ever been attained. It would appear that the very model of this section of Plaintiffs' proposed remedy is largely aspirational.

Contrary to the view advanced by Plaintiffs' witnesses, Microsoft does not consider portions of Windows to be "middleware" while other portions are "operating system." In Microsoft's view, Windows with some of its "middleware" functionality removed is still Windows, but it is a different version of Windows. In general, Microsoft's **[**510]** witnesses argued uniformly that the removal of any middleware functionality from Windows would result in multiple versions [124] **[**511]** of Windows. [125] From this background, Microsoft's witnesses contended that the imposition of § 1 will result in the "balkanization" or "fragmentation" of Windows. Microsoft presents evidence that such fragmentation would hinder, or even destroy, Microsoft's ability to provide a consistent API set. *See* Borduin P 61; Elzinga P 102; Madnick P 197. This loss hinders the ability of Windows to serve as a "platform for applications that supports new functionality while providing backward compatibility [126] for most existing **[*253]** applications." Madnick P 197. Such fragmentation appears to be the goal of § 1 of Plaintiffs' proposed remedy, as Mr. Barksdale testified, because it will ease the way for other middleware products to try to fill the gaps created by the "Microsoft Middleware Products" removed from Windows. *See* Barksdale P 60 ("This . . . will bring an end to developers' certainty that no matter what, Microsoft middleware code will be resident on virtually all PCs."); *see also* id. PP 61-62.

The weight of the evidence indicates that the fragmentation of the Windows platform would be significantly harmful to Microsoft, ISVs, and consumers. Plaintiffs' computer science expert, Dr. Appel, opined that Microsoft would remain responsible for testing at least a "representative sample" of the various configurations of the newly "unbound" Windows, but was uncertain as to **[**512]** exactly what such testing would entail. Tr. at 3130-31, 3135 (Appel). Dr. Bennett, one of Microsoft's computer science experts, testified that Microsoft would be unable to test,

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[124] Dr. Bennett estimated "conservatively" that § 1 of Plaintiffs' proposed remedy would produce more than a thousand variants of Microsoft's PC operating system due to the fact that each OEM could choose a different combination of middleware components. Bennett PP 47, 55; *accord* Gates P 200-01.

[125] Plaintiffs, of course, ignore Microsoft's view of its own products and insist that because Windows is sold as an "operating system," any "middleware" functionality which accompanies that sale is extraneous and can be removed without creating a different version of "Windows." From Plaintiffs' perspective then, the addition or removal of Microsoft's middleware products still leaves the "operating system"-plus or minus a Microsoft middleware product that, like any other application, can be added or removed. Tr. at 422-24 (Barksdale).

[126] "Backward compatibility" can be understood to mean that the APIs that are exposed by older versions of Windows are also supported by the new Windows versions. Tr. at 5093 (Jones).

on a level comparable with the present level of testing, the various configurations of its operating system product created by § 1 of Plaintiffs' remedy. Bennett P 50; *accord* Jones P 81. Similarly, Dr. Bennett testified that § 1 of Plaintiffs' proposed remedy would impose an "intractable" support burden upon Microsoft. Bennett P 56; *accord* Jones PP 75-77.

Plaintiffs' witnesses attempted to challenge Microsoft's fragmentation argument by likening the fragmentation which would be caused by § 1 to the fragmentation which is caused by Microsoft's periodic release of new versions of Windows. Plaintiffs' attempt in this regard is misguided, as there is little similarity between the two types of fragmentation. Most obviously, the present state of fragmentation is minuscule in comparison to the more than 1000 possible versions of Windows that might exist if the Court were to adopt § 1 of Plaintiffs' remedy proposal. *See* Bennett PP 47, 55; *accord* Gates P 201. More fundamentally, because of the relatively **[**513]** small degree of fragmentation between successive versions of Windows, Microsoft is able to work towards maintaining backward compatibility with previous versions. Tr. at 5093 (Jones). Microsoft attempts to maintain this backward compatibility by not altering documented APIs in ways that will prevent them from functioning with older applications. *See* Gates P 325; Jones P 17; Madnick P 153; Short P 8. For example, Microsoft has been able to conduct compatibility tests, though costly and time consuming, even with the minimal amount of fragmentation that presently exists, in order to ensure that the thousands of applications designed to run on Windows 95, Windows 98, Windows 98 SE and Windows ME would continue to function on Windows XP. *See* Jones P 17. In contrast, Plaintiffs' remedy mandates the removal of code, which will result in the absence of the API. In such a scheme, there is no way to maintain this kind of backward compatibility for each and every variation of Microsoft's PC operating system which would result from the imposition of § 1 of Plaintiffs' remedy proposal.

Seeming to fare worst in the scenario envisioned by § 1 of Plaintiffs' remedy are the ISVs, who, following **[**514]** the imposition of § 1, would not have any assurance that a particular functionality was present in any given configuration of the new unbound Windows. *See* Borduin P 64; Frei P 33; Jones PP 88, 91. As a result, at least in the short term, an unbound version of Windows would likely cause existing applications to fail. Gates P 62; Bennett P 86; Tr. at 42829 (Barksdale); Tr. at 7048-49 **[*254]** (Bennett); Tr. at 4521-22 (Gates); *see* also Tr. at 3136-37 (Appel). Plaintiffs' witnesses theorized that any such malfunctioning will be temporary, as competitors create products which will substitute for the middleware which has been removed. *See, e.g.*, Tr. at 3138 (Appel). This duplication of effort among Microsoft and individual ISVs has the potential to lead to many different implementations of the same functionality. Such a circumstance creates a risk that the software code distributed with one ISV's application would conflict with that distributed with another ISV's application, leading to the so-called "DLL Hell" problem that results when multiple versions of the same basic components try to coexist on a single PC. *See* Borduin PP 73, 75-77; Jones P 79; Tr. at 6431-35 (Averett). There **[**515]** is no indication that there is any competitive or economic advantage to such a situation and, quite to the contrary, such a result would likely be detrimental to the consumer.

Plaintiffs' witnesses implied that, with regard to any problems that arise because of the vast modularity they envision, it would be the burden of the ISV to address those problems and to ensure that its products would work effectively with the unbound version of Windows. *See, e.g.*, Def. Ex. 1530 at 39-41 (Greene). Scott Borduin, Vice-President and the Chief Technology Officer at Autodesk, Inc., Borduin P 1, testified that his company would be unable to ensure that its applications work on all versions of the newly unbound Windows. *Id. P 66*. Mr. Borduin went on to explain that the unbinding remedy would heap a massive and unwanted testing burden upon ISVs, who would be required to create multiple versions of their own products to work on the multiple versions of Windows. *Id. PP 67-68*. Similar testimony was offered by Mr. Hofstader, Vice President of Software Engineering for Freedom Scientific Inc. Hofstader PP 1, 43-46. Furthermore, explained Mr. Frei, Chief Executive Officer of Onyx Software Corporation, **[**516]** Frei P 1, the removal of code from Windows would require the addition of code to the ISVs' products. *Id. P 36*. This additional code would render the ISVs' products "larger and more complex," slow development, increase the cost of development, and increase the likelihood that such products would malfunction. *Id.* Dr. Appel, Plaintiffs' computer science expert, acknowledged these results and further noted the possibility that when the OEM's substitution of technology formerly implemented in the "bound" Windows was inadequate or defective, the performance of the application calling upon that technology will suffer. Tr. at 3136-37 (Appel). Despite this acknowledgment, Dr. Appel had not investigated whether ISVs were prepared or willing to undertake the burden imposed upon them to resolve the issues that would likely result from Plaintiffs' unbinding proposal in § 1 of their proposed remedy. [127]

[517]** Plaintiffs fail to offer evidence which counterbalances the difficulties inherent in § 1 of their remedy and the abundance of adverse effects upon ISVs and potentially, consumers. Not surprisingly, therefore, Plaintiffs fail additionally to offer any evidence that § 1 will benefit competition. Indeed, Plaintiffs' sole economic expert refused **[*255]** to endorse *any* aspect of § 1 of Plaintiffs' proposed remedy. Compounding this absence of economic evidence to support such a radical remedy is the testimony of one of Microsoft's economists that there exists no economic rationale for the code removal required by § 1 of Plaintiffs' proposed remedy. Murphy P 204. Dr. Murphy noted that, "the incremental competitive gain from requiring actual removal of code is small or non-existent," while in comparison, "the potential costs of requiring the removal of code are far greater in terms of the costs it will impose on design and testing and the reliability problems it is likely to impose on users." *Id.* Plaintiffs fail entirely to contradict this testimony.

In summary, Plaintiffs' unbinding proposal imposes an entirely new model of product design for Microsoft's operating system products without **[**518]** any showing that such a model is economically justified, beneficial to competition, and technologically feasible. Quite to the contrary, the Court finds that § 1, if imposed, would likely inflict significant harm upon industry participants-ISVs in particular-and potentially, consumers. Plaintiffs new model for Microsoft's operating system products extrapolates extensively from Judge Jackson's determination that there exists a "consensus" as to a distinction between operating system functionality and Webbrowsing functionality: Plaintiffs have expanded Judge Jackson's determination by insisting that there exists such a distinction between all middleware (broadly defined) functionality and operating system functionality. Plaintiffs have not established, however, that there exists any similar "consensus" with regard to all middleware functionality. The provision in Plaintiffs' proposed remedy which would impose this new regime does not provide Microsoft with any degree of guidance regarding the manner in which it is to comply. In particular, § 1 of Plaintiffs' remedy proposal is insufficiently precise in providing definitions which separate the "kernel" or "core operating system" from **[**519]** the "Microsoft Middleware Products," as well as the various "Microsoft Middleware Products" from one another. Even if such definitions were provided, Microsoft has established that there is presently no reasonable means by which Microsoft can remove the middleware portions of its operating system product and still provide a product in which the remaining functionality is not "degraded." SPR § 1.

C. Plaintiffs' Proposed Remedy § 5

Section 5 of Plaintiffs' remedy proposal enjoins Microsoft from engaging in "any action that it knows or reasonably should know, will directly or indirectly interfere with or degrade the performance or compatibility of any non-Microsoft Middleware when Interoperating with any Microsoft Platform Software, other than for good cause." SPR § 5. The provision further requires Microsoft, at least sixty days before taking such action, to provide notice to the affected ISV(s) of the action and the reason for doing so. *Id.* Plaintiffs' economic expert explained that § 5 is intended to provide some "protections" to ISVs that their products will work well with Windows. Shapiro P 152. Advocates of the provision attested that the notification requirement **[**520]** would not hinder Microsoft's ability to innovate and change its products accordingly, but would reduce the harm to Microsoft's rivals by providing notice and an opportunity to re-engineer products to avoid damage in the marketplace. *See* Kertzman P 75; Shapiro P 153.

Unable to link § 5 to any finding of liability in this case, Plaintiffs justify the **[*256]** inclusion of this provision with allegations of other instances of such "knowing interference" which have adversely affected Microsoft's competitors. *See, e.g.*, Richards PP 180-87 (describing problems encountered by RealNetworks); Ledbetter PP 142-43 (linking

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[127] Defendant presented additional unrebutted evidence that server vendors would be harmed by the fragmentation which would result from Plaintiffs' unbinding proposal. Richard Ulmer, a Vice President of Unisys Corporation, a provider of server and server-related products, Ulmer PP 1, 7, testified that interoperation between clients and servers will be severely hindered as a result of the removal of code from the Windows operating system. *Id.* PP 29-32.

the need for § 5 in Plaintiffs' remedy proposal to the MUP problem, described in Memorandum Opinion, Part III.D). The Court has already concluded that allegations of new "bad" acts, including those regarding interoperability, are largely irrelevant because they cannot be fairly characterized as mere extensions of conduct already found to be anticompetitive. *See* Memorandum Opinion, Part III.D . Because the Court has not weighed these allegations for anticompetitive effect, the Court cannot arbitrarily determine that such conduct requires a remedy. *Id.*

Notwithstanding **[**521]** this fact, Microsoft provides evidence which establishes that § 5 of Plaintiffs' proposed remedy is overly regulatory and an unjustified imposition upon Microsoft's lawful business practices which have not been shown to hinder competition. In this regard, § 5 is yet another example of a remedy provision characterized by Plaintiffs' witnesses to address very specific Microsoft conduct, which in practice, addresses a far more expansive amount of conduct, such that the remedy regulates even the most basic design decisions. For example, one of Microsoft's computer science experts, Dr. Madnick, testified that virtually any "non-trivial" change to Windows will fall within the parameters of § 5 of Plaintiffs' proposed remedy. Madnick P 205. For any such change, Microsoft must be prepared to provide "good cause" for its change. *Id.* Mr. Gates expressed a concern that Microsoft's decisions about software design, its weighing of the pros and cons of a particular change, would be exposed to "second-guessing" by a bevy of ISVs who were displeased with the change. Tr. at 4652 (Gates). As a result, testified Mr. Gates, Microsoft might be reluctant to make the change out of a desire to avoid **[**522]** the second-guessing of its decision and, at a minimum, would incur additional costs in conjunction with such changes. *Id.* at 4653; Elzinga P 30. In this regard, Mr. Gates pointed out that "reasonable men [may] disagree" over whether or not changes are justified by good cause, such that there would be a constant battle over enforcement of the provision. Tr. at 4654 (Gates).

Neither side's evidence with regard to the viability of § 5 is particularly convincing. The concerns raised by Mr. Gates regarding vagueness and enforcement problems in the provision are certainly valid, though their effects upon Microsoft's product design appear to be overstated. However, Plaintiffs' justifications for the provision are weak at best, with a non-existent link to the liability in this case and an insufficiently clear benefit to competition. Given this balance, the Court finds, as a factual matter, that the regulatory interference with Microsoft's legitimate business dealings which would result from § 5 of Plaintiffs' remedy proposal has not been shown to be outweighed by the benefit to competition.

D. Plaintiffs' Proposed Remedy § 3

The third section in Plaintiffs' proposed **[**523]** remedy requires Microsoft to "support, both directly and indirectly," the immediate predecessor of any new Windows release for a period of five years following the release of the new version. SPR § 3. In addition, § 3 of Plaintiffs' remedy proposal requires that Microsoft continue to "support, both directly and indirectly," Windows 98 SE for a period of three years after the entry of judgment in this case. **[*257]** *Id.* The royalties charged by such mandatory licenses are limited to the "lowest royalty paid by the OEM or Third-Party License . . . prior to the release of the new version." *Id.*

Plaintiffs offer the testimony of two witnesses to support this provision: John Borthwick, a Vice President at America Online Inc. ("AOL") Advanced Services, Borthwick P 1, and Plaintiffs' economic expert, Dr. Shapiro. Mr. Borthwick testified that § 3 would enhance § 2.c of Plaintiffs' proposed remedy, which allows for greater customization of Windows products, by ensuring that third-party investing in customization is not "thwarted by a "sudden announc[ement of] the release of a new superceding version." Borthwick P 59. Mr. Borthwick's testimony does little to advance Plaintiffs' proposal **[**524]** given the Court's finding *supra* that the third-party customization portion of Plaintiffs' proposed remedy is without justification and discordant with the appellate court's opinion in this case. Moreover, Mr. Borthwick's testimony is based entirely upon speculation that Microsoft would "suddenly" release a new version of an operating system in order to hinder customization. There is no evidence that Microsoft has ever "suddenly" released a new version of its operating system. In fact, the evidence in this case establishes that the development and release of a new operating system is an arduous process which takes approximately three years for each new version of an operating system. *See* Gates P 203. The Court, therefore, does not regard the reasons advanced by Mr. Borthwick as either valid or persuasive.

Dr. Shapiro testified that § 3 will benefit consumers because it provides greater consumer choice. Shapiro P 155. Notably, Dr. Shapiro did not explain the benefit to competition in increasing consumer choice between different versions of *Microsoft's products*. Dr. Shapiro further acknowledged that he would not endorse § 3 of Plaintiffs' proposed remedy if it were **[**525]** shown that the remedy imposed substantial costs upon Microsoft. Tr. at 3642 (Shapiro). Dr. Shapiro did not undertake to estimate the cost to Microsoft of supporting a predecessor version, *id.* at 3643, but instead chose to base his view upon his reading of Dr. Madnick's expert report to indicate that "most operating system vendors support their current version or that version and the one preceding it." Shapiro P 155. Dr. Shapiro's conclusion, in this regard, is an unsupported extrapolation from Dr. Madnick's report, which, even as cited by Dr. Shapiro, merely indicates that "IBM offers two versions of its AIX operating system and Sun offers two versions of its Solaris Operating Environment." *Id.* n.135 (citing Madnick Expert Report P 59, marked for identification as Pl. Ex. 1410 (Tr. at 5884)). Based upon this testimony, the Court rejects as unsupported Dr. Shapiro's conclusion that mandatory support for predecessor versions of Windows would not impose substantial costs upon Microsoft. *See* Bennett PP 88-89 (testifying that support for predecessor versions of Windows will result in enormous expense to Microsoft).

In contrast to Plaintiffs' view, Dr. Elzinga, one of Microsoft's **[**526]** economic experts, testified that § 3 of Plaintiffs' proposed remedy would harm consumers by raising costs for Microsoft, which will eventually translate into higher prices. Elzinga P 29; *see also* Bennett PP 88-89. Dr. Elzinga also testified that the beneficial aspects of network effects will be hindered by the mandatory provision of predecessor versions of the operating system. Elzinga P 29. Dr. Elzinga further noted with concern the absence of a liability finding to justify the increased regulation of Microsoft's **[*258]** business. *Id.* Plaintiffs' economic expert did not counterbalance the absence of direct link to the liability in this case by arguing that the substantial benefit to be gained by § 3 justified its intrusion into legitimate business practices. Quite to the contrary, Dr. Shapiro disclaimed that § 3 of Plaintiffs' proposed remedy would have a "substantial effect on promoting competition" in the market for Intel-compatible PC operating systems. Tr. at 3647 (Shapiro). Emphasizing all of the above concerns, is Mr. Gates' uncontradicted testimony that § 3 has the potential to cause consumer confusion and slow the pace of technology development. Gates PP 277-78. Based **[**527]** upon all of this testimony, the Court is doubtful that the benefit to be gained by the imposition of § 3 of Plaintiffs' proposed remedy would outweigh its costs. This balance is particularly troublesome given that § 3 will govern conduct which is wholly unrelated to any finding of liability in this case.

E. Plaintiffs' Proposed Remedy § 7

Section 7 of Plaintiffs' remedy proposal is entitled "Ban on Contractual Tying" and provides quite simply that "Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms . . . or administration of such license . . . on a licensee agreeing to license, promote, distribute, or provide an access point to, any Microsoft Middleware Product." SPR § 7. Mr. Richards of RealNetworks explained that the purpose of § 7 was to "enhance middleware developers' ability to deal directly with OEMs." Richards P 199. Rather than identify any finding of liability for which § 7 provides a direct remedy, Mr. Richards recounted summarily, relying in part upon Judge Jackson's *Findings of Fact, 84 F. Supp. 2d at 38, PP 113-14*, and in part upon inadmissible hearsay, various "bad" acts in which Microsoft is alleged to have engaged. **[**528]** Richards PP 204-08. Once again, the Court recounts its determination that these types of allegations of "bad" acts, even if proven, merit little weight, if any, because they cannot be treated as conduct which is the same or similar to the illegal conduct identified by the appellate court, and they have not been subjected to the rigorous Sherman Act assessment of whether the anticompetitive effect outweighs Microsoft's procompetitive justification. *See* Memorandum Opinion, Part III.D.

The only other witness to testify in support of § 7 of Plaintiffs' remedy offered a distinct justification for his endorsement. Dr. Shapiro took the position that "contractual tying" should be entirely banned because it "can impede the adoption of non-Microsoft middleware." Shapiro P 168. Dr. Shapiro linked this conclusion to Paragraph 155 of the *Findings of Fact, 84 F. Supp. 2d at 49*, which recounts that Microsoft bound IE to Windows with the intent of preventing Navigator "from weakening the applications barrier to entry." *Findings of Fact, 84 F. Supp. 2d at 49, P 155*. Paragraph 155 in Judge Jackson's *Findings of Fact, 84 F. Supp. 2d at 49* was identified by the appellate court as one of the "key District Court findings" in conjunction with its imposition **[**529]** of liability upon Microsoft for illegal tying in violation of § 1 of the Sherman Act. *Microsoft, 253 F.3d at 84*. The appellate court was unable to affirm Judge Jackson's finding of liability for tying. *Id.* Because the claim was not pursued on remand, there exists no finding that Microsoft illegally "tied" any product to Windows. When pressed, Dr. Shapiro acknowledged that the only connection between § 7 of Plaintiffs' remedy and the findings of liability in this case was Microsoft's prohibition on the removal of end-user access to IE, a liability finding which is addressed by other portions of both parties' proposed remedies. Tr. at 3663-64 (Shapiro). Given that Dr. Shapiro's **[*259]** endorsement of § 7 is cursory and devoid of any true economic analysis of the effect or justification for the provision, the evidence is insufficient to support a finding that § 7 of Plaintiffs' proposed remedy will promote competition in the monopolized market.

Indeed, in his economic analysis, Dr. Elzinga noted the appellate court's observation in this case that tying in software markets may produce efficiencies not previously considered by the courts. Elzinga P 25 (citing *Microsoft, 253 F.3d at 93, 95).* **[**530]** In this regard, Dr. Elzinga concluded that a blanket ban on such tying was likely to harm consumers. *Id.* PP 25, 34. Specifically, Dr. Elzinga explained, "many contractual ties benefit consumers through higher output and reduced transaction costs." *Id. P 34*; *see also id. P 117*. Dr. Murphy echoed this view, noting that Plaintiffs' imposition of § 7 is based upon a presumption that all tying is *per se* anticompetitive, rather than evidence that "specific ties have anticompetitive effects that outweigh pro-competitive benefits." Murphy P 238. In sum, the evidence presented by Plaintiffs is insufficient to establish that competition will benefit from the imposition of § 7 of Plaintiffs' proposed remedy, while the evidence presented by Defendant indicates quite clearly that this portion of Plaintiffs' proposed remedy would likely prohibit beneficial contracts.

F. Plaintiffs' Proposed Remedy § 9

Section 9 in Plaintiffs' proposed remedy is nearly identical to § 8 of Plaintiffs' remedial proposal, which bans Microsoft from taking "adverse[]" action against industry participants "based directly or indirectly . . . on" their support of competing products. **[**531]** SPR § 8. Section 9 differs only in that it bans "adverse[]" action against any participants in this litigation [128] "based directly or indirectly . . . on" such participation. SPR § 9. As a result of this similarity, the Court's assessment of § 8 applies equally to § 9. In short, § 9, like § 8, holds the potential to prohibit significant amounts of legitimate business conduct, notwithstanding Plaintiffs' witnesses' characterization of the provision as a ban on retaliation. *See supra* Part III. However, the over-breadth problems associated with § 9 are more pronounced than those associated with § 8, because there is virtually no way to determine whether a particular action which is adverse to a participant in this litigation is, in fact, "based directly or indirectly . . . on" that firm's or individual's participation in this litigation.

[532]** Furthermore, Plaintiffs have not established that participants in this litigation are in need of any protection against retaliation. Microsoft has been engaged in this and related litigation for nearly seven years, yet Plaintiffs did not present the testimony of any witness which indicated that, during this history, his or her firm had been subjected to retaliation by Microsoft based upon his or her participation in this litigation. [129] Based on the foregoing, the Court cannot conclude that participants **[*260]** in this litigation are in need of protection against retaliation by Microsoft, which exceeds protection from retaliation relating specifically to support by OEMs, ISVs, and IHVs for competing software products. *See supra* Part III.

[**533] G. Plaintiffs' Proposed Remedy § 13

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[128] Section 9 of Plaintiffs' proposed remedy also bans adverse action against participants in the suit instituted by the United States, *United States v. Microsoft*, No. 98-1232 (D.D.C.).

[129] Plaintiffs offer the testimony of Mr. Fama, who recounted that he perceived Microsoft to be unhappy about Gateway's participation in this litigation. Fama PP 144-46. Mr. Fama offered the strained opinion that a refusal by a Microsoft employee to engage in a particular discussion out of fear that it might find its way into the courts was a threat. *Id.* The Court is not convinced that the circumstances described by Mr. Fama reflect a threat of retaliation by Microsoft.

Section 13 of Plaintiffs' proposed remedy, entitled "Java Distribution," requires that Microsoft distribute "a competitively performing Windows-compatible version of the Java runtime environment . . . compliant with the latest Sun Microsystems Technology Compatibility Kit." SPR § 13. Section 13 makes clear that Microsoft shall not be required to "create such a Compliant Version, or to distribute a Compliant Version that is not made available to Microsoft, without charge and on reasonable terms and conditions, at least 90 days prior to Microsoft's commercial release or major update of any such Windows Operating System Product or Browser." *Id.*

Plaintiffs relate this mandatory distribution of Java generally to the actions Microsoft took to combat the threat posed by Java as a platform. Originally, the district court identified four actions taken by Microsoft "to exclude Java from developing as a viable cross-platform threat":

> (a) designing a JVM incompatible with the one developed by Sun; (b) entering into contracts, the so-called "First Wave Agreements," requiring major ISVs to promote Microsoft's JVM exclusively; (c) **[**534]** deceiving Java developers about the Windows-specific nature of the tools it distributed to them; and (d) coercing Intel to stop aiding Sun in improving the Java technologies.

Microsoft, 253 F.3d at 74. Of these originally identified behaviors, the appellate court sustained, in their entirety, the findings of liability against Microsoft for the deception of Java developers and the threat to Intel. *Microsoft, 253 F.3d at 76-77*. The appellate court further sustained the imposition of liability for the "First Wave Agreements" to the extent they required exclusive use of Microsoft's JVM. *Microsoft, 253 F.3d at 75-76*. The appellate court rejected the imposition of liability for Microsoft's development of its own JVM incompatible with Sun's JVM and inclusion of that JVM with every copy of IE. *Microsoft, 253 F.3d at 74-75*.

Plaintiffs' presentation of § 13 relies predominantly upon the testimony of Richard Green, Vice President and General Manager of Java and XML Platforms for Sun Microsystems, Inc. Mr. Green's testimony is somewhat problematic in that it presented a number of complaints which are largely irrelevant to this proceeding. One of Mr. Green's central **[**535]** complaints is that Microsoft determined not to include support for the Java platform in its most recent operating system, Windows XP. Green PP 20, 107, 117-118 (heading and text). Microsoft's recent determination with regard to the exclusion of Java in its most recent operating system has little bearing upon the Court's crafting of a remedy. In this remedial phase, the Court will not engage in a weighing of new allegations against Microsoft for pro- and anticompetitive effect. Plaintiffs have not argued that Microsoft's decision not to support Java in its most recent version of Windows is a continuation of previous conduct found to be illegal, nor have they argued that Microsoft's decision is of the same type or class as conduct for which liability has been ascribed. As a result, the Court declines to ascribe any weight to Mr. Green's complaints in this regard. [130]

[536]** Mr. Green also complained vociferously that Microsoft's JVM is incompatible with **[*261]** Sun's JVM and that this incompatibility constituted a breach of a contract entered into between Microsoft and Sun. Green PP 17, 22. As the appellate court rejected liability on this basis, *Microsoft, 253 F.3d at 74-75*, the incompatibility of Microsoft's JVM is a non-issue. Furthermore, whether Microsoft breached a contract with Sun is the subject of another proceeding and is irrelevant to this proceeding. *See* Def. Ex. 1032-33; Def. Ex. 1033; Pl. Ex. 1157 (sealed).

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[130] The Court similarly rejects the contention that distribution of the JVM through Microsoft is imperative because it is impracticable for OEMs to distribute the technology and similarly impracticable for end users to download the technology from the Internet. Green PP 104-05. Far more persuasive is Dr. Allchin's testimony explaining that "it is fairly common today to have software programs of the same general size as a JVM downloaded in huge numbers." Allchin P 77; *see also* Elzinga P 121; Tr. at 293 (Green) ("[A] compressed JVM with associated class libraries typically ranges from 5 to 12 megabytes in size."). Once downloaded, a user would not incur any further delay in using the JVM. Allchin P 77. Similarly, Mr. Green's conclusion that it is infeasible to depend on OEMs for distribution is unsupported. Green P 105. Rather than infeasibility, the evidence establishes that Sun does not consider it worthwhile to attempt to obtain distribution through the OEM channel and would prefer, instead, to use this litigation as a means by which to obtain ubiquity. Tr. at 295-97 (Green); *see also* Green PP 10506 . Lastly, Mr. Green takes the view that OEMs have little incentive to distribute a Suncompliant JVM. Green P 105. The Court finds this complaint to be meritless, as a lack of incentive to distribute a particular product reflects a problem of a competitor, not a problem with competition. Allchin P 79.

Stripped of these complaints and accusations of persistent Microsoft wrongdoing, Mr. Green's testimony is revealed as little more than an attempt to advance Sun-compliant Java technologies through this proceeding. Mr. Green expounded his view of the advantages of the Java platform over the Windows platform, Green PP 56-70, the ability of the Java platform to enhance competition in the network and sever-based computing environments, *id. PP 76-83*, and the positive attributes of the Java platform in general, *id. PP 71-75,119*-28. Indeed, Mr. Green even proclaimed the benefits of Sun's "licensing **[**537]** and distribution model for developers." *Id. PP 84-93*. From this background, Mr. Green argued that "there are no other economically feasible distribution channels for the Java platform that would achieve anything close to the levels of distribution currently enjoyed by Microsoft platforms such as Windows." *Id. P 106*. On this basis, Mr. Green asserted that the Court should require Microsoft to distribute the Java platform with Windows. *Id. P 134*. The result of § 13, argued Mr. Green, will:

> *merely* put the Java platform on equal footing with the CLR [131] **[**538]** (and thus create competition) by ensuring that the JRE receives the same level of distribution that Microsoft can provide to the CLR. Without this remedy, developers will undoubtedly begin to write applications to the CLR based on its guaranteed ubiquity. And those applications written to the CLR will only run on Microsoft Windows products.

Green P 139 (emphasis added). [132]

Mr. Green's testimony misses the point. What Plaintiffs, and quite clearly Sun Microsystems, **[*262]** are proposing is nothing more than "market engineering." Murphy P 239. This remedy provision appears to work a fundamental violation of two of the five "economic principles" outlined by Plaintiffs' economic expert, Dr. Shapiro. As Dr. Shapiro testified:

> The remedy should facilitate entry into the market for PC operating systems by whatever products and technologies will offer the most promising opportunities to challenge Microsoft's monopoly in the years ahead. . . .
>
> In the presence of rapid technological change, a remedy that primarily is relevant for threats from six years ago (such as certain cross-platform middleware) is unlikely to be effective at restoring competition in the future.

Shapiro P 42. **[**539]** The "Java Distribution" portion of Plaintiffs' remedy is a far cry from "facilitating entry." *Id.*; *see also* SPR § 13. Rather, § 13 of Plaintiffs' remedy proposal places the Java technology "on equal footing" with Microsoft's technology, providing it with instantaneous ubiquitous distribution. Green P 139. There is no evidence that Java would today possess "equal footing," in terms of distribution, with Microsoft, but for Microsoft's anticompetitive conduct.

More significantly, the artificial promotion of Java runs afoul of the goal of restoring competition because it "primarily is relevant for threats from six years ago." Shapiro P 42. Plaintiffs' own economic expert testified that, "to the extent possible, the remedy should be 'technology neutral,' leaving it to *market forces* to identify the most promising future threats to Microsoft's monopoly." Shapiro P 44 (emphasis in original). Dr. Elzinga echoed this view, observing that, from an economic perspective, a remedy will enhance consumer welfare and competition where it "promotes competition, not the interests of particular competitors." Elzinga P 9. The Court can conceive of no provision less "technology neutral" than **[**540]** § 13 of Plaintiffs' remedy. Rather, § 13 appears to be a bold manipulation of the market which provides a particular technology, indeed a particular format of this technology-the Sun-compliant format-with an artificial advantage over other non-Microsoft technologies which may now or in the future compete with Java. [133]

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[131] CLR stands for "Common-Language Runtime." Green P 118. Like Java, the CLR is a type of "component-software middleware" developed by Microsoft. Appel PP 44, 74-75. CLR is part of Microsoft's .NET framework. Madnick P 163.

[132] Mr. Green further relies upon the claim that OEMs fear retaliation by Microsoft for distribution of a competing platform. Green P 105. Given that both of the proposed remedies in this case address such retaliation, the potential for retaliation should not continue to be a concern.

[133] In his testimony, Dr. Elzinga warned that the Court must guard against "rent-seeking" by Microsoft's competitors. Elzinga P 16. "Rent-seeking in economics," according to Dr. Elzinga, applies to "activities by economic agents (individuals or firms) that do not create value, but only influence how existing rewards are distributed." *Id.* Section 13 is an example of such "rent seeking" by

[541]** **H. Plaintiffs' Proposed Remedy § 16**

Section 16 of Plaintiffs' proposed remedy mandates that "if Microsoft publicly claims that any of its products are compliant **[*263]** with any technical standard . . . that has been approved by, or has been submitted to and is under consideration by, a Standard-Setting Body, it shall comply with that Standard." SPR § 16.a. Section 16 further provides that "if Microsoft chooses to extend or modify the implementation of that Standard, Microsoft shall continue fully to implement the Standard (as that Standard may be modified from time to time by the Standard-Setting Body)" until Microsoft "publicly disclaims that it implements that standard" or "the Standard expires or is rescinded." *Id.* If "Microsoft develops a proprietary implementation of a Standard," § 16 would also require Microsoft to "continue to support non-proprietary, industry implementations of such Standard." *Id.* The latter portion of § 16 acknowledges that, in some circumstances, "industry custom and practice recognizes compliance with the Standard to include variations from the formal definition of that Standard." *Id.* § 16.b. Based upon this acknowledgment, § 16 **[**542]** permits Microsoft to "discharge its obligations" under the provision by complying with the "De Facto Standard," so long as Plaintiffs do not object to such compliance. *Id.*

As with other portions of Plaintiffs' proposed remedy which concern industry standards, Plaintiffs direct the Court to the liability finding regarding the deception of Java developers. The appellate court condemned as illegal Microsoft's deception of Java developers "regarding the Windows-specific nature of the tools," such that "developers who relied upon Microsoft's public commitment to cooperate with Sun and who used Microsoft's tools to develop what Microsoft led them to believe were cross-platform applications ended up producing applications that would run only on the Windows operating system." *Microsoft, 253 F.3d at 76*. Also related to the issue of industry standards is the finding of liability against Microsoft for requiring the exclusive use of Microsoft's implementation of the Java technologies in conjunction with the First Wave Agreements. *Microsoft, 253 F.3d at 75*. To remedy these findings of liability, Plaintiffs advance § 16 of their proposed remedy as "effectively a 'Truth in **[**543]** Standards' provision." Shapiro P 185.

Although proffered by Plaintiffs' witnesses as a "truth in standards" provision, § 16 of Plaintiffs' proposed remedy requires far more of Microsoft than simply "truthfulness." Plaintiffs' witnesses focused upon the fact that § 16 requires that if Microsoft creates a proprietary implementation of a particular standard, it must continue to support non-proprietary industry implementations of the standard. *See, e.g.*, Borthwick P 113; Appel P 147; Ledbetter P 105; *see also* SPR § 16. This requirement is imposed without regard to whether Microsoft has made any representation regarding its compliance with an industry standard. Furthermore, Microsoft is not permitted, once it extends or alters the implementation of a standard, to require that third parties adopt such an implementation, without regard to whether such a requirement is exclusive of other implementations of the standard. Appel P 147; *see also* SPR § 16.

Section 16 of Plaintiffs' proposed remedy is yet another attempt by Plaintiffs to prevent Microsoft from extending, modifying, "co-opting," Ledbetter P 90; Pearson P 98, or "polluting," Appel P 143, industry standards. Plaintiffs' **[**544]** primary example of such extension or modification arises from Microsoft's treatment of the Kerberos standard, discussed by the Court in Part III.D of the attached Memorandum Opinion. *See* Ledbetter PP 93-100; Borthwick P 113; Schwartz P 155. There, of course, exists no finding of liability against Microsoft **[*264]** for its proprietary extension of any industry standard, and the Court has rejected the assertion that Microsoft's conduct with regard to Kerberos and other industry standards is the "same or similar" to conduct that gave rise to the liability

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Sun Microsystems. Elzinga P 56 and Table 3. Sun proposed inclusion of a remedy nearly identical to § 13 of Plaintiffs' proposed remedy. Def. Ex. 841 at Sn-R025963-64, 025966-69. Sun is presently seeking the same remedy in a private lawsuit filed against Microsoft. Tr. at 170 (Green). Sun stands to benefit significantly by the imposition of § 13 of Plaintiffs' proposed remedy. *Id.* at 201. Indeed, Sun has "repeatedly offered Microsoft the opportunity to distribute a compatible, current JRE as part of its browser and operating system products, [and] Microsoft has refused." Green P 19. Given these facts, there is little doubt that § 13 reflects the wish of a particular Microsoft competitor, the granting of which is likely to "have very little effect" upon the "development of cross-platform middleware." Tr. at 3614 (Shapiro). As such, the Court regards § 13 of Plaintiffs' proposed remedy as an unjustified manipulation of the marketplace. Sun's request for redress in this regard is best resolved, if at all, through its already-pending private lawsuit.

in this case. *See* Memorandum Opinion, Part III.D. In this regard, the Court has rejected Plaintiffs' suggestion that the imposition of liability for Microsoft's *deception* regarding its Java developer tools, *Microsoft, 253 F.3d at 76-77*, in any way, condemns decisions to depart from industry standards or to utilize a proprietary standard in the absence of deception regarding the departure. In fact, Microsoft's alteration or proprietary extension of industry standards more closely resembles conduct for which Microsoft was absolved of liability; the appellate court absolved Microsoft of liability for its development **[**545]** of a JVM incompatible with Sun's JVM. *Microsoft, 253 F.3d at 75*. Such incompatibility will only give rise to antitrust liability if the anticompetitive effects of the incompatibility outweighs the procompetitive justification for the design. *Id.* As the Court has not weighed any other instances of Microsoft's alteration of industry standards, including Kerberos, for procompetitive and anticompetitive effect, there is no basis for an argument that Microsoft's extension of proprietary standards requires a remedy.

Significantly, Plaintiffs do not present evidence that any aspect of § 16 will enhance competition in the monopolized market. [134] Dr. Shapiro's analysis focused only upon the "truth in standards" aspect of § 16, not the mandatory support for industry standards described above. With regard to the "truth in standards" aspect of § 16, Dr. Shapiro testified that the provision would be only "potentially mildly helpful" in furthering the goal of unfettering the marketplace. Tr. at 3678 (Shapiro). The limited nature of Dr. Shapiro's analysis leaves the remaining portions of § 16 without economic analysis and comment.

[546]** Even if limited to Microsoft's representations of compliance with "Industry Standards," evidence presented by Microsoft's witnesses establishes that § 16 of Plaintiffs' remedy is not workable. Microsoft's computer science expert, Dr. Madnick, testified without contradiction from Plaintiffs' computer science expert that "industry standards" can "vary widely in complexity and specificity, such that various implementations of a particular standard are often incompatible" because "each supports a different subset of the standard's features or offers its own extensions." Madnick P 207 (internal quotations omitted). More importantly, "partial compliance and extensions to standards" are themselves the "standard" practice in the computing industry. *Id.*; Tr. at 4988 (Gates). Because of these facts, the determination of "full compliance with a standard is often a difficult and ambiguous process." Madnick P 208. In other words, the determination of compliance with a particular standard cannot be based upon truly objective, verifiable criteria because even when the standard itself is reasonably clear, the extent to which any product actually implements the standard will often be a matter **[**547]** of opinion. Madnick PP 20810; Gates P 454. The provision of compliance with "De Facto Standards" will not resolve this problem because compliance with the "De Facto Standard" may not itself be clearly and objectively determined. Gates P 455. As a result, the "truth in standards" portion of § 16 has **[*265]** been shown to be ambiguous and therefore, unworkable.

The Court further observes that, not only is the finding of liability (deception of the Java developers) pursuant to which Plaintiffs offer § 16 far more narrowly circumscribed than the terms of Plaintiffs' remedy, but unlike some other findings of liability, it concerns a single, very specific incident of anticompetitive conduct by Microsoft. This action by Microsoft ceased, pursuant to the order of another court, before Judge Jackson entered his factual findings. *Findings of Fact, 84 F. Supp. 2d at 106, PP 390, 394*; *see also* Elzinga P 131. While Plaintiffs have presented evidence that Microsoft has altered industry standards, conduct which the appellate court determined does not necessarily violate ***antitrust law***, Plaintiffs have not offered any evidence which indicates that Microsoft has engaged or is likely to engage in deception similar to that **[**548]** involving the Java developer tools, or any other developer tools for that matter. Accordingly, the Court finds that Plaintiffs have not shown that there exists a continued threat of harm from this anticompetitive act.

I. Plaintiffs' Proposed Remedy § 19.f

As part of the procedures established for enforcement of the remedy imposed in this case, Plaintiffs propose that the Court should "review evidence that Microsoft has brought or has threatened to bring a groundless claim of Intellectual Property infringement for the purpose of" impairing interoperation between a wide variety of non-

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[134] The Court notes that § 16 of Plaintiffs' remedy proposal is not limited in any way to reflect the relevant market in this case. SPR § 16. Rather, the provision applies to all segments of Microsoft's business. *Id.*

Microsoft products and Microsoft products. SPR § 19.f. Plaintiffs do not offer any credible evidence that Microsoft now or in the past has advanced "groundless" claims of intellectual property infringement for the purpose of hindering interoperation, nor do Plaintiffs offer any evidence of a connection between this aspect of their remedy proposal and the liability findings in this case. Additionally, Plaintiffs fail to offer any evidence indicating that such review by the Court of Microsoft's claims of intellectual property infringement would foster or advance competition. From the face **[**549]** of the provision, it appears that § 19 in Plaintiffs' proposed remedy would serve to chill Microsoft's enforcement of its intellectual property rights.

J. Plaintiffs' Proposed Remedy § 20

Following the enforcement provisions of Plaintiffs' proposed remedy, Plaintiffs have included in their remedy proposal a provision which requires Microsoft to provide Plaintiffs with written notice of its investments in computer and electronic product manufacturing, computer and computer peripheral equipment and software wholesalers, telecommunications, cable networks and program distribution, finance and insurance, and computer system design, as well as its acquisition of an exclusive license of technology or intellectual property 60 days in advance of such investment. SPR § 20. Plaintiffs' counsel argue that such monitoring of Microsoft's investments will "ensure that there remain no practices likely to result in monopolization in the future." Pl. Prop. Findings of Fact P 1411 (quoting *Microsoft, 253 F.3d at 103*). The only *evidence* Plaintiffs offer to support this argument is the testimony of Mr. Kertzman who advocated the benefits of a provision which required **[**550]** reporting "significant investments in the technology sector." Kertzman P 53. Mr. Kertzman described § 20 as a compliment to the ban on exclusive contracts contained in § 6 of Plaintiffs' proposed remedy. *Id. P 58*. The disclosures mandated in § 20, noted Mr. Kertzman "would enable the regulatory authorities to impose conditions, as part of allowing the investment, that would limit **[*266]** Microsoft's ability to secure exclusive contracts or to impose particular technology." [135] *Id. P 56*.

Nothing in the language of § 20, however, limits Microsoft's disclosure obligations to *significant* investments. SPR § 20; *see also* Tr. 2127-39 (Kertzman); Gates P 462. As written, the proposed provision requires Microsoft **[**551]** to report "any direct or indirect acquisition . . . or investment," regardless of size. SPR § 20. Furthermore, Dr. Shapiro conceded that § 20 of Plaintiffs' remedy proposal would not have an effect on competition or consumer welfare. Tr. at 3295 (Shapiro). Instead, Dr. Shapiro took the view that § 20 was an "enforcement provision," but did not go so far as to identify what, exactly, was being enforced. *Id.* Given this evidence, Plaintiffs' continued insistence that § 20 will promote competition borders on frivolous. [136]

[552] APPENDIX B**

FINAL JUDGMENT

The Plaintiff States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, and the District of Columbia, having filed their complaints in this action on May 18, 1998;

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[135] Plaintiffs fail to offer any evidence that any such "regulatory authorities" are interested in receiving information from Microsoft pursuant to the Court's remedial order in this case, nor that the provision of information would prove useful to such regulatory authorities.

[136] In response to criticism of § 20 by Mr. Gates, Plaintiffs, in their proposed findings of fact suggest that the provision could be modified to limit the reporting requirements to investments "in an amount larger than 1% of the target company" and that the reporting requirement could exempt from reporting "the acquisition of inventory acquired in the normal course of business." Pl. Prop. Finding of Fact PP 1432-33. While helpful, these modifications do not cure the most significant defect related to § 20 of Plaintiffs' remedy; namely, that there exists no justification for including in the remedy a requirement that Microsoft report its investment activity. There remains no logical relationship between Microsoft's investment activity and the findings of liability in this case, nor have Plaintiffs established that such reporting will benefit competition.

Defendant Microsoft Corporation ("Microsoft") having appeared and filed its answer; The District Court having entered Findings of Fact on November 5, 1999 and Conclusions of Law on April 3, 2000;

The United States Court of Appeals for the District of Columbia Circuit having affirmed the Court's finding of liability against Microsoft for violation of *§ 2* of the Sherman Act and the state law counterparts to *§ 2* of the Sherman Act in the states of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, and the District of Columbia, and having remanded to this Court for an order of remedy; and

Upon the record of trial and all prior and subsequent proceedings herein, it is this 1st day of November, 2002, hereby

ORDERED, ADJUDGED AND DECREED as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of the **[**553]** person of Microsoft.

II. Applicability

This Final Judgment applies to Microsoft and to each of its officers, directors, agents, employees, subsidiaries, successors and assigns; and to all other persons in **[*267]** active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

III. Prohibited Conduct

A. Microsoft shall not retaliate against or threaten retaliation against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding newly introduced forms of non-monetary Consideration (including but not limited to new versions of existing forms of non-monetary Consideration) from that OEM, because it is known to Microsoft that the OEM is or is contemplating:

1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;
2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or

3. **[**554]** exercising any of the options or alternatives provided for under this Final Judgment.

Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM or any intellectual property right that is not inconsistent with this Final Judgment. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Notwithstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered OEM that has received two or more such notices during the term of its Windows Operating System Product license.

Nothing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that Microsoft product or service.

B. Microsoft's provision of Windows Operating System Products to Covered OEMs shall be **[**555]** pursuant to uniform license agreements with uniform terms and conditions. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to the Plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that:

1. the schedule may specify different royalties for different language versions;

2. the schedule may specify reasonable volume discounts based upon the actua volume of licenses of any Windows Operating System Product or any group of such products; and

3. the schedule may include market development allowances, programs, or other discounts in connection with Windows Operating System Products, provided that:

a. such discounts are offered and available uniformly to all Covered OEMs, except that Microsoft may establish one uniform discount schedule for the ten largest Covered OEMs and a second uniform discount schedule for the eleventh **[*268]** through twentieth largest Covered OEMs, where the size of the OEM is measured by volume of licenses;

b. **[**556]** such discounts are based on objective, verifiable criteria that shall be applied and enforced on a uniform basis for all Covered OEMs; and

c. such discounts or their award shall not be based on or impose any criterion or requirement that is otherwise inconsistent with any portion of this Final Judgment.

C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives:

1. Installing, and displaying icons, shortcuts, or menu entries for, any Non-Microsoft Middleware or any product or service (including but not limited to IAP products or services) that distributes, uses, promotes, or supports any Non-Microsoft Middleware, on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict an OEM from displaying icons, shortcuts and menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory **[**557]** with respect to non-Microsoft and Microsoft products.

2. Distributing or promoting Non-Microsoft Middleware by installing and displaying on the desktop shortcuts of any size or shape so long as such shortcuts do not impair the functionality of the user interface.

3. Launching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware, except that Microsoft may restrict the launching of Non-Microsoft Middleware which replaces or drastically alters the Windows Operating System Product user interface.

4. Offering users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product.

5. Presenting during the initial boot sequence its own IAP offer.

6. Exercising any of the options provided in Section III.H of this Final Judgment.

D. Starting at the earlier of the release of Service Pack 1 for Windows XP or three months after the entry of this Final Judgment, Microsoft shall disclose to ISVs, **[**558]** IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. For purposes of this Section III.D, the term APIs means the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product. In the case of a new major version of Microsoft Middleware, the disclosures required by this Section III.D shall occur **[*269]** no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner.

E. Starting three months after the entry of this Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of interoperating or communicating with a Windows Operating System Product, **[**559]** on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product.

F. 1. Microsoft shall not retaliate against or threaten retaliation against any ISV or IHV because of that ISV's or IHV's:

a. developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or
b. exercising any of the options or alternatives provided for under this Final Judgment.

2. Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that **[**560]** runs on any software that competes with Microsoft Platform Software, except that Microsoft may enter into agreements that place limitations on an ISV's development, use, distribution or promotion of any such software if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft.
3. Nothing in this section shall prohibit Microsoft from enforcing any provision of any agreement with any ISV or IHV, or any intellectual property right, that is not inconsistent with this Final Judgment.

G. Microsoft shall not enter into any agreement with:

1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it **[**561]** is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software, or

2. any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any **[*270]** software that competes with Microsoft Middleware.

Nothing in this section shall prohibit Microsoft from entering into (a) any bona fide joint venture or (b) any joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value-add to an existing product, technology or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.

This Section does not apply to any agreements in which Microsoft licenses intellectual property from a third party and such intellectual property license is the principal purpose of the agreement.

[562]** H. Starting at the earlier of the release of Service Pack 1 for Windows XP or *three* months after the entry of this Final Judgment, Microsoft shall:

1. Allow end users (via a mechanism readily accessible from the desktop or Start menu such as an Add/Remove icon) and OEMs (via standard preinstallation kits) to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product by (a) displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict the display of icons, shortcuts, or menu entries for any product in any list of such icons, shortcuts, or

menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products; and (b) enabling or disabling automatic invocations pursuant to Section III.C.3 of this Final Judgment that are used to launch Non-Microsoft Middleware Products **[**563]** or Microsoft Middleware Products. The mechanism shall offer the end user a separate and unbiased choice with respect to enabling or removing access (as described in this subsection III.H.1) and altering default invocations (as described in the following subsection III.H.2) with regard to each such Microsoft Middleware Product or Non-Microsoft Middleware Product and may offer the end-user a separate and unbiased choice of enabling or removing access and altering default configurations as to all Microsoft Middleware Products as a group or all Non-Microsoft Middleware Products as a group.

2. Allow end users (via an unbiased mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft's option, require confirmation from the end user in an unbiased manner) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface **[**564]** elements or (ii) the Trademark of the Microsoft Middleware Product.

Notwithstanding the foregoing Section III.H.2, the Windows Operating System Product **[*271]** may invoke a Microsoft Middleware Product in any instance in which:

(a) that Microsoft Middleware Product would be invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing), or

(b) that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons are described in writing in a reasonably prompt manner to any ISV that requests them.

3. Ensure that a Windows Operating System Product does not (a) automatically alter an OEM's configuration of icons, shortcuts or menu entries installed or displayed by the OEM pursuant to Section III.C of this Final Judgment without first seeking confirmation from the user and (b) seek such confirmation from the end user for an automatic **[**565]** (as opposed to user-initiated) alteration of the OEM's configuration until 14 days after the initial boot up of a new Personal Computer. Any such automatic alteration and confirmation shall be unbiased with respect to Microsoft Middleware Products and Non-Microsoft Middleware. Microsoft shall not alter the manner in which a Windows Operating System Product automatically alters an OEM's configuration of icons, shortcuts or menu entries other than in a new version of a Windows Operating System Product.

Microsoft's obligations under this Section III.H as to any new Windows Operating System Product shall be determined based on the Microsoft Middleware Products which exist seven months prior to the last beta test version (i.e., the one immediately preceding the first release candidate) of that Windows Operating System Product.

I. Microsoft shall offer to license to ISVs, IHVs, IAPs, ICPs, and OEMs any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment, provided that

1. all terms, including royalties or other payment of monetary consideration, **[**566]** are reasonable and non-discriminatory;

2. the scope of any such license (and the intellectual property rights licensed thereunder) need be no broader than is necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment (e.g., an ISV's, IHV's, IAP's, ICP's and OEM's option to promote Non-Microsoft Middleware shall not confer any rights to any Microsoft intellectual property rights infringed by that Non-Microsoft Middleware);

3. an ISV's, IHV's, IAP's, ICP's, or OEM's rights may be conditioned on its not assigning, transferring or sublicensing its rights under any license granted under this provision; and

4. the terms of any license granted under this section are in all respects consistent with the express terms of this Final Judgment.

Beyond the express terms of any license granted by Microsoft pursuant to this section, this Final Judgment does not, directly or by implication, estoppel or otherwise, **[*272]** confer any rights, licenses, covenants or immunities with regard to any Microsoft intellectual property to anyone.

J. No provision of this Final Judgment shall:

1. Require **[**567]** Microsoft to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria; or (b) any API, interface or other information related to any Microsoft product if lawfully directed not to do so by a governmental agency of competent jurisdiction.

2. Prevent Microsoft from conditioning any license of any API, Documentation or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol **[**568]** for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

IV. Compliance and Enforcement Procedures

A. Enforcement Authority

1. The Plaintiffs shall have exclusive responsibility for enforcing this Final Judgment. Without in any way limiting the sovereign enforcement authority of each of the plaintiff States, the plaintiff States shall form a committee to coordinate their enforcement of this Final Judgment. A plaintiff State shall take no action to enforce this Final Judgment without first consulting the plaintiff States' enforcement committee.

2. To determine and enforce compliance with this Final Judgment, duly authorized representatives **[**569]** of the plaintiff States, on reasonable notice to Microsoft and subject to any lawful privilege, shall be permitted the following:

a. Access during normal office hours to inspect any and all source code, books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Microsoft, which may have counsel present, regarding any matters contained in this Final Judgment.

b. Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, informally or on the record, officers, employees, or agents of Microsoft, who may have counsel **[*273]** present, regarding any matters contained in this Final Judgment.

c. Upon written request of a duly designated representative of a plaintiff State, on reasonable notice given to Microsoft, Microsoft shall submit such written reports under oath as requested regarding any matters contained in this Final Judgment.

Individual plaintiff States will consult with the plaintiff States' enforcement committee to minimize the duplication and burden of the exercise of the foregoing powers, where practicable.

3. The Plaintiffs shall not disclose **[**570]** any information or documents obtained from Microsoft under this Final Judgment except for the purpose of securing compliance with this Final Judgment, in a legal proceeding to which one or more of the Plaintiffs is a party, or as otherwise required by law; provided that the relevant Plaintiff(s) must provide ten days' advance notice to Microsoft before disclosing in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party any information or documents provided by Microsoft pursuant to this Final Judgment which Microsoft has identified in writing as material as to which a claim of protection may be asserted under *Rule 26(c)(7) of the Federal Rules of Civil Procedure*.

4. The Plaintiffs shall have the authority to seek such orders as are necessary from the Court to enforce this Final Judgment, provided, however, that the Plaintiffs shall afford Microsoft a reasonable opportunity to cure alleged violations of Sections III.C, III.D, III.E and III.H, provided further that any action by Microsoft to cure any such violation shall not be a defense to enforcement with respect to any knowing, willful or systematic violations.

B. 1. Compliance Committee. **[**571]** Within 30 days of entry of this Final Judgment, Microsoft shall establish a compliance committee (the "Compliance Committee") of its Board of Directors, consisting of at least three members of the Board of Directors who are not present or former employees of Microsoft.

2. Compliance Officer. The Compliance Committee shall hire a Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft. The Compliance Officer shall be responsible for development and supervision of Microsoft's internal programs to ensure compliance with the antitrust laws and this Final Judgment. Microsoft shall give the Compliance Officer all necessary authority and resources to discharge the responsibilities listed herein.

3. Duties of Compliance Officer. The Compliance Officer shall:

a. within 60 days after entry of this Final Judgment, arrange for delivery to all officers and directors of Microsoft a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;

b. arrange for delivery in a timely manner of a copy of this Final Judgment and such **[**572]** additional informational materials to any person who succeeds to a position described in Section IV.B.3.a above;

c. ensure that those persons described in subsection c.i above are annually briefed on the meaning **[*274]** and requirements of this Final Judgment and the United States antitrust laws and advising them that Microsoft's legal advisors are available to confer with them regarding any question concerning compliance with this Final Judgment or under the United States antitrust laws;

d. obtain from each person described in Section IV.B.3.a within 60 days of entry of this Final Judgment and annually thereafter, and for each person thereafter succeeding to such a position within 10 days of such succession and annually thereafter, a written certification that he or she: (i) has read, understands, and agrees to abide by the terms of, and has to their knowledge not violated, this Final Judgment; and (ii) has been advised and understands that his or her failure to comply with this Final Judgment may result in a finding of contempt of court;

e. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section V.B.3.d above has been **[**573]** obtained;

f. on an annual basis, certify to the Plaintiffs that Microsoft is fully compliant with this Final Judgment;

g. maintain a record of all complaints received and action taken by Microsoft with respect to each such complaint; and

g. report promptly to the Plaintiffs any credible evidence of violation of this Final Judgment.

4. The Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.

V. Termination

A. Unless this Court grants an extension, this Final Judgment will expire on the fifth anniversary of the date on which it takes effect.

B. In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate.

VI. Definitions

A. "API" means application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D.

B. "Communications Protocol" means the set of rules for information **[**574]** exchange to accomplish predefined tasks between a Windows Operating System Product and a server operating system product connected via a network, including, but not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.

C. "Consideration" means any monetary payment or the provision of preferential licensing terms; technical, marketing, and sales support; enabling programs; product information; information about future plans; developer support; hardware or software certification or approval; or permission to display trademarks, icons or logos.

D. "Covered OEMs" means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective **[*275]** date of the Final Judgment. The OEMs that fall within this definition of Covered OEMs shall be recomputed by Microsoft as soon as practicable after the close of each of Microsoft's fiscal years.

E. "Documentation" means all information regarding the identification and means of using APIs that a person of ordinary **[**575]** skill in the art requires to make effective use of those APIs. Such information shall be of the sort and to the level of specificity, precision and detail that Microsoft customarily provides for APIs it documents in the Microsoft Developer Network ("MSDN").

F. "IAP" means an Internet access provider that provides consumers with a connection to the Internet, with or without its own proprietary content.

G. "ICP" means an Internet content provider that provides content to users of the Internet by maintaining Web sites.

H. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer running a Windows Operating System Product.

I. "ISV" means an entity other than Microsoft that is engaged in the development or marketing of software products.

J. "Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;

2. is Trademarked or is marketed by Microsoft as a major version of any Microsoft Middleware Product defined in section VI.K.1; and

3. provides the same or substantially similar functionality **[**576]** as a Microsoft Middleware Product.

Microsoft Middleware shall include at least the software code that controls most or all of the user interface elements of that Microsoft Middleware. Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point.

K. "Microsoft Middleware Product" means

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and

2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product

a. Internet browsers, email client software, networked audio/video client software, instant messaging software or

b. functionality provided by Microsoft software that --His, or in the year preceding the **[**577]** commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;
ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and
iii. is Trademarked.

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware **[*276]** Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.

L. "Microsoft Platform Software" means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product.

M. "Non-Microsoft Middleware" means a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a nonMicrosoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft **[**578]** Operating System.

N. "Non-Microsoft Middleware Product" means a non-Microsoft software product running on a Windows Operating System Product (i) that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System, and (ii) of which at least one million copies were distributed in the United States within the previous year.

O. "OEM" means an original equipment manufacturer of Personal Computers that is a licensee of a Windows Operating System Product.

P. "Operating System" means the software code that, inter alia, (i) controls the allocation and usage of hardware resources (such as the microprocessor and various peripheral devices) of a Personal Computer, (ii) provides a platform for developing applications by exposing functionality to ISVs through APIs, and (iii) supplies a user interface that enables users to access functionality of the operating system and in which they can run applications.

[579]** Q. "Personal Computer" means any computer configured so that its primary purpose is for use by one person at a time, that uses a video display and keyboard (whether or not that video display and keyboard is included) and that contains an Intel x86 compatible (or successor) microprocessor. Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.

R. "Timely Manner" means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is made available via an MSDN subscription offering or of which 150,000 or more beta copies are distributed.

S. "Top-Level Window" means a window displayed by a Windows Operating System Product that (a) has its own window controls, such as move, resize, close, minimize, and maximize, (b) can contain sub-windows, and (c) contains user interface elements under the control of at least one independent process.

T. "Trademarked" means distributed in commerce and identified as distributed by a name other than Microsoft (R) or Windows (R) that Microsoft **[**580]** has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as (R) or TM, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for the name in the United States Patent and Trademark Office; or (iii) asserting the name **[*277]** as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft (R) or Windows (R) trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft (R) or Windows (R) trademarks, and hereby abandons any such rights that it may acquire in the future.

U. "Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as

> Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" **[**581]** and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

VII. Further Elements

Jurisdiction is retained by this Court over this action such that the Court may act *sua sponte* to issue further orders or directions, including but not limited to orders or directions relating to the construction or carrying out of this Final Judgment, the enforcement of compliance therewith, the modification thereof, and the punishment of any violation thereof.

Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling the parties to this action to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

Unless otherwise indicated, the provisions of this Final Judgment shall take effect 30 days after the date on which it is entered.

In accordance with the imposition and **[**582]** affirmance of liability, the Plaintiff States shall submit a motion for the award of costs and fees, with supporting documents as necessary, not later than 45 days after the entry of this Final Judgment.

VIII. Third Party Rights

Nothing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY

United States District Judge

United States v. Microsoft Corp.

United States District Court for the District of Columbia

November 1, 2002, Decided ; November 1, 2002, Filed

Civil Action No. 98-1232 (CKK)

Reporter

231 F. Supp. 2d 144 *; 2002 U.S. Dist. LEXIS 21097 **; 2002-2 Trade Cas. (CCH) P73,851

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.

Core Terms

Middleware, operating system, appellate court, decree, software, products, license, final judgment, Non-Microsoft, compliance, functionality, anticompetitive, parties, interoperate, provisions, public interest, user, consent decree, terms, district court, disclosure, interface, technologies, launch, fact finding, distributed, Platform, icons, explains, complaints

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN1[] **Settlements, Antitrust Procedures & Penalties Act**

15 U.S.C.S. § 16(e) mandates that, prior to the entry of a proposed consent judgment, the district court must determine that entry of such judgment is in the public interest. 15 U.S.C.S. § 16(e). 15 U.S.C.S. § 16(e) specifically requires the court to make an independent determination as to whether or not entry of a proposed consent decree is in the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN2[] **Settlements, Consent Judgments**

The court's role in protecting the public interest is one of ensuring that the government has not breached its duty to the public in consenting to the decree. In making this determination, the court may consider the following: (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment; (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. *15 U.S.C.S. § 16(e)*. These considerations are characterized more simply as an inquiry into the purpose, meaning, and efficacy of the decree.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN3[] **Settlements, Consent Judgments**

The district court should pay particularly close attention to a number of issues in its examination of the decree and corresponding assessment of the public interest. A district judge pondering a proposed consent decree should pay special attention to the decree's clarity, as it is the district judge who must preside over the implementation of the decree. Based on a similar rationale, district courts are expected to pay close attention to the enforcement provisions in a proposed consent decree. Where there exist third-party claims that entry of the proposed decree will cause affirmative harm, the district court should at least pause or "hesitate" in order to consider these claims before reaching a conclusion that the proposed decree is appropriate.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN4[] **Settlements, Consent Judgments**

The court's authority to review the proposed decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place. Accordingly, the court must accord deference to the government's predictions as to the effect of the proposed remedies. In this vein, a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN5[] **Settlements, Antitrust Procedures & Penalties Act**

A remedies decree in an antitrust case must seek to unfetter a market from anticompetitive conduct, to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. Although this inquiry is usually reserved for cases which are litigated through remedy, consideration of these "objectives," to the extent they are applicable to the facts of the case, remains appropriate where liability has been established in the case. Still, the court's assessment of the remedy's ability to satisfy these objectives is tempered by the deference owed to the government in the Antitrust Procedures and Penalties Act (Tunney Act) context.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN6[] **Settlements, Consent Judgments**

The mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition. Similarly, because structural relief is designed to eliminate the monopoly altogether, wisdom counsels against adopting radical structural relief in the absence of some measure of confidence that there has been an actual loss to competition that needs to be restored. Instead, the court crafting a remedy must assess the strength of the causation evidence that established liability and "tailor" the relief accordingly.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN7[] **Settlements, Consent Judgments**

A consent decree need not reflect the court's own choice of a remedy, but instead, giving due respect to the government's view of the effect of the remedial proposal, need only reflect a certain consonance with the liability allegations, or the liability findings.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Clayton Act > Penalties

HN8[] **Settlements, Consent Judgments**

The Antitrust Procedures and Penalties Act (Tunney Act), and the case law which follows, dictate that it is for the United States to weigh the benefits of a trade in the first instance, and that, barring a breach of duty in consenting to the decree, the court should respect the government's predictions as to the effect of the proposed remedy.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Clayton Act > Penalties

HN9[] **Settlements, Consent Judgments**

It is not contrary to the public interest, as contemplated by the Antitrust Procedures and Penalties Act (Tunney Act), to enter a decree that is not necessary, or that grants relief to which the government might not be strictly entitled. The public does not suffer because the defendant consented to limitations on its activities that could not otherwise be imposed.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN10[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of the Antitrust Procedures and Penalties Act (Tunney Act), just as the court may not second guess the government's choices about what claims to bring in the first place, it should not treat differently those concessions proposed in a consent decree that might have been achieved at trial from those that might not have been achievable.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Clayton Act > Penalties

HN11[] **Settlements, Consent Judgments**

In the context of the Antitrust Procedures and Penalties Act (Tunney Act), the risks inherent in litigation are likely to be reflected in some portion of the proposed decree, and these risks are appropriately weighed by the government, rather than the court, in the first instance.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN12[] **Settlements, Consent Judgments**

Courts considering antitrust remedies are advised to pay special attention to the potential of any remedy to inflict harm upon third parties.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN13[] **Settlements, Antitrust Procedures & Penalties Act**

A court presiding over an Antitrust Procedures and Penalties Act (Tunney Act) proceeding need not conclude that the terms of the consent decree will best serve society, but only that the proposed decree is within the reaches of the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN14[] **Settlements, Consent Judgments**

On the subject of licenses and antitrust remedies, courts are best excluded from the administration of intricate and detailed rules relating to business affairs.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > Courts > Judicial Precedent

HN15[] **Settlements, Consent Judgments**

Precedent instructs the court to pay close attention to provisions that address enforcement of a consent decree.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN16[] **Supplemental Jurisdiction, Ancillary Jurisdiction**

District courts enjoy no free-ranging "ancillary" jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order. The district court's power over a consent decree, reflecting the hybrid between judicial order and contract, is limited to two sources. A district court may interpret and enforce a decree to the extent authorized by the decree itself or by the related order. Additionally, a district court may modify a decree pursuant to *Fed. R. Civ. P. 60(b)(5)*. This latter power is circumscribed by the Rule's requirements that such modification is appropriate if it is no longer equitable that the judgment should have prospective application. *Fed. R. Civ. P. 60(b)(5)*. A significant change in circumstances may warrant revision of a decree, though any such revision must be suitably tailored to the changed circumstances.

Counsel: **[**1]** For United States of America, PLAINTIFF: Jacqueline S Kelley, US Department of Justice, Washington, DC USA. Mary Jean Moltenbrey, US Department of Justice, Washington, DC USA. Philip Beck, US Department of Justice, Washington, DC USA. Phillip R Malone, US Department of Justice Antitrust Division, San Francisco, CA USA. Renata B Hesse, US Department of Justice Antitrust Division, Washington, DC USA.

For Microsoft Corporation, DEFENDANT: Bradley Paul Smith, Sullivan & Cromwell, Washington, DC USA. John L Warden, Sullivan & Cromwell, New York, NY USA. Richard J Urosksky, Sullivan & Cromwell, New York, NY USA. Steven L. Holley, Sullivan & Cromwell, New York, NY USA. William H Neukom, Microsoft Corporation, Redmond, WA USA.

Roy A Day, Movant, Pro se, Tarpon Springs, FL USA.

Carl Lundgren, MOVANT, Pro se, Arlington, VA USA.

David L Whitehead, MOVANT, Pro se, Oxon Hill, MD USA.

Lonnie G Schmidt, MOVANT, Pro se.

For USA Today, The Washington Post, Los Angeles Times, Dow Jones & Company, Inc, Cable News Network, LP, LLP, The Associated Press, MOVANTS: Jay Ward Brown, Levine Sullivan & Koch, LLP, Washington, DC USA.

For San Jose Mercury News, Inc, MOVANT: Aileen **[**2]** Meyer, Washington, DC USA.

For Relpromax Antitrust Inc, MOVANT: Peter Peckarsky, Washington, DC, USA.

For California Plaintiffs, MOVANT: Steven F Benz, Kellogg, Huber, Hansen, Todd, & Evans, PLLC, Washington, DC USA.

For SBC Communications Inc, MOVANT: Donald L Flexner, Boies, Schiller & Flexner LLP, Washington, DC USA.

For Procomp, MOVANT: Kenneth W Starr, Kirkland & Ellis, Washington, DC USA.

For The Computer & Communications Industry Association, MOVANT: Bradley S Lui, Morrison & Foerster, LLP, Washington, DC USA. Jason M Mahler, Computer & Communications Industry Association, Washington, DC USA.

For Software & Information Industry Association, MOVANT: Glenn B Manishin, Kelley Drye & Warren LLP, Washington, DC USA.

For District of Columbia, State of Utah, State of Minnesota, State of Massachusetts, State of Kansas, State of Iowa, State of Florida, State of Connecticut, State of California, MOVANTS: Brendan V Sullivan, Jr, Williams & Connolly LLP, Washington, DC USA.

For The American Antitrust Institute, Inc, MOVANT: Michael Lenett, The Cuneo Law Group, Washington, DC USA.

For Netaction and Computer Professionals for Social Responsibility, **[**3]** MOVANT: Jeffrey Blumenfeld, Gray Cary Ware & Freidenrich, Washington, DC USA.

For The Association for Competitive Technology, MOVANT: Gene C Schaerr, Sidley Austin Brown & Wood LLP, Washington, DC USA.

For Novell, Inc, MOVANT: Judith L Harris, Reed Smith LLP, Washington, DC USA.

Rebecca A Henderson, MOVANT, Pro se, Lexington, MA USA.

For Free Software Foundation, Mason Thomas, John Carroll, Dan Kegel, Andreas Pour, (Kde League, Inc.), Consumers for Computing Choice and Open Platform Working Group, MOVANTS: James S Turner, Swankin & Turner, Washington, DC USA.

Einer Elhauge, MOVANT, Pro se, Cambridge, MA USA.

Judges: COLLEEN KOLLAR-KOTELLY, United States District Judge.

Opinion by: COLLEEN KOLLAR-KOTELLY

Opinion

[*149] MEMORANDUM OPINION

Remaining in this case for the Court's determination is the resolution of a single issue: whether entry of the final judgment proposed by the parties is in the public interest. The Court makes this determination pursuant to the Antitrust Procedures and Penalties Act ("Tunney Act"), *15 U.S.C. § 16(b)-(h)*. In a previous Memorandum Opinion, the Court reviewed the pertinent procedural history and determined that the parties **[**4]** had satisfied the other requirements of the Tunney Act. *See generally* *United States v. Microsoft Corp., 215 F. Supp. 2d 1 (D.D.C. 2002)*. Having reviewed the voluminous record in this case and considered the factors enumerated in *15 U.S.C. § 16(e)*, the Court finds that, with the exception of the provisions relating to the retention of the Court's jurisdiction, the proposed consent decree is in the public interest. Accordingly, the Court conditionally approves the proposed consent **[*150]** decree as the final judgment in this case, pending the prompt agreement by the parties to a modification of the Court's retention of its jurisdiction.

I. PROCEDURAL HISTORY

On May 18, 1998, the United States filed a civil complaint alleging that Microsoft had engaged in anticompetitive conduct in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. On that same date, a group of state plaintiffs filed a separate civil complaint alleging similar violations of federal law, as well as violations of the corresponding provisions of their various state laws. Not long after filing, the two cases were consolidated and thereafter, proceeded jointly **[**5]** through discovery and a trial on the merits. On November 5, 1999, Judge Thomas Penfield Jackson entered 412 findings of fact, *United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999)* (hereinafter cited as "*Findings of Fact*"), and on April 3, 2000, Judge Jackson entered conclusions of law, finding Microsoft liable for violations of §§ 1 and 2 of the Sherman Act and the corresponding state law provisions, *United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000)*. On June 7, 2000, Judge Jackson entered final judgment in the consolidated cases and imposed a structural remedy of divestiture for Microsoft's violations of the Sherman Act. *United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000)*.

Microsoft appealed, and the United States Court of Appeals for the District of Columbia Circuit determined to consider the appeals in the consolidated cases *en banc.* Following extensive briefing and two days of oral argument, the appellate court issued a unanimous *per curiam* opinion affirming in part, reversing in part, vacating the remedy decree in full, and remanding in part for remedy proceedings before a different **[**6]** district court judge. *See* *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34 (D.C. Cir. 2001)* (*en banc*). Following reassignment, on September 28, 2001, this Court ordered that the parties enter into intensive settlement negotiations. *United States v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272*, Nos. 98-1232 and 98-1233 (D.D.C. Sept. 28, 2001) (setting a schedule for settlement discussions). On that same date, the Court entered a schedule for discovery and commencement of evidentiary proceedings, in the event that the cases were not resolved through settlement. *United States v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272*, Nos. 98-1232 and 981233 (D.D.C. Sept. 28, 2001) (setting discovery guidelines and schedule).

The United States and Microsoft were able to reach a resolution in *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C.), in the form of a proposed consent decree, filed with the Court as the "Revised Proposed Final Judgment" on November 6, 2001. As a result, the Court vacated the discovery schedule with regard to *United States v. Microsoft Corp.* and deconsolidated that case from its companion case, *State of New York, et. al. v. Microsoft Corp.*, No. 98-1233 (D.D.C.). *United States v. Microsoft* **[**7]** *Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. Nov. 2, 2001) (vacating the Sept. 28, 2001, Scheduling Order with regard to Civil Action No. 981232); *United States v. Microsoft Corp., 2002 U.S. Dist. LEXIS 13050*, Nos. 98-1232 and 98-1233 (Feb. 1, 2002) (deconsolidating cases). Rather than proceed to an evidentiary hearing on the issue of remedy along with some of the plaintiffs in *State of New York, et. al. v. Microsoft Corp.*, [1] the United **[*151]** States and Microsoft commenced the process of obtaining judicial approval of the proposed consent decree pursuant to the Tunney Act, 15 U.S.C. § 16(b)-(h).

[8]** The November 6, 2001, filing of the Revised Proposed Final Judgment ("RPFJ") was accompanied by a "Stipulation" entered into by the United States, Microsoft, and the Settling States. The Stipulation provided that the Court could enter the proposed final judgment "at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, and without further notice to any party or other proceedings." Stipulation and Revised Proposed Final Judgment at 1. The United States filed its "competitive impact statement" ("CIS") with the Court on November 15, 2001. Pursuant to 15 U.S.C. § 16(b), the United States published the proposed final judgment, along with the CIS, in the Federal Register on November 28, 2001. Revised Proposed Final Judgment and Competitive Impact Statement, 66 Fed. Reg. 59,452 (Nov. 28, 2001). On December 10, 2001, Defendant Microsoft filed with the Court its "description of . . . written or oral communications by or on behalf of

[1] In the former companion case, *State of New York, et al. v. Microsoft Corp.*, the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin have entered into a conditional settlement with Microsoft as to the issue of remedy. Those Plaintiff States-"Settling States"-are awaiting approval by this Court of the settlement in this case before entry of the settlement in *State of New York, et al v. Microsoft Corp.* pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Because the proposed final judgment addresses the Settling States as well as the United States in its terms, the Court, where appropriate, refers to both the United States and the Settling States as "Plaintiffs" in this Memorandum Opinion.

[Microsoft] . . . with any officer or employee of the United States concerning or relevant to" the proposed consent decree. Thereafter, Microsoft **[**9]** supplemented this description on March 20, 2002.

The United States received 32,392 comments on the proposed final judgment and provided the full text of these comments to the Court on February 28, 2002. On March 1, 2002, the United States submitted the full text of the public's comments for publication in the Federal Register, and on May 3, 2002, the public comments appeared in the Federal Register pursuant to that submission. United States' Certificate of Compliance at 4; Public Comments, *67 Fed. Reg. 23,654* (Books 2-12) (May 3, 2002). On May 9, 2002, the United States published in the Federal Register an "addendum containing the correct text of thirteen (13) comments for which either an incomplete or incorrect electronic version had been included in the original submission to the Federal Register." Addendum to Public Comments, *67 Fed. Reg. 31,373* (May 9, 2002); United States Certificate of Compliance at 4. The United States certified compliance with *15 U.S.C. § 16(b)-(d)* on May 9, 2002. On July 1, 2002, this Court confirmed the applicability of the Tunney Act to these proceedings and found that the parties had complied with the Act's **[**10]** requirements such that the matter was ripe for the Court's determination of the public interest. *See* *United States v. Microsoft Corp., 215 F. Supp. 2d 1 (D.D.C. 2002)*. [2]

II. TUNNEY ACT

A. Tunney Act

Concerned with the appearance of impropriety engendered by the secrecy of **[*152]** consent decree negotiations in antitrust cases, in addition to exposing to "sunlight" **[**11]** the process by which such consent decrees are negotiated, 119 Cong. Rec. at 24599, Congress determined that the judiciary should do more than merely "rubber stamp" proposed consent decrees in antitrust cases, H. Rep. No. 93-1463, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6536; S. Rep. No. 93298, at 5 (1973). *See also* *United States v. Microsoft Corp., 312 U.S. App. D.C. 378, 56 F.3d 1448, 1458 (D.C. Cir. 1995)* (quoting legislative history). Accordingly, ***HN1***[] *§ 16(e)* of Title 15 mandates that, prior to the entry of a consent judgment proposed by the United States in an antitrust action, the district court must determine that "entry of such judgment is in the public interest." *15 U.S.C. § 16(e)*. Subsection (e) specifically requires the Court to "make an independent determination as to whether or not entry of a proposed consent decree is in the public interest." S. Rep. 93-298, at 5; *Microsoft, 56 F.3d at 1458* (quoting legislative history).

HN2[] The court's role in protecting the public interest is one of ensuring that the government has not breached its duty to the public in consenting to the decree." *United States v. Bechtel, 648 F.2d 660, 666 (9th Cir. 1981)*. **[**12]** In making this determination, the Court "may consider" the following:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

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[2] Pursuant to the stipulation filed with the Court on November 6, 2001, Microsoft began complying with portions of the proposed final judgment on December 16, 2001, as if "it were in full force and effect." Stipulation at 2. On August 28, 2002, the United States submitted a "Notice" to the Court advising "the Court of Microsoft's compliance with various milestones established by the Second Revised Proposed Final Judgment ('SRPFJ')." Notice at 1 (Aug. 28, 2002). In general terms, the Notice indicates that Microsoft is in compliance with its requirements and "takes seriously its obligations under the SRPFJ." *Id. at 7*.

15 U.S.C. § 16(e). The D.C. Circuit characterized these considerations more simply as an inquiry into the "purpose, meaning, and efficacy of the decree." Microsoft, 56 F.3d at 1462.

The D.C. Circuit identified **HN3**[] a number of issues to which the district court should pay particularly close attention in its examination of the decree and corresponding assessment of the public interest. "A district judge pondering a proposed consent decree . . . should pay special attention to the decree's clarity," as **[**13]** it is the district judge who must "preside over the implementation of the decree." Id. at 1461-62. Based on a similar rationale, district courts are expected to "pay close attention" to the enforcement provisions in a proposed consent decree. Id. at 1462. Where there exist third-party claims that entry of the proposed decree will cause affirmative harm, the district court should at least pause or "hesitate" in order to consider these claims before reaching a conclusion that the proposed decree is appropriate. *Id.*

Notwithstanding the district court's focused consideration of these and other issues, the Court must recall that **HN4**[] its "authority to review the [proposed] decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place." Id. at 1459-60. Accordingly, the Court must accord deference to the "government's predictions as to the effect of the proposed remedies." United States v. Thomson Corp., 949 F. Supp. 907, 914 (D.D.C. 1996) (quoting Microsoft, 56 F.3d at 1461); *see also* United States v. Western Elec. Co., 283 U.S. App. D.C. 299, 900 F.2d 283, 297 (D.C. Cir. 1990) **[**14]** ("Although we see no doctrinal basis for the district court to defer to the DOJ's interpretation of the decree or its views about **[*153]** ***antitrust law***, it is to be expected that the district court would seriously consider the Department's economic analysis and predictions of market behavior."). In this vein, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest." United States v. AT&T, 552 F. Supp. 131, 151 (D.D.C. 1982) (quotation marks omitted), *aff'd without opinion sub nom.* Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983); *accord* Microsoft, 56 F.3d at 1460; Bechtel, 648 F.2d at 666.

Having so identified the general standard in Tunney Act cases, this Court must inquire as to whether that standard applies equally and without modification in this case. The instant case is more complicated than the usual case in that it contradicts the rule that "because it is a settlement [and] there are no findings that the defendant has actually engaged in illegal practices . . . **[**15]** it is therefore inappropriate for the [district court] judge to measure the remedies in the decree as if they were fashioned after trial." Microsoft, 56 F.3d at 1460-61 (emphasis omitted). In this case there has been a trial, and there have been findings of liability on numerous grounds. *See* Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34. Therefore, it seems entirely appropriate to "measure the remedies" based upon the post-trial liability findings in this case. Microsoft, 56 F.3d at 1461. Accordingly, the findings of liability provide an essential foundation to this Court's analysis, as a "discrepancy between the remedy and undisputed facts of antitrust violations could be such as to render the decree 'a mockery of judicial power.'" Mass. School of Law at Andover, Inc. v. United States, 326 U.S. App. D.C. 175, 118 F.3d 776, 782 (D.C. Cir. 1997) (quoting Microsoft, 56 F.3d at 1462); *accord* Thomson, 949 F. Supp. at 913 ("The court is to compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and **[**16]** effectively address the anticompetitive harms initially identified.").

While this is not to say that the circumstances of this case call for a review of the proposed decree in the absence of deference, the Court cannot simply proceed as if this were a case based upon untested allegations. In the usual case "remedies which appear less than vigorous may well reflect an underlying weakness in the government's case." Microsoft, 56 F.3d at 1460-61. Yet in this case, many, though certainly not all, of the strengths and weaknesses of the government's case have already been exposed. In this regard, the Court cannot overlook the fact that the appellate court sustained liability against Microsoft for violation of § 2 of the Sherman Act. United States v. Microsoft, 253 F.3d 34, 59-78. Therefore, without applying a wholly distinct standard, this Court must remain ever-mindful of the posture of this case when assessing the proposed consent decree for determination of the public interest.

Given the liability findings, part of the public interest analysis will require consideration of the extent to which the proposed consent decree "meets the requirements for an antitrust remedy. **[**17]** " *AT&T, 552 F. Supp. at 153*. ***HN5***[] "[A] remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' *Ford Motor Co.* [*v. United States*], *405 U.S. 562, 577, 31 L. Ed. 2d 492, 92 S. Ct. 1142* [1972], . . . to 'terminate the illegal monopoly, [3] deny to the defendant **[*154]** the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' [*United States v. United Shoe Machinery Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496]*." *Microsoft, 253 F.3d at 103*. Although this inquiry is usually reserved for cases which are litigated through remedy, such as *State of New York, et al. v. Microsoft Corp.*, No. 98-1233 (D.D.C.), consideration of these "objectives," to the extent they are applicable to the facts of this case, remains appropriate because liability has been established in this case. Still, the Court's assessment of the remedy's ability to satisfy these objectives is tempered by the deference owed to the government in the Tunney Act context. *See generally* *Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448*.

[18]** Applying these principles to the instant case, because the district court has rendered findings of fact and liability which have been reviewed on appeal, the Court examines, in general terms, the correspondence between the liability findings and the conduct restrictions in the proposed consent decree. In conjunction with this inquiry, the Court is particularly attentive to the clarity of the proposed decree's provisions, the enforcement mechanisms, and to claims that harm will result from the implementation of the proposed decree. *Microsoft, 56 F.3d at 1461-62*.

III. DISCUSSION

A. Court of Appeals Opinion

In most cases, judicial analysis of the public interest in a Tunney Act proceeding commences, quite logically, with an examination of the allegations laid out in the complaint. *See, e.g.,* *Thomson, 949 F. Supp. at 909-11* (describing complaint). Indeed, the district court is without authority to "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft, 56 F.3d at 1459*. In light of the procedural posture of this case, however, the **[**19]** complaint in this case is of little moment, as proceedings have far surpassed the allegations stage. Instead, the opinion of the appellate court provides the underpinning for this Court's analysis of the proposed decree. As a result, the Court pauses to summarize and recount the pertinent portions of the appellate opinion in this case. Where appropriate, a more detailed examination of the appellate court's opinion appears in the context of the Court's discussion of the specific provisions of the proposed final judgment.

1. Market Definition

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[3] The Court notes that the objective of "terminating the illegal monopoly," *United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496 (1968)*, is incompatible with the facts of this case. Neither the district court, nor the appellate court concluded that Microsoft had unlawfully obtained its monopoly. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*; *Microsoft, 87 F. Supp. 2d 30*; *see also* *Microsoft, 56 F.3d at 1452* (observing in the precursor to this case that "the government did not allege and does not contend-and this is of crucial significance to this case-that Microsoft *obtained* its alleged monopoly position in violation of the antitrust laws") (emphasis in original). Moreover, as noted by the appellate court, "the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior." *Microsoft, 253 F.3d at 107* (citing *Findings of Fact* P 411). In this context, outright termination of the monopoly is a questionable remedial goal, as such action would exceed the limits of the controversy presented to the Court. Accordingly, the Court's inquiry into the extent to which the proposed consent decree "terminates the illegal monopoly," *United Shoe, 391 U.S. at 250*, will be limited, and the Court will instead focus upon terminating the illegal *maintenance* of the monopoly.

The appellate court began its opinion by **[*155]** examining Plaintiffs' [4] *§ 2* Sherman Act claims and specifically, whether the district judge had identified the proper market for purposes of assessing Microsoft's monopoly power. The appellate court concluded that the district court had properly defined the relevant market as "the licensing of all Intel-compatible PC [5] operating systems [6] worldwide." *Microsoft, 253 F.3d at 52* (quoting *Microsoft, 87 F. Supp. 2d at 36*). Having agreed with the district court's definition of the relevant market, the appellate court adopted the district court's determination that **[**20]** "circumstantial evidence proves that Microsoft possesses monopoly power." *253 F.3d at 56*. The appellate court further noted that "if we were to require direct proof [of monopoly power], . . . Microsoft's behavior may well be sufficient to show the existence of monopoly power." *Id. at 57*.

[21]** ***2. Theory of Liability***

Integral to the appellate court's adoption of the market definition was its simultaneous acceptance of Plaintiffs' theory of Microsoft's market dominance. Both the district and appellate courts noted that Microsoft's lawfully acquired monopoly is naturally protected by a "structural barrier," known as the "applications barrier to entry." *Id. at 55*. "That barrier . . . stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base." *Id.* (citing *Findings of Fact* PP 30, 36). This barrier creates a "chicken-and-egg" or network effects situation, which perpetuates Microsoft's operating system dominance because "applications will continue to be written for the already dominant Windows, [7] which in turn ensures that consumers will continue to prefer it over other operating systems." *Id.* Because "every **[*156]** operating system has different APIs," [8] applications written for one operating system will not function on another

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[4] In referring to "Plaintiffs" throughout this Memorandum Opinion, the Court refers to the United States, as well as the Plaintiff States in Civ. No. 98-1233, who entered into a settlement agreement with Microsoft. *See supra* note 1. The Court notes, however, that the appellate court's opinion applies not only to the claims brought by the United States and the Settling States, but also to those states who have opted to litigate the issue of remedy in *State of New York, et al. v. Microsoft*, No. 98-1233 (D.D.C.).

[5] "PC" is short for "personal computer." *Findings of Fact* P 1.

[6] The appellate court, relying upon the factual testimony presented to the district court, explained the functions of a PC operating system:

> Operating systems perform many functions, including allocating computer memory and controlling peripherals such as printers and keyboards. Operating systems also function as platforms for software applications. They do this by "exposing"-i.e., making available to software developers-routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or "APIs." For example, Windows contains an API that enables users to draw a box on the screen. Software developers wishing to include that function in an application need not duplicate it in their own code. Instead, they can "call"-*i.e.*, use-the Windows API. Windows contains thousands of APIs, controlling everything from data storage to font display.

Microsoft, 253 F.3d at 53 (citations omitted).

[7] "In 1985, Microsoft began shipping a software package [for the PC] called Windows. The product included a graphical user interface, which enabled users to perform tasks by selecting icons and words on the screen using a mouse." *Findings of Fact* P 7. In 1995, Microsoft introduced an updated version of its Windows software known as "Windows 95." *Id. P 8*. Similarly, in 1998, Microsoft released "Windows 98." *Id.* Since that time, Microsoft has continued to update, revise, and re-create its "Windows" PC operating system.

[8]

> "APIs" are applications programming interfaces. As Judge Jackson explained: [An] operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen.

operating **[**22]** system unless the developer undertakes the "time consuming and expensive" process of transferring and adapting, known in the industry as "porting," the application to the alternative operating system. *Id. at 53*.

[23]** Plaintiffs proceeded under the theory that certain kinds of software products, termed "middleware," [9] could reduce the "self-reinforcing cycle," *Findings of Fact* P 39, by serving as a platform for applications, taking over some of the platform functions provided by Windows and thereby "weakening the applications barrier to entry," *id. P 68*. One of middleware's defining characteristics as a software product is its ability to "expose its own APIs." *Findings of Fact* P 28. Eventually, reasoned Plaintiffs, if applications were written to rely on the middleware API set, rather than the Windows API set, the applications could be made to run on alternative operating systems simply by porting the middleware. Ultimately, by writing to the middleware API set, applications developers could write applications which would run on any operating system on which the middleware was preset. Plaintiffs focused their attention primarily upon two such middleware threats to Microsoft's operating system dominance-Netscape Navigator [10] and the Java technologies. *Microsoft, 253 F.3d at 53*. The district and appellate courts accepted Plaintiffs' theory of competition despite the **[**24]** fact that "neither Navigator, Java, nor any other middleware product could [at that time], or would soon, expose enough APIs to serve as a platform for popular applications." *Id.*; *Findings of Fact* PP 28-29.

3. Four-Part Test for Liability

Having concluded that the district court properly identified the relevant market as the market for Intel-compatible PC operating systems and properly excluded middleware products from that market, the **[**25]** appellate court turned its attention to the issue of whether Microsoft responded to the threat posed by middleware in violation of *§ 2* of the Sherman Act. Specifically, the appellate court set out to determine whether Microsoft "maintained, or attempted to . . . maintain, a monopoly by engaging in exclusionary conduct." *Microsoft, 253 F.3d at 58*. The appellate court recounted that the district court answered that inquiry in the affirmative, finding Microsoft liable for violating *§ 2* of the Sherman Act:

> by engaging in a variety of exclusionary acts . . . specifically . . .: (1) the way in which it integrated [Internet Explorer] into Windows; (2) its various dealings with Original Equipment Manufacturers **[*157]** ("OEMs"), Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors (ISVs), and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole.

Id. In order to review the district court's findings on this point, the appellate court outlined a four-part test for determining whether particular conduct can be said to violate ***antitrust law***. "First, to **[**26]** be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers." *Id. at 58* (emphasis in original). Second, the plaintiff must "demonstrate that the monopolist's conduct harmed competition, not just a competitor." *Id. at 59*. Third, "the monopolist may proffer a 'procompetitive justification' for its conduct." *Id.* (quoting *Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 483, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992))*. If this justification stands unrebutted by the plaintiff, the monopolist may escape liability. Therefore, the fourth prong of the inquiry requires that the plaintiff "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* The appellate court stressed that, although evidence of intent is relevant "to understand the likely effect of the monopolist's conduct," when assessing the balance between the anticompetitive harm and the procompetitive effect, the trial court should focus on the "effect of [the exclusionary] conduct, not the intent behind it." *Id.*

Findings of Fact P 2.

[9] Such software takes the name "middleware" because "it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers" and, therefore, is said to reside in the middle. *Findings of Fact* P 28.

[10] "Although certain Web browsers provided graphical user interfaces as far back as 1993, the first widely-popular graphical browser distributed for profit, called Navigator, was brought to market by the Netscape Communications Corporation ('Netscape') in December 1994." *Findings of Fact* P 17.

Using this framework, the appellate **[**27]** court addressed Microsoft's challenge to each of the findings by the district court. The appellate court examined the district court's four basic areas of findings with regard to § 2 liability in an order different from that of the district court. The Court presents these holdings, in the order addressed by the appellate court.

4. Original Equipment Manufacturer ("OEM") Licenses

Commencing its analysis with the "licenses issued to original equipment manufacturers," [11] *253 F.3d at 59*, the appellate court focused upon three license provisions "prohibiting the OEMs from: removing any desktop icons, folders, or 'Start' menu entries; (2) altering the initial boot sequence; and (3) otherwise altering the appearance of the Windows desktop," *253 F.3d at 61* (citing *Findings of Fact* P 213). Into the category of "otherwise altering the appearance of the Windows desktop," the appellate court subsumed the automatic launch of an alternative user interface, the prohibition against the addition of icons and folders different in size and shape from those used by Microsoft, and the prohibition on the use of the "Active Desktop" feature [12] to display third-party brands. *253 F.3d at 62*; **[**28]** *see also Findings of Fact* P 213. Of these license provisions, the appellate court concluded that, "with the exception of the one restriction prohibiting automatically launched alternative interfaces, all of the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification." *253 F.3d at 64*. In commencing its next area of **[*158]** analysis, the appellate court noted with regard to the license restrictions imposed upon OEMs that they "have a significant effect in closing rival browsers out of one of the two primary channels of distribution." *Id.*

5. Integration of Internet Explorer ("IE") and **[**29]** ***Windows***

The appellate court next turned its attention toward the "integration of [Internet Explorer ("IE")] [13] and Windows." *Id.* At the outset of its analysis, the appellate court took a narrow view of the district court's determination, noting that the district court's "broad[]" condemnation of "Microsoft's decision to bind 'Internet Explorer to Windows with . . . technological shackles'" is supported by only three specific actions taken by Microsoft. *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 39*). The appellate court identified these three as (1) "excluding IE from the 'Add/Remove Programs' utility"; (2) "designing Windows so as in certain circumstances to override the user's choice of a default browser other than IE"; and (3) "commingling code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating system." *253 F.3d 34, 64-65*. Pursuant to its four part test for liability, the appellate court concluded that Microsoft could be held liable for the first and the third of these actions. *253 F.3d 34, 65-67*. As to the second of these **[**30]** actions, the override of the user's choice of default in certain circumstances, the court determined that Microsoft had proffered a procompetitive justification that went unrebutted by Plaintiffs, namely that the override was the result of "valid technical reasons" which justified the override in a "few out of the nearly 30 means of accessing the Internet." *253 F.3d 34, 67* (quotation marks omitted). Finding that Plaintiffs had neither rebutted Microsoft's procompetitive justification, nor demonstrated that the anticompetitive effect of the challenged act outweighed such justification, the appellate court held that "Microsoft may not be held liable for this aspect of its product design." *Id.*

6. Agreements with Internet Access Providers ("IAPs")

Directing its attention to Microsoft's "agreements with various IAPs," [14] which the district court "condemned" as exclusionary, the appellate court identified five Microsoft **[**31]** actions specifically relied upon by the district court for this condemnation:

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[11] Manufacturers of PCs are known as "original equipment manufacturers" or "OEMs." *Findings of Fact* P 10.

[12] "The Active Desktop was a Microsoft feature that, if enabled, allowed the Windows user to position Web pages as open windows that appear on the background, or 'wallpaper' of the Windows desktop." *Findings of Fact* P 314.

[13] Internet Explorer is Microsoft's Web browser. *Findings of Fact* P 17.

> (1) offering IE free of charge to IAPs[;] . . . (2) offering IAPs a bounty for each customer the IAP signs up for service using the IE browser[;] . . . (3) developing the IE Access Kit ("IEAK"), a software package that allows an IAP to "create a distinctive identity for its service in as little as a few hours by customizing the [IE] title bar, icon, start and search pages," *Findings of Fact* P 249[;] . . . (4) offering the IEAK to IAPs free of charge, on the ground that those acts, too, helped Microsoft preserve its monopoly[,] [*Microsoft*, 87 F. Supp. 2d] at 41-42[;] . . . (5) agreeing to provide easy access to IAPs' services from the Windows desktop in return for the IAPs' agreement to promote IE exclusively and to keep shipments of internet access software using Navigator under a specific percentage, typically 25%. **[*159]** *See* [*Microsoft*, 87 F. Supp. 2d] at 42 (citing *Findings of Fact* PP 258, 262, 289).

253 F.3d 34, 67-68. Grouping the first four of these actions together as "Microsoft's inducements," the appellate court held that these four actions **[**32]** merely "offered a consumer an attractive deal" and, therefore, could not be treated as anticompetitive. *253 F.3d 34, 68*. In contrast, the appellate court agreed with the district court that Microsoft's exclusive contracts with IAP's "are exclusionary devices, in violation of *§ 2* of the Sherman Act." *253 F.3d 34, 71*.

7. Agreements with Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple

The appellate court next considered Microsoft's "dealings with ICPs, which develop websites; ISVs, which develop software; and Apple, which is both an OEM and a software developer." *253 F.3d 34, 71*. The "deals" at issue in this portion of the case are grants of "free licenses to bundle IE with [the ICPs' and ISVs'] offerings" and the exchange **[**33]** of "other valuable inducements for [ICPs' and ISVs'] agreement to distribute, promote, and rely on IE rather than Navigator." *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 42-43*) (brackets and quotation marks omitted). The district court held these agreements to be anticompetitive in violation of *§ 2* of the Sherman Act because they had the effect of "directly inducing developers to focus on [Microsoft's] own APIs rather than ones exposed by Navigator." *Id.* (quoting *Microsoft, 87 F. Supp. 2d at 42-43*) (quotation marks omitted).

At the outset of its analysis in this context, the appellate court concluded bluntly that "with respect to [Microsoft's] deals with ICPs, the District Court's findings do not support liability." *Id.* In contrast, the appellate court sustained the district court's finding of liability with regard to Microsoft's agreements with ISVs because Plaintiffs made "a *prima facie* showing that the deals have an anticompetitive effect," and Defendant did not successfully rebut this showing. *253 F.3d 34, 72*. In particular, the appellate court found that the exclusive provisions in these so-called "First Wave Agreements" **[**34]** with ISVs foreclosed a substantial share of the market for Navigator. *Id.*

Turning its attention in this context finally to Microsoft's relationship with Apple, the appellate court concluded that Microsoft's agreement with Apple was exclusionary in violation of *§ 2* of the *Sherman Act. 253 F.3d 34, 72-74*. The appellate court recounted that in mid-1997, Microsoft and Apple entered into an agreement which obligated Microsoft to continue to release "up-to-date " versions of its office productivity software for Apple's systems, Mac Office. *253 F.3d 34, 73* (quoting *Findings of Fact* PP 350-52). The agreement further obligated Apple to make IE the default browser. *Id*. (quoting *Findings of Fact* PP 350-52). Pursuant to this same agreement, Apple promised not to install Navigator during the "default installation," and not to "position icons for non[-]Microsoft browsing software on the desktop of new Macintosh PC systems or Mac OS upgrades." *Id.* (quoting *Findings of Fact* PP 350-52). Similarly, the agreement prohibited Apple "from encouraging users to substitute another browser for IE, and stated that Apple [would] 'encourage its employees to use **[**35]** IE.'" *Id.* (quoting *Findings of Fact* P 352) (brackets omitted). The appellate court concluded that "this exclusive deal between Microsoft and Apple had a substantial effect upon the distribution of rival browsers." *Id.* Given the absence of a "procompetitive justification for the exclusive dealing arrangement," the appellate court affirmed the district court's finding **[*160]** of *§ 2* liability based upon Microsoft's exclusive deal with Apple. *253 F.3d 34, 74*.

8. Java

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[14] "PCs typically connect to the Internet through the services of Internet access providers ('IAPs'), which generally charge subscription fees to their customers in the United States." *Findings of Fact* P 15.

The appellate court grouped the next category of Microsoft conduct under the heading "Java" in reference to "a set of technologies developed by Sun Microsystems" ("Sun"). *Id.* The Java technologies are described as "another type of middleware posing a potential threat to Windows' position as the ubiquitous platform for software development." *Id.* (citing *Findings of Fact* P 28). The appellate opinion recounts that the district court identified four steps taken by Microsoft to "exclude Java from developing as a viable cross-platform threat: (a) designing a [Java Virtual Machine ("JVM") [15]] incompatible with the one developed by Sun; (b) entering into contracts, the so called 'First **[**36]** Wave Agreements,' requiring major ISVs to promote Microsoft's JVM exclusively; (c) deceiving Java developers about the Windows-specific nature of the tools it distributed to them; and (d) coercing Intel to stop aiding Sun in improving the Java technologies." *Id.* Of these actions, the appellate court concluded that all but the first action were anticompetitive in violation of *§ 2*. *253 F.3d 34, 74-78*. With regard to the first enumerated action, the incompatible JVM, the appellate court held that because the incompatible JVM did not have an anticompetitive effect which outweighed the procompetitive justification for the design, it could not provide a basis for antitrust liability. *253 F.3d 34, 75*.

[37]** Specifically, with regard to the First Wave Agreements, the appellate court observed that the district court had found the agreements, "although not literally exclusive . . . were exclusive in practice." *253 F.3d 34, 75*. Although the district court did not enter precise findings as to the effect of the First Wave Agreements upon rival Java distribution, the appellate court determined that "the record indicates that Microsoft's deals with the major ISVs had a significant effect upon JVM promotion." *Id.* In the absence of procompetitive justification, the appellate court imposed liability for this aspect of the First Wave Agreements. *Id.* at 76.

As to the Java developer tools, the appellate court's imposition of liability focused not upon the fact that the tools created programs which were not cross platform, but upon the fact that Microsoft deceived software developers about the Windows-specific nature of the tools. *253 F.3d 34, 76-77*. The appellate court found that Microsoft's deception was intentional and without procompetitive explanation. *253 F.3d 34, 77*. As a result, the appellate court imposed liability for Microsoft's deception. **[**38]** *Id.*

9. Intel

As noted above, the appellate court's final imposition of liability arose out of a "threat" by Microsoft directed at Intel. *253 F.3d 34, 77*. "Intel is [a firm] engaged principally in the design and manufacture of microprocessors." *Findings of Fact* P 95. A segment of Intel's business develops **[*161]** software, with the primary focus upon "finding useful ways to consume more microprocessor cycles, thereby stimulating demand for advanced Intel microprocessors." *Id.* The appellate court recounted that in 1995, Intel was in the process of "developing a high performance, Windows-compatible JVM." *Microsoft, 253 F.3d at 77*. Furthering its efforts to combat the cross-platform threat of Java to the Windows platform, Microsoft repeatedly "urged Intel not to help Sun by distributing Intel's fast, Sun compliant JVM." *Id.* Eventually, Microsoft "threatened Intel that if it did not stop aiding Sun . . . then Microsoft would refuse to distribute Intel technologies bundled with Windows." *Id.* Intel capitulated after Microsoft threatened to support an Intel competitor, AMD, if Intel's efforts with Java continued. *Id.*

The appellate **[**39]** court acknowledged Microsoft's anticompetitive intent, as well as the anticompetitive effect of Microsoft's actions toward Intel. *Id.* Microsoft did not offer a procompetitive justification for its treatment of Intel, but "lamely characterized its threat to Intel as 'advice.'" *Id.* Rejecting the characterization of Microsoft's threat as mere "advice," the appellate court found the district court's imposition of liability to be supported by both fact and law. *253 F.3d 34, 77-78*. On this basis, the appellate court imposed *§ 2* liability for Microsoft's threat to Intel.

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[15] "The Java technologies include: (1) a programming language; (2) a set of programs written in that language, called the 'Java class libraries,' which expose APIs; (3) a compiler, which translates code written by a developer into 'bytecode'; and (4) a Java Virtual Machine ('JVM'), which translates bytecode into instructions to the operating system. [*Findings of Fact*] P 73. Programs calling upon the Java APIs will run on any machine with a 'Java runtime environment,' ['JRE'] that is, Java class libraries and a JVM. ***Id. PP 73, 74***." *Microsoft, 253 F.3d at 74*. The terms "JRE" and "JVM" are sometimes used interchangeably to refer to the Java platform. The court uses the term JVM throughout this Memorandum Opinion for that purpose.

Corresponding to the above-described imposition of liability pursuant to *§ 2* of the Sherman Act, the appellate court imposed liability upon Microsoft for violations of the relevant state law counterparts of" the *Sherman Act. 253 F.3d 34, 46*. Beyond these findings, the appellate court did not find Microsoft liable for any additional antitrust violations. Specifically, the appellate court reversed the district court's conclusion that Microsoft's "course of conduct" as a whole constitutes a separate violation of *§ 2*. *253 F.3d 34, 78*. In addition, the appellate court rejected the district **[**40]** court's finding of attempted monopolization and remanded the *§ 1* tying claim for further proceedings at the district court level. [16] Plaintiffs opted not to pursue the tying claim on remand. [17] Joint Status Report (Sept. 20, 2001) at 2.

10. Vacating the District Court's Order of Remedy

Following its review **[**41]** of the district court's conclusions with regard to liability, the appellate court considered the district court's choice of remedy. Over the objection of Defendant Microsoft, the district court decided to consider the merits of Plaintiffs' remedy proposal in the absence of an evidentiary hearing. *Microsoft, 253 F.3d at 98-99*; *see also Microsoft, 97 F. Supp. 2d at 61*. The district court did so based on the rationale that Microsoft's evidentiary proffers largely concerned "testimonial predictions about future events" which would be of little use to the court in identifying an "optimum remedy." *Microsoft, 253 F.3d at 99* (quoting *Microsoft, 97 F. Supp. 2d at 62*). Based upon its finding of liability for illegal monopoly maintenance, attempted monopolization, **[*162]** and illegal tying, the district court entered a remedy "nearly identical to plaintiffs' proposal" mandating the divestiture of Microsoft Corporation into an "Operating Systems Business" and an "Applications Business." *253 F.3d at 99-100* (quoting *Microsoft, 97 F. Supp. 2d at 64*). The original decree entered by the district court, often referred **[**42]** to as the Initial Final Judgment ("IFJ"), also included a number of "interim restrictions on Microsoft's conduct." *253 F.3d 34, 100*. The interim restrictions included, *inter alia*, mandatory disclosure "to third-party developers the APIs and other technical information necessary to ensure that software effectively interoperates with Windows," *id.* (describing IFJ § 3.b), a prohibition on Microsoft's ability to enter into contracts which oblige third parties to limit their "'development, production, distribution, promotion, or use of, or payment for' non-Microsoft platform level software," *id.* (quoting IFJ § 3.e), and a "'Restriction on Binding Middleware Products to Operating System Products' unless Microsoft also offers consumers 'an otherwise identical version' of the operating system without the middleware," *id.* (quoting IFJ § 3.g).

The appellate court found three fundamental flaws in the district court's order of remedy, each of which alone justified vacating the remedial decree. The appellate court first concluded that the failure to hold an evidentiary hearing in the face of disputed facts concerning the remedy violated the "cardinal principle of **[**43]** our system of justice that factual disputes must be heard in an open court and resolved through trial-like evidentiary proceedings." *253 F.3d at 101*. The appellate court rejected the district court's conclusion that evidentiary proceedings would not be useful, noting that "a prediction about future events is not, as a prediction, any less a factual issue." *253 F.3d 34, 102*. Moreover, noted the appellate court, "drafting an antitrust decree by necessity 'involves predictions and assumption concerning future economic and business events.'" *Id.* (quoting *Ford Motor Co . v. United States., 405 U.S. 562, 578)*.

In addition to the failure to hold an evidentiary hearing, the appellate court faulted the district court for its "failure to provide an adequate explanation for the relief it ordered." *253 F.3d at 103*. Finding the trial court's devotion of "a mere four paragraphs of its order to explaining its reasons for the remedy" insufficient, the appellate court observed that the initial remedy was not accompanied by an explanation of the manner in which the remedy would

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[16] Plaintiffs' complaint also included a separate claim of "monopoly leveraging" under *§ 2* of the Sherman Act. Judge Jackson granted summary judgment in favor of Microsoft as to this claim on the grounds that the theory runs "contrary to both economic theory and the Sherman Act's plain language." *United States v. Microsoft, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485*, at * 27 (D.D.C. Sept. 14, 1998).

[17] Plaintiffs' tying claim alleged that "Microsoft's contractual and technological bundling of the IE Web browser (the 'tied' product) with its Windows operating system ('OS') (the 'tying' product) resulted in a tying arrangement that was per se unlawful." *Microsoft, 253 F.3d at 84*.

accomplish the objectives of a remedial decree in an antitrust case. *Id.* In this regard, the appellate **[**44]** court recited that "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' *Ford Motor Co.*, 405 U.S. at 577, to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' [*United Shoe, 391 U.S. at 250*]." *Id.* (internal citations in original).

Lastly, the appellate court concluded that the substantial modifications to the liability imposed by the district court merited a new determination of the remedy for the surviving antitrust violations. In particular, the appellate court noted that of the three original findings of liability, only liability for illegal monopoly maintenance in violation of *§ 2* of the Sherman Act had survived, and even this aspect of liability had been modified. *253 F.3d at 103-04*. The appellate court determined that where "sweeping equitable relief is employed to remedy multiple violations, and some-indeed most-of the findings of remediable violations do not withstand scrutiny" the **[*163]** remedy decree must be vacated because there no longer exists a rational **[**45]** connection between the liability imposed and the remedy ascribed thereto. *253 F.3d at 105*. Accordingly, the appellate court remanded the case for this Court to resolve any factual disputes surrounding a remedy and for this Court to exercise its "broad discretion" in imposing the "relief it calculates will best remedy the conduct . . . found to be unlawful." *Id.*

11. Causation and Remedy

In its appeal, Microsoft "urged" the circuit court to "reverse on the monopoly maintenance claim, because Plaintiffs never established a causal link between Microsoft's anticompetitive conduct, in particular its foreclosure of Netscape's and Java's distribution channels, and the maintenance of Microsoft's operating system monopoly." *253 F.3d at 78*. Relying heavily on the treatise on ***antitrust law*** authored by Phillip E. Areeda and Herbert Hovenkamp, the appellate court determined that liability in this case could be established through an "inference" of causation. *253 F.3d at 79* (citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 651c, at 78 (1996)). Applying this "rather edentulous test for causation" the appellate court identified two relevant inquiries, the satisfaction of **[**46]** which would result in liability:

> (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.

Id. On the record from the district court, the appellate court readily concluded that both inquiries had been satisfied and that liability must be imposed. *Id.*

The appellate court noted, however, that "Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue." *253 F.3d at 80*. Again relying upon Areeda and Hovenkamp, the appellate court focused upon the structural remedy that had been imposed by Judge Jackson and identified a relationship between the evidence of causation and the imposition of "radical structural relief":

> As we point out later in this opinion, divestiture is a remedy that is imposed only with great caution, in part because **[**47]** its long-term efficacy is rarely certain. Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief. *See* 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 91-92 ("More extensive equitable relief, particularly remedies such as divestiture designed to eliminate the monopoly altogether, raise more serious questions and require a clearer indication of a significant causal connection between the conduct and creation or maintenance of the market power.").

Id. (internal citation omitted). Later in the opinion, the appellate court again quoted from Areeda and Hovenkamp, highlighting the need for "a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of the market power" where the remedy is structural relief. *253 F.3d at 106* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 9192) (emphasis added by appellate court). The appellate court instructed that in the absence of "a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market . . . the antitrust **[*164]** defendant's **[**48]** unlawful behavior should be remedied by 'an injunction against the continuation of that conduct.'" *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67).

In effect, the appellate court appears to have identified a proportionality between the severity of the remedy and the strength of the evidence of the causal connection. Accordingly, ***HN6***[] the "mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." *Id.* (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67). Similarly, because structural relief is "designed to eliminate the monopoly altogether," 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW*** P 650a, at 67, "wisdom counsels against adopting radical structural relief" in the "absence of some measure of confidence that there has been an actual loss to competition that needs to be restored," *id.* Instead, the court crafting a remedy must assess the strength of the causation evidence that established liability and "tailor" the relief accordingly. *Microsoft, 253 F.3d at 107*.

As the Court recounted above, the United States, along with nine State Plaintiffs, reached an agreement on **[**49]** the issue of remedy. As a result, these Plaintiffs opted not to litigate further the issue of remedy. The United States proceeded to seek approval of the settlement agreement and the entry of the agreement as the final judgment in this case pursuant to the Tunney Act, *15 U.S.C. § 16(b)-(h)*. Having determined that the issue is ripe for the Court's consideration, the Court addresses the proposed final judgment and the public interest in the paragraphs below.

B. Second Revised Proposed Final Judgment

The Second Revised Proposed Final Judgment (SRPFJ) which the parties seek to have entered as a final judgment in this case sets forth a number of restrictions upon Microsoft's conduct which are intended to remedy the effects of Microsoft's anticompetitive behavior. Section III of the SRPFJ, entitled "Prohibited Conduct," contains the substance of these restrictions, organized into subsections by letters. SRPFJ § III.A-J. Sections III.A, B, and F can be grouped together according to the similarity of their terms and the manner in which the terms compliment each other. Each of these sections restricts Microsoft's ability to utilize its market power as **[**50]** a means, via retaliation and coercion, to protect its monopoly.

1. Anti-Retaliation and Uniform Licenses

Section III.A bars Microsoft from "retaliation" against OEMs by altering its commercial relationship with that OEM or "withholding newly introduced forms of non-monetary Consideration . . . from that OEM" in certain circumstances. *Id.* § III.A. In particular, the provision bars retaliation where Microsoft knows the OEM "is or is contemplating":

> 1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;
> 2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or
> 3. exercising any of the options or alternatives provided for under this Final Judgment.

SRPFJ § III.A. The provision further requires Microsoft to provide written notice **[*165]** to a "Covered OEM" [18] and at least "thirty days' opportunity to cure" prior to termination of that OEM's Windows Operating System Product **[**51]** license. *Id.* However, where Microsoft has already provided "two or more such notices during the term of [the Covered OEM's] Window's Operating System Product License," Microsoft is not obligated to provide "such a termination notice and opportunity to cure." *Id.*

There are two exceptions to subsection A. First, and without controversy, the provision shall not be construed to "prohibit Microsoft from enforcing any provision of any license with any OEM or intellectual property right that is not

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[18] "Covered OEMs" is a defined term. Pursuant to § VI.D, "'Covered OEMs' means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective date of the Final Judgment." SRPFJ § VI.D.

inconsistent with the Final Judgment." *Id.* Second, and more significantly, the provision does not prohibit Microsoft from "providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration **[**52]** is commensurate with the absolute level or amount of that OEM's development, distribution, promotion or licensing of that Microsoft product or service." *Id.*

The United States identifies § III.A as a provision broadly drawn so as to "ensure[] that OEMs have contractual and economic freedom to make decisions about distributing and supporting non-Microsoft middleware products without fear of coercion or retaliation by Microsoft." United States Mem. in Support of the RPFJ (hereinafter cited as "United States Mem.") at 57. Section III.A focuses on OEMs because of the significance of the OEM channel as a means of distributing rival middleware and operating systems. *Id.* The exception in § III.A for consideration commensurate with the promotion of or other similar support for Microsoft's products is intended to preserve "permissible collaborations between an OEM and Microsoft to promote Microsoft products and services." United States Response to Public Comments (hereinafter cited as "United States Resp.") at 78. For example, explains the government, "an OEM that collaborates with Microsoft on developing a particular product through extensive testing, or offers advertising or other **[**53]** promotion, may be compensated for its greater role through a higher level of Consideration for that product than one that is not developing or supporting that product." *Id.* Given this reasoned explanation, the Court concludes that the exception in § III.A for compensation commensurate with an OEM's promotion or similar support for a Microsoft product is appropriately tailored to permit procompetitive agreements between Microsoft and OEMs.

a. "Microsoft Platform Software"

The Court pauses its discussion of § III.A at this point to examine the term "Microsoft Platform Software," which is the first of a number of carefully defined terms used throughout the SRPFJ. The proposed final judgment defines Microsoft Platform Software as the combination or alternative of two other defined terms. *See* SRPFJ § VI.L. "'Microsoft Platform Software' means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product." *Id.* Each of the two terms used in the definition of "Microsoft Platform Software" raises its own definitional issues, with the more complex issues arising in conjunction with latter of the two. Accordingly, the Court will examine each definition **[**54]** in turn.

[*166] ***i. Windows Operating System Product***

The SRPFJ defines a "Windows Operating System Product" as

> the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

SRPFJ § VI.U. Controversy swirls around the SRPFJ's definition of "Windows Operating System Product" largely because of the final sentence in the definition, which leaves to Microsoft's discretion the determination of which code shall comprise a Windows Operating System Product. This controversy, to quote the Immortal Bard, is really "much ado about nothing." The criticism of this aspect of the definition arises from an interpretation which views the final sentence as a form of absolution for Microsoft from any liability for the illegal tying **[**55]** of two distinct products based upon the design of its Windows operating system product. Such criticism is misplaced.

The definitions in the final judgment in this case do not possess the power to alter the application of the antitrust laws to Microsoft's conduct or its products. The power to determine which software code constitutes a "Windows Operating System Product" for purposes of the SRPFJ cannot logically be viewed as a grant of special rights or immunity from prosecution under the antitrust laws for illegal tying. Quite simply, the code that Microsoft identifies as a "Windows Operating System Product" has no impact upon the ability of the Department of Justice, or any future plaintiff, to allege that the product identified as a "Windows Operating System Product" for purposes of the SRPFJ is an illegal amalgamation of two separate products under *§ 1* of the Sherman Act. Likewise, the definition of "Windows Operating System Product" in the SRPFJ cannot curtail the ability of a court to determine that

Microsoft has illegally tied two products which are separate under the antitrust laws. Instead, the definition merely recognizes that, as a practical matter, Microsoft retains the **[**56]** power to determine which software code it will include in the products marketed as "Windows."

The definition of "Windows Operating System Product" is similarly misunderstood as enabling Microsoft to somehow manipulate which code is included in the definition in order to avoid classification as a "Microsoft Middleware Product." According to this misreading of the definition, Microsoft could avoid inclusion of a particular piece of code within the definition of "Microsoft Middleware Product," SRPFJ § VI.K, by simply declaring that the code is part of a "Windows Operating System Product." The fatal flaw in this reading of the definition is the presumption that "Microsoft Middleware Product" and "Windows Operating System Product" are mutually exclusive terms; that is not the case. Software code can simultaneously fall within both the "Windows Operating System Product" and "Microsoft Middleware Product" definitions. *Id.* § VI.K, U. Once again, therefore, the definition of "Windows Operating System Product" merely recognizes that Microsoft, as the distributor of a product called "Windows," has the discretion to determine which code to include in its distribution of that product.

[57] [*167]** ***ii. "Microsoft Middleware Product***"

As recounted above, the latter portion of the definition of "Microsoft Platform Software" rests upon the definition of "Microsoft Middleware Product." In the SRPFJ, "Microsoft Middleware Product" means:

> 1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and
> 2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product
>
> > a. Internet browsers, email client software, networked audio/video client software, instant messaging software or
> > b. functionality provided by Microsoft software that --
> > i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;
> > ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and
> > iii. is Trademarked. [19]

Functionality **[**58]** that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.

SRPFJ § VI.K. The first portion of this definition captures various types of functionality provided by one of a set of existing, named products and their successors. The functionalities in this list go beyond the functionality provided by the Java technologies and Netscape's Navigator, the middleware technologies which were the focus of the liability findings in this case, and include a broad range of existing middleware technologies.

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[19] Trademarked is defined in the SRPFJ to have the following meaning:

> distributed in commerce and identified as distributed by a name other than Microsoft (R) or Windows (R) that Microsoft has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as (R) or TM, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for the name in the United States Patent and Trademark Office; or (iii) asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft (R) or Windows (R) trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft (R) or Windows (R) trademarks, and hereby abandons any such rights that it may acquire in the future.

SRPFJ § VI.T.

[59]** The latter portion of the definition enables inclusion in the decree of future technologies, provided the new technologies meet certain requirements. To fall within the prescient portion of the definition, the software code must first be distributed as part of any "Windows Operating System Product," the definition of which the Court discussed above. *Id.* The rationale for this requirement is quite clear, as Windows is Microsoft's product in the monopoly market. If the Microsoft software has not been included in Windows, it lacks a fundamental relationship to the theory and imposition of liability in this case. The second **[*168]** element of such future functionality is that it must also be distributed separately from a Windows Operating System Product. The government's rationale for this requirement derives from its view that the "competitive significance of middleware products such as browsers and media players will be relatively small if they are not distributed in any form separate from a Windows Operating System Product." United States Resp. at 44. This view results from the fact that, absent separate distribution, Microsoft will remain unable to reach the "large installed base of Windows **[**60]** machines" and can only impact users willing to upgrade to new versions of the operating system. *Id.* Even then, Microsoft releases new operating systems at fairly long intervals and, in the absence of separate distribution, will be unable to update and release new versions of products provided originally with the operating system. *Id. at 44-45*. Therefore, according to the government, the competitively significant middleware portions of Windows, of necessity, will be distributed separately.

The third element of the definition is based upon yet another defined term requiring that the "Microsoft Middleware Product" provide similar functionality to that provided by a "NonMicrosoft Middleware Product." SRPFJ § VI.K. In this instance, the definition of "NonMicrosoft Middleware Product" [20] is indisputably broad, incorporating anything which can be reasonably identified as "middleware" and which has achieved a certain level of popularity. *Id.* § VI.N.

[61]** Finally, the requirement that Microsoft trademark the future functionality derives from the government's recognition of the "business reality that Microsoft often names and markets the technologies that it wishes developers and consumers to adopt." United States Resp. at 53. The government further explains that, in its view, "Microsoft has little incentive to bury its new products inside other applications in order to avoid having it meet the Trademark standard." *Id.* These explanations address and rebut to the Court's satisfaction criticisms of the "trademarked" requirement in the definition of "Microsoft Middleware Product."

b. Anti-Retaliation: Original Equipment Manufacturers ("OEMs")

Having examined the various components of the definition of "Microsoft Platform Software," the Court returns to its original inquiry into the effect of § III.A. The government asserts, and the Court sees little basis to disagree, that § III.A will prevent Microsoft from hindering an OEM's ability to choose to support products which have the capacity to threaten Microsoft's operating system monopoly. Contrary to some criticism, the Court regards the limited scope of this provision, **[**62]** in that it addresses only competition relative to Microsoft's dominant role as a platform for applications, as entirely appropriate given the middleware theory of liability pursued in this case. *See generally* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. The Court further regards § III.A as presenting clear and enforceable terms.

The only lingering concern held by the Court is that § III.A does nothing to prevent **[*169]** Microsoft from making threats of retaliation. The factual findings and liability in this case evidence that Microsoft has used not only actual retaliation, but threats of retaliation in coercing certain kinds of behavior. *See, e.g.*, *id. at 77-78* (discussing Microsoft's "threat to Intel"). Given the power Microsoft wields as a monopolist, it would be appropriate to prohibit Microsoft from stifling competition with threats of bad treatment. The United States explains the absence of any ban

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[20] The SRPFJ defines "Non-Microsoft Middleware" as

> a non-Microsoft software product running on a Windows Operating System Product (i) that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System, and (ii) of which at least one million copies were distributed in the United States within the previous year.

SRPFJ § VI.N.

on threats rather logically, noting that where the retaliation itself is prohibited, any threat of retaliation is empty and, therefore, without power. United States Resp. at 75. While a rational explanation, the Court regards a ban on threats of retaliation, at a minimum, **[**63]** as more comforting to business entities dealing with Microsoft when making decisions about supporting Microsoft competitors. Nevertheless, it is a far cry from making a "mockery of judicial power" that the remedy in this case does not include a ban on threats of retaliation. *Microsoft, 56 F.3d at 1462*. Accordingly, this criticism matters little in the Court's assessment of the public interest, as ***HN7***[] a consent decree need not reflect the Court's own choice of a remedy, but instead, giving due respect to the government's view of the effect of the remedial proposal, need only reflect a certain consonance with the liability allegations, or more appropriately in this case, the liability findings. *See* *id.at 1461*.

c. Anti-Retaliation: Independent Software Vendors ("ISVs") and Independent Hardware Vendors ("IHVs")

Section III.F mirrors § III.A to some extent, in that it too prohibits retaliation, but § III.F applies to Microsoft's conduct towards ISVs and IHVs. SRPFJ § III.F. Pursuant to § III.F.1:

> Microsoft shall not retaliate against any ISV or IHV because of that ISV's or IHV's:
>
> a. developing, using, distributing, promoting or **[**64]** supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or
> b. exercising any of the options or alternatives provided for under this Final Judgment.

Id. § III.F.1. Inasmuch as § III.F.1 mirrors § III.A, criticism with regard to the absence of a ban on threats of retaliation is equally applicable. For the reasons discussed with regard to § III.A, however, the Court need not tarry long on the absence of such a prohibition. In all other respects, the protections in § III.F reflect the liability findings against Microsoft for retaliating against ISVs and IHVs. *See* *Microsoft, 253 F.3d at 72-73* (discussing Microsoft's dealings with Apple), 77-78 (describing Microsoft's "threat to Intel" [21]). Furthermore, because § III.F.1 prohibits retaliation responsive to IHVs' or ISVs' support for software which "competes" with not only "Microsoft Platform Software," but "any software that runs on software that competes with Microsoft Platform Software," its protections are broadly drawn. SRPFJ § III.F.1. Simultaneously, however, § III.F.1 remains appropriately **[**65]** grounded in its reflection of the monopoly market in this case and does **[*170]** not stray inappropriately into markets unrelated to the market in which liability was imposed. *Id.* The Court observes, in this regard, that there is little justification for protection against retaliation for software which does not "compete" with the monopoly product or run on software which "competes" with the monopoly product. The Court, therefore, finds that the protections afforded by § III.F.1 are appropriately drawn so as to advance the public interest.

d. Uniform Licenses

Section III.B is said to strengthen § III.A by mandating that Microsoft provide uniform license terms to Covered OEMs. SRPFJ § III.B. The uniform royalties are to be established in a schedule, which is accessible **[**66]** to Plaintiffs and the covered OEMs. *Id.* Notwithstanding the general uniformity of the licenses, Microsoft may provide volume discounts based upon the volume of the OEM's licenses of a Windows Operating System Product or group of such products. *Id.* § III.B.2. The licenses may also include discounts so long as the discounts are uniform among the Covered OEMs. [22] *Id.* § III.B.3. The discounts must also be based on objective, verifiable criteria and may not be inconsistent with other portions of the SRPFJ. *Id.* This section simplifies the complex royalty licenses so as to prevent Microsoft from using the license terms as a means by which to coerce and control the OEMs into favoring Microsoft products. United States Mem. at 57. Still, the provision is limited such that larger OEMs may, quite reasonably, receive different treatment than some of the smaller OEMs. *Id.*

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[21] In the *Findings of Fact*, Judge Jackson noted that Intel is both an IHV and an ISV. *Findings of Fact* P 95 ("Although Intel is engaged principally in the design and manufacture of microprocessors, it also develops some software.").

[22] However, Microsoft may establish a two tiered discount schedule, one for the ten largest Covered OEMs, and another for the eleventh through the twentieth Covered OEMs. SRPFJ § III.B.3.a.

[67]** The strongest criticism of § III.B argues that it should forbid Microsoft's practice of using market development allowances ("MDAs") and other discounts. Vociferous though this criticism may be, it ignores the fact that there is no liability in this case which regards the use of MDAs themselves, or in conjunction with other anticompetitive behavior, to be an antitrust violation. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. Quite to the contrary, the United States takes the view that MDAs and similar discounts, when not misused, constitute "efficient behavior that has little or no potential to be used by Microsoft for anticompetitive purposes." United States Resp. at 81. Other provisions of the SRPFJ protect against the potential for misuse of MDAs, via retaliation or selective rewarding, such that there is little justification, and certainly no necessity, for a ban on Microsoft's use of MDAs and other discounts. Moreover, MDAs and similar discounts are prohibited any time they are inconsistent with any other term of the SRPFJ. SRPFJ § III.B.3.

By mandating uniformity, the SRPFJ sacrifices the ability of OEMs to negotiate the most favorable terms. The Court recognizes that despite **[**68]** the obvious benefit to be gained by uniformity in licenses, undoubtedly, there are some which would be happier with the freedom to negotiate. Yet, ***HN8***[] the Tunney Act, and the case law which follows, dictate that it is for the United States to weigh the benefits of such a trade in the first instance, and that, barring a breach of duty in consenting to the decree, *Bechtel, 648 F.2d at 666*, the Court should respect the government's "predictions as to the effect of the proposed remedy." *Microsoft, 56 F.3d at 1461*. Adhering to this guidance, the Court cannot say that the imposition of uniform licenses and the preservation of Microsoft's ability to utilize MDAs and **[*171]** similar discounts approach a breach of duty by the government.

In sum, the Court finds the above-described provisions in the SRPFJ to be an effective means of protecting against Microsoft's utilization of its monopoly position to retaliate against companies that choose to support products that have the capacity to threaten Microsoft's monopoly. In particular, the Court finds that the definitions discussed in this section, though they appear throughout the SRPFJ, namely "Windows Operating System Product, **[**69]** " "Microsoft Middleware Product," and "Microsoft Platform Software," comport with the theory of liability in this case and, in many instances, exceed the actual scope of the liability in some ways, such that a number of products not directly involved in Microsoft's anticompetitive conduct are addressed in the proposed final judgment. The Court finds that, to the extent that these definitions encompass products beyond the scope of the liability findings, such breadth is appropriate, and likely necessary, to ensure that the anticompetitive conduct ceases and to prevent its reoccurrence. *See* *Bechtel, 648 F.2d at 666* ***HN9***[] ("It is not contrary to the public interest, as contemplated by the [Tunney Act], to enter a decree that is not necessary, or that grants relief to which the government might not be strictly entitled. The public does not suffer because [the defendant] consented to limitations on its activities that could not otherwise be imposed.").

2. Flexibility in OEM Licenses

a. Icons, Shortcuts, and Menu Entries

Unlike Sections III.A and III.B, which bear a more general relation to the liability findings, the conduct enjoined in § III.C correlates **[**70]** closely to Microsoft practices which were found to violate *§ 2* of the Sherman Act. Rather than a blanket prohibition on the license restrictions which were found to be anticompetitive, § III.C provides substantial, though not absolute, flexibility to OEMs in configuring personal computers. Subsection C.1 prohibits restriction on an OEM's installation and display of icons, shortcut, and menu entries for any "Non-Microsoft Middleware or any product or service . . . that distributes, uses, promotes, or supports any Non-Microsoft Middleware, . . . anywhere . . . in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed." SRPFJ § III.C.1. Section VI.M. defines "Non-Microsoft Middleware" broadly as:

> a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating **[**71]** System.

Id. § VI.M. Excluded from the mandated flexibility in § III.C.1 is Microsoft's ability to limit the icons, shortcuts, or menu entries placed in a particular area according to the functionality provided by the product, so long as the limitation is non-discriminatory with respect to Microsoft and non-Microsoft products. *Id.* § III.C.1. In practical terms, this limitation means, for example, that if Microsoft has created a menu list for software providing email capability, the OEM is not free to configure Windows to place icons for programs which do not provide email capability in that area. This limitation is intended to balance Microsoft's concerns with protecting consumer clarity and the provision of OEM flexibility. United States Resp. at 89-90. The government notes that the **[*172]** prohibition on discrimination in the application of this exception prevents Microsoft from "prescribing the functionality so narrowly that it becomes, in effect, discriminatory." *Id. at 91*. Likewise, the non-discrimination language precludes Microsoft from "completely forbidding the promotion or display of a particular Non-Microsoft Middleware Product on the ground that Microsoft **[**72]** does not have a competing product itself." *Id.* "To do so," explains the government, "would be discriminatory." *Id.*

The Court has reviewed the common complaint of some individuals and entities filing comments that the term "functionality" used in SRPFJ § III.C.1 is too vague to be enforced. In short, the Court disagrees. Admittedly the term is broad and somewhat flexible, but in this area of technology, overly restrictive terminology will prove useless as the technology continues to evolve. Therefore, the Court takes the view that the phrase "particular types of functionality" carries sufficient meaning to be applied effectively and without confusion. SRPFJ § III.C.1. Section III.C.1 provides flexibility in product configuration while preserving for Microsoft control over the appearance of its product at the outermost edges. The core freedom of configuration provided in § III.C.1 far outweighs the limited exception to this freedom where such configuration works a bizarre and unjustified result. Accordingly, the Court takes the view that § III.C.1 will redress the illegal conduct, promote competition, and further the public interest.

b. Size and Shape of Icons

[73]** Section III.C.2. enables installation and display of shortcut icons of any size or shape, provided the shortcut "does not impair the functionality of the user interface." *Id.* § III.C.2. This provision, like the one described above, provides OEM flexibility, while eliminating the most extreme manifestations of that flexibility. Once again the central complaint about subsection C.2 involves an allegation of vagueness. Some individuals and entities argue that there is insufficient clarity in what it means to "impair the functionality of the user interface." *Id.*

The appellate court displayed a certain limited respect for Microsoft's configuration of the user interface when it held that the prevention of "drastic alteration of Microsoft's copyrighted work" was a valid basis for one of Microsoft's license restrictions. *Microsoft, 253 F.3d at 63*. At the same time, the appellate court rejected Microsoft's general claim that its license restrictions "merely prevent OEMs from taking actions that would reduce substantially the value of Microsoft's copyrighted work." *Id.* The exception in § III.C.2 for alterations which "impair the functionality" of the user interface **[**74]** attempts to strike a balance between these polar examples. In the Court's view, there is no ambiguity in the language of § III.C.2, and the Court cannot say that its effect is inconsonant with the liability in this case. Quite to the contrary, this provision appears to strike the appropriate balance between OEM freedom, Microsoft's interests in protecting the functionality of its product against drastic alteration, and the appellate court's imposition of liability.

c. Automatically Launched Software

Section III.C.3 concerns licensing restrictions which are oddly reminiscent of restrictions for which the appellate court did not impose antitrust liability, namely the automatic launch of an alternative user interface at the conclusion of the boot sequence. *Id.* The appellate court observed that the automatic launch of software which replaces the Microsoft user interface worked a "drastic alteration" of Microsoft's copyrighted product, while Microsoft's restriction had only a "marginal anticompetitive **[*173]** effect." *Id.* As a result, the appellate court rejected the imposition of liability for Microsoft's prohibition in its OEM licenses of this practice. *Id.* Notwithstanding **[**75]** this similarity, § III.C.3. applies to more than the automatic launch of an alternative user interface, regulating the automatic launching of any non-Microsoft Middleware Product "at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connection to or disconnections from the Internet" without regard to whether such automatically launched product disturbs the Microsoft user interface. SRPFJ § III.C.3. This provision protects automatic launching of Non-Microsoft Middleware Products only where "a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time" and imposes stringent limitations upon such automatic launching. *Id.* Where such Non-Microsoft Middleware is permitted to automatically launch, § III.C.3. requires that the middleware either provide no user interface or a user interface that resembles the corresponding Microsoft Middleware Product interface. *Id.*

In response to complaints regarding the restrictive nature of § III.C.3, the United States invokes the D.C. Circuit's rejection of liability for the automatic launching of an alternative user interface as a justification for **[**76]** the limitations in that provision. *Microsoft, 253 F.3d at 63*. As explained by the United States, this provision attempts to strike a balance between Microsoft's interest in "preventing unjustified drastic alterations to its copyrighted work" and allowing new innovations and product features. United States Resp. at 94. The most obvious flaw in this rationale, however, is that § III.C.3 is not directed exclusively at the launching of alternative user interfaces, but includes the launching of software products which launch automatically, but do so within the general parameters of the Microsoft user interface. SRPFJ § III.C.3. Despite some acknowledgment of this flaw, the United States argues that the restrictions in § III.C.3 are tolerable because they "govern[] only the original OEM configuration," such that the end user can click on an icon to enable the automatic launching of Non-Microsoft Middleware notwithstanding the restrictions in § III.C.3. United States Resp. at 94. Given this ability, argues the United States, § III.C.3 reflects a "reasonable compromise" between Microsoft's concerns for ease of use and the liability findings in this case. *Id.*

In **[**77]** the Court's view, the restrictions in § III.C.3 give too much credence to Microsoft's purportedly "valid interest" in providing consistent product characteristics valued by users. *Id.* The appellate court rejected a remarkably similar concern proffered by Microsoft in an attempt to justify the other license restrictions imposed by Microsoft upon OEMs. *Microsoft, 253 F.3d at 63-64*. The appellate court's rejection in this regard can be read to include any restriction on the automatic launching of software which does *not* replace the Microsoft user interface. *Compare* *253 F.3d 34, 64* ("In sum, we hold that with the exception of the one restriction prohibiting automatically launched alternative interfaces, all the OEM license restrictions at issue . . . violate *§ 2* of the Sherman Act."), *with Findings of Fact* P 213 ("Third, Microsoft prohibited OEMs from installing programs, including [but not limited to] alternatives to the Windows desktop user interface, which would launch automatically upon completion of the initial Windows boot sequence."). Moreover, this Court cannot help but recognize that this provision has the potential to empower Microsoft **[**78]** to control, or at least regulate, the pace of innovation with regard to middleware products designed to launch automatically, but which do not replace the **[*174]** user interface and, thereby, run afoul of the appellate court's opinion.

Importantly, however, the Court does not assess the proposed final judgment in a vacuum. In this regard, although the Court might have crafted a different remedy, the Court cannot conclude that the government has violated the public trust in agreeing to the terms set forth in § III.C.3. *See* *Bechtel, 648 F.2d at 666*. When considered as part of the greater whole of the proposed decree which offers OEM freedoms not clearly implicated in the appellate court's ruling, the Court can only conclude that the United States conceded this aspect of OEM flexibility in exchange for other freedoms which, in the government's view, will more effectively benefit competition. *See* *Microsoft, 56 F.3d at 1461*. ***HN10***[] "Just as the Court may not second guess the government's choices about what claims to bring in the first place, it should not treat differently those concessions proposed in a consent decree that might have been achieved at trial from those **[**79]** that might not have been achievable." *Thomson, 949 F. Supp. at 927*. Although liability was established in this case, there remained litigation surrounding the issue of remedy, during which there would have been no guarantee that the United States would obtain all of the provisions it desired. ***HN11***[] The risks inherent in litigation are likely to be reflected in some portion of the proposed decree, and these risks are appropriately weighed by the government, rather than the Court, in the first instance. *See* *AT&T, 552 F. Supp. at 151*. Giving limited deference to the assessment of the United States which takes the view that Microsoft has a valid interest in "having a computer boot up quickly the first time it is turned on," United States Resp. at 94, the Court does not deem this particular provision, though it is likely one of the proposed decree's more obvious weaknesses, to so conflict with important public policy or ***antitrust law*** that it removes the proposed decree from "the reaches of the public interest," *Microsoft, 56 F.3d at 1458* (quoting statement originally in *United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975))*. **[**80]**

d. Internet Access Provider ("IAP") Offers in the Initial Boot Sequence

In general, subsection C.5 is aimed at remedying the restrictions on OEM modification of the initial boot sequence- "the process that occurs the first time a consumer turns on the computer," *Microsoft, 253 F.3d at 61*, which were found by the appellate court to violate *§ 2*. *253 F.3d 34, 61-64*. The appellate court noted that this restriction "prevents OEMs from using [the initial boot sequence] to promote the services of IAPs." *253 F.3d 34, 62*. This restriction hinders the distribution and/or promotion of non-Microsoft middleware which was often used by the IAPs in their internet access software. *Id.* Removal of this restriction will once again allow OEMs to promote various IAPs by inserting an option for choosing an IAP during the initial boot sequence.

As with subsection C.3, subsection C.5 of § III lifts a restriction directly implicated in the appellate court's liability findings, but does not do so completely. Section III.C.5 enables OEMs to offer an IAP service of their choosing during the initial boot sequence, but only where the offer complies with **[**81]** Microsoft's "reasonable technical specifications." SRPFJ § III.C.5. The appellate court concluded that Microsoft's prohibition on the inclusion of IAP registration offers in the initial boot sequence were without procompetitive justification. *Microsoft, 253 F.3d at 63-64*. In particular, the appellate court rejected Microsoft's arguments that OEM alterations created "quality issues," *253 F.3d 34, 64* (quoting Defendant's Trial Exhibit 2395), and caused consumer confusion because **[*175]** the district court found that OEMs, not Microsoft, bear the additional support costs associated with such a result. *Id*. (citing *Findings of Fact* P 159). Given this holding, there is little basis in the liability findings for the retention of Microsoft's power to impose "reasonable technical specifications" on an OEMs' insertion of an IAP offer in the initial boot sequence.

Despite this observation, however, the same analysis which applied to subsection C.3 applies to subsection C.5 of § III. That is, the Court cannot say that the limited retention of discretion permitted by Microsoft with regard to the insertion of IAP registration offers is so flawed that it renders the **[**82]** entire decree, or even this particular section of the decree, outside of the public interest. *See* *AT&T, 552 F. Supp. at 150-51*. Rather, the Court observes once again, that this limited retreat from the full feasible relief which the United States might have obtained through litigation reflects the give and take of a negotiated settlement. *Id. at 151*. Moreover, the preservation of Microsoft's ability to impose "reasonable technical specifications" upon registration sequences inserted into the boot sequence is less objectionable than the reservation of Microsoft authority in § III.C.3 because the exception from § III.C.5 subjects Microsoft to an objective standard of reasonableness. If the technical specifications are objectively "unreasonable," Microsoft is without power to impose them. As a result, the Court is convinced that the freedom provided to OEMs by the opportunity to insert IAP registrations during the initial boot sequences, even as limited by § III.C.5, will have the procompetitive effect of enabling promotion and distribution of non-Microsoft middleware. *See* *Microsoft, 253 F.3d at 62*. The Court regards it unlikely that **[**83]** Microsoft's imposition of "reasonable technical specifications" upon this freedom will undercut substantially its value to competition.

e. Alternative Operating Systems and Other Alternatives under the Final Judgment

Subsection C.4 of § III, prohibits Microsoft from restricting an OEM's ability to "offer[] users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product." SRPFJ § III.C.4. In effect, § III.C.4. provides OEMs with the option of launching competing operating systems and prevents Microsoft from interfering with OEM decisions to do so. Lastly, § III.C.6. provides protection for OEMs which exercise any of the options provided to them pursuant to § III.H. of the SRPFJ, which the Court discusses in greater detail below. *Id.* § III.C.6. The Court sees little worthy of criticism in these final provisions of subsection C, each of which should serve to provide OEM flexibility, which in turn, should encourage competition.

f. End-User Access

Like subsection C, subsection H of § III is aimed at providing **[**84]** flexibility in the OEM channel of distribution for non-Microsoft middleware, as well as for consumers in configuring their own Windows installation. Scheduled to take effect not later than twelve months from the submission of the SRPFJ to the Court, subsection H concerns the addition, removal, and placement of shortcuts, icons, and menu entries. *Id.* § III.H. As recounted above, the appellate court found that Microsoft's restrictions on icon appearance and placement, folders and menu entries, and other alterations of the appearance of the desktop had the effect of "imposing significant costs upon the OEMs." *Microsoft, 253 F.3d at 62*. As a result of these additional costs, Microsoft "reduced rival browsers' **[*176]** usage share not by improving its own product but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage." *Id.* The appellate court rejected Microsoft's proffered procompetitive justifications for these restrictions and, therefore, found them to be exclusionary in violation of *§ 2* of the *Sherman Act. 253 F.3d 34, 63-64*.

Section III.H.1(a) requires that Microsoft permit end users and OEMs "to enable or remove **[**85]** access to each Microsoft Middleware Product or Non-Microsoft Middleware Product by . . . displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed." SRPFJ § III.H.1(a). In derogation of this provision, Microsoft reserves the right to restrict the display of icons, shortcuts, and menu entries in any list of the same "specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products." *Id.* The government explains that this exception is intended to "capture broad categories of products" so as to avoid consumer confusion by ensuring orderly placement of product icons, shortcuts, and menu entries. United States Resp. at 99. As is plain from the language of the exception, Microsoft may not use these product categories to discriminate between its own products and its competitors' products. SRPFJ § III.H.1(a).

Section III.H.1(a) is responsive to the appellate **[**86]** court's finding of anticompetitive behavior in Microsoft's exclusion of IE from the Add/Remove Programs utility. *Microsoft, 253 F.3d at 67*. The government posits that the provision will "alter Microsoft's current practice of creating an artificial distinction between . . . Non-Microsoft Middleware Products and Microsoft Middleware Products." United States Resp. at 98. On this rationale, the government predicts that users will be able, with the assistance of the SRPFJ, "to make choices on the merits about Microsoft and Non-Microsoft Middleware Products." *Id.* As with § III.C.1, § III.H.1(a) reserves for Microsoft the right limit the insertion of particular icons, shortcuts, and menu entries in lists or other areas of Windows which are reserved for particular functionality. SRPFJ § III.H.1(a). Once again, the Court does not regard such a limitation as inappropriately restrictive of OEM and end-user ability to configure Windows. The limitations imposed by Microsoft must be nondiscriminatory and may not be used to benefit Microsoft software over third-party software. *Id.* As a result, the Court rejects any contention that such a limitation will hinder the appropriately **[**87]** procompetitive effect of the remedial provision. On this basis, the Court finds that § III.H.1(a) advances the public interest.

Section III.H.1(b) also requires Microsoft to allow end users and OEMs to enable or remove access to middleware products by "enabling or disabling automatic invocations pursuant to § III.C.3 of the SRPFJ that are used to launch Non-Microsoft Middleware Products or Microsoft Middleware Products." *Id.* § III.H.1(b). Again, § III.C.3. concerns the automatic launch of Non-Microsoft Middleware. *Id.* § III.C.3. The "mechanism" for such enabling or disabling must offer an unbiased choice between each Microsoft Middleware Product and NonMicrosoft Middleware Product and may offer such an unbiased choice as between all Microsoft Middleware Products as a group and Non-Microsoft Middleware Products as a group. *Id.* § III.H.1.(b). The Court finds this provision unobjectionable and appropriately procompetitive.

[*177] ***i. Designation of a Non-Microsoft Middleware Product in Place of a Microsoft Middleware Product***

The second subpart of § III.H. requires Microsoft to allow end users and OEMs to designate a Non-Microsoft Middleware Product to be invoked **[**88]** in place of [a] Microsoft Middleware Product (or vice versa)" in certain circumstances. *Id.* § III.H.2. This provision requires that the option be presented to end users "via an unbiased mechanism" and to OEMs "via a standard OEM preinstallation kits" in any situation "where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product." *Id.* As exceptions to the foregoing, Microsoft may invoke a Microsoft Middleware Product where the product would be "invoked solely for use in interoperating with a server maintained by Microsoft" or "that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement." *Id.* § III.H.2(a)-(b). The government explains that the central goal and the anticipated effect of § III.H.2 are that Microsoft will be required to "implement and respect default settings in a number of circumstances." United States Resp. at 101.

Critics of § III.H.2 complain that Microsoft could engineer its software to avoid falling within the requirements **[**89]** of a "separate Top-Level Window" displaying either "all of the user interface elements" or the "Trademark of the Microsoft Middleware Product." SRPFJ § III.H.2. Microsoft's ability to circumvent this provision through its product design, argue some, will undercut the usefulness of the affirmative portion of § III.H.2. The government explains that these qualifications exist to "ensure that access to defaults exists whenever the alternative Microsoft product would be launched as the full 'product' . . . rather than when just a portion of the product's underlying functionality is launched to perform functions in Windows itself . . . or otherwise where the end user might not necessarily be aware that he or she is using a specific Microsoft Middleware Product. " United States Resp. at 102.

The most obvious flaw in this criticism of § III.H.2 is that such criticism fails to recognize that the provision offers relief beyond that which might be regarded as necessary to redress the liability in this case. Microsoft prevailed on its assertion that the override of a user's choice of a default browser was justified, and as a result, the appellate court did not ascribe liability for Microsoft's **[**90]** failure to provide true defaults, *Findings of Fact* P 171 ("While Windows 98 does provide the user with the ability to choose a different default browser, it does not treat this choice as the 'default browser' within the ordinary meaning of the term."). *See* *Microsoft, 253 F.3d at 67*. Despite this holding, § III.H.2 addresses the acknowledged anticompetitive effect of the override of non-Microsoft defaults, *253 F.3d 34, 65*, by requiring Microsoft to make non-Microsoft products the "default" in certain circumstances. SRPFJ § III.H.2. This requirement in § III.H.2 exceeds even the scope of the facts addressed during the liability phase because the mandatory setting of defaults applies to multiple types of software functionality, not merely Web-browsing functionality. *See* *Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34*. Moreover, the government views the limited nature of § III.H.2 as one of the strengths of the provision, rather than its weakness. In this regard, the government notes that paramount in § III.H.2 is the ability to "provide certainty and a bright line regarding when Microsoft is obligated to provide and respect a default setting." United States **[**91]** Resp. at 102. Based on the **[*178]** foregoing, and deferring to the government's view that § III.H.2 will have a procompetitive effect because of the clarity in its terms, however circumscribed, the Court cannot say that the United States has erred or strayed from the realm of acceptable remedies in sacrificing some flexibility in order to achieve the "bright line" drawn by the provision.

With regard to the latter portion of § III.H.2, the Court notes that subsections H.2(a) and (b) appear to reflect the two findings by the appellate court as to liability or, more specifically, the lack thereof. The relationship between subsection H.2(a) and the appellate opinion in this case is somewhat subtle, but the United States explains that automatic invocation of a "Microsoft Middleware Product . . . solely for use in interoperating with a server maintained by Microsoft (outside of the general context of Web browsing)" derives from the appellate court's holding that Microsoft did not violate *§ 2* in designing its product to override a user's browser preference in conjunction with invocation of the Windows "Help" system, *Microsoft, 253 F.3d at 67*. *See* United States Resp. at 104-05. The **[**92]** government avers that "the current Windows Help system, as well as other parts of the Windows interface, rely on interoperating with servers maintained by Microsoft." *253 F.3d 34, 104*. While the Court might not have interpreted the appellate court's holding to require the precise exception in § III.H.2(a), the Court cannot say that the provision is inappropriate, and certainly, the provision does not conflict with the appellate court's holding. Rather, the provision is remarkable in that it tracks an exception to liability, which was carefully carved out by the appellate court, without sacrificing the effectiveness of the provision itself.

The link between § III.H.2(b)'s "reasonable technical requirement" language and the appellate court's finding with regard to Microsoft's "override the user's preferences" is somewhat less subtle. *Microsoft, 253 F.3d at 67*. Addressing whether Microsoft's product design to "override the user's choice of a default browser in certain circumstances" was anticompetitive, the appellate court concluded that Microsoft's proffered "valid technical reasons" were sufficient to outweigh any anticompetitive effect of the override. **[**93]** *Id.* As a result, the appellate court did not ascribe liability for this aspect of Microsoft's product design. *Id.* Section III.H.2(b) tracks the appellate court's liability holding on this point, while simultaneously countering any anticompetitive effects of the product design by requiring that Microsoft provide the unfulfilled technical requirements to any ISV requesting them. SRPFJ § III.H.2(b). Given the close relationship between § III.H.2(b) and the appellate opinion in this case, the Court finds little merit in the criticism of the provision in the public's comments. Like the exception in § III.H.2(a), the exception in subpart H.2(b) acknowledges the nuances of the appellate court's holding and yet maintains the potency of the restrictive portion of the provision. In doing so, § III.H comports with the public interest.

ii. Automatic Alteration of OEM Configuration

The final provision in § III.H., subsection 3, prohibits a Windows Operating System Product from automatically altering an OEM's icon, shortcut, or menu-entry configuration without first seeking confirmation from the user. *Id.* § III.H.3(a). Furthermore, pursuant to § III.H.3(b), the Windows **[**94]** Operating System Product may not seek confirmation from the end user for such a non-user initiated change in configuration until "14 days after the initial boot up of a new Personal Computer." *Id.* § III.H.3(b). Any request for confirmation pursuant to this section must be unbiased with regard **[*179]** to Microsoft Middleware Products and Non-Microsoft Middleware. *Id.* § III.H.3.

Section III.H.3 is written carefully to enable a feature in Microsoft's latest version of Windows, the "Clean Desktop Wizard," to remove unused icons from the desktop. CIS at 48; United States Resp. at 107. The 14-day grace period received wide criticism in the public's comments for its brevity, which, argue critics, devalues space on the desktop. The government explains that this time-frame was chosen as a "reasonable compromise between the need to use desktop icons to promote Non-Microsoft Middleware, and the needs of users who would prefer to be presented with the choice of moving unused icons to a folder." United States Resp. at 108. The government further asserts that there are other valuable areas in Windows within which nonMicrosoft middleware products can be promoted. *Id.* While the former explanation **[**95]** offered by the government is valid, the Court finds the latter rationale weak given the role that placement on the desktop played in the liability proceedings. *See, e.g,*, *Microsoft, 253 F.3d at 61* (finding that the inability to remove desktop icons for IE protected Microsoft's monopoly), 68-71 (holding that Microsoft's exclusive agreements with IAPs concerning desktop placement foreclosed a substantial share of the market). The more salient point made by the government is that the trigger and the confirmation for change must be unbiased with respect to Microsoft products and non-Microsoft products, such that the "Clean Desktop Wizard" should not be viewed as a tool for the suppression of non-Microsoft middleware products. United States Resp. at 107-08. Moreover, the government explains that the utility does not delete the icons, but merely moves the icons from the desktop into a folder from which they may be retrieved if the user changes his or her mind. *253 F.3d 34,108*-09. The Court notes in addition that there is no ascription of liability for Microsoft's alteration of user preferences and that the closest conduct to any such alteration-the override **[**96]** of defaults-is conduct for which Microsoft was absolved of liability. *Microsoft, 253 F.3d at 67*. In sum, the Court is not compelled to conclude that the preservation of a consumer option for a desktop "clean-up" tool is discordant with the public interest, so long as there exist adequate protections to ensure that the tool is not used as a sword with which Microsoft can attack its competitors.

g. Sections III.C and III.H: Remedy for Commingling Liability

Taking a more broad view of Sections III.C and III.H, the United States posits that these sections "remedy Microsoft's anticompetitive commingling of browser and Windows operating system code by requiring Microsoft to redesign its Windows Operating System Products to permit OEMs and end users effectively to remove access to Microsoft Middleware Products (Section III.H) and to allow competing middleware to be featured in its place (Section III.C)." United States Resp. at 114. The invocation of anticompetitive conduct in this context refers to the appellate court's affirmance of the following district court finding:

> The District Court condemned Microsoft's decision to bind IE to Windows 98 "by placing **[**97]** code specific to Web browsing in the same files as code that provided operating system functions." [*Findings of Fact*] P 161; *see also* *id. PP 174, 192*. Putting code supplying browsing functionality into a file with code supplying operating system functionality "ensures that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows . . . ." *Id. P 164*. As noted above, preventing an OEM from removing IE deters it **[*180]** from installing a second browser because doing so increases the OEM's product testing and support costs; by contrast, had OEMs been able to remove IE, they might have chosen to pre-install Navigator alone. *See* *id. P 159*.

Microsoft, 253 F.3d at 65-66 (ellipsis in original). Rejecting Microsoft's factual assertion that it does not commingle browsing and non-browsing code, the appellate court reiterated that "commingling has an anticompetitive effect; . . . the commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's **[**98]** operating system." 253 F.3d 34, 66.

The government correctly notes that the basis for the appellate court' condemnation of commingling is its anticompetitive effect and that, in the absence of such effect, it is not at all clear that the practice of commingling would be of antitrust concern. United States Resp. at 115. This observation is significant because, in this instance, the government proposes a remedy which does not simply proscribe the conduct found to be anticompetitive in violation of § 2. Instead, the remedy for Microsoft's commingling liability is more closely aligned with alleviating the anticompetitive effect of the conduct, rather than simply banning the conduct itself.

This approach receives much criticism in the public's comments on the proposed consent decree. In general terms, these comments insist that Microsoft should be required to "uncommingle ," or make removable, much of the software code in its Windows operating system. Not surprisingly, the United States rejects this criticism and insists that it has never pursued a position that would have required the removal or removability of code. 253 F.3d 34, 115-16; *see also* *Microsoft, 97 F. Supp. 2d at 68* **[**99]** (IFJ requiring the removal of end-user access, *not* code removal). Indeed, even the *Findings of Fact* support the view that code removal is unnecessary: Judge Jackson noted in P 165 that "from the user's perspective, uninstalling Internet Explorer [via the 'Add/Remove' function] was equivalent to removing the Internet Explorer program from Windows 95." *Findings of Fact* P 165. The United States takes this view one step further, asserting that, contrary to theories advanced by some individuals and entities filing comments, "the basis for commingling liability, and remedy, in this case is the presence, from the user's perspective, of the product, and consequent confusion and other deterrents to installation of additional, rival middleware products; the mere presence of APIs is not enough." United States Resp. at 119.

Non-party cries for removal of software code as a remedy appear to reflect a substantive misunderstanding of the commingling liability in this case, which did not condemn Microsoft for including middleware functionality along with a product offering operating system functionality. [23] The remedy then, need not separate the functionalities, rather, it need only **[**100]** protect against any anticompetitive effect of the manner in which the functionalities have been bundled. In this case, the anticompetitive effect was found to be a disincentive to OEMs to install nonMicrosoft middleware products. If that disincentive can be removed, then the remedy is within the realm of appropriate relief. *See* 2 PHILLIP **[*181]** E. AREEDA ET AL., ***ANTITRUST LAW*** P 325a, at 246 (2d ed. 2000) ("The decree . . . will not embody harsh measures when less severe ones will do.").

The United States predicts that §§ III.C and III.H will enhance competition between Microsoft middleware **[**101]** and non-Microsoft middleware, *see, e.g.*, CIS at 29, 45, and the Court is obliged to give some amount of deference to this prediction. Mass. School of Law, 118 F.3d at 782; Microsoft, 56 F.3d at 1461. In fact, the Court sees substantial merit in the government's explanation of the relationship between the theory of liability advanced by Plaintiffs, Judge Jackson's *Findings of Fact*, the district and appellate courts' findings of liability on this point, and the proposed consent decree's focus on end-user access, rather than code removal or redesign. Accordingly, the Court rejects the view that a remedial decree which does not mandate the "uncommingling " of code necessarily renders the remedy inappropriate, inadequate, or discordant with the public interest.

Adding emphasis to the foregoing conclusion is one final and important consideration-the effect of the remedy upon consumers and other participants in this segment of the industry. In addition to its prediction that §§ III.C and III.H will effectively remedy commingling, the United States predicts that a "blanket prohibition" of the practice "would

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[23] Any such condemnation would likely be reflected in the imposition of liability for illegal tying, rather than liability for illegal for monopoly maintenance. *Cf. generally* United States v. Microsoft Corp., 331 U.S. App. D.C. 121, 147 F.3d 935 (D.C. Cir. 1998). Such a tying claim was offered by Plaintiffs pursuant to a *per se* analysis and was ultimately rejected by the appellate court. Microsoft, 253 F.3d at 89.

impose a wholly unnecessary and artificial **[**102]** constraint on software design and could have adverse implications for consumers." United States Resp. at 119-20. The government goes on to predict that:

> Changes to the operating system that would be required to implement such a blanket prohibition likely would have adverse effects not only upon Microsoft and its customers but also upon third parties that already have designed software to rely on the present operating system code. A flat prohibition on commingling in this particular case, without due regard to the competitive impact of that commingling, therefore likely would be harmful, not helpful.

253 F.3d 34, 120. The Court is hard pressed to reject a remedy on the grounds that it lacks a provision which has the potential to give rise to such dire consequences. Indeed, ***HN12***[] courts considering antitrust remedies are advised to pay special attention to the potential of any remedy to inflict harm upon third parties. *See* *Microsoft, 56 F.3d at 1462*. Moreover, the Court acknowledges that a remedy requiring code removal would disregard the repeated admonition offered by the appellate court in an earlier *Microsoft* opinion that its is undesirable for the Court **[**103]** to inject itself into matters of product design. *Microsoft, 147 F.3d at 949-50* and n.13 (identifying a "limited competence of courts to evaluate high-tech product designs and the very high cost of error" associated therewith); *but see* *Microsoft, 253 F.3d at 65* ("Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are *per se* lawful."). Based on the foregoing, the Court will not reject the SRPFJ on the ground that it does not include a blanket prohibition against commingling Web-browsing code with operating system code. To the contrary, the Court finds that the end-user focus of the remedy comports with the public interest as it minimizes potential for harm to third parties and, nevertheless, carries a great potential for the advancement of competition.

3. Agreements with Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Others

a. Exclusive Agreements

Section III.G of the SRPFJ governs Microsoft's ability to enter into agreements **[*182]** with IAPs, ICPs, ISVs, IHVs, [24] and OEMs which require any such entity to **[**104]** distribute, promote, use or support, "exclusively or in a fixed percentage," any Microsoft Platform Software. SRPFJ § III.G.1. Subsection G.1 prohibits Microsoft from entering into any exclusive or fixed percentage agreement except where "Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use, or support for software that competes with Microsoft Platform Software." *Id.* This portion of the consent decree is aimed at remedying the liability findings against Microsoft for entering into exclusive contracts with IAPs and ISVs. Citing to the "First Wave Agreements," the appellate court first deemed anticompetitive Microsoft's promise to ISVs to give "preferential support . . ., other technical information, and the right to use certain Microsoft seals of approval," *Microsoft, 253 F.3d at 71*, in exchange for the ISVs' exclusive use of IE as the default browser and the ISVs' exclusive "use of Microsoft's 'HTML Help,' which is accessible only with [IE]," *253 F.3d 34, 71-72*. [25] The appellate court further determined that Microsoft's agreement with Apple, "which **[**105]** is both an OEM and a software developer," [26] **[**106]** *253 F.3d 34, 71*, for Apple's exclusive use of IE as the default browser was anticompetitive in

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[24] An "IHV" is an "independent hardware vendor that develops hardware to be included in or used with a Personal Computer running a Windows Operating System Product." SRPFJ

§ VI.H.

[25] In contrast, the appellate court declined to find Microsoft liable for entering into similar deals with ICPs on the grounds that Plaintiffs "failed to demonstrate that Microsoft's deals with the ICPs have a substantial effect upon competition." *Microsoft, 253 F.3d at 71*.

[26] Although identified as an OEM in the appellate court's opinion, the Court observes that Apple does not fit into the definition of OEM provided in the SRPFJ because it does not license Microsoft's operating system product. SRPFJ § VI.O. The Court remains unconcerned by this fact because the protections afforded to OEMs concern their licensing of Windows, and therefore,

violation of *§ 2*. *253 F.3d 34, 72-74*. Lastly, once again citing to the "First Wave Agreements," the appellate court concluded that "to the extent Microsoft's First Wave Agreements with ISVs conditioned receipt of Windows technical information upon the ISVs' agreement to promote Microsoft's JVM exclusively," *253 F.3d 34, 75*, the agreements were "exclusionary, in violation of the Sherman Act." *253 F.3d 34, 76*. [27]

Some individuals and entities filing comments contend that the "commercially practicable" representation in § III.G.1 is too easily evaded and, therefore, will be ineffective. The United States responds by explaining the manner in which the provision will function. The government first explains that the provision will prevent Microsoft "from guaranteeing that rival technology will not become broadly available," United States Resp. at 133, by "making it logically impossible for Microsoft to seek-much less get-any form of exclusive distribution, promotion, use, or support on all of a third party's products, no matter how much Microsoft is willing to pay." *Id. at 134*. In this regard, § III.G.1 is shown to appropriately **[**107]** permit contracts with other participants in the **[*183]** industry which cannot be said to be anticompetitive. The government goes on to debunk the contention that Microsoft can extract the "commercially practicable" representation by pressuring the party with which it is contracting, as such tactics would not satisfy the "good faith" requirement in § III.G.1. *Id. at 133-34*. The "good faith" requirement prevents Microsoft from pressuring or coercing any such entity into making the necessary representation. *Id.* Similarly, Microsoft cannot simply include such representations as boilerplate language in its contracts as, once again, the "good faith" requirement will not have been met. *Id.*

The appellate court expressly observed in conjunction with its discussion of Microsoft's illegal exclusive contracts that "exclusivity provisions in contracts may serve many useful purposes," such that they are "a presumptively legitimate business practice." *Microsoft, 253 F.3d at 69*. "Exclusive contracts are commonplace-particularly in the field of distribution-in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time **[**108]** it enters into such a contract, no matter how small the effect, would create an unacceptable, and unjustified burden on any such firm." *253 F.3d 34, 70*. Because ***antitrust law*** does not condemn all exclusive contracts, even if entered into by a monopolist, the Court regards it as entirely appropriate for the remedy in this case to prohibit only those contracts that have a significant degree of foreclosure of the market. In this light, § III.G.1 is shown to be a provision which carefully balances the prohibition of anticompetitive conduct and the preservation of opportunities for symbiotic relationships between Microsoft and third parties which are not likely to be anticompetitive in their effect.

b. Placement on the Desktop

To further remedy Microsoft's anticompetitive exclusive deals with IAPs, subsection G.2 of Section III prohibits agreements with IAPs and ICPs that condition placement on the desktop (or elsewhere in Windows) on a promise to refrain from distribution, promotion, or use of any software that competes with certain functionality offered by Microsoft as part of its operating system-Microsoft Middleware. SRPFJ § III.G.2. Accordingly, subsection **[**109]** G.2 provides broad protection for present and future middleware which competes with Microsoft Middleware. Section III.G.2 directly addresses the liability finding against Microsoft for entering into contracts with IAPs for prominent desktop placement in exchange for the IAPs' exclusive promotion of Microsoft's browser. *Microsoft, 253 F.3d at 68-71*. Subsection G.2 broadens the remedial decree beyond the liability finding with regard to IAPs to protect ICPs as well, despite the fact that liability with regard to Microsoft's agreements with ICPs was ultimately rejected by the appellate court. *Microsoft, 253 F.3d at 71*. This expansion beyond the liability is not over-broad and reflects a means of prohibiting Microsoft from engaging in conduct which is closely related to the conduct for which Microsoft was found liable. *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)* (holding that an injunction that "goes beyond a simple proscription against the precise conduct previously pursued . . . is entirely appropriate").

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it would make little sense to include Apple within the purview of these protections. *See, e.g.*, SRPFJ § III.A-C, H. Moreover, Apple appropriately receives protections afforded to ISVs. *Id.* §§ III.D, F-G, I and VI.I.

[27] The proposed consent decree's prohibition on exclusive or fixed-percentage agreements extends beyond the specific findings of liability to apply to ICPs and IHVs. This extension is appropriate, as "the public does not suffer because [the defendant] consented to limitations on its activities that could not otherwise be imposed." *Bechtel, 648 F.2d at 666*.

c. Joint Ventures, Joint Development Agreements, and Joint Services Agreements

[110]** The latter portion of § III.G makes clear that neither subsection G.1 nor G.2 prohibits Microsoft from entering **[*184]** into agreements which limit competition within the context of a "bona fide joint venture . . . joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value add-on to an existing product, technology or service, in which both Microsoft and the [other entity] contribute significant developer or other resources." *Id.* § III.G. Also excepted from the purview of § III.G are any agreements in which Microsoft licenses intellectual property from a third party. *Id.* This exception provides an incentive for Microsoft to license nascent technology from third-party vendors for distribution with Microsoft products. United States Resp. at 136-37. Such an exception protects the potential for third parties to benefit from Microsoft's broad distribution capability. *Id.*

The above-described limitations placed on subsections G.1 and G.2 receive some criticism to the effect that Microsoft will simply be able to label its agreements "joint ventures" so as to escape the limitations otherwise **[**111]** imposed by § III.G. As is often the case, these critics fail to carefully consider the precise wording of the provision. The words "bona fide" modify the joint ventures to which the exception applies. SRPFJ § III.G. Were Microsoft to simply label ordinary transactions as "joint ventures" because they involve some amount of collaboration, the "bona fide" requirement would not be met. Similarly, criticism of the use of the term "bona fide" fails to recognize that the term is a legal term which carries with it a particular legal significance. Therefore, there is nothing vague or ambiguous about its use. In a similar vein, comments which assert that the terms "joint development or joint services arrangement" are without meaning fail to take account of the language modifying these terms which makes clear that the joint activity must be aimed at new products, technologies, or services, or a material value add-on to existing technology, and that the parties to the arrangement must each contribute significant resources. *Id.* The exception is tailored to permit joint activities that are genuinely procompetitive and, indeed, recognizes that non-compete clauses may be appropriate where two **[**112]** firms legitimately share resources to create new or improved opportunities for consumers. United States Resp. at 136. Given these considerations, the permissive exceptions to the restrictive portion of § III.G. are shown to be far more narrow in their application than most recognize. Accordingly, the Court sees little merit in the general criticism that the exceptions in § III.G for joint ventures, joint development agreements, and joint services agreements are overly broad.

The more salient criticism of § III.G arises from the fairly broad exception of "any agreements in which Microsoft licenses intellectual property in [sic] from a third party" from the purview of the prohibitive portions of the provision. SRPFJ § III.G. Critics of this portion of the SRPFJ contend that Microsoft can simply add an intellectual property license to an exclusive agreement in order to circumvent the prohibitive portion of § III.G. The United States explains that the exception "permits Microsoft, in licensing new technology from an ISV for incorporation into a Microsoft product, to ensure that the ISV will not also license the same technology to a competitor who hopes to 'free ride' on Microsoft **[**113]** popularization of the technology." United States Resp. at 137. In this regard, the government argues that the exception preserves Microsoft's "incentives to invest in such popularization." *Id.*

Although the government's explanation is reasonable, the government does not explain why the exception for agreements in which Microsoft licenses intellectual **[*185]** property is not more carefully tailored to address the circumstance referenced by the government. Given the breadth of the exclusion, it is possible that agreements which the government did not intend to exclude from the prohibitory portion of § III.G, nonetheless, will be excluded. The government appears far less concerned about this potential over-breadth, than with the potential for the exception to provide an unintended loophole. In this regard, the government observes that a license of intellectual property as a pretext for otherwise exclusionary terms would be subject to review by the United States, and could result in a request for modification if the provision is abused. *Id.*

The exception from § III.G of agreements in which Microsoft licenses third-party intellectual property provides an additional example of a provision **[**114]** which the Court, if called upon to craft a remedy, would likely not craft so broadly. However, it scarcely bears repeating that ***HN13***[] a court presiding over a Tunney Act proceeding need not conclude that the terms of the consent decree "will *best* serve society," but only that the proposed decree is "within the reaches of the public interest." *Microsoft, 56 F.3d at 1460* (quoting *Western Elec. Co., 900 F.2d at 309*) (emphasis in original). Had the government been unable to offer a reasoned justification and predictive effect of the exception in § III.G for agreements in which Microsoft licenses intellectual property, the Court might well have concluded that the exception does not accord with the public interest. The Court is not faced with such a circumstance. The government has offered a legitimate justification for the balance struck between the prohibitive and permissive portions of § III.G, and the Court declines to second guess the wisdom of this balance. Recalling that "above all, [a] consent decree . . . [is] the product[] of a negotiated settlement from which, presumably, no party obtained everything it wanted," Thomson, 949 F. Supp. at 914, **[**115]** the Court takes the view that this particular exception in § III.G of the SRPFJ may reflect one of those instances in which the government exchanged some degree of breadth for some other valuable benefit. *See* AT&T, 552 F. Supp. at 151 ("Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.") (quoting United States v. Armour & Co., 402 U.S. 673, 681, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)). Given the totality of the facts, the Court cannot conclude that the breadth of the exception in the latter portion of § III.G so far detracts from the remainder of the provision, and the other portions of the decree, that it falls beyond the reaches of the public interest.

d. Limitations on Support for Competing Products

Section III.F.2 [28] is aimed directly at Microsoft's dealings with ISVs. Pursuant to § III.F.2 Microsoft may not condition any benefit or "grant of Consideration" on an ISV's "refraining from developing, using, distributing, or promoting" software that competes with Microsoft Platform Software. **[**116]** *Id.* § III.F.2. Excepted from the protections of § III.F.2, however, are agreements which limit an ISV's "development, use, distribution, or promotion" of such competing software, where such agreement is reasonable in its terms and "reasonably necessary to . . . a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop **[*186]** software for, or in conjunction with, Microsoft." *Id.* § III.F.2.

The government explains the exception in § III.F.2 as a means by which to "protect ISVs' opportunity to engage in legitimate, procompetitive arrangements with Microsoft," such as a very basic agreement whereby Microsoft "provides an ISV with funds for the promotion of Microsoft software and prohibits the ISV from spending those funds to promote rival software." United States Resp. at 127-28. In the face of criticism, the United States maintains that this exception will not permit Microsoft to "enter into an agreement **[**117]** that provides an ISV with assistance in promoting a Microsoft product on [the] condition that the ISV not also distribute, use, or promote, a rival product, because such a limitation would not be reasonably related to the ISV's obligation to promote the Microsoft product." Id. at 128. The government readily admits that the language of this exception is somewhat "general[]" but contends that this generality is a "necessary tradeoff ." *Id.* In this regard, the government argues that more precise provisions provide greater opportunity for circumvention, while a provision like § III.F.2, which relies on "general but established legal terms," will provide the government and the Court with greater flexibility to consider the substance rather than the "mere form of Microsoft's future agreements with ISVs." *Id.* The government further notes that were there no such exception, § III.F.2 would prohibit lawful, procompetitive agreements with ISVs. *Id.* This explanation satisfies the Court that the terms of § III.F are not drawn contrary to the public interest.

Viewed in their entirety, §§ III.F and III.G not only prohibit the anticompetitive conduct identified by the appellate **[**118]** court with regard to ISVs, IAPs, and IHVs, but these provisions extend further, to address Microsoft's conduct with other participants in the industry even though Microsoft's dealings with these entities did not give rise to liability in this case. More importantly, these provisions strike a delicate balance between the prohibition of conduct found to be anticompetitive, or conduct closely related to conduct found to be anticompetitive, and the preservation of conduct that benefits other participants in the industry, as well as consumers. The Court regards it particularly necessary when addressing Microsoft's contracting power to ensure that procompetitive, mutually beneficial arrangements are not prohibited by the terms of an overbroad decree. Acknowledging that the United States has weighed these considerations in the first instance, the Court regards the balance struck as one which falls within the realm of an acceptable remedy.

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[28] Section III.F.1 is discussed *supra* Part III.B.1.c.

4. API Disclosure, Interoperability, and Related Provisions

Sections III.D and III.E generally concern the disclosure of APIs, communications protocols, and other technical information for purposes of ensuring successful interoperation with **[**119]** Microsoft's Windows operating system. Subsection D requires Microsoft to disclose the "APIs and related Documentation" used by "Microsoft Middleware" to interoperate with Windows. SRPFJ § III.D. The provision defines "APIs" as "the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product to obtain any services from that Windows Operating System Product." *Id.* While the rationale for this type of disclosure rests, in part, upon the finding of liability for conditioning the provision of technical information on illegal, exclusive agreements, *Microsoft, 253 F.3d at 71-72*, it can be viewed more broadly to relate to the United States' theory of the case as a **[*187]** whole. As recounted above, the United States proceeded to trial on the theory that Microsoft had acted anticompetitively in an effort to boost its own middleware and stifle rival middleware because those products posed a potential "platform threat." The disclosure of interfaces and related technical information pursuant to § III.D ensures the ability of competitive products to interoperate **[**120]** effectively with the Windows operating system and in a manner which is not disadvantaged by comparison to Microsoft's middleware technology. Accordingly, such disclosure has the potential to increase the ability of competing middleware to threaten Microsoft's operating system monopoly.

a. API Disclosures

One of the more prevalent criticisms of the SRPFJ arises in conjunction with § III.D, relating specifically to the use of the term "Microsoft Middleware." As indicated above, § III.D mandates the disclosure of the APIs relied upon by "Microsoft Middleware to interoperate with a Windows Operating System Product." SRPFJ § III.D. The definition of "Microsoft Middleware" is very similar to the definition of "Microsoft Middleware Product," discussed *supra* Part III.B.1.a.ii. The term "Microsoft Middleware" is used in this context, rather than "Microsoft Middleware Product," because § III.D requires the identification of particular pieces of software code.

In order to identify specifically the appropriate pieces of code, the definition of "Microsoft Middleware" identifies the code that Microsoft distributes separately from Windows and trademarks or identifies as a major **[**121]** version of any Microsoft Middleware Product. SRPFJ § VI.J. The oft-criticized separate distribution requirement provides not only a ready means by which to identify code, but acknowledges that the most competitively significant products will be distributed and updated at more frequent intervals than Microsoft's entire operating system product. *See* United States Resp. at 44-45. Similarly, the requirement of trademarking serves also to identify the competitively significant software, while simultaneously excluding security patches, fixes, or other small downloads. *Id. at 47-48*. Lastly, "Microsoft Middleware" must provide functionality which is the same or substantially similar to the functionality provided by a "Microsoft Middleware Product." SRPFJ § VI.J. Because a "Microsoft Middleware Product," by definition, is part of Windows, *id.* § VI.K, this last major requirement serves to ensure a close link to the monopoly market and Microsoft's product in that market. *See* United States Resp. at 48-49 . On this point, the government explains, in particular, that its case was never intended to address products that Microsoft never distributed with its Windows operating **[**122]** system, and therefore, the relationship to Microsoft's monopoly product is entirely consonant with the theory of liability. *Id. at 48.* The government further explains that the parameters of "Microsoft Middleware" exceed mere application to the Microsoft counterparts to Navigator and Java, extending to a number of present and future middleware technologies. Such expansion is appropriately forward-looking and accords with the general law of remedies in ***antitrust law***. *See* *United Shoe, 391 U.S. at 250*.

Criticisms of this definition in the government's remedial decree are wide-ranging, with most sharing the view that the definition should apply to more Microsoft software. The United States has offered a reasoned justification for each limitation in the definition. These explanations are directly responsive to the criticism and serve to rebut all of the various accusations regarding the parameters of "Microsoft Middleware." In short, the Court is not convinced **[*188]** that the parameters of "Microsoft Middleware" and the ensuing impact upon Microsoft's obligations under the proposed final judgment are inappropriately drawn or are in conflict with the public **[**123]** interest.

Additionally, the definition of "API" receives criticism by those filing comments. API is defined in § III.D as "the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating

System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product." SRPFJ § III.D. Some entities filing comments complain that the definition of API is too narrow. In his *Findings of Fact*, Judge Jackson described APIs as the "synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system." *Findings of Fact* P 2. The definition in the SRPFJ is consistent with the description in the *Findings of Fact* and, given the liability which was affirmed by the appellate court, is appropriately limited in scope. In this regard, the Court notes that because liability in this case concerns middleware, it would far exceed that liability to require Microsoft to disclose interfaces between its operating system products and all applications and devices. Moreover, as the government explains, the definition of API **[**124]** is fairly broad such that "whatever Microsoft Middleware uses to request services from a Windows Operating System Product, whether it includes something that could arguably be called a 'file format' or not, is the subject of disclosure." United States Resp. at 144. Accordingly, the Court concludes that the definition of API is sufficiently broad, yet appropriately tailored to reflect the extent of liability in this case.

Similarly, some entities filing comments complain that the definition of "Documentation" is too limited. The Court finds little merit in this complaint. "Documentation" is defined in the SRPFJ as "all information regarding the identification and means of using APIs that a person of ordinary skill in the art requires to make effective use of those APIs." SRPFJ § VI.E. The goal of this provision is clear; the "Documentation" should enable a software developer to utilize the APIs which are disclosed pursuant to § III.D. The Court is satisfied that the definition of "Documentation" is appropriately drawn to accomplish that legitimate goal.

One additional complaint relevant to this discussion concerns the timing of the disclosures mandated by § III.D. Section III. **[**125]** D provides for two alternatives relevant to timing, one for new major versions of Microsoft Middleware, and another for the release of a new version of a Windows Operating System Product. *Id.* § III.D. "In the case of a new major version of Microsoft Middleware, the disclosures . . . shall occur no later than the last major beta test release of that Microsoft Middleware." *Id.* The United States explains that the "last major beta test release for various Microsoft Middleware Products" will likely occur "anywhere from two to seven months prior to the commercial release of the product." United States Resp. at 153. The government further explains that earlier release of the information is not feasible, despite the fact that developers within Microsoft may have earlier access to the APIs. *Id.* at 154. This is so because the API is often not finalized, tested, and fully documented at that stage, and may, in fact, continue to change. *Id.* Any alteration to the API threatens not only to destroy the usefulness of the disclosure for software developers, but has the capacity to hinder developers in the creation of software. *Id.* Given these bases, it does not seem unreasonable **[**126]** to fix a time for disclosure which will ensure that **[*189]** the disclosed information is stable and unlikely to be subjected to future alteration.

"In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section shall occur in a Timely Manner." SRPFJ § III.D. "Timely Manner" appears in the definition section and "means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is made available via an MSDN subscription offering or of which 150,000 or more beta copies are distributed." *Id.* § VI.R. The government explains that the timing of disclosures relevant to the release of new Windows Operating System Products reflects the "approximate current MSDN subscription base" such that disclosure is triggered by the distribution of 150,000 beta copies of the software. United States Resp. at 155. Once again, given the explanations in the government's response to public comments, the timing of disclosures pursuant to § III.D does not seem to be unreasonable or unjustified.

Disclosure beyond these parameters, while potentially useful to other industry participants in combating Microsoft's dominance in the **[**127]** operating system market, is not absolutely required by the liability in this case. Indeed, the disclosures in § III.D are not clearly directed at the redress of a specific finding of liability, but instead advance the more general antitrust remedial goal of "eliminating the effects of the illegal conduct." *Nat'l Soc'y Prof'l Eng'rs*, *435 U.S. at 698*. Both the United States and Microsoft acknowledge that, at present, Microsoft discloses, supports, and evangelizes many Windows APIs. *See* Microsoft Mem. in Support of the SRPFJ at 29; United States Resp. at 140. Of course, Microsoft has a clear business incentive to do so, as it is this disclosure, in part, which makes the Windows platform attractive to applications developers. United States Resp. at 140-41. As the United States explains, the mandated disclosures in § III.D will be useful "in those cases where Microsoft may have a strategic interest in withholding APIs that outweighs Microsoft's natural incentive to disclose them-namely, where Microsoft's own middleware is competing with rival middleware that threatens the applications barrier to entry." *Id.* In this regard, § III.D appropriately **[**128]** requires disclosure of "the most competitively significant APIs . . . used by competing [middleware] products, not those used by completely different types of software." *Id. at 140*.

b. Communications Protocols

In a similar vein § III.E requires that Microsoft license, for purposes of interoperating or communicating with a Windows Operating System Product, any communications protocol installed on a Windows client which is used to interoperate or communicate with a Microsoft server operating system product without the addition of software code to the client. SRPFJ § III.E. This aspect of the proposed consent decree, like § III.D, is forward-looking and seeks to address the "rapidly growing server segment of the market." United States Mem. at 59. A "growing number of applications . . . run on servers, rather than on the desktop." Sibley Decl. P 56. These technologies "represent[] a strong source of competition to Microsoft in the business computing segment and may yet make a serious attack on the applications barrier to entry in the desktop PC market." *Id.* Hence, the goal of this disclosure is to ensure that rival middleware can interoperate with servers running **[**129]** Microsoft's server operating system software and thereby compete vigorously with Microsoft middleware. *Id.* In addition, enabling non-Microsoft middleware to interoperate with Microsoft's operating systems in the server segment **[*190]** ensures that Microsoft does not "incorporate into Windows features or functionality with which only its own servers can interoperate, and then refuse to make available information about those features non-Microsoft servers need in order to have the same opportunities to interoperate with the Windows operating system." United States Mem. at 58-59.

Although this aspect of the remedy plainly exceeds the scope of liability it is appropriately forward-looking. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132, 23 L. Ed. 2d 129, 89 S. Ct. 1562-33 (1969)*; *Int'l* *Salt Co. v. United States, 332 U.S. 392, 400, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. Certainly it cannot be said that the disclosures specified in Sections III.D and E are a blanket prohibition on all future violations of the antitrust laws. *See* *Zenith Radio, 395 U.S. at 133*. To the contrary, these provisions are closely connected with the theory of liability in this case and further efforts to "ensure **[**130]** that there remain no practices likely to result in monopolization in the future." *United Shoe, 391 U.S. at 250*. As a result, the provisions plainly fall within the public interest.

c. Interoperation

Somewhat controversial in § III.D and E is the fact that the SRPFJ does not include a definition of "interoperate." Entities raising this concern assert that the CIS offers some explanation of the term, but in the absence of a definition in the SRPFJ, there is no guarantee that the term will be given the meaning ascribed in the CIS. In the CIS, the government explains that "the effect of Section III.D. is to assure Non-Microsoft Middleware meaningful access to the same services provided by the operating system as those available to Microsoft Middleware." CIS at 35. Similarly, with regard to § III.E, the CIS explains that subsection E "ensures that ISVs will have full access to, and be able to use, the protocols that are necessary for software located on a server computer to interoperate with, and fully take advantage of, the functionality provided by any Windows Operating System Product." *Id.* From this language, it appears that the United States defines **[**131]** the ability to "interoperate" as the ability to "fully take advantage of functionality" or as the ability to have "meaningful access" to services. *Id. at 35-36*. Adding further confusion, the government, in its responses to the public comments offers that § III.E is intended to "allow for the possibility of seamless two-way interoperability." United States Resp. at 165.

Critics note, and the government acknowledges, that Microsoft has espoused a different understanding of "interoperate" in its submissions to the European Union. United States Resp. at 164. Nevertheless, the government insists that it has reached a "meeting of the minds" with Microsoft as to the intended meaning of "interoperate" and its effect in the SRPFJ. *Id.* The government further notes that, in an effort to clarify the meaning of "interoperate," it agreed with Microsoft to add language to § III.E., supplementing the term such that "interoperate" became "interoperate, or communicate." *Id. at 164-65*; *compare* RPFJ § III.E, *with* SRPFJ § III.E. This addition provides a very simple definition of "interoperate" in the text of the decree, clarifying the parties' intent.

Courts reviewing proposed **[**132]** consent decrees pursuant to the Tunney Act are obliged to pay close attention to any potential ambiguity, particularly since it is the district court which must enforce the decree. *Microsoft, 56 F.3d at 1462-63*. Aware of the criticism of the lack of definition of "interoperate," the Court inquired of Microsoft as to whether there was some ambiguity in the decree or a lack of agreement with the government. Hearing **[*191]** Transcript ("Tr.") at 81-82 (March 6, 2002). Microsoft, responded carefully, stating that, "the competitive impact statement and the extraordinarily lengthy response to comments . . . were prepared without any input from or consultation with Microsoft." *Id. at 82*. Further noting that "it is impossible that two different people or parties would write any document in exactly the same way," Microsoft nevertheless expressed its agreement with the government that the parties "have a meeting of the minds" and "certainly agree with the scope and operation of the judgment." *Id. at 82-83*; *see also* United States Resp. at 164.

Taking the parties as their word, the Court is not compelled to conclude that the parties lack agreement or that the SRPFJ is ambiguous **[**133]** simply because Microsoft has advanced a different understanding of a particular term in an unrelated forum. So long as Microsoft and the United States have a common understanding in this case, the fact that Microsoft advanced a different position in some other context is not relevant. Moreover, a clear definition of the term appears in § III.E, as a result of the addition of the words "or communicate" in order to clarify the meaning of the term "interoperate," SRPFJ § III.E ("Microsoft shall make available . . . any Communications Protocol that is . . . (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to *interoperate, or communicate*, natively . . . with a Microsoft server operating system product.") (emphasis added). *See* United States Mem. Regarding Modifications at 5-6; United States Resp. at 164-65. Accordingly, the use of the term in § III.E, at present, does not appear to carry ambiguity. Moreover, as the parties' intent will control the interpretation of this decree, *see* *Microsoft, 147 F.3d at 945 n. 7*, and given the clarification and ensuing revision, there seems little risk of dispute as to the parties' **[**134]** intent should the use of the term prove troublesome in the future.

The use of the term "interoperate" in § III.D presents a slightly harder problem, as the parties did not augment the use of the term "interoperate" in § III.D with the word communicate." The government's submission is unhelpful on this point, as it refers only to the use of the term "interoperate" in § III.E and does not mention the term's use in § III.D. Nevertheless, the Court cannot conclude that the lack of definition for the term renders the provision ambiguous. Microsoft's obligations are fixed in § III.D primarily by the definition of API, rather than the use of the term "interoperate;" the term "interoperate" serves only to circumscribe the purpose for which the API must be disclosed. SRPFJ § III.D. The definition of API which appears in § III.D strongly indicates the meaning to be given to "interoperate" by its reference to "obtaining services from." *Id.* Therefore, rather than require a separate definition, the use of the term "interoperate" in § III.D is apparent from its context. Based on this fact and the parties' agreement that they have a "meeting of the minds," the Court is satisfied that **[**135]** Microsoft's obligations under § III.D are sufficiently clear.

It is worthy of note, at this juncture, that § III.E is directed at a segment of the industry which was addressed in a very limited manner during the liability trial and was not related to the imposition of liability. The government explains the inclusion of this provision based upon the rationale that "the United States believed that the RPFJ's effectiveness would be undercut unless it addressed the rapidly growing server segment of the market." United States Mem. at 59. Given the forward-looking nature of § III.E, and the limited relation of servers to the liability **[*192]** imposed in the case, the Court recognizes that the protections in § III.E evidence the successful efforts of the United States to obtain a decree which not only redressed the specific conduct found to violate the antitrust laws, but to obtain protection which is prospective in its focus. Such a prospective remedy is particularly warranted in this case given the rapid pace of change in the software industry. *See* *Microsoft, 253 F.3d at 49*. In the absence of this type of provision and the other prospective provisions in the SRPFJ, it is quite **[**136]** possible that the core of the decree would prove prematurely obsolete. Instead, Plaintiffs and Microsoft appear to have proposed a decree that acknowledges the continuing change in the industry and expands appropriately from the imposition of liability. Although the government may not have been "strictly entitled" to such expansion, this fact cannot itself render the decree in conflict with the public interest, as contemplated by the Tunney Act. *Bechtel, 648 F.2d at 666*.

d. Reasonable, Non-Discriminatory Licenses

Closely related to the disclosures mandated by § III.D and E is § III.I, which concerns the terms pursuant to which Microsoft must license its intellectual property rights in conjunction with it obligations under the SRPFJ. Subsection I provides that Microsoft shall offer licenses to the relevant entities (ISVs, IHVs, IAPs, ICPs, and OEM) of "any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment." SRPFJ § III.I. Such licenses shall be "reasonable and non-discriminatory" in all regards, including the amount of royalties **[**137]** and monetary consideration, and shall be limited in scope such that they are no broader than necessary. *Id.* § III.I.1-2. In addition, pursuant to § III.I, Microsoft may reserve the right to prohibit the transfer, assignment, or sublicense of the intellectual property right conferred by the license. *Id.* § III.I.3. As is apparent from the terms of subsection I and the government's explanation, this provision "ensures that Microsoft cannot use its intellectual property rights to undermine the competitive value of its obligations in Sections III.D and E, while at the same time [it] permits Microsoft to take legitimate steps to prevent unauthorized use of its intellectual property." United States Resp.

at 171. [29]

[138]** One significant complaint about this provision is that Microsoft should not be entitled to *any* royalty in exchange for its disclosures. The Court finds little merit in this position. To prohibit Microsoft from charging a reasonable royalty would require Microsoft to give away significant amounts of valuable intellectual property rights. The Court does not agree that the liability in this case supports, much less requires, such a drastic and draconian remedy. *See* *Microsoft, 253 F.3d at 106* ("Mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition") (quoting 3 AREEDA & HOVENKAMP, ***ANTITRUST LAW***, P 650a, at 67). The appellate court established "a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference." *253 F.3d 34, 106-07*. While this "edentulous" test was sufficient for the **[*193]** imposition of liability, *253 F.3d 34, 79*, the relative potency of the causal connection established during the liability phase cannot be overlooked in a discussion of remedy, *253 F.3d 34, 80* ("Microsoft's **[**139]** concerns over causation have more purchase in connection with the appropriate remedy issue . . . .").

Based on the specific circumstances in this case, the Court finds that the requirement that Microsoft license its intellectual property at reasonable and non-discriminatory rates is entirely appropriate. Because "reasonableness" is generally recognized as an objective standard, *see* *Stringer v. Black, 503 U.S. 222, 237, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992)*, its incorporation into the SRPRJ serves to limit substantially the terms that Microsoft may impose in licenses of information disclosed pursuant to the final judgment. Greater specificity as to the terms of the licenses would likely be inappropriate, as case law ***HN14***[] on the subject of licenses and antitrust remedies advises that courts are best excluded from "the administration of intricate and detailed rules" relating to business affairs. *United States v. Paramount Pictures, 334 U.S. 131, 163, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)* ("The judiciary is unsuited to affairs of business management . . . ."). Moreover, the disclosure and licensing of intellectual property serves primarily to "unfetter" the market from the effects of Microsoft's illegal conduct, rather **[**140]** than redress very particular exclusionary conduct. *Ford Motor Co.*, 405 U.S. at 577. Therefore, the disclosure and license of such information in the absence of a reasonable royalty would impose an unduly confiscatory remedy upon Microsoft.

e. Source Code Access

Related to these disclosure provisions are the complaints of individuals and entities that those receiving such disclosures are not afforded access to the Windows operating system source code. This complaint reflects the fact that the IFJ originally entered by Judge Jackson, thereafter vacated by the appellate court, included a provision mandating access by representatives of OEMs, ISVs, and IHVs to "relevant and necessary portion of the source code" in order "to facilitate compliance, and monitoring of compliance" in conjunction with efforts to enable

[29] During the public comment period, some entities lodged complaints about RPFJ § III.I.5, which required a cross-license of certain intellectual property rights. In response, the United States and Microsoft agreed to amend § III.I to remove subsection I.5 in its entirety. *Compare* SRPFJ § III.I, *with* RPFJ § III.I.

interoperation. *Microsoft, 97 F. Supp. 2d at 67*. In this regard, the IFJ required Microsoft to make the relevant portions of the source code accessible at a "secure facility" where appropriate persons could "study, interrogate and interact" with the code. *Id.* The SRPFJ, like the IFJ, utilizes access to the source code as a means **[**141]** of enforcement, but limits such access to a special committee which serves Plaintiffs, rather than permitting access by representatives of the OEMs, ISVs, and IHVs. SRPFJ § IV.A.2. Hence, the same goal-ensuring compliance-is accomplished, albeit through a slightly different means. This shift in focus is abundantly appropriate given that it is Plaintiffs who are responsible for enforcement of the decree, not third parties in the marketplace who will likely benefit from the decree's provisions. To the extent entities or individuals desire access to the Microsoft source code for purposes other than ensuring compliance with the consent, such a use is discordant with the intent underlying the provision, and its predecessor in Judge Jackson's IFJ. As a result, the Court finds the absence of source code access for OEMs, ISVs, and other third parties to be of little concern.

f. Security-Based Limitations

Subsection J limits Microsoft's disclosures under the SRPFJ to ensure that the mandated disclosures do not result in the release of information which "would compromise the security of a particular installation . . . of anti-piracy, anti-virus, software licensing, digital rights **[**142]** **[*194]** management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria." *Id.* § III.J.1(a). In addition, subsection J excludes from disclosure any API, interface, or other information which Microsoft is "lawfully directed" by a "governmental agency of competent jurisdiction" not to do so. *Id.* § III.J.1(b). The chief complaint about these so-called "security carve-out" provisions is that they are more broad than is necessary to accomplish the goal of ensuring security. Such complaints ignore the limitations in the provision that require the release of information to work an *actual* compromise of security, rather than a potential, hypothetical, or likely compromise of security. Similarly, as the government explains, the provision applies to "particular installations," meaning "end-user installations or a specific, narrowly-prescribed subset of installations" and not all installations using a particular product or functionality. United States Resp. at 179. Accordingly, the Court finds complaints about § III.J.1 unpersuasive.

Subsection J further limits Microsoft's disclosure obligations with regard to a specific **[**143]** subset of the APIs and communications protocols that Microsoft will have to disclose. The provision specifies that Microsoft may condition licenses relating to "anti-piracy systems, antivirus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product" on the requirement that the licensee:

> (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

SRPFJ **[**144]** § III.J.2. Plainly, the thrust of this provision is to provide some protection for Microsoft from companies or individuals which may seek to make improper use of the API documentation and communications protocol disclosures made pursuant to the SRPFJ. Contrary to some comments, nothing in this provision authorizes Microsoft to discriminate against certain individuals or companies based on their development philosophy or not-for-profit status. Instead, subsection J.2 strikes a balance between protecting Microsoft's intellectual property rights and effecting the mandates of the decree. Indeed, the fears of some that they will face exclusion based upon having been sued for patent infringement and lost are unfounded, as such a suit is not itself evidence of "*willful* violation of intellectual property rights." *Id.* (emphasis added). Subpart (c) of § III.J merely offers Microsoft some flexibility in establishing reasonable and nondiscriminatory standards for determining that an individual or entity has not requested a license of intellectual property for some improper or illegitimate purpose that threatens Microsoft security. Nothing in the phrasing "reasonable, objective standards" **[**145]** authorizes Microsoft to use this term of the proposed decree to discriminate or oppress industry participants at its whim. *Id.* Concomitantly, subpart (d) does not entitle Microsoft to the licensee's intellectual property, but instead provides for independent third-party testing and verification **[*195]** relevant to Microsoft specifications and only where the specifications are "related to the proper operation and integrity of the systems and mechanisms identified in [§ III.J.2]." *Id.* The government explains that the cost of such independent testing is to be borne by the licensee because "with other third-party testing programs in the software industry, the cost is usually borne by the organization submitting the program." United States Resp. at 183. As all of these provisions constitute reasonable means of balancing competing interests, the Court fails to see any substantial merit in the complaints and comments of the provision's detractors.

5. Term of Decree

Section V of the SRPFJ provides that the decree "will expire on the fifth anniversary of the date it is entered by the Court." SRPFJ § V.A. Section V further empowers Plaintiffs to apply to the Court "for a one-time **[**146]** extension" of the five-year term of the decree "in any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations." *Id.* § V.B.

Though simple in language and effect, the proposed term of the decree, five years from the date of entry by the Court, has also met with significant criticism. Critics argue that the five-year term is too short. These individuals and entities contend that there is no basis to deviate from the general policy of the Antitrust Division to avoid negotiation of decrees of less than ten years in duration. *Antitrust Division Manual* at IV-54 (3d ed. Feb. 1998) ("With regard both to the preparation of proposed draft decrees by staff as well as to decree proposals that may be made by defendants, note that the Division's standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. The staff should not negotiate any decree of less than 10 years' duration, although decrees of longer than 10 years may be appropriate in certain circumstances."). The government responds that each decree must be tailored to fit the circumstances of the case, **[**147]** United States Resp. at 203 (citing *Antitrust Division Manual* at IV-51 ("While the scope of relief obtained in prior antitrust cases may be viewed as precedent, the theory behind equitable relief is that it should be fashioned to fit the particular facts of the case at issue."), and notes that the Antitrust Division has imposed five-year terms in numerous other decrees, *id.* (citing cases).

The government justifies departure from the standard ten-year term in this case because of the pace of technological change in the computer industry. United States Resp. at 202. At this point in the case, there can be no dispute that the industry has shown a great capacity for rapid change. As the D.C. Circuit noted in June of 2001:

> Just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable **[**148]** enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second.

Microsoft, 253 F.3d at 49. The government observes that absent a departure from the ten-year term, there exists a substantial risk that the decree will become highly regulatory in nature. United States Resp. at 203. Given these considerations, it is difficult to fault the government **[*196]** for departing from the usual ten-year term in this instance.

6. Compliance and Enforcement

The final portions of the SRPFJ detail the procedures for enforcement of the decree. As noted above, ***HN15***[] precedent instructs the Court to "pay close attention" to provisions that address enforcement of a consent decree. Microsoft, 56 F.3d at 1462. Although divided into numerous parts and subparts, virtually every aspect of the enforcement and compliance mechanisms interrelates with some other aspect, such that the provisions can be best understood when viewed as a whole, rather than piecemeal. Accordingly, the Court will commence its careful analysis of the compliance and enforcement provisions in the proposed consent decree with detailed descriptions **[**149]** of the provisions. Once this background is established, the Court will examine the most common and salient complaints about the compliance and enforcement provisions and assess whether these complaints render this aspect of the decree to be in discord with the public interest.

a. Technical Committee and Compliance Officer

The initial focus of this portion of the consent decree concerns the "Technical Committee" which serves to "assist in enforcement of and compliance with" the terms of the consent decree. SRPFJ § IV.B.1. The three committee members are to be "experts in software design and programming." *Id.* § IV.B.2. The independence of the committee members is ensured by the exclusion from candidacy of any individual employed by Microsoft or a Microsoft competitor in the past year, or retained as a consulting or testifying expert by any person in this action or other action adverse to Microsoft. *Id.* In addition, committee members shall not perform any work for Microsoft or a Microsoft competitor for two years after serving on the committee. *Id.*

Section IV.B establishes a detailed procedure for the selection of the three committee members, with each side **[**150]** selecting one member, and those two members selecting the third member. *Id.* § IV.B.3. All members of the committee must be appointed by the Court to serve. *Id.* Committee members shall serve for a 30-month term, which is renewable at the option of the party that initially selected that member of the committee. *Id.* § IV.B.4. The third member may be reappointed or replaced pursuant to the same procedure by which that member was selected. *Id.*

Although the Technical Committee serves Plaintiffs, Microsoft is responsible for the cost and expense of the service of the committee, including the payment of reasonable fees and expenses. *Id.* § IV.B.6. In addition, Microsoft is obligated to provide each committee member with a permanent office and related facilities on its corporate campus in Redmond, Washington. *Id.* § IV.B.7. At the further cost and expense of Microsoft, the committee may, with approval of the government, hire impartial staff and consultants to assist the committee in performing its duties. *Id.* § IV.B.8.h.

The committee is empowered broadly to "monitor Microsoft's compliance with its obligations under [the] Final Judgment." *Id.* § IV.B. **[**151]** 8.a. In concert with this broad grant of authority, the proposed final judgment specifies that the committee may, on reasonable notice to Microsoft, interview Microsoft personnel; inspect and copy Microsoft documents; access Microsoft systems, equipment, premises, and facilities; and require Microsoft personnel to compile data, reports, or other information. *Id.* § IV.B.8.b. The proposed final judgment further specifies that the Technical Committee **[*197]** shall have access to Microsoft source code and that the committee may study, interrogate, and interact with the source code in conjunction with its duties. *Id.* § IV.B.8.c.

As evidenced by the reporting requirements attendant to the Technical Committee's duties, the committee is answerable to the government. The proposed final judgment mandates that the committee provide bi-annual reports to Plaintiffs regarding the actions undertaken by the committee in furtherance of its duties. *Id.* § IV.B.8.e. Such reports shall include an identification of the business practices reviewed and the ensuing recommendations of the committee to Microsoft. *Id.* Notwithstanding this reporting obligation, the committee must also provide a written **[**152]** report to the government immediately upon "reason to believe that there may have been a failure by Microsoft to comply with any term" of the judgment. *Id.* § IV.B.8.f.

The Technical Committee is empowered to receive complaints from Microsoft's "Compliance Officer" as well as from third parties or the government. *Id.* § IV.B.8.d. When the committee receives complaints from third parties, it may communicate with these parties regarding their complaints, but the committee is ultimately obliged to maintain confidentiality with regard to information obtained from Microsoft. *Id.* § IV.B.8.g. In fact, the proposed final judgment mandates that the committee and its consultants and staff enter into confidentiality agreements with Microsoft such that all information gathered by the committee from Microsoft is not disclosed beyond Microsoft, Plaintiffs, or the Court. *Id.* § IV.B.9. In this regard, the committee is expressly banned from making public statements relating to its activities. *Id.* § IV.B.10.

As the Technical Committee is the enforcement arm of the government, the substantial counterpart to the committee is the Microsoft Internal Compliance Officer. In contrast **[**153]** to the impartiality of the Technical Committee, however, the Compliance Officer is far more closely aligned with Microsoft. The Compliance Officer will be an employee of Microsoft responsible for administering Microsoft's antitrust compliance program and "helping to ensure compliance" with the decree. *Id.* § IV.C. In accordance with the general duty to supervise Microsoft's compliance, the Compliance Officer is specifically obligated under the proposed consent decree with distributing a copy of the final judgment to all present officers and directors of Microsoft and their successors. SRPFJ § IV.C.3. The Compliance Officer must ensure that such officers and directors are "annually briefed on the meaning and requirements of [the] Final Judgment and the U.S. antitrust laws and advising them that Microsoft's legal advisors are available to confer with them regarding any question concerning compliance with [the] Final Judgment or under the U.S. antitrust laws." *Id.* § IV.C.3.c. Likewise, the Compliance Officer must obtain from each such officer and director "an annual written certification that he or she: (i) has read and agrees to abide by the terms of [the] Final Judgment; **[**154]** and (ii) has been advised and understands that his or her failure to comply with [the] Final Judgment may result in a finding of contempt of court." *Id.* § IV.C.3.d. In concert with these duties, the Compliance Officer must maintain records of the above-described distribution and certification. *Id.* § IV.C.3.e. Lastly, the Compliance Officer is specifically obliged to receive complaints from third parties and the government concerning Microsoft's compliance and to maintain a record of all such complaints and the action taken by Microsoft with respect to each such complaint. *Id.* § IV.C.3.g-h

In addition to these core duties, both the Technical Committee and the Compliance **[*198]** Officer are obliged to take certain action in conjunction with efforts toward the voluntary resolution of disputes. Along with the government, the Technical Committee and the Compliance Officer may receive complaints from third parties regarding Microsoft's compliance with the terms of the decree. *Id.* § IV.D. The Compliance Officer and the Technical Committee may also receive complaints from each other and from the government. *Id.* In order to facilitate the communication of such complaints **[**155]** and inquiries by third parties, the Compliance Officer is responsible for providing information on Microsoft's web site regarding the submission of complaints and for enabling the submission of complaints and inquiries to the Compliance Officer via the website. *Id.* §§ IV.C.3.f. and IV.D.3.b. Within thirty days of the receipt of such complaint, Microsoft may "attempt to resolve it or reject it" and must then "promptly advise the [Technical Committee] of the nature of the complaint and its disposition." *Id.* § IV.D.3.c.

Correspondingly, when the Technical Committee receives complaints, it shall investigate such complaints and consult with the government regarding such investigation. *Id.* § IV.D.4. During the investigation, the Technical Committee shall meet with the Compliance Officer in an effort to allow Microsoft to respond to the substance of the complaint and, thereby, reach an informal resolution of the complaint where possible and appropriate. *Id.* Where the committee finds merit in a complaint, it shall so advise Microsoft and Plaintiffs and propose a cure. *Id.* § IV.D.4.c. Notably, the work product, findings, and recommendations of the committee are not **[**156]** to be admitted in "any law enforcement proceedings before the Court for any purpose," and members of the committee are prohibited from testifying in any capacity before a court or other tribunal. *Id.* § IV.D.4.d. Similarly, any information gathered by or any report from the Technical Committee is to be treated as highly confidential pursuant to the Protective Order entered in this case. *Id.* § IV.B.9.

Notwithstanding all of the procedures in place with regard to the Technical Committee, ultimately the power to enforce the terms of the decree rests with the government. SRPFJ § IV.A. Accordingly, representatives of the government may, [30] in complete disregard of the Technical Committee, subject to lawful privilege, investigate and inspect Microsoft source code, books, accounts, correspondence, memoranda, and the like in conjunction with enforcement. *Id.* § IV.A.2. The government may interview Microsoft employees and agents and require submission of written reports. *Id.* Although Plaintiffs possess "the authority to seek such orders as are necessary from the Court to enforce [the] Final Judgment," on the occasion that the United States alleges a violation of §§ III. **[**157]** C, III.D., III.E, or III.H, it must first provide Microsoft with the opportunity to cure prior to seeking an order from the

[30] The SRPFJ provides this power equally to the United States and the Settling States but requires that the States shall consult first with the "States' enforcement committee to minimize the duplication and burden of the exercise of [such] powers, where practicable." SRPFJ § IV.A.

Court. *Id.* § IV.A.4. Any such cure will not constitute a defense to enforcement with respect to "knowing, willful or systematic violations." *Id.*

Having thoroughly reviewed the provisions specific to compliance and enforcement proposed by the parties, the Court turns its attention to the merits of these provisions. The most common complaints about the compliance and enforcement scheme concern the Technical Committee, **[*199]** with the overall rallying cry that the committee will be an ineffective tool for delay. In sum, in the Court's view, much of the criticism in this regard misunderstands the role of the Technical **[**158]** Committee. Although Microsoft plays a role in the selection of the committee's members and the committee is portrayed as "independent" in many regards, the proposed decree itself, as well as the parties' filings make clear that the committee exists to assist the government in enforcing the decree. *See, e.g.*, United States Resp. at 191-93; Microsoft Mem. in Support of the SRPFJ at 61; CIS at 56-58. The impartial or independent nature of the committee's members exists primarily to enable investigation of third-party complaints for purposes of enforcement. Impartiality of the committee will likely foster an environment of cooperative resolution, rather than one of persistent conflict and litigation. Otherwise, attempts at enforcement have a greater potential to take on the tenor of adversary proceedings, resolved in most instances with great difficulty and delay.

Importantly, the Technical Committee is not intended as a substitute for the enforcement authority of the United States. As explained at the Tunney Act hearing, the proposed consent decree "does not . . . cede the enforcement powers of the Department of Justice to some other entity." Tr. at 39. Instead, the proposed decree **[**159]** appropriately devises a mechanism for the provision of impartial and expert compliance assessment to the parties charged with enforcement. Such assistance, which comes at a cost to Defendant only, can only assist Plaintiffs' enforcement efforts and should not be viewed as a hindrance or a cause of delay. Dovetailing with the misunderstanding of the role of the Technical Committee are complaints regarding the qualifications for the committee's members. Because the SRPFJ sets forth only minimum qualifications with regard to technical expertise, some entities and individuals complain that the committee will be unskilled at interpretation of the decree-which requires legal expertise. As the legal interpretation of the decree is properly left to the parties, with ultimate authority resting with the Court, the focus on the technical expertise of the Technical Committee is far from troubling. Although the committee will investigate technical issues and advise the government, the responsibility remains with the government to examine the terms of the decree and assess in the first instance whether, as a legal matter, the decree has been violated. Should the government take the view there has **[**160]** been a violation, it is the government, not the Technical Committee, which must present that view to the Court.

Similarly misunderstanding the role of the Technical Committee, some entities filing comments complain that the Technical Committee is not required to inform third parties of the status or ultimate resolution of their complaints. Once again, the committee serves Plaintiffs-the entities properly responsible for enforcing the decree, not third parties. Certainly third-party input will be significant in assessing compliance and ensuring the decree's overall effectiveness. The decree, therefore, provides wide avenues for third-party input. Still, third-party concerns cannot supplant the ultimate enforcement role of the government, nor should third-party complaints burden mechanisms established for the government's and ultimately the Court's benefit.

Another significant criticism regarding the Technical Committee finds its roots in the bar on the use of Technical Committee "work product, findings or recommendations" in judicial proceedings. Those who find fault in this aspect of the decree tend to interpret the bar broadly, speculating that there exists a "fruit of the poisonous **[**161]** tree" rule, such that any information **[*200]** in the hands of the committee cannot be utilized by Plaintiffs in formal enforcement proceedings before the Court. Such an interpretation ignores the plain language of the provision and the unequivocal intent of the parties. The government was clear on this point on numerous occasions. The limitation on the use of Technical Committee work product does not preclude the government from "utilizing, relying on, or making derivative use of the [Technical Committee's] work product" in conjunction with its own enforcement activities, CIS at 58, nor does the provision preclude Plaintiffs from obtaining Microsoft documents from the committee for use in an enforcement proceedings. Tr. at 46. In short, the prohibition on the use of committee work product is most accurately described as "a narrow recognition that the opinions or conclusions reached by the committee as a whole or by members of the committee would not be admissible, but the information that they gather certainly would be used by [the government] and introduced into evidence by [the government]." *Id. at 46-47*.

b. Retention of Jurisdiction

One of the more salient concerns **[**162]** raised in the comments is the fact that neither Microsoft, nor the government, are obliged under the proposed decree to report to the Court regarding Microsoft's compliance with the decree. Compounding this omission from the decree is the limited nature of the clause specifying the degree to which the Court retains jurisdiction. Section VII provides in full:

> Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling either of the parties thereto to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

SRPFJ § VII. The D.C. Circuit recently made clear that ***HN16***[] "district courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Pigford v. Veneman, 292 F.3d 918, 924 (D.C. Cir. 2002)*. The *Pigford* court further explained that the district court's power over a consent decree, reflecting the hybrid between judicial **[**163]** order and contract, is limited to two sources. A district court may interpret and enforce a decree to the extent authorized by the decree itself or by the related order. *Id. at 923*. Additionally, a district court may modify a decree pursuant to *Rule 60(b)(5) of the Federal Rules of Civil Procedure*. *Id.* This latter power is circumscribed by the Rule's requirements that such modification is appropriate if "it is no longer equitable that the judgment should have prospective application." *Fed. R. Civ. P. 60(b)(5)*; *Pigford, 292 F.3d at 925*. As the D.C. Circuit recounted the present state of the law, "a significant change in circumstances [may] warrant[] revision of [a] decree," *id.* (quoting *Rufo v. Inmates of Suffolk Co. Jail, 502 U.S. 367, 383, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992))*, though any such revision must be "suitably tailored to the changed circumstances," *id.* (quoting *Rufo, 502 U.S. at 370*).

A strict reading of § VII would appear to limit this Court's jurisdiction to "enabling either of the parties thereto to apply to this Court . . . for further orders and directions as may be necessary or appropriate to carry out or construe **[**164]** this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions." SRPFJ § VII. This language does not clearly vest the Court with the authority to act *sua sponte* to order certifications **[*201]** of compliance and other actions by the parties.

Such a circumstance is not acceptable to the Court. The Court considers it imperative, in this unusually complex case, for the Court's retention of jurisdiction to be clearly articulated and broadly drawn. Such clarity and broad reservation of power are necessary to ensure that the Court may require action of the parties when it deems appropriate and need not wait for the parties to file a motion before action is taken. The government, in its colloquy with the Court, indicated its view that the Court would be free to require the government to file reports with the Court on issues relating to the "progress of enforcement of the decree," Tr. at 47-48, but the retention of jurisdiction in § VII does not reflect this view. Indeed, counsel indicated that the parties expressly opted *not* to identify the specific mechanism for reporting to the Court based upon the view that they "didn't **[**165]** think it was [their] place to tell the Court how often [it] might want reports from [the parties]." *Id. at 48*. Counsel went on to explain that they "didn't think that Microsoft and [the government] should be negotiating that, but rather wait to hear from [the Court] on that," anticipating that if the Court "has any concerns at all [it] will let [the parties] know and [they] will fix it." *Id.*

As the proposed final judgment is presently drafted, the Court is not convinced that it has retained the authority, on its own volition, to inform the parties of a particular concern and to require additional action by the parties. Given the parties apparent intent to the contrary, the Court cannot conclude that this aspect of the proposed final judgment is in the public interest. As this Court "must preside over the implementation of the decree," the Court "is certainly entitled to insist" upon precision in the decree's reflection of the intent of the parties. *Microsoft, 56 F.3d at 1461-62*. As a result, this Court takes the view that the proposed final judgment should be amended to reflect the intent expressed to the Court at the March 6, 2002, hearing. **[**166]** In the absence of a clear reflection of the parties' intent with regard to the Court's involvement, the Court is unable to find that the decree is in the public interest.

As the Court "can foresee difficulties in [the] implementation" of a decree wherein the retention of jurisdiction does not make clear the Court's power to act *sua sponte* as may be appropriate or necessary, the Court must "insist that [this] matter be attended to." *Id. at 1462*. The Court suggests that the public interest would be served if Microsoft and the United States (and the Settling States) would agree to amend the proposed final judgment to reserve for the Court, in addition to the powers presently specified in the proposed final judgment, the power to *sua sponte* issue orders or directions regarding to the final judgment, including, but not limited to orders regarding the construction or carrying out of the final judgment, the enforcement of compliance therewith, and the punishment of any violation thereof. Such an amendment would not appear to work a fundamental change to the parties' agreement and would ensure that the Court retains the power intended by the parties and which **[**167]** the Court deems necessary to ensure effective implementation of the final judgment in this case.

Because the Court has found all other aspects of the proposed final judgment to be in the public interest, the Court is loathe to reject the proposed consent decree on this defect alone. Rather, the more prudent course appears to be a conditional approval of the consent decree, dependent upon the parties' prompt agreement to the modification proposed by the Court, or some similar modification. Accordingly, **[*202]** out of an abundance of caution, the Court will condition its approval of the consent decree pending an alteration to § VII which makes clear that the Court may take appropriate action regarding enforcement of the decree on its own volition and without prompting by the parties. In the presence of such a provision, there will be no doubt that the Court may require certifications of compliance, the regular status reporting, and other action by the parties as the Court deems necessary or appropriate.

IV. CONCLUSION

In conclusion, the Court is compelled to comment more generally on the terms of the proposed remedy. First, the Court commends the parties for their intense efforts at **[**168]** reaching a settlement and their willingness to try to do so in the face of previous failures. Second, and more importantly, praise is due based solely on the quality of the fruits of their collaborative labors. While the proposed final judgment, in general, is appropriately crafted to address the anticompetitive conduct, as well as conduct related thereto, the Court regards the document as laudable not for these traits alone, but for the clear, consistent, and coherent manner in which it accomplishes its task. Far from an amalgam of scattered rules and regulations pieced and patched together to restrict Microsoft's anticompetitive business conduct, the proposed final judgment adopts a clear and consistent philosophy such that the provisions form a tightly woven fabric. The proposed final judgment takes account of the theory of liability advanced by Plaintiffs, the actual liability imposed by the appellate court, the concerns of the Plaintiffs with regard to future technologies, and the relevant policy considerations. The product, although not precisely the judgment the Court would have crafted, with the exception of the reservation of jurisdiction, does not stray from the realm of **[**169]** the public interest.

Based on the foregoing, the Court finds that, with the exception of § VII of the SRPFJ, the Court is satisfied that the parties have reached a settlement which comports with the public interest. With regard to § VII, the Court's only reservation concerns the retention of jurisdiction. Accordingly, the Court will conditionally approve the proposed consent decree as the final judgment in this case. Such conditional approval will become final following the submission by the parties of an amendment to § VII which reflects the parties' intention that the Court retain jurisdiction to take action *sua sponte* in conjunction with the enforcement of the decree. Upon receipt of such an amendment, if satisfied with the proposal, the Court will enter the proposed final judgment, as amended, as the final judgment in this case. The Court provides in a separate Order that the parties shall indicate their intent on this issue in a written submission filed with the Court not later than November 8, 2002.

November 1, 2002

COLLEEN KOLLAR-KOTELLY

United States District Judge

Golan v. Pingel Enter.

United States Court of Appeals for the Federal Circuit

November 7, 2002, Decided

01-1626

Reporter
310 F.3d 1360 *; 2002 U.S. App. LEXIS 23139 **; 64 U.S.P.Q.2D (BNA) 1911 ***; 2002-2 Trade Cas. (CCH) P73,857

ILAN GOLAN (doing business as Golan Products), Plaintiff-Appellant, v. PINGEL ENTERPRISE, INC., WAYNE PINGEL, DONNA M. PINGEL, and ARLEN NESS, Defendants-Appellees.

Prior History: **[**1]** Appealed from: United States District Court for the Central District of California. Senior Judge Mariana R. Pfaelzer.

Disposition: Affirmed in part, reversed in part and remanded.

Core Terms

patent, infringement, bad faith, valve, district court, summary judgment, relevant market, filter, expired, fuel, trademark, antitrust claim, petcock, rights, unfair competition, trademark infringement, monopoly power, grant of summary judgment, patent infringement, patent law, allegations, motorcycle, initiate, noninfringement, distributors, patentee, reasonable jury, cease-and-desist, counterclaims, advertised

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **Appellate Jurisdiction, Final Judgment Rule**

The United States Court of Appeals for the Seventh Circuit applies the law of the pertinent regional circuit to determine whether a district court's entry was final relative to all pending issues.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN2[] **Appellate Jurisdiction, Final Judgment Rule**

The United States Court of Appeals for the Ninth Circuit has expressly approved of the exercise of appellate jurisdiction where a plaintiff, with the district court's permission, has dismissed without prejudice remaining claims in order to make a judgment appealable.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

HN3[] **Jurisdiction, Jurisdictional Sources**

28 U.S.C.S. § 1295(a)(1) authorizes the United States Court of Appeals for the Federal Circuit to exercise appellate jurisdiction over only those appeals in which the complaint authorized the district court to exercise jurisdiction pursuant to *28 U.S.C.S. § 1338*. The Federal Circuit may no longer rely solely on counterclaims arising under the patent laws to establish its appellate jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN4[] **Subject Matter Jurisdiction, Federal Questions**

Where a plaintiff's well-pleaded complaint seeks declarations of patent noninfringement, the complaint arises, in part, under *28 U.S.C.S. § 1338*. This is so because the well-pleaded complaint rule governs district court patent jurisdiction under *§ 1338* to the same extent that it governs the existence of general federal question jurisdiction under *28 U.S.C.S. § 1331*. Jurisdiction exists under *28 U.S.C.S. § 1338* only in those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN5[] **Subject Matter Jurisdiction, Federal Questions**

In the context of declaratory judgments under *28 U.S.C.S. § 1331*, a plaintiff's complaint arises under federal law if the cause of action that the declaratory defendant threatens to assert arises (or would arise) under federal law. Under the doctrine of Skelly Oil Co., which interpreted the federal Declaratory Judgment Act so as not to confer jurisdiction over cases that otherwise would not arise under federal law, federal courts regularly exercise jurisdiction over suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Patent Law > Remedies > Declaratory Judgments

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Grounds

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

Patent Law > Remedies > General Overview

HN6[] **Jurisdiction, Subject Matter Jurisdiction**

In the context of a complaint seeking a declaration of noninfringement, the action threatened by the declaratory defendant would be an action for patent infringement. Such an action clearly arises under the patent laws. Federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN7[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

That a defendant actually counterclaimed for patent infringement is irrelevant to the United States Court of Appeals for the Federal Circuit's jurisdiction. Instead, it is the plaintiff's well-pleaded complaint which seeks declarations of patent noninfringement that controls, regardless of whether or not the defendant counterclaimed for patent infringement in response to the plaintiff's complaint.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN8[] **Standards of Review, De Novo Review**

An appellate court reviews a grant of summary judgment de novo, reapplying the summary judgment standard to determine whether it was appropriately granted.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN9[] **Entitlement as Matter of Law, Materiality of Facts**

Summary judgment is appropriate when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*. Evidence, and any inferences to be drawn therefrom, must be viewed in the light most favorable to the non-movant.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

HN10[] **Summary Judgment, Opposing Materials**

Where the party opposing summary judgment bears the burden of proof at trial, it must show more than a mere metaphysical doubt regarding the material facts. Nor will the existence of a mere scintilla of evidence suffice. Rather, the non-movant must show the existence of a genuine issue of material fact, which exists only if the evidence is such that a reasonable jury could reach a verdict in its favor.

Civil Procedure > Appeals > Standards of Review > General Overview

Trademark Law > ... > Infringement Actions > Standards of Review > General Overview

HN11[] **Appeals, Standards of Review**

As a general proposition, when reviewing a district court's judgment involving federal ***antitrust law***, the United States Court of Appeals for the Federal Circuit is guided by the law of the regional circuit in which that district court sits. The same is true of the Federal Circuit's review of Lanham Act claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN12[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

United States Court of Appeals for the Federal Circuit law applies to causes of action within the exclusive jurisdiction of the Federal Circuit.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Under *15 U.S.C.S. § 2* of the Sherman Act, the offense of monopoly has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

Defining the relevant market is indispensable to a monopolization claim under *15 U.S.C.S. § 2* of the Sherman Act. The relevant market has two dimensions, the relevant product market which includes a determination of the lack or presence of readily available substitutes and the relevant geographic market when the competition is geographically confined. The relevant market is determined by choices available to purchasers and is composed of products with reasonable interchangeability.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15[] **Public Enforcement, State Civil Actions**

California's state antitrust statute, the Cartwright Act, is patterned after the Sherman Act, and Sherman Act decisions are applicable to cases under the Cartwright Act. *Cal. Bus. & Prof. Code § 16700 et seq.*

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN16[] **Defenses, Bad Faith Enforcement**

In general, federal patent law bars the imposition of liability under federal or state law for publicizing a patent in the marketplace unless the plaintiff can show that the patent holder acted in bad faith. A patent owner has the right to enforce its patent, and that includes threatening alleged infringers with suit.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > Infringement Actions > General Overview

HN17[] **Defenses, Bad Faith Enforcement**

A federal standard is applicable to all torts, state or federal, based on a patentee's statements about patent infringement to a potential infringer and the industry. Communication to possible infringers concerning patent rights is not improper if the patent holder has a good faith belief in the accuracy of the communication. Although "bad faith" may encompass subjective as well as objective considerations, and the patent holder's notice is not irrelevant to a determination of bad faith, a competitive commercial purpose is not of itself improper, and bad faith is not supported when the information is objectively accurate. In general, a threshold showing of incorrectness or falsity, or disregard for either, is required in order to find bad faith in the communication of information about the existence or pendency of patent rights. Indeed, a patentee, acting in good faith on its belief as to the nature and scope of its rights, is fully permitted to press those rights even though he may misconceive what those rights are.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN18[] **Defenses, Bad Faith Enforcement**

The law recognizes a presumption that the assertion of a duly granted patent is made in good faith; this presumption is overcome only by affirmative evidence of bad faith.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN19[] **Summary Judgment, Evidentiary Considerations**

Patentees do not violate the rules of fair competition by making accurate representations, and are allowed to make representations that turn out to be inaccurate provided they make them in good faith. Nevertheless, if the party challenging such statements under state or federal law presents clear and convincing evidence that the infringement allegations are objectively false, and that the patentee made them in bad faith, viz., with knowledge of their incorrectness or falsity, or disregard for either, the statements are actionable and are not protected by the existence of a patent. To survive summary judgment, the party challenging such statements must present affirmative evidence sufficient for a reasonable jury to conclude that the patentee acted in bad faith, in light of the burden of clear and convincing evidence that will adhere at trial.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > ... > Defenses > Patent Invalidity > Grounds

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN20[] **Defenses, Bad Faith Enforcement**

The law regarding proof of bad faith assertion of patent rights is case-specific. In certain cases, bad faith may be clear. Exactly what constitutes bad faith remains to be determined on a case by case basis. Obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representation is made out.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN21[] **Defenses, Bad Faith Enforcement**

A decision not to sue one's own customers is not particularly probative of bad faith conduct with respect to assertion of patent rights.

Patent Law > ... > Damages > Collateral Assessments > Costs

Torts > Business Torts > General Overview

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN22[] **Collateral Assessments, Costs**

While notifying patent infringers without intending to file suit may be an example of bad faith, it is not dispositive. The decision to initiate a lawsuit often includes business-related considerations. For example, a patentee might have a good faith belief that a competitor's product infringes the patent but, for business-related reasons, determines the financial cost of enforcing the patent outweighs the recoverable damages. In such a circumstance, a patentee may elect to attempt to enforce the patent--or example by aggressively asserting its patent rights--and never intend to file suit. This conduct is authorized under the patent laws in the absence of falsity or incorrectness, or disregard for either. Indeed, such conduct is commonly the first step taken to enforce one's patent rights.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN23[] **Defenses, Bad Faith Enforcement**

A party that knowingly asserts an expired, and therefore unenforceable, patent results in a clear case of bad faith.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN24[] **Defenses, Bad Faith Enforcement**

With respect to bad faith assertion of patent rights, requiring the patent holder to prove that reliance on attorneys' opinions was reasonable effectively, and improperly, shifts the burden to the holder to prove it acted in good faith. Instead, it is the plaintiff's burden to present affirmative evidence that the holder acted in bad faith. Whether or not an opinion was "legally" correct is not the proper focus. Reliance on an attorney's oral opinion, even though it was in error, is evidence of good faith.

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN25[] **Federal Unfair Competition Law, Lanham Act**

The law of the pertinent regional circuit governs the assertion of federally protected trademark rights.

Torts > Procedural Matters > Preemption > General Overview

Trademark Law > ... > Unfair Competition > State Unfair Competition Laws > Federal Preemption

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN26[] **Procedural Matters, Preemption**

If a trademark holder has not federally registered the mark at the time he asserts infringement, the asserted trademark rights are entirely creatures of state or common law. If that is the case, no federal statute preempts or affects state claims.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN27[] **Trade Dress Protection, Causes of Action**

In deciding non-patent issues, such as trademark, trade dress and other unfair competition issues under § 43(a) of the Lanham Act, the United States Court of Appeals for the Federal Circuit applies regional circuit law.

Counsel: Jon E. Hokanson, Small Larkin, LLP, of Los Angeles, California, argued for plaintiff-appellant. With him on the brief was J. Thomas Gilbride, of Whittier, California.

Kenneth B. Axe, Lathrop & Clark LLP, of Madison, Wisconsin, argued for defendants-appellees. With him on the brief was Donald L. Heaney.

Judges: Before NEWMAN, GAJARSA, and PROST, Circuit Judges.

Opinion by: GAJARSA

Opinion

[*1912]** **[*1362]** GAJARSA, *Circuit Judge*.

The plaintiff-appellant, Ilan Golan ("Golan"), seeks review of the final judgment of the United States District Court for the Central District of California granting summary judgment to the defendants-appellees, Pingel Enterprise, Inc., Wayne **[*1363]** and Donna Pingel, and Arlen Ness (together "Pingel"), on Golan's federal and state antitrust and unfair competition claims, and state tort claims. The district court determined that none of Golan's claims could survive Pingel's motion for summary judgment because Pingel made no actionable false or misleading statements. We affirm the grant of summary judgment dismissing **[**2]** the federal and state antitrust claims because Golan failed to show Pingel possessed monopoly power in the relevant market. We also affirm the grant of summary judgment dismissing the federal and state unfair competition claims and state tort claims because Golan has not presented clear and convincing evidence sufficient for a reasonable jury to conclude Pingel acted in bad faith. Finally, because the district court applied the wrong law to the statements relating to trademark infringement, we reverse and remand for proceedings consistent with our opinion herein.

I. BACKGROUND

Pingel manufactures after-market motorcycle fuel valves, also called "petcocks," for Harley-Davidson motorcycles. Petcocks regulate the flow of fuel between the fuel tanks and the engine. Pingel sells its petcocks under the unregistered trademark "Power-Flo," and owns utility and design patents relating to motorcycle fuel valves.

Golan also manufactures after-market products for Harley-Davidson motorcycles. Golan's product line includes a fuel filter, and a fuel valve. Golan markets both the filter and the valve under the trademark "Peak Flow." Through distributors, Golan advertised the Peak Flow filter as **[**3]** early as 1997. The Peak Flow fuel valve became available sometime in 1998. The record contains evidence that Golan showed a prototype of the Peak Flow fuel valve at a trade show in February 1998, but both Golan and Pingel represented to the district court that Golan's first sale of the Peak Flow valve was in October, 1998.

In 1997, one distributor, Rivera Engineering ("Rivera"), issued a promotional brochure advertising Golan's Peak Flow filter. Pingel received this brochure, which advertised that the Peak Flow filter was "flow rated at 6.3 gallons per minute," and requested a sample Peak Flow filter from Golan. Golan provided the sample. Wayne Pingel testified that he tested the Peak Flow filter and found that it failed to exhibit the advertised flow rate. Pingel then faxed a handwritten note to Rivera, on September 24, 1997. This facsimile, addressed to "Distributor," indicated that Wayne Pingel had tested the filter, and stated:

> I don't recommend these filters with my or stock HD valves. Don't be mislead [sic], they will *not* flow 6 gal. per minute on *any* gravity system.

The district court found that in response, "Rivera apparently ignored Pingel's warning **[**4]** and continued to carry the fuel filter."

In late 1998, Pingel became aware that Golan was selling the Peak Flow fuel valve. Pingel obtained a sample of the valve, and consulted his then-patent attorney. The district court found that "in consultation with his long-time patent attorney, . . . Pingel determined that [Golan's] valve infringed a [Pingel] utility patent, a [Pingel] design patent, and [Pingel's] 'Power-Flo' trademark for petcock valves." **[***1913]**

Through his patent attorney, Pingel sent a cease-and-desist letter to Golan. The letter, dated October 30, 1998, accused Golan of infringing United States Patent No. **[*1364]** 4,250,921 ("the '921 patent"), United States Patent No. Des. 363,533 ("the '533 design patent"), and Pingel's Power-Flo mark for petcocks. The letter demanded that

Golan "immediately cease and desist *all* manufacturing and *all* sales of [Golan's] petcock." The letter also warned that failure to terminate manufacturing and selling of the valves "will result in legal action for patent and trademark infringement." Wayne Pingel testified that at the time this letter was sent, Pingel was contemplating a lawsuit against Golan.

On November 2, 1998, several days **[**5]** after sending the cease-and-desist letter to Golan, Pingel sent a letter to each of its twenty-two distributors. This letter stated:

> The purpose of this letter is to alert our distributors that a petcock manufactured and distributed by Golan Products, [sic] infringes patents and a trademark held by Pingel Enterprise, Inc. We are taking immediate action to halt the production and sale of this product.
>
> If you are approached to distribute a petcock for Golan Products, or if you have any questions or comments, please call me. . . .

Pingel's letter to the distributors failed to specify which patents and trademark Golan's fuel valve allegedly infringed. Golan presented evidence that subsequent to receiving this letter, one distributor, Custom Chrome, cancelled a purchase order for Golan's valves that had already been filled and paid for.

The record contains evidence that just before February, 1999, Wayne Pingel called Mel Magnet, President of Rivera. Mr. Pingel allegedly opened this conversation by asking, "isn't one fuel valve enough," and stating that Golan's valve infringed Pingel's valve, and that it would be "a pleasure to take you down." On February 5, 1999, Pingel, **[**6]** through its attorney, sent a letter to Mel Magnet of Rivera demanding that Rivera cease and desist all sales of Golan's Power Flow petcock. Pingel's attorney also sent a letter requesting that Golan's attorney agree to accept service of a summons and complaint for infringement on Golan's behalf.

During his deposition, Pingel's attorney, White, admitted that when he sent this letter, Pingel had not authorized him to file an infringement suit. Additionally, Pingel testified that he had not authorized White to initiate litigation against Golan and that he had no intention of suing Rivera when he sent Rivera the letter demanding that Rivera cease and desist selling Golan's valve.

After sending these letters, Pingel contacted at least two additional outside attorneys in order to assess the likelihood of prevailing on the merits of its infringement claims. Both outside attorneys told Pingel the litigation would be expensive and that the issues were "close." The first outside attorney issued one opinion orally. The second outside attorney sent Pingel a letter on March 31, 1999, stating that "whether Pingel would prevail on any of [its potential] claims is a close issue." The letter **[**7]** also informed Pingel, albeit incorrectly, that "the '921 patent expires April 23, 1999, which is 20 years from after the filing of its application." [1] The letter also advised Pingel "to engage an independent **[*1365]** intellectual property attorney to formally evaluate these claims and offer an opinion as to whether there is infringement." Pingel did not initiate patent or trademark infringement litigation against Golan.

[8]** In March, 1999, less than five months after Pingel's cease-and-desist letter, Golan initiated the present action. Golan sought declaratory judgment of noninfringement for the "Power-Flo" trademark and for several patents owned by Pingel, including the two patents referenced in the cease-and-desist letter. Golan also alleged federal and state antitrust claims, federal and state unfair competition claims, and state law business tort claims.

Pingel filed an answer and counterclaims. Pingel's answer alleged that the district court **[***1914]** lacked subject matter jurisdiction due to the absence of a case or controversy regarding the patents other than the '533 design

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[1] Effective June 8, 1995, the patent laws were amended to change the term of a patent from seventeen years measured from the date the patent issued to twenty years measured from the filing date of the earliest U.S. application for which priority benefit is claimed. Applications that were filed on or after June 8, 1995 have a twenty year term measured from the date of filing. All patents that were in force on June 8, 1995, or that issued on an application that was filed before June 8, 1995, have a term that is the greater of the twenty year term or seventeen years from the patent grant. *35 U.S.C. § 154(c)(1) (2000)*. The '921 patent was filed on April 23, 1979, claimed priority to a divisional application filed on May 10, 1978, and issued on February 17, 1981. Thus, the '921 patent expired on May 10, 1998, not April 23, 1999 as Pingel's attorney incorrectly advised.

patent and the '921 patent. Pingel's counterclaims included trademark and unfair competition claims pertaining to the Power-Flo mark, and infringement of the '533 design patent. Although Pingel did not counterclaim for infringement of the '921 patent, neither did it represent that the court lacked jurisdiction for want of a case or controversy regarding that patent. Rather, Pingel admitted that the '921 patent expired on May 10, 1998, but stated that the defendants lacked knowledge regarding when Golan's Peak Flow petcock was first **[**9]** offered for sale.

Golan v. Pingel Enter., Inc., No. CV 99-3143 (C.D. Ca. Nov. 4, 1999)Golan moved for partial summary judgment of noninfringement of the '533 design patent and of the '921 patent. Golan filed its motion regarding the '921 patent on August 27, 1999. Pingel filed an opposition to Golan's motion for summary judgment of noninfringement of the '921 patent on October 4, 1999. The opposition stated, for the first time, that there was no case or controversy because the '921 patent had expired, that Golan testified he first sold the Peak Flow petcock after the expiration of the patent, and that Pingel had asserted no claim of past or present infringement. The opposition acknowledged that the October 10, 1998 cease-and-desist letter from Pingel's counsel to Golan was sent after the patent expired. In addition to its opposition, Pingel also filed a statement of nonliability, in which Pingel covenanted not to sue Golan or any of its customers for infringement of the '921 patent.

The district court granted Golan's motion for summary judgment of noninfringement of the '533 design patent. (memorandum of decision granting partial summary judgment). The court dismissed Golan's **[**10]** claim for declaratory judgment of noninfringement of the '921 patent as moot. *Golan v. Pingel Enter., Inc.*, No. CV 99-3143 (C.D. Cal. Nov. 4, 1999) (order dismissing motion as moot).

Pingel then moved for summary judgment on Golan's tort, unfair competition, and antitrust claims. The district court found that these claims rested entirely on one or both of two activities: **[*1366]** Pingel's communications with Rivera regarding the flow rate of Golan's filter, and Pingel's communications with Golan and Pingel's distributors regarding Golan's alleged patent and trademark infringement. The district court held that neither activity is actionable. Pingel's facsimile communication with Rivera, it determined, was not actionable because Golan provided no evidence to show that the assertion contained in the facsimile -- that Golan's filter failed to flow at the advertised 6.3 gallons per minute in a gravity system -- was untrue. [2] Pingel's communications regarding Golan's alleged infringement, the district court determined, were not actionable because Golan provided insufficient evidence to rebut the presumption that Pingel made the claims in good faith. Consequently, the court granted summary judgment **[**11]** on Golan's tort, unfair competition, and antitrust claims. [3]

[12]** Golan appeals, contending that issues of material fact preclude summary judgment on his tort, unfair competition, and antitrust claims.

II. JURISDICTION

Although Pingel's counterclaims requested direct coercive relief under the patent laws, in [*Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 153 L. Ed. 2d 13, 122 S. Ct. 1889, 1893 (2002)*], the Supreme

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[2] In making this determination, the district court excluded portions of Golan's declaration as hearsay and for lack of foundation, and excluded Exhibit B to Golan's declaration on these grounds as well as failure to produce previously the document in discovery.

[3] The district court declined to grant Pingel's motion for summary judgment regarding the trademark claim but, subsequently, the parties stipulated to dismissal without prejudice of Pingel's trademark counterclaims and of Golan's claim for declaratory judgment of noninfringement of Pingel's trademark. The district court ultimately ordered the trademark claims dismissed without prejudice. Although the district court did not provide a Rule 54(b) certification or other entry of final judgment, this case appears to satisfy the final judgment rule. ***HN1***[] This court applies the law of the pertinent regional circuit, here the Ninth Circuit, to determine whether the district court's entry was final relative to all pending issues. *See* *CAE Screenplates Inc. v. Heinrich Fiedler GMBH & Co., 224 F.3d 1308, 1314-15, 55 USPQ2d 1804, 1808 (Fed. Cir. 2000)*. ***HN2***[] The Ninth Circuit recently issued an opinion that expressly approved of the exercise of jurisdiction "in a situation indistinguishable from ours," in which the Sixth Circuit held "that appellate jurisdiction exists where plaintiff, with the district court's permission, dismissed without prejudice the remaining claims in order to make the judgment appealable." *James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1069 (9th Cir. 2002)* (citing *Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987)*).

Court held ***HN3***[] that *§ 1295(a)(1)* authorizes us to exercise appellate jurisdiction over only **[***1915]** those appeals in which the complaint authorized the district court to exercise jurisdiction pursuant to *28 U.S.C. § 1338*. After *Vornado*, we may no longer rely solely on counterclaims arising under the patent laws to establish our appellate jurisdiction.

Nevertheless, we have jurisdiction over this appeal ***HN4***[] because Golan's well-pleaded complaint sought declarations of patent noninfringement. Consequently, the complaint arose, in part, under *28 U.S.C. § 1338*. This is so because, as the Supreme Court directed in *Vornado*, the well-pleaded complaint rule governs district court patent jurisdiction under *§ 1338* to the same extent that it governs **[**13]** the existence of general federal question jurisdiction under *§ 1331*. *Vornado, 122 S. Ct. at 1893* ("'linguistic consistency' requires us to apply the same test to determine whether a case arises under *§ 1338(a)* as under *§ 1331*.") (quoting *Christianson v. Colt Indus. Operating* ***[*1367]*** *Corp., 486 U.S. 800, 808, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988))*; *see also* *Christianson, 486 U.S. at 809* (holding that jurisdiction exists under *§ 1338* only in those cases in which a "well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims").

HN5[] In the context of declaratory judgments under *§ 1331*, the plaintiff's complaint arises under federal law if the cause of action that the declaratory defendant threatens to assert arises (or would arise) under federal law. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 18, 103 S. Ct. 2841, 2850-51, 77 L. Ed. 2d 420 (1983)* **[**14]** (noting that under the doctrine of *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)*, which interpreted the federal declaratory judgment act so as not to confer jurisdiction over cases that otherwise would not arise under federal law, federal courts regularly exercise jurisdiction over suits in which "if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question"). ***HN6***[] In the context of a complaint seeking a declaration of noninfringement, the action threatened by the declaratory defendant, here Pingel, would be an action for patent infringement. Such an action clearly arises under the patent laws. *See, e.g.*, *Pixton v. B & B Plastics, Inc., 291 F.3d 1324, 1327, 62 USPQ2d 1944, 1946 (Fed. Cir. 2002)* (vacating dismissal and holding that district court had jurisdiction because patent infringement suit arises under the patent laws); *see also* *Franchise Tax Bd., 463 U.S. at 18 n.19* (recognizing that "federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory **[**15]** that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction") (citing *E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852 (7th Cir. 1937))*. Thus, after *Vornado*, ***HN7***[] that Pingel actually counterclaimed for patent infringement is irrelevant to our jurisdiction. Instead, it is Golan's well-pleaded complaint, which sought, among other things, declarations of patent noninfringement, that controls, regardless of whether or not Pingel counterclaimed for patent infringement in response to Golan's complaint. Consequently, this court has jurisdiction over the appeal pursuant to *28 U.S.C. § 1295(a)(1)*.

III. STANDARD OF REVIEW

HN8[] This court reviews the grant of summary judgment *de novo*, reapplying the summary judgment standard to determine whether it was appropriately granted. *Pickholtz v. Rainbow Techs., Inc., 284 F.3d 1365, 1371, 62 USPQ2d 1340, 1343 (Fed. Cir. 2002)*; *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1185, 25 USPQ2d 1561, 1563 (Fed. Cir. 1993)*. ***HN9***[] Summary judgment is appropriate when there are **[**16]** no issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Evidence, and any inferences to be drawn therefrom, must be viewed in the light most favorable to the non-movant. *Id. at 255*. ***HN10***[] Where the party opposing summary judgment bears **[*1368]** the burden of proof at trial, however, it must show more than a mere metaphysical doubt regarding the material facts. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Nor will the existence of a mere scintilla of evidence suffice. *Anderson, 477 U.S. at 251*. Rather, the non-movant must show the existence of a genuine issue of material fact, which exists only if the evidence is such that a reasonable jury could reach a verdict in its favor. *Id.* **[***1916]**

HN11[] "As a general proposition, when reviewing a district court's judgment involving federal ***antitrust law***, we are guided by the law of the regional circuit in which that district court sits. . . ." *In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325, 53 USPQ2d 1852, 1854 (Fed. Cir. 2000).* **[**17]** The same is true of this court's review of Lanham Act claims. *Cont'l Plastic Containers v. Owens Brockway Plastic Prods., Inc., 141 F.3d 1073, 1080, 46 USPQ2d 1277, 1282 (Fed. Cir. 1998)*. In this case, the pertinent law is that of the Ninth Circuit.

In contrast, ***HN12***[] Federal Circuit law applies to causes of action within the exclusive jurisdiction of the Federal Circuit. *United States v. Hohri, 482 U.S. 64, 75, 96 L. Ed. 2d 51, 107 S. Ct. 2246 (1987)* (holding Congress' desire to create national uniformity requires that the Federal Circuit decide questions arising under the federal Constitution and statutes whenever such questions arise in cases within the Federal Circuit's jurisdiction); *Midwest Indus., Inc, v. Karavan Trailers, Inc., 175 F.3d 1356, 1358-59, 50 USPQ2d 1672, 1674-75 (Fed. Cir. 1999)* (*en banc*) (overruling *Cable Elec. Prods., Inc. v. Genmark, Inc., 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985))*; *Interpart Corp. v. Italia, 777 F.2d 678, 226 USPQ 124 (Fed. Cir. 1985)*.

IV. DISCUSSION

On appeal, Golan contends that disputed issues of material fact require this court to reverse the district **[**18]** court's grant of summary judgment dismissing each of Golan's claims. In particular, Golan points to evidence in the record indicating that Pingel made false or misleading statements regarding the performance characteristics of the Peak Flow valve, and regarding infringement of Pingel's patents and trademark, and that Pingel made these statements in bad faith. Pingel contends that this court should affirm the grant of summary judgment on all claims because the record contains no evidence that its statement regarding the flow rate of Golan's valve was untrue, or that it alleged infringement in bad faith. In the alternative, Pingel contends that this court should affirm the grant of summary judgment because the record is devoid of evidence creating a genuine issue of material fact regarding other elements of each of the asserted claims.

A. *Federal and State Antitrust Claims*

We affirm the district court's grant of summary judgment dismissing Golan's state and federal antitrust claims on alternate grounds. These claims cannot proceed because Golan failed to provide evidence that Pingel possessed monopoly power in the relevant market.

HN13[] Under *§ 2* of the Sherman Act, "the offense of **[**19]** monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell* ***[*1369]*** *Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. ***HN14***[] "Defining the relevant market is indispensable to a monopolization claim" under *§ 2* of the Sherman Act. *Thurman Indus., Inc. v. Pay ' N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. The relevant market has two dimensions, the relevant product market which includes a determination of the lack or presence of readily available substitutes and the relevant geographic market when the competition is geographically confined. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *Kodak v. Image Technical Servs., 504 U.S. 451, 481-82, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* (stating that the relevant market is determined by choices available to purchasers and is composed of products with reasonable interchangeability) **[**20]** (citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*; *see also* *Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1353, 52 USPQ2d 1641, 1645 (Fed. Cir. 1999)*. ***HN15***[] California's state antitrust statute, the Cartwright Act, is patterned after the Sherman Act, and Sherman Act decisions are applicable to cases under the Cartwright Act. *See* *Cal. Bus. & Prof. Code § 16700, et seq.*; *G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 195 Cal.Rptr. 211, 216 (Cal. Ct. App. 1983)*.

Golan's antitrust claims cannot survive summary judgment because Golan failed to satisfy the summary judgment requirement of proffering sufficient evidentiary support to establish, *prima facie*, the possession of monopoly power in the relevant market.

Indeed, Golan's antitrust claims fail for at least two reasons. First, Golan failed to provide sufficient evidence to establish a relevant market. Golan offered only conclusory allegations that the relevant market is the "high end after-market motorcycle fuel valve market for Harley Davidson motorcycles" without further supporting evidence. Pingel presented uncontroverted **[***1917]** **[**21]** evidence that its fuel valves compete against lower priced valves that are interchangeable substitutes, and that it lacked monopoly power and could not control prices. Golan presented no expert testimony regarding monopolization or the relevant market, nor did Golan present evidence sufficient to raise a question of material fact regarding the existence or nonexistence of interchangeable substitutes. Although Golan presented declarations of dealers in the motorcycle fuel valve industry stating that Golan and Pingel's valves are the only products in the "high end high performance aftermarket motorcycle fuel valve market for Harley-Davidson motorcycles," these conclusory statements are insufficient to exclude lower priced interchangeable substitutes from the relevant market. "High end," and "high performance" are irrelevant if "lower end," and "lower performance" valves are interchangeable substitutes. Pingel's testimony regarding interchangeability is therefore uncontroverted.

Second, even assuming the relevant market is as narrow as Golan suggests, Golan failed to prove that Pingel had acquired monopoly power in this relevant market. Golan offered no evidence of market share, barriers **[**22]** to entry, or any other commonly accepted evidence showing monopoly power. From the record before us, the evidence at best shows there were two competitors in this limited market. Without proof of monopoly power Golan's antitrust claims must fail.

We therefore affirm the dismissal of Golan's antitrust claims because Golan failed **[*1370]** to satisfy the summary judgment requirement of proffering sufficient evidentiary support to establish, *prima facie*, the possession of monopoly power in the relevant market.

B. *Federal and State Unfair Competition Claims & State Tort Claims*

With regard to the remaining claims, we affirm the district court's grant of summary judgment in Pingel's favor. The district court analyzed the challenged statements under the following two categories: 1) Pingel's communications with Rivera regarding Golan's fuel filter; and 2) Pingel's allegations of patent and trademark infringement.

1. Pingel's communications with Rivera regarding Golan's fuel filter

We agree with the district court that Pingel's facsimile statement to Rivera regarding the flow rate of the Peak Flow filter was not itself actionable. This statement represented that Pingel tested the filters **[**23]** and that they would not flow at the advertised six gallon per minute rate in a gravity system. Wayne Pingel testified that he tested Golan's filter and it failed to flow at the advertised 6.3 gallons per minute rate. Golan's argument that this statement is false rests on the contention that "it is entirely possible that a reasonable jury could find that [Pingel] had made false or misleading descriptions of the *filter element* found in the [Golan] fuel filter. . . ." Applnt's Br. at 56 (emphasis added). We disagree. The facsimile plainly refers to the flow rate of the fuel filter in a gravity system, not to any limited element thereof. Because Golan's argument rests on a strained and implausible reading of the challenged statement, we agree with the district court that Golan failed to present evidence sufficient to raise a genuine issue of material fact that this statement was false or misleading. [4]

[24]** 2. Pingel's allegations of infringement

The district court considered the allegations of patent infringement and trademark infringement as a single issue. For the reasons discussed below, we address the allegations separately.

a. Patent infringement allegations

HN16[] In general, "federal patent law bars the imposition of liability [under federal or state law] for publicizing a patent in the marketplace unless the plaintiff can show that the patent holder acted in bad faith." *Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1353, 51 USPQ2d 1337, 1347 (Fed. Cir. 1999)* (quoting *Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1336, 47 USPQ2d 1769, 1782 (Fed. Cir. 1998)*. "[A] patent owner has the

[4] This determination renders harmless any abuse of discretion the district court might have committed in excluding Golan's evidence regarding the flow rate of the filter element itself.

right to . . . enforce its patent, and that includes threatening alleged infringers with suit." *Concrete Unlimited, Inc. v. Cementcraft, Inc., 776 F.2d 1537, 1538, 227 USPQ 784, 785 (Fed. Cir. 1985)*.

In *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, this court articulated **HN17**[] a federal standard applicable to all torts, state or federal, **[***1918]** based on a patentee's statements about patent infringement to a potential infringer and the industry. **[**25]** *165 F.3d 891, 897, 49 USPQ2d 1308, 1312 (Fed. Cir. 1998)*. We explained that

> **[*1371]** communication to possible infringers concerning patent rights is not improper if the patent holder has a good faith belief in the accuracy of the communication. Although "bad faith" may encompass subjective as well as objective considerations, and the patent holder's notice is not irrelevant to a determination of bad faith, a competitive commercial purpose is not of itself improper, and bad faith is not supported when the information is objectively accurate. In general, a threshold showing of incorrectness or falsity, or disregard for either, is required in order to find bad faith in the communication of information about the existence or pendency of patent rights. Indeed, a patentee, acting in good faith on its belief as to the nature and scope of its rights, is fully permitted to press those rights even though he may misconceive what those rights are.

Id. Moreover, in *C.R. Bard Inc. v. M3 Sys., Inc.*, we explained that:

> **HN18**[] The law recognizes a presumption that the assertion of a duly granted patent is made in good faith, *see* *Virtue v. Creamery Package Mfg. Co., 227 U.S. 8, 37-38, 57 L. Ed. 393, 33 S. Ct. 202, 1913 Dec. Comm'r Pat. 519 (1913)*; **[**26]** this presumption is overcome only by affirmative evidence of bad faith.

C.R. Bard, 157 F.3d 1340, 1369, 48 USPQ2d 1225, 1246 (Fed. Cir. 1998).

Consequently, **HN19**[] patentees do not violate the rules of fair competition by making accurate representations, and are allowed to make representations that turn out to be inaccurate provided they make them in good faith. *See* *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 710, 24 USPQ2d 1173, 1180-81 (Fed. Cir. 1992)*. Nevertheless, if the party challenging such statements under state or federal law presents clear and convincing evidence that the infringement allegations are objectively false, and that the patentee made them in bad faith, *viz.*, with knowledge of their incorrectness or falsity, or disregard for either, the statements are actionable and are not protected by the existence of a patent. To survive summary judgment, the party challenging such statements must present affirmative evidence sufficient for a reasonable jury to conclude that the patentee acted in bad faith, in light of the burden of clear and convincing evidence that will adhere at trial.

In *Zenith Electronics*, we explained **[**27]** that **HN20**[] the law regarding proof of bad faith is case-specific. In certain cases, bad faith may be clear:

> Exactly what constitutes bad faith remains to be determined on a case by case basis. Obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representation is made out.

182 F.3d at 1354, 51 USPQ2d at 1348.

To show bad faith in Pingel's actions, Golan must offer clear and convincing evidence that Pingel had no reasonable basis to believe that the GP petcock infringed Pingel's patents or that Pingel knew it was enforcing an expired, and therefore unenforceable, patent. In this case, there is not clear and convincing evidence from which a reasonable jury could conclude that Pingel alleged patent infringement in bad faith or knowingly enforced an expired patent. Our review of the record reveals two separate categories of conduct which Golan asserts, either explicitly or implicitly, shows Pingel's bad **[*1372]** faith: (1) notification of infringers without intention of initiating suit; and (2) enforcing an expired patent.

First, **[**28]** Golan points to Pingel's intent not to initiate suit as evidence of bad faith. Wayne Pingel admitted during his deposition that, at the time Pingel notified Rivera of Golan's potential infringement, Pingel did not intend to initiate suit against Rivera. [5] While this admission may or may not provide a basis from which a reasonable jury could infer bad faith toward Rivera (which is not the issue here), it clearly does not provide a sufficient basis from which a jury could reasonably infer bad faith toward Golan. Indeed, Wayne Pingel also testified that Pingel was in fact contemplating a lawsuit against Golan when Pingel sent the October 30, 1998 cease-and-desist letter. Thus, the record shows only that Pingel **[***1919]** did not intend to initiate suit against Rivera and does not support an inference that Pingel did not intend to initiate suit against Golan.

[29]** ***HN22***[] While notifying infringers without intending to file suit may be an example of bad faith, *see* *Mallinckrodt, 976 F.2d at 710, 24 USPQ2d at 1181*, it is not dispositive. The decision to initiate a lawsuit often includes business-related considerations. For example, a patentee might have a good faith belief that a competitor's product infringes the patent but, for business-related reasons, determines the financial cost of enforcing the patent outweighs the recoverable damages. In such a circumstance, a patentee may elect to attempt to enforce the patent - for example by aggressively asserting its patent rights - and never intend to file suit. This conduct is authorized under the patent laws in the absence of falsity or incorrectness, or disregard for either. *See* *Mikohn, 165 F.3d at 897, 49 USPQ2d at 1312*. Indeed, such conduct is commonly the first step taken to enforce one's patent rights. Thus, even if Pingel never intended to file suit, we believe this is only a factor to consider in determining whether the enforcement of a patent is in bad faith.

Since the intention to file suit is only one factor in determining bad faith, and the only evidence in **[**30]** the record that Pingel did not intend to file suit against Golan is based on an inference, we do not believe a reasonably jury could find that Pingel acted in bad faith in light of Golan's clear and convincing evidentiary burden.

Second, the record shows that Pingel was, in fact, asserting infringement of an expired patent. ***HN23***[] A party that knowingly asserts an expired, and therefore unenforceable, patent results in a clear case of bad faith. *See* *Zenith Elecs., 182 F.3d at 1354, 51 USPQ2d at 1348*. However, the record shows that Pingel was told by at least one attorney that the '921 patent did not expire until April 23, 1999. It was only at some point well after the October 30, 1998 cease-and-desist letter that Pingel became aware that the advice it received from the attorney was incorrect. While the reliance on the attorney's calculation of patent term clearly does not affect the expiration of the patent, it does negate an inference that Pingel was asserting a patent it knew to be expired, and accordingly negates a finding of bad faith.

In further support of its decision, the district court relied upon the fact that **[*1373]** Pingel came to a determination of Golan's infringement **[**31]** in consultation with his patent attorney and later consulted with two other attorneys, both of whom confirmed that the issues were close. Golan expends considerable effort pointing out that in order to rely upon an opinion of counsel, that opinion must be credible.

As an initial note, each case Golan cites for this proposition deals with exculpatory opinions in cases of willful infringement charges or the basis for filing a lawsuit *after* filing. *See, e.g.*, *SRI Int'l, Inc. v. Advanced Tech. Labs., Inc., 127 F.3d 1462, 44 USPQ2d 1422 (Fed. Cir. 1997)*; *Judin v. United States, 110 F.3d 780, 42 USPQ2d 1300 (Fed. Cir. 1997)*; *Minnesota Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559, 24 USPQ2d 1321 (Fed. Cir. 1992)*; *Kloster Speedsteel AB v. Crucible, Inc., 793 F.2d 1565, 230 USPQ 81 (Fed. Cir. 1986)*. We do not believe these cases are applicable to the facts of the present case primarily because ***HN24***[] requiring Pingel to prove that reliance on the attorneys' opinions was reasonable effectively, and improperly, shifts the burden to Pingel to prove it acted in good faith. Instead, it is Golan's burden **[**32]** to present affirmative evidence that Pingel acted in bad faith. *C.R. Bard, 157 F.3d at 1369, 48 USPQ2d at 1246*. At most, the evidence shows Pingel was seeking advice from counsel in ongoing contemplation whether to actually file suit against Golan. The evidence of record relating to Pingel's reliance on attorney advice, while potentially inaccurate and questionable, does not support Golan's claim that Pingel acted in bad faith. "Whether or not an opinion was 'legally' correct is not the proper focus." *Graco, Inc. v. Binks Mfg Co., 60 F.3d 785, 793-94, 35 USPQ2d 1255, 1261-62*

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[5] We do not place much weight on the fact that Pingel did not intend to sue Rivera, its customer, for patent infringement, as ***HN21***[] a decision not to sue one's own customers is not particularly probative of bad faith conduct.

(Fed. Cir. 1995) (quoting *Read Corp. v. Portec, Inc., 970 F.2d 816, 830, 23 USPQ2d 1426, 1438 (Fed. Cir. 1992)* (holding that reliance on an attorney's oral opinion, even though it was in error, is evidence of good faith).

From the record before us, Pingel, in asserting patent infringement of the '921 patent, had no reason to believe an attorney would provide the wrong date of patent expiration. Additionally, each attorney stated that although Pingel's case might not be particularly strong, the issues were "close." Thus, we find that the evidence does not clearly **[**33]** show that Pingel knew the '921 patent was invalid at the time it asserted infringement or that Pingel had no **[***1920]** reason to believe that Golan did not infringe any of Pingel's asserted patents.

b. Trademark infringement allegations

The parties and the district court appear to have presumed that Federal Circuit law regarding bad faith governs Pingel's assertions of trademark infringement. This is not so. ***HN25***[] The law of the pertinent regional circuit governs the assertion of federally protected trademark rights. *Al-Site Corp. v. VSI Int'l, Inc., 174 F.3d 1308, 1326, 50 USPQ2d 1161, 1172 (Fed. Cir. 1999)*.

HN26[] If, however, Pingel had not federally registered the Power-Flo mark at the time he asserted infringement, the asserted trademark rights are entirely creatures of state or common law. If that is the case, no federal statute preempts or affects the remaining state claims. Rather, Ninth Circuit law applies to the federal Lanham Act claims predicated on the assertion of state trademark rights, and state law applies entirely to the California unfair competition and business tort claims predicated on the assertion of state trademark rights. *Thompson v. Haynes, 305 F.3d 1369, 2002 WL 31155195 (2002)* **[**34]** ***HN27***[] ("In deciding non- patent **[*1374]** issues, such as trademark, trade dress and other unfair competition issues under § 43(a) of the Lanham Act, this Court applies regional circuit law."). On remand, the district court should determine which law applies and whether Pingel's allegations of trademark infringement are actionable under that law.

V. CONCLUSION

In light of the record before us, we affirm the district court's grant of summary judgment in favor of Pingel on Golan's state and federal antitrust claims because Golan failed to provide evidence that Pingel possessed monopoly power in the relevant market, and the district court's determination that Pingel's facsimile statement to Rivera regarding the flow rate of the Peak Flow filter was not actionable because Golan presented insufficient evidence that the statement was untrue. We affirm the grant of summary judgment on Golan's remaining state and federal unfair competition and state tort claims because Golan has not presented clear and convincing evidence sufficient for a reasonable jury to conclude Pingel acted in bad faith. We remand to the district court to ascertain the proper **[**35]** application of law with respect to the trademark infringement issues.

AFFIRMED-IN-PART, REVERSED-IN-PART, and REMANDED.

No costs.

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Rolex Watch U.S.A. v. Zeotec Diamonds

United States District Court for the Central District of California

November 7, 2002, Decided; November 8, 2002, Filed

NO. CV 02-01089 (GAF)(VBKx)

Reporter
2002 U.S. Dist. LEXIS 30757 *; 2002 WL 35656950

ROLEX WATCH U.S.A., INC., Plaintiff, v. ZEOTEC DIAMONDS, INC., AND ALI PARAVAR, Defendant.

Core Terms

Rolex, watches, Zeotec, trademark, diamonds, non-genuine, genuine, altered, dial, bezel, customers, bracelet, marks, dilution, gold, counterfeiting, purchaser, sells, trademark infringement, summary judgment, antitrust, likelihood of confusion, first sale, advertising, undisputed, warranty, replacement part, infringement, products, website

Counsel: [*1] For Ali Paravar, Defendant: Michael R Doram, LEAD ATTORNEY, Creskoff and Doram, Pasadena, CA.

For Rolex Watch USA Inc, Plaintiff: Matthew Scott Bellinger, Knobbe Martens Olson and Bear LLP, Irvine, CA; Brian W Brokate, LEAD ATTORNEY, Gibney Anthony and Flaherty LLP, New York, NY; Kathleen E McCarthy, LEAD ATTORNEY, King and Spalding LLP, New York, NY; Siegrun D Kane, LEAD ATTORNEY, Morgan & Finnegan, New York, NY; Michele V Ficarra, Gibney Anthony & Flaherty, New York, NY; Robert A Ackermann, LEAD ATTORNEY, Jenkens & Gilchrist, Los Angeles, CA; Jeffrey E Dupler, PRO HAC VICE, Gibney Anthony and Flaherty LLP, New York, NY; Craig S Summers, Knobbe Martens Olson and Bear LLP, Irvine, CA; Adam W Sgro, PRO HAC VICE, Gibney Anthony and Flaherty LLP, New York, NY; David H T Kane, LEAD ATTORNEY, Morgan & Finnegan, New York, NY.

For Zeotec Diamonds Inc, Defendant: Michael R Doram, LEAD ATTORNEY, Creskoff and Doram, Pasadena, CA.

Judges: Gary Allen Feess, United States District Judge.

Opinion by: Gary Allen Feess

Opinion

ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

I.

INTRODUCTION

Defendants Zeotec Diamonds, Inc. and Ali Paravar, its owner[1], buy Rolex watches, modify them with non-Rolex parts, retain the Rolex trademark, and **[*2]** advertise and re-sell the watches using the genuine Rolex trademark. Defendants claim that they may engage in this conduct under the "first sale" doctrine, which permits the re-sale of trademarked items once they have been sold and placed in the stream of commerce. In this lawsuit, Rolex charges that Defendants may not defend against trademark infringement under the first sale doctrine when the trademarked items being sold have been modified in ways not approved by the trademark owner. Since that defense is not available, according to Rolex, Defendants' conduct constitutes trademark counterfeiting, trademark infringement, and trademark dilution.

The issue now before this Court on summary judgment is not new to this circuit or to this trademark holder. In a materially indistinguishable case, the Ninth Circuit has found trademark infringement where a re-seller had altered Rolex watches using non-genuine components, retained the Rolex trademark on those watches, and then advertised and re-sold them with the Rolex trademark in place. *Rolex Watch U.S.A., Inc. v. Michel Co., 179 F.3d 704, 707, 710 (9th Cir. 1999)*. According to the Ninth Circuit, even the use of an additional legend along with the trademark would have been insufficient to permit the use of the genuine **[*3]** trademark, because the alteration of the watch has resulted in a new product not manufactured by the trademark owner. Id. Other district and circuit courts have reached the same conclusion. See, e.g., *Rolex Watch U.S.A., Inc., v. Meece, 158 F.3d 816 (5th Cir.1998)*, cert. denied, *526 U.S. 1133, 119 S.Ct. 1808, 143 L.Ed.2d 1011 (1999)*; see also *Westinghouse Electric Corp. v. General Circuit Breaker & Electric Supply Inc., 106 F.3d 894, 899-900 (9th Cir.)*, cert. denied, *522 U.S. 857 (1997)* ("retaining the original Westinghouse trademarks on used, reconditioned circuit breakers sold by circuit breaker vendors constituted trademark counterfeiting under section 32(1)"); *Bulova Watch Co. v. Allerton Co., 328 F.2d 20 (7th Cir.1964)* (Injunction granted because "The substitution of a different crown and case by defendants results in a different product. The watch is no longer a Bulova watch. It is a new and different "watch" albeit one containing a "movement" manufactured by Bulova.")

The undisputed or materially uncontroverted facts in this case demonstrate that Defendants' conduct varies in no significant way from the infringing conduct in these reported decisions. Accordingly, the motion for summary judgment is **GRANTED**.

II.

FACTUAL BACKGROUND

The following facts are undisputed or without substantial controversy.

A. THE PARTIES

The Plaintiff, Rolex Watch U.S.A., Inc. ("Rolex") is a New York corporation with its offices and principal place of business in New York. (SUF ¶ 1), Rolex is the exclusive distributor **[*4]** of Rolex watches in the United States and is responsible for assembling, finishing, marketing and selling Rolex products in the United States. Rolex owns (by assignment from Manufacture Des Montres S.A. Bienne, hereinafter "Bienne") the U.S. Patient and Trademark Office (USPTO) registration for the trademark Rolex. (SUF II 2, 3, 5; GIMF ¶ 99; Rolex Exhibit 1). Rolex also owns the USPTO registrations for the trademarks used in connection with Rolex watches, including: 1) OYSTER; 2)

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[1] Corporate officers or directors are generally personally liable for all torts which they authorize or direct or participate in, and a showing of intent or bad faith is not required to prove liability under §1114. (*Hewlett-Packard Co. v. Repeat-O-Type Stencil Manufacturing Corp., et al., 1995 W.L. 552168 (N.D. Cal. 1995)* (sustaining summary judgment against a corporation's president and majority stockholder, where the undisputed facts indicated that he was involved and participated in the conduct giving rise to the corporation's trademark infringement liability). Therefore, the Court will not discuss Paravar's liability separately from that of Zeotec Diamonds, Inc.

PRESIDENT; 3) CROWN DESIGN; 4) DATEJUST; 5) GMT-MASTER; 6) OYSTER PERPETUAL; 7) YACHT-MASTER; 8) SUBMARINER; 9) ROLEX DAYTONA; 10) DAYTONA, through assignment from Montres Rolex S.A. Geneva (hereinafter "Geneva"). (SUF ¶ 6; Rolex Ex. 1). The Rolex registrations are in full force and effect and, with the exception of DAYTONA, have become incontestable pursuant to *15 U.S.C. § 1065*. (SUF ¶ 7).

Defendant, Zeotec Diamonds, Inc. ("Zeotec") is a California corporation with its principal place of business in Los Angeles, California. (SUF ¶ 38). Zeotec is in the jewelry business, involved in purchasing, selling, and appraising diamonds, watches, jewelry and precious stones. (SUF ¶ 40). Ali Paravar is the president of Zeotec. (SUF **[*5]** ¶ 39).

B. ROLEX ACTIVITIES

Rolex has sold watches in the U.S. for over 80 years and has spent over $15 million dollars a year on advertising and promoting Rolex watches, and their durability, reliability and pressure-proof performance. (SUF ¶¶ 4, 9). Rolex ads feature the Rolex and Crown Design marks and other Rolex marks. (SUE ¶ 10). Rolex has also received extensive unsolicited media publicity. (SUF ¶ 13). Over 10,000 articles from 1985-2001 mention Rolex watches. (SUF ¶ 14). Rolex was named "Watch of the century" by American Time in its "100 Years of Wrist Watches" issue and was named the number one luxury brand in a 2001 Women's Wear Daily survey. (SUF ¶¶ 15, 16). Rolex sells its watches to individuals exclusively through Official Rolex Jewelers, with whom it also engages in cooperative advertising in magazines and local newspapers. (SUF ¶¶ 8,12).

C. GENUINE ROLEX PRODUCTS

Rolex watches are made of, inter alia, stainless steel, stainless steel and gold, or all gold and are sometimes sold with diamond bezels, dials and/or bracelets. (SUF ¶ 17). Rolex watches contain the following components: the watch movement, the watch case, the dial, the bezel, and the watch bracelet and bracelet **[*6]** clasp. (SUF ¶ 18). The Rolex dial bears the Rolex and Crown Design trademarks at the 12 o-clock position. (SUF ¶ 28) The Rolex bracelet clasp bears the embossed Rolex Crown Design on the exterior and the Rolex and Crown Design marks on the interior. (SUF ¶ 32). All components are designed to be durable and long-lasting so that replacement is rarely required. (SUF ¶ 33).

Rolex watches are sold with a one-year warranty that covers the functioning of the entire watch. (SUF ¶ 34). Modification of Rolex watches by the addition or substitution of parts not authorized by Rolex renders the warranty null and void. (SUF ¶ 35). When Rolex authorized dealers service a watch, they give a one-year warranty on services performed and parts replaced. (SUF ¶ 36). Rolex policy is to refuse to service Rolex watches where non-genuine parts have been added and/or substituted, because Rolex cannot maintain its quality control standards with respect to such products. (SUF ¶ 37).

D. ZEOTEC ACTIVITIES REGARDING ROLEX WATCHES

1. In General

Zeotec offers Rolex watches for sale at trade shows and on its website, http://www.zeotec.com. (SUF ¶¶ 85, 90-91). For example, as of January 4, 2002, Zeotec's website offered **[*7]** over 20 Rolex models described as "unused" or "pre-owned." (SUF ¶¶ 86, 88). At least one of the models contained non-genuine components, but the website did not disclose their presence. (SUF ¶¶ 43, 47[2], 86, 89). Zeotec accepts orders by fax. (SUF ¶ 91).

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[2] In SUF ¶ 47, Zeotec denies substituting a non-genuine bracelet clasp, but does not deny other allegations regarding non-genuine components. Furthermore, Zeotec's response that "Rolex does not make diamonds and the claim to "genuine" Rolex

Zeotec advertises in magazines and at trade shows and specifically promotes the profits to be made by selling Rolex watches with added diamonds. (SUF ¶¶ 80-84). For example, a Zeotec post card distributed at a trade show notes that "adding diamonds is guaranteed to increase the retail point and your margin." (SUF ¶ 84). The post card also depicts a Rolex watch split in half with the right half showing the bezel, dial, and bracelet covered with diamonds. (SUF ¶ 83). The same split Rolex watch is pictured in Zeotec's March 2002 JCK trade magazine ad. (SUF ¶ 81). The ad also contains the slogan "Business as usual" (under the non-diamond half) and "Unusually fine timepieces at a margin that will bring a smile to your face." (SUF ¶ 82). The same split Rolex watch also appears at the top of each Zeotec website page. (SUF ¶ 87).

E. ROLEX INVESTIGATIONS AND ZEOTEC ALTERED WATCHES

Rolex investigators purchased Rolex watches from Zeotec on four separate **[*8]** occasions: three times before suit was filed (the 8/27/01, 11/15/01 and 1/16/02 watches) and once after suit was filed (the 4/26/02 watch). (SUF ¶ 41). The first purchase was made at the New York City JA Jewelry trade show. (SUF ¶ 42). The next three purchases were made after the investigators accessed the Zeotec website http://www.zeotech.com and inquired about specific models displayed on the site. (SUF ¶ 43).

Rolex evaluated the Zeotec watches to identify the presence of non-genuine components, which they define as components not authorized by Rolex. (SUF ¶ 44).

1. The 8/27/01 Watch

Zeotec concedes that the 8/27/01 Men's steel and gold Rolex contained a non-genuine diamond bezel and non-genuine diamonds added to dial.[3] (SUF ¶ 45). Likewise, Zeotec does not dispute the following quality deficiencies in the Zeotec watch relative to its Rolex equivalent:

a. The diamonds on the watch are not uniform in size as are the diamonds on a genuine Rolex diamond dial (SUF ¶ 56);

b. some of the Zeotec diamonds and diamond settings were set in a crooked manner. (SUF ¶ 56); and

c. the fit of the non-genuine bezel was not sufficiently tight to protect against penetration of moisture into the movement over **[*9]** time. (SUF ¶ 57).

2. The 11/15/01 Watch

Zeotec concedes that the 11/15/01 Lady's steel and gold Rolex contained a non-genuine diamond bezel, non-genuine finish on rose dial, and non-genuine diamonds added to the dial.

Zeotec also does not dispute how the customization was performed, which involved removing the hour stick markers, the Crown Design trademark, and the Rolex and Oyster Perpetual trademarks, stripping the dial surface, reapplying the paint onto the dial surface, reprinting the word trademarks and reattaching the Crown Design mark. (SUF ¶ 58). Diamonds were added by drilling holes in 10 places where the hour stick markers were removed from the dial and inserting diamond settings in the holes. (SUF ¶ 59). Regarding quality deficiencies, Zeotec does not dispute that:

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diamonds is meaningless", ignores as Rolex points out - that Rolex defined non-genuine components as components not authorized by Rolex in SUF ¶ 44.

[3] Zeotec's only response to this and other allegations of non-genuine parts, except as otherwise noted, was that "Rolex" does not make diamonds and the claim to "genuine" diamonds is meaningless. However, they did not provide any factual support for this assertion or appear to address Rolex's defining non-genuine to mean "components not authorized by Rolex." Thus, these facts will be deemed undisputed.

a. The diamond settings are affixed with glue and so are more subject to falling off, as compared to genuine Rolex diamond settings that are riveted on the dial. (SUF ¶ 60);
b. the non-genuine bezel contains a 14-Kt gold, whereas a genuine Rolex diamond bezel contains 18-Kt gold. (SUF ¶ 61);
c. the non-genuine bezel contains only 36 diamonds, whereas a genuine Rolex bezel contains 40 diamonds. (SUF ¶ 62);

d. the table **[*10]** tops on the "non-genuine" diamonds are not of uniform size and the diamonds are set at different heights and tilted at different angles. (SUF ¶ 63).

<u>3. The 1/16/02 Watch</u>

Zeotec concedes that the 1/16/02 Men's steel and gold Rolex contained a non-genuine diamond bezel, non-genuine mother of pearl ("MOP") dial finish, non-genuine diamonds added to the dial, and a non-genuine steel/gold bracelet. (SUF ¶¶ 47, 64). Moreover, Zeotec does not this watch's deficiencies:
a. The non-genuine diamond bezel was installed with an incorrect crystal, which does not allow as much clearance between the dial surface and the underside of the crystal; thus, the second hand is in danger of dragging along the underside surface of the crystal, which could affect timekeeping. (SUF ¶ 65);
b. the non-genuine bezel is made of 14 Kt gold; the genuine Rolex diamond bezel is made of 18 Kt gold (SUF ¶ 66);
c. the non-genuine bezel's table tops are not uniform in size and the diamonds are tilted at different angles (SUF ¶ 67);

d. the links on the non-genuine bracelet are abnormally stiff and crude, and the lack of flexibility in the bracelet will likely result in a less comfortable wear relative to a genuine Rolex bracelet **[*11]** (SUF ¶ 68);
e. the non-genuine bracelet clasp has copies of an embossed Rolex Crown Design mark on the clasp exterior and Rolex and Crown Design marks on the clasp interior, all of which are less clearly defined when compared to the genuine marks. (SUF ¶ 69).

<u>4. The 4/26/02 Watch</u>

Zeotec acknowledges that the 4/26/02 Lady's steel and gold Rolex contained a non-genuine MOP dial finish, non-genuine diamonds, and a Rolex Crown Design mark that is non-genuine. (SUF ¶¶ 48, 70).[4] Zeotec does not dispute that no part of the dial originated with ROLEX, (SUF ¶ 72), but concedes that the 4/26/02 watch came with papers that identify the dial as a "FACTORY BASE DIAL." (SUF ¶ 71).

The following quality differences between the Zeotec watch and a genuine Rolex watch were also undisputed:
a. The Zeotec's diamonds are smaller and have table tops that are not uniform in size. (SUF ¶ 73);
b. the case back gasket was exposed and visible to the naked eye, which may cause moisture to penetrate the watch case and damage the movement. (SUF ¶ 74);
c. because of the faulty crystal gasket seal, the watch was not pressure-proof. (SUF ¶ 75).

<u>5. Other Defects In The Watches</u>

Some of the watches came with genuine Rolex packaging, **[*12]** warranties, and/or accessories. Specifically, the 8/27/01 watch, and the 11/15/01 watch were packaged in genuine Rolex inner and outer boxes and were accompanied by Zeotec sales receipts and Rolex warranties (in French). (SUF ¶¶ 49, 50). The 11/15/01 watch also came with a Rolex calendar, Rolex booklet, and Rolex booklet carrying case. (SUF ¶ 50). The 1/16/02 watch was

[4] Zeotec disputes Rolex's allegations that they use a non-genuine dial place and cite to Paravar's Decl. ¶ 9.

packaged in a genuine Rolex inner box. (SUF ¶ 51). However, the 4/16/02 watch was only accompanied by a Zeotec sales receipt and appraisal. (SUF ¶ 52).

Finally, the following price differences between the Zeotec watches and the comparable genuine Rolex watches were undisputed. (SUF ¶¶ 76-79).

Comparative Prices of Zeotec Altered Rolex with Genuine Rolex Equivalents

Watch	Zeotec Price	Comparable Rolex Price*
8/27/01 Watch	$5,450	$6,750[5]
11/15/01 Watch	$4,825	$4,900
1/16/02 Watch	$3,900	$8,650
4/26/02 Watch	$2,900	$7,400.

Note: * Rolex sells a number of models with diamond bezels. The Rolex prices for the first three listed watches are for comparable Rolex models, which are not offered with a diamond bezel. The Rolex price for the last watch listed is for a comparable Rolex model with a diamond bezel. (Declaration of Charles Berthiaume **[*13]** ("Bert. Deci.") ¶ 22, n.2).

III.

ANALYSIS

A. THE LEGAL STANDARD UNDER *RULE 56*

On July 15, 2002, Rolex filed this motion for summary judgment on Zeotec's liability. (Mot. at 1). Summary judgment is granted when the record reveals that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)*. The burden is on the moving party to establish both the nonexistence of a genuine issue of fact and that it is entitled to judgment. Id. When, as in this case, the moving party has the burden of proof at trial, the party must demonstrate affirmatively that there is no genuine issue of material fact as to each element of the party's claim. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-53 (1986)*. The burden then shifts to the non-moving party. *Fed. R. Civ. P. 56(e)*. The non-moving party cannot rest on the allegations and denials in the pleadings, but must set forth specific facts establishing an issue for trial. *Anderson, 477 U.S. at 248*; see also H-D Michigan, Inc. v. Bikers Dream, Inc., 48 U.S.P.Q.2d 1108, 1110 (C.D. Cal. 1998). Furthermore, the opposing party must present admissible evidence on matters where it has the burden of proof. *Anderson, 477 U.S. at 249*.

Inferences draw from the evidence must be viewed in the light most favorable to the nonmoving party. *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992)*. However, where the applicable substantive law limits what inferences may be drawn from certain evidence, **[*14]** the opposing party cannot rely on other inferences to oppose summary judgment. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 906 F.2d 432, 440 (9th Cir. 1990)*.

B. CLAIMS AT ISSUE

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[5] This price is from the SUF ¶ 76, the GIMF erroneously reported that the comparable price was $7,750, but declared that SUF ¶ 76 undisputed.

Rolex moves for summary judgment on its trademark counterfeiting, infringement and dilution claims. The issues in dispute in this case have been decided in nearly identical litigation in this and other circuits. The Court will GRANT this motion on the same grounds articulated in those decisions.

C. PRIOR ROLEX CASES - TRADEMARK COUNTERFEITING

In *Rolex Watch U.S.A. v Michel, 179 F.3d 704 (9th Cir. 1999)*, Rolex brought suit against a jewelry dealer engaged in the sale of used and altered Rolex watches. The Ninth Circuit described defendant's activities as follows:

> Mottale sells the following products related to Rolex watches: (1) used Rolex watches; (2) used Rolex watches that have been "reconditioned" or "customized" with non-Rolex parts, which we call "altered 'Rolex' watches;" (3) used Rolex watch replacement parts; and (4) generic replacement parts fitting Rolex watches. Mottale customizes used Rolex watches by replacing their bezels (the ring that surrounds the crystal and affixes it to the watch casing), dials, and bracelets, and/or by inserting diamonds into their dials. These replacement parts are not authorized or provided by Rolex. The **[*15]** altered "Rolex" watches retain their original Rolex trademarks on their dials and bracelets, except when Mottale replaces the bracelet. Some examples of the replacement bracelets used by Mottale bear an imitation of the Crown Device logo. The other replacement parts added by Mottale bear no independent mark.

Id. at 706-07. The District Court found that:

> retention of the original Rolex marks on altered "Rolex" watches, in the absence of adequate disclosures that the altered watches contain non-Rolex parts, was deceptive and misleading as to the origin of the non-Rolex parts, and likely to cause confusion to subsequent or downstream purchasers, as well as to persons observing the product. Accordingly, under Westinghouse, the district court concluded that this confusing use of Rolex's trademarks in connection with the sale of altered "Rolex" watches constituted a counterfeit use of the trademarks.

Id. at 707.

Based on its findings, the District Court permanently enjoined defendant from re-selling the Rolex watches without marking the replacement parts with its own mark and making appropriate disclosures on the watches and in its advertising regarding any alterations that might have been made. *Id. at 708*.

Though it got some **[*16]** relief in District Court, Rolex appealed. Rolex argued that defendant had made such basic changes to the watches that he should be enjoined from any use of the Rolex trademark in the re-sale of the watches. The Ninth Circuit agreed. Surveying the law, the Ninth Circuit noted two cases, *Bulova Watch Co., 328 F.2d 20*, and *Rolex Watch U.S.A., Inc. v. Meece, 158 F.3d 816 (5th Cir. 1998)*, where permanent injunctions were entered against the use of a genuine trademark in any resale of altered watches, whether or not notice was given that the watches had been modified. The court wrote:

> We find the reasoning in Meece and Bulova persuasive, and further conclude that the alterations that Mottale makes to the used Rolex watches he sells, like those made by Meece and the defendant in Bulova, result in a new product, although one containing a Rolex movement and casing.

Id. at 710. In that light, the Court concluded that tagging or otherwise marking the watch to indicate that it had been altered was not adequate to prevent consumer confusion. Id.

In *Rolex Watch USA, Inc., v. Meece, 158 F.3d 816 (5th Cir. 1998)*, cert. denied, *526 U.S. 1133 (1999)* ("Meece "), the Fifth Circuit reached the same conclusion on similar facts. In that case, the circuit noted:

> Meece is not affiliated with Rolex, and his activities are not sanctioned or authorized by Rolex. His advertising is directed exclusively **[*17]** to the retail jewelry store trade, and he sells only to jewelers. Meece's advertising

> brochures indicate that his replacement parts are not genuine Rolex parts; that he is not affiliated with Rolex; and that the addition of non-Rolex parts will void the Rolex warranty. However, he stipulated that the parts he sells do not bear any markings indicating that he is the source; and that he has not disclosed on invoices or tags either that his non-Rolex parts are not authorized by Rolex or that their addition voids the Rolex warranty.

Id. at 818. On appeal, the Fifth Circuit concluded that an injunction prohibiting Meece from "injecting into commerce a watch bearing a Rolex mark which is reconstructed with generic replacement parts and which simulates a Rolex Submariner or other Rolex watch" barred him from selling altered new Rolex watches. *Id. at 825*. The Meece court concluded that the injunction encompassed the sale of altered new watches, and that in either case, the use of a genuine Rolex trademark in connection with the sale constituted trademark counterfeiting.

Zeotec defends against the counterfeiting claim on the ground that its customers requested the alterations to the watches. On that issue, Zeotec **[*18]** presents no admissible evidence, as discussed in greater detail below. But that defense in any event fails to meet the thrust of the holding in Michel. Even where a particular customer requests an alteration, the performance of the requested work while retaining Rolex's trademark on the finished product creates the risk of confusing and misleading not the customer who requests the alterations but "subsequent or downstream purchasers, as well as . . . persons observing the product." *Id., at 704*. Similarly, Meece noted:

> "Rolex did not perform or authorize the modifications, and its warranty was voided by Meece's activities. Meece, not Rolex, stood behind the watches; ***but the trademark suggest otherwise."***

158 F.3d 827. (Emphasis added.)

In short, in two prior cases involving the trademarks at issue in this case, courts have found trademark counterfeiting on facts that are indistinguishable from those presented here. Accordingly, the Court concludes that Rolex has established its counterfeiting claim and is entitled to judgment on that claim as a matter of law.

D. TRADEMARK INFRINGEMENT

To prevail on a trademark infringement claim, a plaintiff must show that the defendant used the plaintiffs trademark "in commerce" **[*19]** and "that the use was likely to confuse customers as to the source of the product." *Karl Storz Endoscopy-Amer., Inc. v. Surgical Technologies, Inc., 285 F. 3d 848, 853-854 (9th Cir 2002)*. In general, "[l]ikelihood of confusion' is the basic test for. . . trademark infringement." *Id., at 855* (citations omitted). The Ninth Circuit has made clear that "post-purchase confusion," *i.e.*, confusion on the part of someone other than the purchaser who simply sees the item after it has been purchased, can establish the required likelihood of confusion under the Lanham Act. Id. ("Post-sale' confusion. . . may be no less injurious to the trademark owner's reputation than confusion on the part of the purchaser at the time of sale."). In addition, "use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement." *Brookfield Communications Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1062 (9th Cir. 1999)*.

AMF Inc., v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979), establishes the factors relevant to determining the likelihood of confusion. Id., at at 348-349. The factors include: 1) the strength of the mark; 2) proximity of the goods; 3) similarity of the marks; 4) evidence of actual confusion; 5) marketing channels used; 6) type of goods and the degree of care likely to be exercised by the purchaser; 7) defendant's intent in **[*20]** selecting the mark; and 8) likelihood of expansion of the product lines. As the Brookfield court stated " this eight-factor test of likelihood of confusion is pliant. Some factors are much more important than others, and the relative importance of each individual factor will be case-specific. Although some factors -- such as the similarity of the marks and whether the two companies are direct competitors — will always be important, it is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of factors." *Brookfield Communications Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1054 (9th Cir. 1999)*. Moreover, intent to confuse consumers is not required for a finding of trademark infringement. *Brookfield at 1059*.

While application of the Sleekcraft test clearly establishes the likelihood of confusion in this case, resort to the Sleekcraft analysis is hardly necessary. The marks and goods are not similar, they are identical — defendants are using Rolex's marks on goods Rolex manufactured, but which defendants subsequently altered. They are necessarily directly competing, they market in similar channels, and although one could expect that buyers of expensive goods would exercise greater caution than purchasers of generic goods, confusion can still **[*21]** be likely, especially where, as here, the marks are genuine. See *Sleekcraft at 353* (citing *Omega Importing Corp. v. Petri-Kine Camera Co., 451 F. 2d 1190, 1195 (2d Cir. 1971)*, which warns against undue reliance on the 'supposed sophistication' and care of buyers of expensive goods). This is enough to establish infringement as a matter of law in this case.

In its Separate [Statement] of Genuine Issues of Material Fact Necessary to be Litigated (GIMF), Zeotec disputes that its conduct created any likelihood of confusion. First, they state: "Zeotec customers ask for substitution of non-genuine parts in their Rolex watches." (GIMF ¶ 95). Second, they assert that "Zeotec customers bring previously purchased Rolex watches to Zeotec and ask for alterations with non-genuine parts." (GIMF ¶ 96). Finally, they argue "Zeotec customers are not misled or confused as to source or origin when they have requested changes to an otherwise genuine watch." (GIMF ¶ 97).

However, Zeotec's underlying evidence — signed letters of acknowledgment that Zeotec solicited in connection with this litigation — see Exhibits A and B to Paravar Declaration, cannot be admitted to support the assertions in Zeotec's statement of genuine issues. See Separate Memorandum Re Evidentiary Objections at 2-6. Valid objections **[*22]** include lack of oath or affirmation of the underlying customer statements (*FED. R. EVID. 603*; see also *Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 883* (*Rule 56* requires documents that are submitted "to be authenticated by affidavits or declarations of persons with personal knowledge through whom they could be introduced at friar)); inadmissible hearsay (*Fed. R. Evid. 801*); and no foundation (*Fed. R. Evid. 602*). And, having been solicited expressly for this litigation, they can hardly be described as business records prepared and kept in the ordinary course of Zeotec's business. Moreover, Paravar's declaration contains no evidence of his personal knowledge regarding the facts he discussed in his affidavit - i.e. that he dealt with the customers in question or even customers in general. *FRCP 56 (e)*; see also *Bank Melli v. Pahlavi, 58 F.3d. 1406, 1412 (9th Cir. 1995)*(declarations "on information and belief' entitled to no weight where declarant lacks personal knowledge and cannot be inferred from declarant's position and nature of participation in the matter).

Moreover, even if the Court received the statements in evidence for their truth, the evidence does not preclude finding Zeotec liable for trademark infringement on the undisputed facts. Zeotec admits that its website offers Rolex watches without indicating the presence of non-genuine parts and that it **[*23]** offers Rolex watches to individuals over its website and accepts offers by fax. (SUF ¶¶ 89, 91). Furthermore, as previously stated, certain non-genuine parts were, undisputedly, found on the watches that Rolex investigators purchased over the Internet. (See e.g. SUF ¶ 46). In addition, it is doubtful that third party observers of Zeotec's altered watches, seeing the genuine Rolex trademarks, would have any way of knowing that the watches contained non-genuine parts. *Rolex Watch U.S.A., Inc. v. Canner, 645 F.Supp. 484, 492 (S.D.Fla., 1986)* (noting that changes in the Lanham Act show that "Mile Act endeavors not just to protect a purchaser, but instead aims to prevent mistake, deception, and confusion in the market place at large."); see also *id., at 493* ("Once a product is injected into commerce there is no bar to confusion, mistake, or deception occurring at some future point in time."). Thus, even assuming that four customers requested the alterations, and that Zeotec could make those alterations while retaining the Rolex trademark on the altered watches, those facts have no bearing on Zeotec's other infringing activity.

E. Trademark Dilution

To prove a violation of the Federal Trademark Dilution Act ("FTDA"), "a plaintiff must show that (1) the mark is famous; (2) **[*24]** the defendant is making commercial use of the mark in commerce; (3) the defendant's use began after the mark became famous; and (4) the defendant's use of the mark dilutes the quality of the mark." *Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316, 1324 (9th Cir. 1998)*. The analysis of the California Anti-dilution statute is the same. Id. One of the classic harms caused by dilution is "tarnishment," which "occurs when a famous mark is improperly associated with an inferior or offensive product or service." *Id., at 1326 n.7*. Likelihood of confusion is not required for a finding of trademark dilution. *Id. at 1324*; see also *Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180 (9th Cir. 1988)* ("All that need be shown is the 'likelihood of injury to business reputation or of dilution of the distinctive quality of a mark. Actual injury need not be proven.").

Given the aforementioned undisputed deficiencies in the quality of Zeotec's altered watches relative to 100 percent genuine Rolex equivalents, the Court also finds Zeotec liable for trademark dilution under the federal and state anti-dilution acts. However, the determination of Zeotec's liability for trademark dilution is unnecessary and/or redundant; the remedy for trademark dilution, injunctive relief, is also available for the former two causes of action, which have been established. See *Cal. Bus. & Prof. Code § 14330* (2002); **[*25]** see also *15 U.S.C.A. §1125(c)*; see also *Michel at 708 n. 6* ("A finding of liability under these laws [federal and state anti-dilution laws], however, would provide Rolex no greater remedies than those available under ...section 32(1)(a) of the Lanham Act," concurring with a 5th circuit decision that likewise declined to address FTDA liability as redundant).

F. ZEOTEC'S DEFENSES

In addition to disputing the likelihood of confusion, Zeotec makes two main defenses neither of which the Court finds applicable. First, Zeotec asserts that Rolex U.S.A.'s trademark rights stops with the first sale of the Rolex watches. (the "first sale defense"). Second, Zeotec argues that Rolex U.S.A. is barred from enforcing its trademark rights, because its likely antitrust violations creates an "unclean hands" defense.

1. First Sale Defense

The first sale defense holds that "[w]hen a purchaser resells a trademarked article under the producer's trademark, and nothing more, there is no actionable misrepresentation under the [Lanham Act]." *Sebastian Intl.. Inc. v. Longs Drug Stores Corp., 53 F.3d 1073, 1076 (9th Cir. 1995)*. However, "conduct by the reseller other than merely stocking and reselling genuine trademarked products may be sufficient to support a cause of action for infringement." Id. The purpose of the Lanham Act is "to prevent consumer **[*26]** confusion or deception about the origin or make of the product," which would be created if an entity alters the integral parts of a product while retaining the original trademark. See *Michel at 709-710*.

The first sale doctrine as a matter of law does not apply to this case. In a similar case, the court explicitly rejected the relevance of the first sale defense where alterations to watches resulted, as here, in appreciably different products. *Bulova Corp. v Bulova Do. Brasil Com.Rep. Imp. & Exp. Ltda., 144 F. Supp. 2d 1329 (S.D. Fla. 2001)*. That decision is entirely consistent with Michel where the Ninth Circuit explicitly held that the bezel, bracelet and dial are integral parts of a Rolex watch and so their replacement with non-genuine parts creates new products. *Michel at 709-710*. First sale is no defense to Zeotec's conduct.

2. Zeotec's Unclean Hands/Antitrust Defense

"Unclean hands is a defense to a Lanham Act infringement suit... To prevail, the defendant must demonstrate that the plaintiffs conduct is inequitable and that the conduct relates to the subject matter of its claims." *Fudruckers. Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 847 (9th Cir. 1987)*. The Lanham Act itself denies relief in trademark cases when a violation of the antitrust laws has been proven. *15 U.S.C.A. § 1115(b)(7)*; see also *G.D. Searle & Co. v. Inst. Drug Dist., Inc., 151 F. Supp 715, 720 (S.D. Cal. 1957)*. However, "[n]ot every monopolistic practice violates ***antitrust law***. Monopolistic restrictions are condemned **[*27]** only if they affect a substantial segment of interstate commerce." *Id., at 724*. Furthermore, monopolization of one's own trademarked product is not usually a viable claim. See *U.S. v. E.I. du Pont de Nemours & Co, 351 U.S. 377, 393 (1956)*. As one court noted: "it is significant that in almost every reported instance where the antitrust misuse of a trademark has been raised as a defense it has been rejected." *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, JENA, 298 F. Supp. 1309, 1314 (S.D.N.Y. 1969)*; see *id., at 1315* (noting the heavy burden of establishing direct misuse of trademark in violation of antitrust laws).

a. On the Undisputed Facts, the Defense Fails as a Matter of Law

In general, defendant Zeotec bears the burden to prove its antitrust/unclean hands defense. To prove attempted monopolization claims, Zeotec must establish "specific intent, which must be shown by proof of unfair or predatory conduct. Predatory conduct is 'conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition.'" *Mozart Co. v. Mercedes-Benz of North Amer., Inc., 833 F.2d 1342, 1352 (9th Cir. 1987)* (holding that ensuring quality control and protecting goodwill are valid business justifications for otherwise per se illegal tying arrangement in violation of antitrust laws). In particular, Zeotec must prove its specific allegation that Rolex U.S.A. was attempting **[*28]** to achieve a monopoly when it sought U.S. Customs Service's grey market protection, i.e. protection against the importation of genuine goods imported without the U.S. trademark owner's written authorization. In addition, Zeotec must prove that this alleged antitrust violation constitutes abuse of Rolex U.S.A.'s trademark rights and so relates to the subject matter of its trademark suit.

b. The Noerr-Pennington Doctrine Immunizes Rolex U.S.A.'s Conduct and So Bars Zeotec's Allegations.

Generally, the Noerr-Pennington doctrine defeats Zeotec's claim that Rolex U.S.A. violated the antitrust laws when it sought and obtained U.S. Customs Service's protection against unauthorized imports of Rolex watches. See *Allied Tube & Conduit Corp. v. Indian Head Inc., 486 U.S. 492, 499 (1988)*. To defeat summary judgment in this case, Defendant Zeotec must establish a genuine issue of material fact that would undermine Rolex's assertion of the Noerr-Pennington doctrine. *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, 31 F. 3d 800, 811 (9th Cir. 1994)* (plaintiff in antitrust action must overcome Noerr defense). The only way to overcome the Noerr-Pennington is to show facts suggesting that "[the] activity 'ostensibly directed toward influencing governmental action' does not qualify for Noerr immunity [as] it 'is a mere sham to cover... an attempt to interfere **[*29]** directly with the business relationships of a competitor." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 51 (1993)*. The party invoking the "sham" exception to Noerr-Pennington immunity must prove its applicability by clear and convincing evidence. *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1294 (9th Cir. 1984)*. Zeotec cannot show even a triable issue of material fact on this question.

To meet the first part of the Supreme Court's two-part definition of the "sham" exception, the lawsuit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail." *Professional Real Estate Investors, Inc., 508 U.S. at 60*. Under the definition's second part, the court must determine whether the baseless lawsuit conceals an attempt to "use the governmental *process* — as opposed to the *outcome* of that process — as an anti-competitive weapon." *Id., at 60-61* (emphasis in original). However, a winning lawsuit is per se a reasonable effort at petitioning for redress and so not a sham. Id. at n.5. In addition, proof of a sham merely deprives the defendant in an antitrust action of immunity; it does not relieve the plaintiff of the **[*30]** obligation to establish all other elements of his antitrust claim. *Id., at 61*; see also *USS-POSCO Indus., 31 F. 3d at 811* ("If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham.") (citations omitted).

As the U.S. Customs Office granted Rolex U.S.A.'s request to maintain its grey market protection, ROLEX U.S.A.'s efforts were perforce not completely baseless, and so are protected by Noerr-Pennington immunity. Thus, Zeotec is barred from asserting its unclean hands defense.

IV.

CONCLUSION

In sum, Zeotec's invocation of the first sale defense is inapposite, and it has not met its burden of proof regarding its defense of unclean hands. Thus, as the undisputed facts support claims for trademark infringement and counterfeiting, as well as trademark dilution, the Court GRANTS Plaintiffs Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: November 7, 2002

/s/ Gary Allen Feess

Gary Allen Feess

United States District Court

Innomed Labs, LLC v. Alza Corp.

United States District Court for the Southern District of New York

November 12, 2002, Decided ; November 13, 2002, Filed

01 Civ. 8095 (HB)

Reporter

2002 U.S. Dist. LEXIS 21840 *; 2002-2 Trade Cas. (CCH) P73,876

INNOMED LABS, LLC, Plaintiff, -against-ALZA CORP., Defendants.

Subsequent History: Motion denied by *Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237, 2002 U.S. Dist. LEXIS 22194 (S.D.N.Y., 2002)*
Affirmed by Innomed Labs, LLC v. Alza Corp., 2004 U.S. App. LEXIS 9452 (2d Cir., May 14, 2004)

Prior History: *Innomed Labs, LLC v. Alza Corp., 2002 U.S. Dist. LEXIS 20510 (S.D.N.Y., Oct. 23, 2002)*

Disposition: **[*1]** Defendant's motion for summary judgment granted in part and denied in part.

Core Terms

written agreement, cure, R-P Act, terminate, up-front, prices, contends, summary judgment motion, genuine issue of material fact, summary judgment, oral agreement, milestone, good faith, breached, rights, fair dealing, alleges, assign, standstill, covenant, products, induced, sales, competitors, distributor, deposition, asserts

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Evidence in support of a motion for summary judgment must be reviewed in a light most favorable to the non-movant. *Fed. R. Civ. P. 56(c)*. If, when viewing the evidence produced in the light most favorable to the nonmovant a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Opposing Materials**

While the burden to demonstrate that no genuine issue of material fact rests solely with the moving party, once the moving party has provided sufficient evidence to support a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial and cannot rest on mere allegations or denials. *Fed. R. Civ. P. 56(e)*. The mere existence of a scintilla of evidence in support of the opposing party's position is insufficient to defeat a motion for summary judgment. An opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN3[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act requires that the sales, which form the basis of the discrimination, must be reasonably proximate in time.A plaintiff can satisfy this requirement by showing that the plaintiff engaged in actual competition with the favored purchaser(s) as of the time of the price differential.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN4[] **Antitrust & Trade Law, Robinson-Patman Act**

Pursuant to *15 U.S.C.S. § 13(a)*, competitive injury may be inferred from evidence demonstrating injury to an individual competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] **Robinson-Patman Act, Claims**

Although the Robinson-Patman Act requires that the analysis for price discrimination be between commodities of "like grade and quality," nothing precludes one from allocating a portion of the payments to the like products at-issue.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN6[] **Summary Judgment, Opposing Materials**

The reliability of expert opinion on a subject requiring expert testimony, but which is opposed only by lawyer argument raises genuine issues of material fact that is not properly resolved on summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

HN7[] **Summary Judgment, Entitlement as Matter of Law**

Courts must be especially careful not to hobble the jury system by excluding potential evidence through Daubert hearings and summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

HN8[] **Summary Judgment, Entitlement as Matter of Law**

Courts do not sit to judge witness credibility on a motion for summary judgment.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] **Robinson-Patman Act, Claims**

Because a written agreement may be held unlawfully discriminatory under the Robinson-Patman Act does not give a party permission to ignore its obligations under the agreement.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Material Misrepresentations

Contracts Law > Remedies > Rescission & Redhibition > General Overview

HN10[] **Defenses, Ambiguities & Mistakes**

In California, a contract may be rescinded by a contracting party unilaterally if his consent to be bound by the agreement was induced either by a material misrepresentation, though innocently made, or a mistake. *Cal. Civ. Code § 1689* (West 1985). A statement, though arguably puffery, may render a contract subject to rescission if intended to convey an impression that is inaccurate in regard to basic assumption upon which the contract is made.

Counsel: For Innomed Labs, LLC, PLAINTIFF: Paul Corcoran, Davis & Gilbert, Cory Greenberg, John T Brennan, Davis & Gilbert LLP, New York, NY USA.

For Alza Corporation, DEFENDANT: Harold P Weinberger, Jennifer L Rochon, Kramer, Levin, Naftalis & Frankel, LLP, New York, NY USA.

For Alza Corporation, COUNTER-CLAIMANT: Harold P Weinberger, Jennifer L Rochon, Kramer, Levin, Naftalis & Frankel, LLP, New York, NY USA.

For Innomed Labs, LLC, COUNTER-DEFENDANT: Paul Corcoran, Davis & Gilbert, Cory Greenberg, John T Brennan, Davis & Gilbert LLP, New York, NY USA.

Judges: Harold Baer, Jr., U.S.D.J.

Opinion by: Harold Baer, Jr.

Opinion

OPINION & ORDER

Hon. HAROLD BAER, JR., District Judge:

Defendant Alza Corp. ("Alza") moves for summary judgment pursuant to Fed. R. Civ. P. ("FRCP") 56(c) on eight different points, which plaintiff Innomed Labs, LLC. ("Innomed") opposes. Oral argument was held on the motion October 21, 2002. For the reasons set forth below, Alza's motion is GRANTED-IN-PART and DENIED-IN-PART.

I. BACKGROUND

This action was originally based on Innomed's allegation **[*2]** that Alza breached its obligations under a December 1997 distribution agreement ("the written agreement"). Under the written agreement, Alza designated Innomed to be a semi-exclusive distributor of three Alza cold and allergy products: (1) the Chlor product, (2) the Pseud product, and (3) the Combo product. Before Alza entered into the written agreement with Innomed, Alza entered into another distribution agreement with Warner-Lambert ("W-L") in which W-L was to be the semi-exclusive distributor of the Pseud product.

On November 28, 2000, Alza notified Innomed of its intention to terminate the distribution arrangement as per a provision in the written agreement that also provided Innomed with a certain time to cure its default for having failed to make payments under the agreement. Innomed alleges that the parties later orally agreed in January 2001 to permit Innomed to cure its default by assigning its distribution rights to a third-party, American Home Products ("AHP"). Innomed had realized for some time that it did not have the requisite cash and could only continue business if such an arrangement could be consummated. Before Innomed could complete any such assignment, Alza terminated **[*3]** the written agreement. It was also around this time period that Alza agreed to merge with Johnson & Johnson, a major competitor of AHP.

The original complaint essentially claimed that Alza breached the contract with Innomed when Alza refused to allow Innomed to assign its right to AHP. Innomed alleged that Alza breached the written agreement, breached the oral agreement, and wrongfully interfered with Innomed's business relations with AHP. I denied on April 23, 2002 Alza's motion to dismiss for failure to state a claim upon which relief could be granted. *Innomed Labs, LLC. v. Alza Corp., 2002 U.S. Dist. LEXIS 20510, 01* Civ. 8095, slip op. at 2 (S.D.N.Y. Apr. 23, 2002).

I later granted Innomed leave to amend its complaint to include a claim against Alza for violation of § 2(a) of the Robinson-Patman Act ("the R-P Act"). Innomed claims that Alza violated § 2(a) of the R-P Act when it charged W-L significantly lower prices than it charged Innomed for both the right to distribute the Pseud Product and the various costs associated with W-L's distribution of it. Accordingly, Innomed asserts that the alleged price discrimination forced it out of business.

II. DISCUSSION

A. Standard for summary* [*4] *judgment

HN1[] Evidence in support of a motion for summary judgment must be reviewed in a light most favorable to the non-movant. *FRCP 56(c)*, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. If, when "viewing the evidence produced in the light most favorable to the nonmovant ... a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991)*. ***HN2***[] While the burden to demonstrate that no genuine issue of material fact rests solely with the moving party, *FDIC v. Giammetti, 34 F.3d 51, 54 (2d Cir. 1994)*, once the moving party has provided sufficient evidence to support a motion for summary judgment, the opposing party must "set forth specific facts showing that there is a genuine issue for trial" and cannot rest on "mere allegations or denials." Rule 56(e); *see* *Rexnord Holdings, Inc. v. Biderman, 21 F.3d 522, 525-26 (2d Cir. 1994)*. The "mere existence of a scintilla of evidence in support of the plaintiff's position" **[*5]** is insufficient to defeat a motion for summary judgment. *Anderson, 477 U.S. at 252*. An "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. With this standard in mind, I review Alza's following claims in its summary judgment motion.

B. Alza's summary judgment motion

Alza claims it is entitled to summary judgment on the following eight claims:

1) Violation § 2(a) of the R-P Act;

2) Breach of contract and breach of the implied covenant of good faith and fair dealings;

3) Fraudulent inducement of Innomed to enter into the written agreement;

4) Breach of the written agreement;

5) Breach of covenant of good faith and fair dealing by failing to give Innomed a reasonable time to cure its breach under the written agreement or by engaging in actions that effectively interfered with Innomed's ability to assign its rights to AHP;

6) Breach of the January 26, 2001 oral agreement;

7) Tortious interference with Innomed's prospective business advantage when it terminated the **[*6]** written agreement before Innomed could assign its rights to a third party; and

8) Alza's counterclaims.

Claim 1

First, Alza asserts Innomed cannot show that the price discrimination was "contemporaneous" as required under § 2(a) of the R-P Act. Alza made exactly the same claim in opposition to Innomed's motion to amend its complaint. When Alza made that claim to oppose Innomed's motion to amend, it asserted that the W-L and Innomed agreements were executed at different times (*i.e.,* August 1997 and December 1997), and therefore Alza did not charge the two buyers different prices in contemporaneous transactions, as required by the R-P Act. ***HN3***[] The R-P Act requires that the sales, which form the basis of the discrimination, must be reasonably proximate in time. 3 Earl W. Kintner & Joseph P. Bauer, Federal ***Antitrust Law***: The Robinson Patman Act § 20.5 at 124 (1983). You rejected Alza's claim, noting that a plaintiff can satisfy this requirement by showing that the plaintiff "engaged in actual competition with the favored purchaser(s) as of the time of the price differential." *Innomed Labs, LLC, v. Alza Corp., 2002 U.S. Dist. LEXIS 13298, 2002 WL 1628943*, at *3 (S.D.N.Y., July 23, 2002) **[*7]** (quoting *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987)*.

Alza contends that it has "now" learned that the prices given to W-L were set in 1996, almost a year and a half before Alza's pricing was set. Innomed notes that the 1996 "INTERIM AGREEMENT" that Alza relies on to establish the lack of temporal proximity between transactions did not, in fact, firmly set the actual price that W-L was ultimately charged with until August 28, 1997, when the negotiated agreement was signed. According to the 1996 W-L interim agreement, if W-L wanted to settle upon a "definitive agreement," the parties were to "negotiate in good faith a definitive agreement … for the marketing of the product by W-L." Exh. 31 at ALZ 1497. Following negotiation between Alza and W-L, the terms originally set forth in the 1996 interim agreement were amended to provide for a $ 500,000 up-front payment and a separate $ 500,000 payment after delivery of "launch quantities" of Alza's product in consideration for access to Alza's pseudoephedrine technology. I agree with Innomed that there is at least a factual dispute in regard to when pricing for the Pseud product was "determined. **[*8]** " Furthermore, as a matter of law, I have found nothing to support the position that contracts formed a few months apart cannot be considered "contemporaneous" for purposes of analysis under the Robinson-Patman Act. Given the congruence in subject matter, territory, and termination date in the Innomed and W-L agreements, as well as the few months separating the formation of the agreements, I find that a reasonable juror could conclude that the two agreements are contemporaneous for purposes of analysis under the R-P Act. *See* Exhs. 4, 32.

Second, Alza contends that there is no evidence that any differences in pricing between the agreements was "likely to substantially lessen competition or to create a monopoly in any line of commerce." *See* *15 U.S.C. § 13(a)*. Innomed correctly observes that Alza conveniently truncates the balance of *§ 13(a)*, which states that it shall also be unlawful to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination." As explained by the Second Circuit, the purpose of this passage was to relieve secondary-line plaintiffs … from having to prove harm to **[*9]** competition market wide, allowing them instead to impose liability simply by proving effects on individual competitors." *George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 142 (2d Cir. 1998)*. Thus, ***HN4***[] competitive injury may be inferred from evidence demonstrating injury to an individual competitor. *Id.* Evidence of competitive injury to Innomed is provided by its expert, Dr. Iain Cockburn, who opines at length that Innomed suffered economic injury as a result of Alza's discriminatory pricing. Exh. 41. Alza asserts that Innomed's expert makes certain erroneous assumption in his report when evaluating the price of commodities for purposes of the R-P Act. Alza, however, cites no law or expert authority to support its contention that the expert's inclusion of upfront, milestone, and royalty payments for calculating price is improper for purposes of the Act.

In further support of its contention that the analysis by Innomed's expert is faulty, Alza attempts to recast the same argument it made earlier in opposition to Innomed's motion to amend -- namely, that upfront and milestone payments were consideration for non-tangible commodities. I had earlier rejected **[*10]** this claim, noting that a review of the written agreement, under which the payment was made, arguably concerns the marketing and selling of tangible commodities. *Innomed Labs, 2002 U.S. Dist. LEXIS 13298*, [WL] at *3. Alza has not presented any new evidence, which would change my mind.

Furthermore, Alza contends that the upfront payment that was owed by Innomed was for three different products, the Pseud product, the Chlor product, and the Combo product, whereas W-L's upfront and milestone payments were strictly for the Pseud product. Therefore, according to Alza, the payments under the Innomed and W-L agreement cannot be compared for purposes of the R-P Act. ***HN5***[] Although the Act requires that the analysis for price discrimination be between commodities of "like grade and quality," *George Haug, 148 F.3d at 141*, nothing precludes one from allocating a portion of the payments to the like products at-issue (*i.e.,* the Pseud product). The proper allocation of payment made for the Pseud product appears by itself to raise a genuine issue of material fact.

Third, Alza contends that Innomed has failed to show that it suffered sufficient antitrust injury to warrant damages **[*11]** to a private plaintiff. In particular, Alza alleges that (1) Innomed's resale prices were lower than W-L's prices; (2) Innomed's expert's opinion is speculative and fails to consider other causes of Innomed's lost sales; and (3) Innomed did not make payments for the supposedly discriminatory pricing. With respect to the first issue, Alza again fails to provide legal or other expert authority to support its claim. Indeed, Innomed makes the very valid point that the R-P Act was intended, in part, to protect small competitors from discriminatory pricing in favor of larger purchasers, who would have the power to impose higher prices with their stronger brand names. *See, e.g., Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 11, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976)*. With respect to the second issue, Alza appears to dismiss, primarily on counsel argument, Innomed's expert's report, which opines that Innomed suffered antitrust injury. Citing *Stelwagon Mfg Co.* v. *Tarmac Roofing Sys., Inc.,* Alza notes that the Third Circuit reversed the district court because it found that the expert's analysis was flawed. *63 F.3d 1267, 1275-76 (3d Cir. 1995)*. **[*12]** More specifically, the Third Circuit determined that the expert had failed to adequately account for reasons, apart from price discrimination, why the plaintiff had lost sales, and thus it reversed the district court's finding of a Robinson-Patman violation. *Id.* The reversal by the Third Circuit, however, was ***not in the context of a summary judgment motion.*** While Alza contends that the analysis by Innomed's expert, Dr. Cockburn, fails for reasons similar to those expressed in *Stelwagon,* we must view the evidence in the light most favorable to the non-movant, Innomed. Although some of Alza's claims may in the last analysis prove to have some merit, motions, such as this, are not by definition the last analysis. Dr. Cockburn finds a connection between Innomed's lost sales and price discrimination. Whether that connection in fact caused lost sales to Innomed is an issue for a jury to decide. *See B.F. Goodrich v. Betkoski, 99 F.3d 505, 526-27 (2d Cir. 1996)* (noting that ***HN6***[] reliability of expert opinion on a subject requiring expert testimony, but which is opposed only by lawyer argument raises genuine issues of material fact that is not properly resolved **[*13]** on summary judgment).

With respect to the third issue, how Innomed's $ 2 million dollars should be parsed is a genuine issue of material fact because it lies at the very heart of whether Innomed's expert's price analysis is in fact proper. Alza notes that Innomed only paid half of the required $ 4 million up-front and milestone payment, and that Innomed's expert incorrectly calculates damages assuming Innomed had paid the full $ 4 million. Innomed does not dispute that Dr. Cockburn's analysis appears to be based on the full dollar amount that was to be paid. Notwithstanding Innomed's failure to pay the entire $ 4 million, Innomed contends that it paid at least $ 1.4 million more than W-L in up-front payments, and that this differential lead Innomed to incur debts that prevented it from making payments under the written agreement and which ultimately resulted in the termination of the agreement. Again, the lynchpin seems to be what weight, if any, should be given to Innomed's expert analysis on whether Innomed suffered any kind of economic harm as a result of the alleged difference in the amount of money paid. There may come a time to outright reject Dr. Cockburn's testimony as unfounded **[*14]** and based on unrealistic assumptions, but this is not it. *Cf. In re Simon II Litigation, 2002 U.S. Dist. LEXIS 19647, 2002 WL 31375510*, at *72 (E.D.N.Y. Sept. 19, 2002) ***HN7***[] ("Courts must be especially careful not to hobble the jury system by excluding potential evidence" through *Daubert* hearings and summary judgment.).

Claim 2

Innomed's claims for breach of contract and breach of the implied covenant of good faith and fair dealings (Innomed's second and third claims) are predicated on its R-P Act good faith and fair dealings (Innomed's second and third claims) are predicated on its R-P Act claim. Given Alza's failure to show that the R-P claim, Alza's contention on the plaintiff's second and third claims must be rejected.

Claim 3

Innomed alleges that Alza fraudulently induced Innomed to enter into a written agreement by representing that performance under the agreement did not violate any law, including the § 2(a) of the R-P Act. Furthermore, Innomed contends that Alza had made various representations about the amount Alza would charge for up-front and milestone payments, as well as the amount that would be charged per pill. Alza claims that because of the insufficiency **[*15]** of Innomed's claim under the R-P Act, summary judgment should be granted against Innomed for fraudulent inducement. As shown above, Alza's claim regarding the insufficiency of Innomed's R-P claim fails.

Alza contends that Joseph Krivulka, the CEO of Hogil, predecessor to Innomed, testified that Alza never made any representation that Innomed's upfront and milestone payments or price per pill would be the same as those agreed to by Alza's other semi-exclusive distributor. Although Krivulka stated in his deposition that he did not have any recollection explicitly regarding "upfront and milestone payments," Krivulka Tr. at pp. 16-17, he submitted a later affidavit indicating that Alza had assured him that Innomed "would not be put at a competitive disadvantage to the other semi-exclusive distributor." Krivulka Decl. PP 2-5. Alza, citing *Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987)*, contends that I should disregard Krivulka's affidavit because it contradicts his own prior deposition. I do not find Krivulka's affidavit testimony, however, necessarily contradictory to his prior deposition testimony. Merely because Krivulka could not recall specific discussion **[*16]** in regard to up-front or milestone payments does not preclude the possibility that he was assured by Alza that Innomed would not be put at a competitive disadvantage. How Innomed would be put on equal footing with its competitors through, for example, up-front and milestone payments, may simply have not come up. At best, the affidavit is a prior inconsistent statement, which may be used in an effort to impeach credibility if Krivulka testifies. I can not conclude at this juncture that his affidavit is contradictory without drawing an improper inference as to his credibility. *United States v. Diebold, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)* (holding that ***HN8***[] courts do not sit to judge witness credibility on a motion for summary judgment); *Hayes v. New York City of Dept. of Corrections, 84 F.3d 614, 620 (2d Cir. 1996)*.

Alza further seizes on Krivulka's statement during his deposition that he could not recall whether Alza ever told him that the price per pill charged to Innomed would be exactly the same as other distributors. Krivulka Decl. at p. 17. Alza, however, completely ignores Krivulka's later recollection that Bob Meyer, **[*17]** vice-president of commercial development at Alza, had agreed with him that the price per pill would be same. Krivulka Decl. at p. 18. Viewing Krivulka's equivocal testimony in the light most favorable to Innomed, I find it inconclusive whether Alza, indeed, had not made misrepresentations regarding the price that Innomed would be charged compared to W-L, and thus there is a genuine issue of material fact in regard to Alza's Claim 3.

Claim 4

Innomed asserts that there are at least three genuine issues of material fact surrounding the alleged breach of the written agreement by Alza's termination of the agreement -- specifically, 1) the amount of time Innomed was given to cure, 2) the amount of time Innomed was entitled to have in order to cure; and 3) what Innomed needed to do in order to cure. I find each assertion to be meritless. Pursuant to § 12.2(c) of the agreement, Alza notified Innomed on November 28, 2000 that it intended to terminate the written agreement sixty days from that date because Innomed had failed to make payments under the written agreement. On January 23, 2001, five days before the date set for termination, Innomed informed Alza that it planned **[*18]** to file an order to show cause for a temporary restraining order to prevent Alza from terminating the written agreement. The following day, the parties entered into a "standstill agreement" in which Alza agreed not to terminate the written agreement and neither party would commence any legal action against the other. The January 24, 2001 standstill agreement was scheduled to terminate February 11, 2001. Innomed and Alza subsequently agreed to extend the standstill agreement three more times, giving Innomed, in total, more than 120 days to cure from the time it first received notice of Alza's intent to terminate the written agreement, pursuant to § 12.2(c). Nothing in any of the communications, however, states or suggests that the standstill agreement tolled the 60-day cure period.

In regard to the second issue of fact, Alza contends that the extended reasonable cure period for material breaches provided by § 12.2(c) of the written agreement does not apply because Innomed's breach could be cured within 60 days. I agree. I remain unconvinced that the extended cure period should apply to scenarios when there is a failure to pay amounts due, because a failure to pay can "always be cured **[*19]** within a 60 day period if in no other way than by payment." *Innomed Labs, LLC v. Alza Corp., 2001 U.S. Dist. LEXIS 4886, 2001 WL 406211*, at *2 (S.D.N.Y. Apr. 19, 2001). Indeed, Howard Wendy, Innomed's principal testified that he was prepared personally "to put up the amount of money necessary to cure the default" before the 60-day cure period expired in January 2001.

Wendy Tr. at p. 134-136. Thus, Innomed cannot claim, as a practical matter, that it could not cure the material breach within the established 60 days.

In regard to the third issue, Innomed contends that there is a dispute about what Innomed needed to do in order to cure. Because Alza was allegedly charging Innomed more money than W-L, perhaps in contravention of the R-P Act, Innomed seems to suggests either that it was entitled to simply disregard the payments called for by the written agreement or that the dispute regarding the amount owed to Alza somehow excused it from making any sort of payment under the written agreement. First, ***HN9***[] merely because the written agreement may be held unlawfully discriminatory under the R-P Act does not give Innomed permission to ignore its obligations under the agreement. *Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 756-57, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947)* **[*20]** (finding no legislative support for defendant's claim that it was free from obligations under the contract because it may violate the R-P Act); *see also* *Viacom Int'l Inc. v. Tandem Prods., Inc., 526 F.2d 593, 597-600 (2d Cir. 1975)* (rejecting defendant's contention that it could avoid its obligations under the contract because it may violate antitrust laws). Second, I find Innomed has presented no colorable arguments on any other basis that would excuse its non-performance under the written agreement. Certainly, as shown by Wendy's transcript, Innomed was capable of paying at least some portion of the money putatively owed under the written agreement. I see no evidence to support Innomed's contention that either the standstill agreement tolled the 60-day cure period or that the extended cure period should apply to Innomed's failure to pay amounts due. Accordingly, I find that Alza was well within its rights, pursuant to § 12.2(c), to terminate the written agreement after it gave Innomed more than twice the amount of time enumerated by the written agreement to cure its breach. I am granting Alza summary judgment on this claim.

Claim 5

Innomed alleges **[*21]** that Alza breached the covenant of good faith and fair dealing that is implied in (1) the written agreement, by failing to give Innomed a reasonable time to cure and (2) the January 26, 2001 oral agreement, by engaging in actions that effectively destroyed Innomed's ability to complete the alleged assignment to AHP. First, I agree that Alza did not breach the covenant of good faith and fair dealing by failing to give Innomed sufficient time under the written agreement to cure. *See supra,* Point 4. Second, in view of the misrepresentation or mistake by by Wendy in regard to the purported deal with AHP, I find that Alza has a right to avoid the written agreement, *see infra* Claim 6, and thus Innomed cannot claim that Alza's alleged termination of the oral agreement constitutes a breach of the covenant of good faith and fair dealing. Accordingly, Alza's motion on this claim is granted.

Claim 6

Innomed alleges that Alza orally agreed on January 26, 2001 to allow Innomed to assign its distribution rights to AHP, and that Alza breached this oral agreement by terminating the written agreement before it provided Innomed with reasonable time to consummate the third-party **[*22]** assignment. Surprisingly, I find that there is a paucity of testimony presented by either side, which might inform me of the content of the oral agreement.

Irrespective of what Innomed and Alza orally agreed to, Alza notes that the oral agreement was induced by Wendy's representation to Alza near the end of January 2001 that there was a deal with AHP, whereby AHP would pay $ 8 million and a 5% royalty on gross royalty to Innomed. At his deposition, Wendy admitted that he conveyed his belief to Meyer at Alza some time after January 24, 2001 that there was such a deal, subject to AHP's due diligence. *See* Wendy Tr. at pp. 119-21. Gregory Bobycock, the assistant vice president who was responsible for licensing acquisition for AHP, however testified that AHP never agreed to the terms specified by Wendy and that it never had any deal to acquire Innomed's rights to distribute Alza's products. Bobycock Tr. at pp. 76-77, 82-84. In rebuttal, Innomed mentions that Marc Benson, Alza's senior counsel admitted in his affidavit that Innomed had conveyed only "hopes" of being able to assign its rights. The passage that Innomed relies on, however, pertained to a communication from December 6, 2000 by **[*23]** Innomed's counsel, Paul Corcoran. Benson Tr. at pp.70-72. There appears to be undisputed evidence that Alza relied to its detriment on Wendy's representation that the assignment to AHP was imminent, which resulted in a series of extensions on the standstill agreement. Meyer Tr. at p. 96. Regardless of whether Wendy's belief was merely an innocent misrepresentation or mistake, ***HN10***[] in

California, "a contract may be rescinded by a contracting party unilaterally if his consent to be bound by the agreement was induced either by a material misrepresentation, though innocently made, or a mistake." 5 *Cal. Civ. Code § 1689* (West 1985); *Wood v. Kalbaugh, 39 Cal. App. 3d 926, 114 Cal. Rptr. 673, 675-76 (Cal. Ct. App. 1974)* (finding a statement, though arguably puffery, may render a contract subject to rescission if intended to convey an impression that is inaccurate in regard to basic assumption upon which the contract is made). Accordingly, Alza's motion on this claim by Innomed is granted.

Claim 7

Innomed alleges that Alza tortiously interfered with Innomed's prospective business advantage when it terminated the written agreement and the oral agreement before **[*24]** Innomed had the chance to assign its rights under the written agreement to a third-party. When asked about the basis for the tortious interference, Innomed's counsel responded that there "was a contract in place, [which Alza] wrongfully breached." Apr. 23, 2002 Tr. at pp. 27-28. As shown by the discussion above in connection with Claims 4 and 6, however, I found no genuine issues of material fact as to Alza's alleged breach of the written agreement or the oral agreement. Nonetheless, I find that Alza's alleged price discrimination may stand as a "wrongful act" that is actionable for purposes of a cause of action claiming tortious interference with economic relations. *Penna v. Toyota Motor Sales, U.S.A., 11 Cal. 4th 376, 902 P.2d 740, 751, 45 Cal. Rptr. 2d 436 (Cal. 1995)* (noting that wrongful conduct element of tortious interference may include anticompetitive behavior in violation of state or federal law). Thus, I must deny Alza's motion for summary judgment on this point.

Claim 8

Alza asserts two counter-claims for breach of the written agreement. Namely, Innomed allegedly failed to provide Alza (1) $ 2,792,495.27 that is due under the written agreement, (2) any **[*25]** monthly, quarterly, or annual reports of its net Sales, and (3) 5% product payments on its sale of Alza products. Because Alza cannot demonstrate the absence of a genuine issue of material fact in regard to whether Innomed was fraudulently induced to accept the written agreement (*see supra* Claim 3), Alza's motion for summary judgment on its counterclaims must fail. *See Patrick Carter Associates, Inc. v. Rent, 781 F. Supp. 207 (S.D.N.Y. 1991)* ("Resolution of the issue of intent on a motion for summary judgment is inappropriate here, as it involves assessing the credibility of the conflicting statements of the parties to the alleged fraud.").

III. CONCLUSION

For the foregoing reasons, Alza motion for summary judgment on its Claims 4, 5, 6 are GRANTED and Claims 1, 2, 3, 7, and 8 are DENIED.

SO ORDERED.

Harold Baer, Jr.

U.S.D.J.

New York, New York

November 12, 2002

Woman's Clinic, Inc. v. St. John's Health Sys.

United States District Court for the Western District of Missouri, Southern Division

November 12, 2002, Decided

Case No. 01-3245-CV-S-GAF

Reporter
252 F. Supp. 2d 857 *; 2002 U.S. Dist. LEXIS 25675 **; 2003-2 Trade Cas. (CCH) P74,074

WOMAN'S CLINIC, INC., ELIZABETH CAMPBELL, M.D., DONALD P. KRATZ, M.D., DARREN LEHNERT, M.D., DAVID L. REDFERN, M.D., J. CHRISTOPHER STEIN, M.D., THOMAS D. McCLAIN, M.D., and THOMAS D. McCLAIN M.D., ORTHOPEDIC SURGERY, L.L.C., Plaintiffs, vs. ST. JOHN'S HEALTH SYSTEM, INC., ST. JOHN'S PHYSICIANS AND CLINICS, INC., f/ k/ a ST. JOHN'S HEALTH SYSTEMS, INC., Defendants.

Disposition: [1]** Defendant's motion for summary judgment granted. Plaintiff Woman's Clinic's motion for partial summary judgment denied.

Core Terms

Clinic, Covenant, payors, network, Affiliation, market power, providers, ancillary, terminate, patients, antitrust, contracts, declaratory relief, mammography, Transition, alleges, seller, medical practice, buyer, declaratory judgment, breaching, asserts, compete, surgery, summary judgment, anti trust law, declaration, foreclosed, naked, genuine issue of material fact

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Summary Judgment, Motions for Summary Judgment**

Fed. R. Civ. P. 56(c) provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Entitlement as Matter of Law, Appropriateness**

On a motion for summary judgment, if there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. The summary judgment procedure is not a disfavored procedural shortcut. Rather, it is an integral part of the Federal Rules as a whole. Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN3[] **Summary Judgment, Opposing Materials**

On a motion for summary judgment, the moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. Id. A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in the pleading to get to a jury without any significant probative evidence tending to support the complaint.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] Summary Judgment, Burdens of Proof

At the summary judgment stage the judge's function is not to weigh the credibility of the evidence, but rather to determine whether a genuine issue of material fact exists. A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The evidence favoring the nonmoving party must be more than "merely colorable." When the moving party has carried its burden under *Fed. R. Civ. P. 56(c)*, its opponent must do more than simply show there is some metaphysical doubt as to the material facts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Monopolies & Monopolization, Actual Monopolization

Missouri's antitrust laws are almost identical the Sherman Antitrust Act, hence the reasoning of all federal antitrust cases will be equally applicable to state claims.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Governments > Courts > Authority to Adjudicate

HN6[] Types of Contracts, Covenants

Where a plaintiff posits multiple theories to support its antitrust case, each theory must be evaluated independent of the others.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Exclusive dealing contracts are evaluated under the Rule of Reason. The Rule of Reason involves an inquiry into a defendant's market power within a given market structure. The antitrust laws are aimed at exclusive agreements which have detrimental effects on competition or have the potential for adverse market impacts. Accordingly, an exclusive dealing agreement can be invalidated upon either a showing of actual detrimental impacts on competition or upon a showing of substantial market power sufficient to foreclose competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN8[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

In order to establish that a system of exclusive arrangements violates antitrust laws, the plaintiff must show either actual harm to competition or sufficient market power to presume competition would be injured.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The first step in determining market power is to identify the relevant product and geographic markets. This burden falls on the plaintiff.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN10[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Antitrust is concerned with the protection of competition, not individual competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN11[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

When analyzing horizontal agreements, it is useful to attempt to classify the agreement as either a "naked restraint" or an "ancillary agreement." Naked restraints are so pernicious in their effect on competition and so blatantly inapposite to the true function of a competitive market that their existence is routinely condemned as per se illegal. Naked restraints are generally formed with the objectively intended purpose or likely effect of increasing prices or decreasing output. If an agreement is a naked restraint, neither the relevant market nor market power need be proven. The harmful effects of the agreement will instead be presumed. Ancillary agreements, by contrast, are agreements that, while horizontal, have the potential to promote competition. These agreements are usually (1) between the seller of property or business and the buyer not to compete with the buyer in such a way as to detract from the value of the property just sold; or (2) between the buyer and seller of property or a business not to use the purchased property in competition with the business retained by the seller. In order to determine whether a horizontal agreement is ancillary, the court must determine whether at the time the agreement was made, it was necessary to promote the enterprise and productivity of an underlying arrangement.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Federal Versus State Law > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] **Types of Contracts, Covenants**

Generally, satisfaction of the federal antitrust statutes will satisfy state antitrust laws. However, some states still adhere to the common law of trade restraints condemning "unreasonable" non-compete agreements. Under Missouri law, a covenant not to compete is unreasonable if, in addition to being ancillary to a valid underlying agreement, the covenant is not reasonably limited in scope to protecting the covenantee's legitimate interest. Covenants not to compete are found in a variety of relationships including employer/ employee relationships and buyer/ seller relationships. The importance of identifying the type of relationship is that it allows the court to determine what legitimate interests may be at stake. In the employer/employee context, the legitimate concerns include protecting customer contacts and protecting trade secrets. In the context of a buyer/seller relationship, particularly the relationship between the buyer and seller of a business, the interests include maintaining the good will of the business for the buyer, and protecting any business interest retained by the seller.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN13[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Temporary and spatially limited restraints are enforceable if reasonable under all attending circumstances. Whether a spatial or geographic restriction is reasonable will depend on whether the restriction is no greater than necessary to protect the legitimate interest at stake.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

Contracts Law > Remedies > Equitable Relief > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN14[] **Equity, Adequate Remedy at Law**

Under Missouri law, a valid plea for declaratory relief requires three things; (1) the existence of a justiciable controversy; (2) the presence of a legally protectable interest; and (3) the existence of a question ripe for judicial decision. Having said that much, it is also true that a declaratory judgment remedy is not a panacea for any real or imagined legal ills. Absent an exceptional circumstance, a declaratory judgment remedy should not be used when an adequate remedy already exists, either in law or in equity. If the plaintiff is seeking to construe portions of an agreement, Missouri law looks more favorably upon granting declaratory relief. If the movant is merely asserting a breach of contract claim, courts in Missouri have ruled that the plaintiffs had adequate remedies at law or equity and found declaratory relief inappropriate.

Counsel: For St. John's Health System, Inc., Defendant: Allen Allred, THOMPSON COBURN, Jeffrey R. Fink, Thompson Coburn LLP, St. Louis, MO.

For St. John's Health System, Inc., Defendant: Frank M. Evans, III, Mark A. Fletcher, Lathrop & Gage, L.C., Springfield, MO.

For St. John's Health System, Inc., Defendant: David Marx, Jr., Sandra A. Muhlenbeck, Jennifer K. Schott, McDermott, Will & Emery, Chicago, IL.

For Primrose Healthcare Services, Inc., interested party: Michael J. Cordonnier, Cunningham, Harpool & Cordonnier, Springfield, MO.

For Cox Health Systems Insurance Company, interested party: Gretchen Garrison, Stinson, Morrison, Hecker LLP, St. Louis, MO.

For Med-Pay, Inc., interested party: Daniel K. Wooten, Neale & Newman, L.L.P., Springfield, MO.

For Orthopedic Surgery, L.L.C., Plaintiff: S. Jay Dobbs, Mark Kermit Fendler, Randy S. Gerber, Polsinelli, Shalton & Welte, P.C., David W. Harlan, Senniger, Powers, Leavitt & Roedel, St. Louis, MO.

For Orthopedic Surgery, L.L.C., Plaintiff: Joseph Clayton Greene, Ben K. Upp, **[**2]** Husch & Eppenberger, LLC, Springfield, MO.

For Mid America Health Network, Inc., Intervenor: Jeffrey J. Simon, Husch & Eppenberger, LLC, Kansas City, MO.

Judges: GARY A. FENNER, JUDGE, United States District Court.

Opinion by: GARY A. FENNER

Opinion

[*860] **ORDER**

Presently before the Court is Defendant St. John's Health System, Inc., and St. John's Physicians and Clinics, Inc. ("St. John")'s Motion for Summary Judgment. Also pending is Plaintiff Woman's Clinic, et al. ("Woman's Clinic")'s Motion for Partial Summary Judgment. [1] These motions arise from a case filed in this Court by Woman's Clinic alleging that St. John's engaged in anticompetitive behavior in that St. John's has vertically integrated its health care network through exclusive contracts and that a Business Covenant between St. John's and plaintiff physicians prohibits plaintiff physicians from investing in or operating ambulatory surgical centers, birthing centers, mammography clinics, or other operations for which the physicians could charge a facility fee. The crux of Woman's Clinic's complaint is that these behaviors inhibit competition within the Springfield, Missouri medical community by making it difficult for the **[**3]** plaintiff physicians to practice medicine were they to be disassociated from the St. John's network. Additionally, Woman's Clinic, in its Complaint, sought a declaration by this Court that St. John's was breaching the terms of the Affiliation Agreement, entered into with the plaintiff physicians, by not directing referrals to plaintiff physicians, **[*861]** and by not guaranteeing network admittance to new physicians hired by Woman's Clinic.

After reviewing the voluminous exhibits submitted by Woman's Clinic, the Court concludes that no genuine issue of material fact exists as to whether the activities of St. John's violate the Sherman Act antitrust provisions or Missouri state law. Even resolving all inferences and credibility issues in favor of the plaintiff, Woman's Clinic has failed to prove that the conduct of St. John's offends **[**4]** the Rule of Reason and, therefore, St. John's is entitled to

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[1] Also included with Woman's Clinic are the individual physicians who own and operate Woman's Clinic. These physicians will hereinafter be collectively referred to as "plaintiff physicians".

judgment as a matter of law. The Court also determines that declaratory relief is not a proper remedy for Woman's Clinic in this case.

DISCUSSION

I. Standard

HN1[] Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*; *Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28 (8th Cir. 1979)*.

HN2[] If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency **[**5]** *Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979)*; *United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978)*. The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; see also *City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 273 (8th Cir. 1988)*. Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex, 477 U.S. at 324*.

HN3[] The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. Id.

The **[**6]** nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. Id. A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in the pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*.

HN4[] At the summary judgment stage the judge's function is not to weigh the credibility of the evidence, but rather to determine whether a genuine issue of material fact exists. Id. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The evidence **[*862]** favoring the nonmoving party must be more than "merely colorable." *Id. at 2511*. When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)* **[**7]** (footnote omitted).

II. Facts

Plaintiffs in this case are comprised of Woman's Clinic, Inc., an obstetrics and gynecological ("OB-GYN") clinic as well as the physicians who work in the clinic. Also included with the plaintiffs is Thomas D. McClain, M.D. Orthopedic Surgery., L.L.C. Defendant St. John's is a network of health care providers, insurance providers, and health care facilities. St. John's Regional Health Center is a 663 bed, tertiary care unit located in Springfield, Missouri. St. John's Physicians and Clinics, Inc. is a non-profit corporation which is comprised of physicians who provide medical services for patients in the Springfield community. St. John's Health System is the larger non-profit corporation which operates St. John's Regional and is the parent company of St. John's Physicians and Clinics, Inc.

In 1994, St. John's embarked on a campaign to enlarge its health care network within the Springfield community. To this end, St. John's sought to contract and/ or affiliate with providers and insurers in an effort to establish relationships with third party payors. "Providers" are the medical doctors that render health care to patients. "Payors" refers to **[**8]** the entities that make payments for medical care on behalf of the members of their coverage plans. Included within the group of "payors" are government-financed entities such as Medicare and Medicaid, self-paying individuals who have no health insurance coverage; and the commercial payors such as Blue Cross/ Blue Shield, as well as independent provider networks who organize providers and make them available to insurance carriers, self-funded or insured groups, and employers.

In order to develop its multi-provider network, St. John's began to purchase the medical practices of physicians in the surrounding community, including the Woman's Clinic. St. John's sought to increase its services in the OB-GYN areas as well as providing mammographies which Woman's Clinic was doing at that time. In 1994, St. John's purchased the Woman's Clinic and the plaintiff physicians became employees of St. John's. [2] As part of the purchase of the Woman's Clinic and the hiring of the Woman's Clinic physicians, St. John's received from the physicians covenants not to compete should they ever leave the St. John's network. The physicians covenanted that they would not practice medicine in competition with **[**9]** St. John's within a twenty-five mile radius of St. John's Regional for two years.

Once employed by St. John's, the plaintiff physicians had access to the St. John's healthcare network. The major boon to the Woman's Clinic was that it received patient referrals from payors that contracted with the St. John's network. Payors who are contracted with St. John's provide financial incentives for individuals enrolled in their plans to see in-network physicians and financial disincentives to see out-of-network physicians. For example, a payor may offer to pay for 90% of the cost of services provided by an in-network physician, meaning a physician employed by or affiliated with the St. John's network. Patients may choose to see a physician out-of-network; not employed by or affiliated with St. John's, **[*863]** however in those cases the payor may only pay for 70% of the cost of the service. By providing these financial incentives (or disincentives, depending **[**10]** upon perspective) payors can obtain greater reductions in costs from providers and receive volume discounts.

As part of the agreement between the St. John's network and the payors, the payors promise that they will exclusively prefer St. John's providers and facilities. This does not preclude payors from paying for out-of-network services. What it means is that each payor has a preferred provider panel from which enrollees can select. Patients who see these preferred providers receive greater benefits from the plan. The payor agreements may be terminated with the appropriate notice, usually 90 days. Unless terminated, the payor contracts automatically renew for another year.

Payors are free to switch to other health care providers including the Cox network, the other major health care provider in Springfield. Additionally, payors may contract with independent physicians who are not members of the payor's provider panel, assuming that St. John's grants its permission to the independent physicians to solicit payor contracts. Providers not affiliated with St. John's also have the option of contracting with the Cox network to provide services.

Once St. John's purchased Woman's Clinic, **[**11]** St. John's received the benefit of patient access brought by Woman's Clinic and the Woman's Clinic providers obtained access to patients whose payors contracted with St. John's. From the evidence, the plaintiff physicians received favorable remunerations during their employ with St. John's. However, in 1999, St. John's undertook a restructuring that allowed plaintiff physicians the option of repurchasing the Woman's Clinic, but without the mammography clinic and the orthopedic surgery clinic. Apparently St. John's was unwilling to resell the mammography clinic and the orthopedic surgery clinic because it was considering expanding its own ambulatory surgery and mammography services. Plaintiff physicians chose to repurchase the clinic, minus the surgery center and the mammography clinic.

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[2] St. John's also purchased the Thomas D. McClain Orthopedic Surgery Center.

As part of the resale of the clinic, St. John's and plaintiff physicians entered into a Transition Agreement. Under the new agreement, plaintiff physicians would no longer be bound by the original covenants not to compete found in the employment contracts. Plaintiff physicians would instead be obligated under a new Business Covenant. The terms of the Business Covenant provided that for a term of five **[**12]** years, plaintiff physicians could practice medicine in the Springfield area, but could not invest in or operate any ambulatory surgical center, birthing center, and freestanding lab or diagnostic service clinic including mammography and ultrasound.

Currently, plaintiff physicians are still affiliated with the St. John's network. However, plaintiff physicians perceive that they may be in danger of losing that affiliation. Plaintiff physicians fear that they will be foreclosed from the Springfield market because of, what they describe as, St. John's "exclusive" vertical network arrangement as well as the Business Covenant restricting plaintiff physicians' medical practice options. In response to these perceived dangers, Woman's Clinic filed the immediate action. Woman's Clinic asks this Court to find that the actions of St. John's, by vertically integrating its network through exclusive contracts with payors and by restricting plaintiff's ability to start an ambulatory surgical center or mammography clinic, has violated federal and state antitrust laws.

St. John's filed the present Motion for Summary Judgment alleging that Woman's **[*864]** Clinic could not prevail on any of its four counts stated **[**13]** in the Complaint: The antitrust claims, Counts I, II, and III break down into allegations of violations with respect to two practices; 1) the vertical integration structure of St. John's, and 2) the Business Covenant entered with plaintiff physicians. Woman's Clinic alleges that the structure of the St. John's network is an illegal restraint of trade. Woman's Clinic further alleges that the Business Covenant is a horizontal market allocation. Both allegations assert violations of the Sherman Antitrust Act, *15 U.S.C. § 1*. [3] The remaining Count IV pertains to a claim for declaratory relief that St. John's is breaching the affiliation agreement with Woman's Clinic.

St. John's counters that Woman's Clinic is unable **[**14]** to meet its burden of proof under the Rule of Reason with regard to both antitrust claims and, therefore, summary judgment is appropriate. As to Count IV, St. John's asserts that the prayer for declaratory relief is really a claim for breach of contract. St. John's avers that because Woman's Clinic has not pled damages, an essential element, there can be no relief for Woman's Clinic on this claim and declaratory relief is inappropriate. For the reasons set forth below, summary judgment is GRANTED in favor of St. John's on Counts I, II, and III; the antitrust claims. Summary judgment is also GRANTED with respect to the declaratory breach of contract claim. Woman's Clinic's Motion for Partial Summary Judgment is DENIED.

III. Analysis

At the outset, Woman's Clinic argues that all of St. John's conduct should be considered collectively when determining whether Woman's Clinic has proved its antitrust claims. Woman's Clinic alleges that everything St. John's and Cox does establishes that the Springfield medical market is completely foreclosed from entry by independent or non-affiliated physicians. In support of this contention, Woman's Clinic cites to *Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)* **[**15]** for the proposition that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Id. at 698-99*. However, that proposition is not applicable in this case.

Under Union Carbide, a conspiracy must be considered in totality. In this case however, there is no conspiracy. Woman's Clinic strenuously asserts throughout its 120 page brief that the actions of St. John's and Cox foreclose the market. However, neither Cox nor its subsidiaries, nor its affiliates have ever been named in this lawsuit. For that reason, the conduct of Cox, as far as it pertains to allegations of antitrust violations, is completely irrelevant. Because of this, there is no conspiracy to be evaluated. Woman's Clinic has three different theories upon which it may prevail that St. John's has violated antitrust laws; 1) that St. John's vertical network and the Business Covenant

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[3] Count III alleges that St. John's has violated Missouri's antitrust laws found at *Mo. Rev. Stat. § 416.031*. ***HN5***[] Missouri's antitrust laws are almost identical the Sherman Antitrust Act, hence the reasoning of all federal antitrust cases will be equally applicable to state claims.

unreasonably restrain trade; 2) that the Business Covenant is a per se invalid market allocation; and 3) that the Business Covenant violates Missouri antitrust statutes. Woman's Clinic may succeed on all of its theories, some **[**16]** of its theories, or none at all. However, ***HN6***[] each theory must be evaluated independent of the other. See *Intergraph Corp. v. Intel* ***[*865]*** *Corp., 195 F.3d 1346, 1367 (Fed. Cir. 1999)* (stating that "each legal theory must be examined for its sufficiency and applicability[.]") Having so stated, each theory will be examined individually.

A. St. John's "Exclusive" Vertical Integration as a Restraint of Trade

In Count I, Woman's Clinic asserts that St. John's has illegally restrained trade by entering into exclusive contracts with payors. Woman's Clinic also alleges that the Business Covenant entered into with the plaintiff physicians is an illegal restraint of trade. [4] Such claims must be evaluated under the Rule of Reason. Even when viewing the evidence in a favorable light to the plaintiff, Woman's Clinic has failed to meet its burden under the Rule of Reason analysis.

HN7[] Exclusive dealing contracts **[**17]** are evaluated under the Rule of Reason. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. Accord *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 660 (8th Cir. 2000)*. The Rule of Reason involves an inquiry into a defendant's market power within a given market structure. *Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1997)*. The antitrust laws are aimed at exclusive agreements which have detrimental effects on competition or have the potential for adverse market impacts. *Levine v. Central Florida Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996)*. Accordingly, an exclusive dealing agreement can be invalidated upon either a showing of actual detrimental impacts on competition or upon a showing of substantial market power sufficient to foreclose competition. *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*. Accord *Ryko Manuf. Co. v. Eden Servs., 823 F.2d 1215, 1233 (8th Cir. 1987)*. Thus, Woman's Clinic can prevail if any genuine **[**18]** issues of material fact exist as to whether the exclusive agreements between St. John's and its payors actually, detrimentally, impact competition, or if St. John's has sufficient market power. Woman's Clinic has shown neither.

At the outset, the Court recognizes that there are actual agreements between St. John's which are purportedly exclusive. The significance of this is that the Court need not look to a pattern of behavior or practices. See *Dillon Materials Handling v. Albion Indus., 567 F.2d 1299, 1302 (5th Cir. 1978)* (stating that an exclusive dealing agreement could be inferred from conduct of parties). In this case, there is an express agreement between St. John's and its payors and the language of such an agreement governs the decision. The putative exclusive agreements generally state as follows:

> During the term of this Agreement, Payor agrees riot to enter into, either directly or indirectly, any other agreement for the provision of health services for Payor's employees or dependants with any other provider, insurance carrier, health maintenance organization, preferred provider organization, and/ or hospital-physician organization located in or **[**19]** doing business in the service area outlined and defined … except for Covered Services not available through St. John's.

While this appears to be an exclusive dealing agreement, nowhere does it prevent the payor from paying for services that its enrollees receive outside the St. John's **[*866]** network. The payors may offer incentives to stay in-network; however if the patient or enrollee elects to see an out-of-network physician, the payor is bound to pay the agreed upon amount for out-of-network care. Furthermore, physicians who no longer associate with St. John's may still treat patients enrolled in the St. John's network. The individual patients may have to pay more out of pocket, but they are not precluded from seeing an out-of-network physician by the "exclusive" agreement of the patient's payor. These facts indicate that the agreement between St. John's and its payors is not the type of "exclusive" agreement with which the antitrust laws are concerned.

[4] The Business Covenant is also the subject of Counts II and III and will be discussed more fully below.

Further evidence that the Sherman Act was not designed to curtail this type of practice is the fact that payors can and have left the St. John's network to contract with one of St. John's competitors. The contracts between St. **[**20]** John's and the payors contain a provision for the termination of the agreement. While the terms vary, a typical termination clause reads as follows:

> Contract Hospital [St. John's] or payor may terminate this Contract by giving the other party at least sixty (60) days written notice prior to the effective date of termination and provided that the termination shall take effect on the sixtieth (60th) day after the anniversary date of the Contract. [5]

The ability to cancel the contract on relatively short notice indicates the benign nature of any exclusive effect. [6] Such a power on the part of the payor would prohibit St. John's from unfairly raising prices or lowering output because the payor could terminate the agreement in a relatively short period of time. See *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993)* (stating that a short termination period on an exclusive arrangement general indicates a de minimus restraint on competition). In the Springfield market, if a payor terminates its contract with St. John's, it has the option of contracting with Cox, perhaps on more favorable terms. To combat this, St. John's is **[**21]** motivated to keep premiums low as well as keep enrollees Satisfied. This is the very nature of competition.

[22]** Nevertheless, the plaintiff physicians allege that if their affiliation with St. John's were terminated, they would be foreclosed from the Springfield market because of these "exclusive" contracts. While the Court is dubious as to the exclusive nature of the payor agreements, the Court will nevertheless assume for purposes of this motion that the contracts are exclusive. ***HN8***[] In order to establish that a system of exclusive arrangements violates antitrust laws, the plaintiff must show either actual harm to competition or sufficient market power to presume competition would be injured. See *Minnesota Ass'n of Nurse Anesthetists, 208 F.3d at **[*867]** 662* (stating that when plaintiffs failed to prove actual adverse effects on competition, they were forced to prove market power in a relevant geographic market).

Woman's Clinic asserts that it has established a violation of the antitrust laws based on the conclusion of its expert, James Lagenfeld, that between St. John's and Cox, the Springfield medical market is almost totally foreclosed. This, says Woman's Clinic, is sufficient to preclude an inquiry into market power. The Court has read both of Lagenfeld's reports and finds them completely **[**23]** irrelevant to this issue. Lagenfeld erroneously included the activities of Cox in his calculations. As mentioned earlier, what Cox does has absolutely no bearing on a case in which Cox has not been named a defendant. Any wrongdoing on the part of Cox cannot be imputed to St. John's and vice versa. The only relevant issue is the exclusive contracts made between St. John's and its payors.

Outside these bald, erroneous, assertions that almost all of the Springfield market is totally foreclosed, Plaintiffs present no evidence to support their claims of foreclosure. Therefore, there is no actual evidence, and the Court is unable to find an antitrust violation on the basis of foreclosure rates. This leaves Woman's Clinic to show that St. John's has sufficient market share so as to potentially foreclose the market.

HN9[] The first step in determining market power is to identify the relevant product and geographic markets. *Double D, 136 F.3d at 560*. This burden falls on the plaintiff. Id. Woman's Clinic's expert hypothesizes, and the parties do not dispute that, for purposes of this motion, the relevant product market is OB-GYN services and the geographic market is the 12 **[**24]** county area around Springfield.

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[5] Some of the contracts were terminable upon twenty days notice, others upon ninety days notice.

[6] Woman's Clinic asserts it has factually disputed the ability to terminate the contracts and has shown that contracts are de facto long term contracts because of automatic renewal provisions and because few payors actually terminate their contracts with St. John's. Woman's Clinic argues that several additional factual disputes preclude summary judgment. Though perhaps disputed, these facts are not material. It is true the contracts with St. John's and the payors automatically renew, unless terminated. The simple fact is that payors have the power to terminate contracts if they feel such action is warranted. Whether payors have or have not terminated or switched is not a material dispute. Even if no payors have ever switched, that does not establish any harm to competition. In fact, it likely suggests the opposite; that competition is keeping payors satisfied.

As to proof of market power, Woman's Clinic alleges that, based on Lagenfeld's report, St. John's has employed or contracted with 56% of the OB-GYN physicians in the Springfield market. Woman's Clinic conclusively states that this establishes market power. However, the data relied upon by Lagenfeld contradicts Woman's Clinic's assertions.

According to Lagenfeld's data, St. John's either employs or contracts with 27 OB-GYN physicians in the Springfield market. See May 13, 2002 Report of Dr. James Lagenfeld, Plaintiff's Suggestions in Opposition, Volume III, Exhibit 6. However, 13 of those physicians have courtesy privileges with St. John's but are not members of St. John's network. Therefore it is more accurate to say that St. John's is associated with 14 OB-GYN physicians. There are a total of 45 OB-GYN physicians in the relevant market area. [7] This leaves 31% of the OB-GYN physicians under contract with St. John's. If the risk is harm to the OB-GYN physician market, St. John's 31% share of the OB-GYN physicians is hardly indicative of power sufficient to unilaterally reduce output or increase prices without losing patients to competitors.

[25]** If the alleged risk is harm to patient choice, nowhere does Plaintiff's data ever produce the percent of OB-GYN patients treated by St. John's. The data does show that St. John's has 35% market share overall, **[*868]** but does not specify what percent actually utilize the relevant market in question, OB-GYN services. Even assuming the 35% is a representative market share of OB-GYN patients, the Court finds that this does not equal sufficient market power to constitute an antitrust violation. See *Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1212-13 (W.D. N.C. 1989)* (finding that 40% of market share did not constitute market power); *Hassan v. Independent Practice Assc., 698 F. Supp. 679, 696 (E.D. Mich. 1988)* (finding that physicians group with 20% share of relevant market was not sufficient market power); *Kuck v. Bensen, 647 F. Supp. 743, 746 (D. Me. 1986)* (concluding that hospital did not have market power in emergency services market where it only handled 37% of emergency room volume); and *Gonzales v. Insignares, 1985-2 Trade Cas. (CCH) P66,701 (N.D. Ga. 1985)* (stating that hospital controlling 40% of the relevant **[**26]** market was not sufficient market power to make exclusive agreement anticompetitive). Even assuming that the contract between St. John's and the payors and exclusive, St. John's simply does not have enough market power to presume that the exclusive contracts will impair competition because 65% of the market share is still available. [8]

In sum, the Court doubts the agreements between St. John's and the payors are the types of "exclusive" agreements which the antitrust statutes are designed to remedy. The payors' ability to terminate the contract and the ability of enrollees to see physicians out-of-network supports this conclusion. Even assuming the exclusivity of the agreements, Woman's Clinic **[**27]** has failed to show that there is any actual detrimental foreclosure or that St. John's has sufficient market power so as to warrant antitrust concerns. [9]

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[7] In his report, Dr. Lagenfeld used OB-GYN physician data from a 21-county region around Springfield. This accounted for 48 OB-GYN physicians. Three of those 48 physicians are not in the 12-county area being used as the relevant geographic market. Of those three, two had affiliation with Cox, and the other was, presumably, affiliated elsewhere. In the end, this difference only effected the total number of physicians and not the number of St. John's physicians used to calculate the percent of OB-GYN physicians affiliated with St. John's

[8] Woman's Clinic asserts that the Cox network is closed to the plaintiff physicians, and therefore all the market is foreclosed. The fact that some plaintiff physicians have applied and been turned down by Cox does not mean the network is closed. It only means that the Cox network has no need for more OB-GYN physicians.

[9] Because Woman's Clinic has devoted so much of its case to tying the conduct of the Cox network into this lawsuit, it bears repeating once more: the conduct of Cox is irrelevant. When one player in any given market begins to consolidate downstream distributors into a network, it is only natural that the other players in the market follow suit. Where antitrust becomes concerned is when upstream and downstream competition is cut off. In this case, there is upstream competition between Cox and St. John's for payor contracts. There is also downstream competition for physician referrals within the two respective networks. While Woman's Clinic disputes whether the competition is "vigorous" the fact is that Cox and St. John's are competitors for the same market of payor contracts. If anything has been "vigorous" is Woman's Clinic's attempt to obfuscate this matter by bombarding the Court with pounds of arguably irrelevant information. Plaintiff physicians should heed the following well: ***HN10***[] antitrust is concerned with the protection of competition, not individual competitors. *Ryko, 823 F.2d at 1234*.

[28] B. The Business Covenant as a Horizontal Market Allocation**

Count II of Woman's Clinic's Complaint alleges that the Business Covenant, entered into between St. John's and plaintiff physicians prior to the resale of the Woman's Clinic is a horizontal market allocation that is illegal per se under the Sherman Antitrust Act. Woman's Clinic argues that the Business Covenant prohibiting it from operating an ambulatory surgery center or a mammography clinic for five years is a naked restraint on competition. As such, Woman's Clinic contends the Business Covenant must be invalidated without any inquiry into the actual or potential effects on competition. St. John's counters that **[*869]** the Business Covenant was ancillary to the agreement to resell the Woman's Clinic to the plaintiff physicians. Accordingly, St. John's presses that the Business Covenant must be evaluated under the Rule of Reason.

HN11[] When analyzing horizontal agreements, it is useful to attempt to classify the agreement as either a "naked restraint" or an "ancillary agreement." XI Herbert D. Hovenkamp, ***Antitrust Law***, P 1904 (1998). Naked restraints are so pernicious in their effect on competition and so blatantly inapposite **[**29]** to the true function of a competitive market that their existence is routinely condemned as per se illegal. *Dunafon v. Delaware McDonald's Corp., 691 F. Supp. 1232, 1241 (W.D. Mo. 1988)* (citing *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958))*. Naked restraints are generally formed with the objectively intended purpose or likely effect of increasing prices or decreasing output. See XI Hovenkamp, P 1906. If an agreement is a naked restraint, neither the relevant market nor market power need be proven. Id. at P 1910. The harmful effects of the agreement will instead be presumed. Id.

Ancillary agreements, by contrast, are agreements that, while horizontal, have the potential to promote competition. *Polk Bros. Inc. v. Forest City Enter., 776 F.2d 185, 189 (7th Cir. 1985)*. These agreements are usually 1) between the seller of property or business and the buyer not to compete with the buyer in such a way as to detract from the value of the property just sold; or 2) between the buyer and seller of property or a business not to use the purchased property in competition with the business retained by the seller. *United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898)* **[**30]** (aff'd as modified by *Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899))*. In order to determine whether a horizontal agreement is ancillary, the court must determine whether at the time the agreement was made, it was necessary to promote the enterprise and productivity of an underlying arrangement. *Polk Bros., 776 F.2d at 189*.

In the present case, Woman's Clinic argues that the Business Covenant is a naked restraint on competition because it "1) it was entered into years after the Employment Agreements to which it is supposedly ancillary; 2) imposes restraints unnecessary and unrelated to the procompetitive aspects of the Employment Agreements; and 3) plainly restricts output." Plaintiff's Suggestions in Oppostion, at 49. Based on a review of the facts of this case, it appears to the Court that the Business Covenant is not ancillary to the Employment Agreement, but rather is ancillary to the Transition Agreement which was to govern the plaintiff physicians' repurchase of the Woman's Clinic.

The relevant facts are these: In 1999, St. John's undertook a restructuring program after concerns were raised **[**31]** in regard to administration and management. As part of the restructuring, plaintiff physicians were given the option of 1) remaining with St. John's under an amended covenant not to compete; 2) remaining with St. John's under the same Employment Covenant; or 3) terminating their employment with St. John's, repurchasing Woman's Clinic, and entering into a Transition Agreement and Affiliation Agreement with St. John's. The plaintiff physicians opted to terminate their employment and repurchase the Woman's Clinic. The plaintiff physicians then entered into the Transition Agreement whereby the plaintiff physicians became affiliates of the St. John's network instead of employees. For its part, St. John's waived the original non-compete agreement contained in the employment **[*870]** agreements which prevented plaintiff physicians from practicing medicine. In the Transition Agreement, the plaintiff physicians were instead restricted by the Business Covenant which allowed the plaintiff physicians to continue practicing medicine, but prohibited them from investing in or operating, among other things, an ambulatory surgery center and a mammography clinic.

Based on these facts, the Business Covenant **[**32]** was ancillary to the Transition Agreement. The new Business Covenant was necessary because, for one, it allowed the plaintiff physicians to practice medicine. It would be folly for the plaintiff physicians to have repurchased the Woman's Clinic when they were barred from practicing medicine. Moreover, the Covenant was need to ensure a successful transition from employees to affiliates. This was not a situation where the underlying arrangement was completed, as is argued by Woman's Clinic. The transition from employees to affiliates was ongoing. Compare *Blackburn v. Sweeney, 53 F.3d 825, 828 (7th Cir. 1995)* (finding that covenant not to compete with advertising was not ancillary to partnership dissolution because a judge had already ordered the partnership dissolved before the creation of the covenant). This indicates the ancillary nature of the Business Covenant. Additionally, by allowing the plaintiff physicians to practice medicine, the Business Covenant increases competition, allowing more physicians to compete for patient referrals. Thus the Business Covenant does not have the earmarks of a naked restraint on trade. It is rather ancillary to the Transition Agreement **[**33]** and must be evaluated under the Rule of Reason.

The Business Covenant is not invalid under the Rule of Reason for the same reason the vertical arrangement of St. John's was not invalid. [10] The Court notes that Woman's Clinic has satisfied even less of its burden with respect to this argument. Beyond not proving that St. John's has market power, Woman's Clinic has failed to even establish the relevant market. Because the Business Covenant pertains to the delivery of medical care besides OB-GYN services, the OB-GYN market is no longer appropriate. Given this difference, a new market is required and Woman's Clinic has failed to allege what the new market would be. Without this proof, Woman's Clinic's claims under Count II must fail.

C. The Business Covenant Under Missouri Law

As to Count III, Plaintiff Woman's Clinic alleges that the Business **[**34]** Covenant is not valid because it does not protect a valid interest under Missouri law, *Mo. Rev. Stat. § 416.031*. ***HN12***[] Generally, satisfaction of the federal antitrust statutes will satisfy state antitrust laws. However, some states still adhere to the common law of trade restraints condemning "unreasonable" non-compete agreements. XIV Hovenkamp, at P 2418. Under Missouri law, a covenant not to compete is unreasonable if, in addition to being ancillary to a valid underlying agreement, the covenant is not reasonably limited in scope to protecting the covenatee's legitimate interest. *Renal Treatment Ctrs-Missouri, Inc. v. Braxton, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997)*.

Covenants not to compete are found in a variety of relationships including employer/ employee relationships and buyer/ seller relationships. Id. The importance of identifying the type of relationship is that it allows the court to determine what legitimate interests may be at stake. In the employer/ employee context, the legitimate **[*871]** concerns include protecting customer contacts and protecting trade secrets. *Schmersahl, Treloar, & Co. v. McHugh, 28 S.W.3d 345, 349 (Mo. Ct. App. 2000)*. **[**35]** In the context of a buyer/ seller relationship, particularly the relationship between the buyer and seller of a business, the interests include maintaining the good will of the business for the buyer, and protecting any business interest retained by the seller. See e.g. *Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279, 286 (Mo. Ct. App. 1979)* (upholding promise by seller not to enter into grocery business under seller's surname in competition with buyer) and *Amer. Strawboard Co. v. Haldeman Paper Co., 83 F. 619, 624 (6th Cir. 1897)* (upholding covenant by operator of paper mill not to produce certain type of paper products in competition with owner).

According to Woman's Clinic, the Business Covenant does not protect any of the legitimate interests of an employer/ employee relationship. Woman's Clinic asserts that St. John's has admitted as much by its "damning" admission that "the revised covenant separates limitations on the professional practice of medicine from ***potential future business relationships*** that could harm St. John's[.]" Plaintiff's Suggestions in Support of Partial Motion for

[10] Thus summary judgment is also granted in favor of St. John's to the extent Woman's Clinic claimed the Business Covenant was an alleged restraint on trade in Count I.

Summary Judgment at 16. (emphasis supplied **[**36]** in original). Thus, says Woman's Clinic, St. John's only seeks to prohibit future competition. [11]

What Woman's Clinic ignores is that the current relationship between St. John's and the plaintiff physicians is not an employer/ employee relationship. It is true that the plaintiff physicians were employees of St. John's. It is also true that at one time there was a non-competition agreement that was part of the employment contract. Plaintiff physicians have since decided to terminate their employ. The non-compete agreement which was ancillary to the employment contracts of the plaintiff physicians has been waived. Instead, the current Business Covenant is ancillary to a Transition Agreement **[**37]** for the sale of a business, namely, the Woman's Clinic. Since the Business Covenant is ancillary to the re-sale of the Woman's Clinic to the plaintiff physicians from St. John's, the relevant, legitimate concerns are those that are concomitant with a buyer/ seller relationship, not an employer/ employee relationship. As such, St. John's has a legitimate interest in protecting its retained business.

It is important to remember that St. John's is not selling back all of the Woman's Clinic. It retained for itself the mammography and orthopedic surgery clinics. It is therefore legitimate for St. John's to seek to protect the value of an asset recently purchased. See *Addyston Pipe, 85 F. at 281* (finding that covenants not to compete have been upheld in situations were the buyer of a property promises "not to use the same in competition with the business retained by the seller[.]"). Having found that the covenant protects a legitimate interest of St. John's, the question remains whether the covenant is reasonable in terms of duration and geographic scope.

Based on case law, the five year duration of the covenant, and the 25-mile radius that is geographically encompassed **[**38]** are both reasonable to protect St. John's interest. ***HN13***[] "Temporary and spatially limited restraints are enforceable if reasonable under all attending circumstances[.]" *Schott v. Beussink, 950 S.W.2d 621, 626 (Mo. Ct.* ***[*872]*** *App. 1997)*. Whether a spacial or geographic restriction is reasonable will depend on whether the restriction is no greater than necessary to protect the legitimate interest at stake. *Continental Research Corp. v. Scholz, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980)*. Given that the relevant market for St. John's services has been established to be the 25-mile radius of St. John's Regional, a restriction on the plaintiff physicians from operating mammography or ambulatory surgery centers within that area appears to the Court to be no broader than necessary to protect St. John's business. See *Orchard Container Corp. v. Orchard, 601 S.W.2d 299 (Mo Ct. App. 1980)* (upholding a 125-mile radius restriction as reasonable given the placement of the customers). Additionally, the five year time period of the restriction does not appear to cause any concerns as being overly broad. See *Mills v. Murray, 472 S.W.2d 6 (Mo. Ct. App. 1971)* **[**39]** (finding a restriction on competition for three years to be reasonable); and *Schnucks Twenty-Five, 595 S.W.2d at 285* (upholding ten-year restriction period as reasonable). Because the Covenant is reasonable, it does not violate Missouri law. No genuine issues of material fact remain and St. John's is entitled to judgment as a matter of law on the claim that the Business Covenant violates Missouri law.

Woman's Clinic filed a cross-motion for partial summary judgment asserting that there was no genuine issue of material fact that the Business Covenant was a naked restraint on trade and per se invalid. The arguments in support of this motion were virtually identical to the arguments in opposition to St. John's motion for summary judgment. Having concluded that the Business Covenant is ancillary to the Transition Agreement and that the Rule of Reason applies, it necessarily follows that a per se treatment is inapplicable. Plaintiff's motion for partial summary judgment is therefore DENIED.

D. Declaratory Judgment Relief

In its final claim, Woman's Clinic asks this Court to declare 1) that St. John's is breaching the Affiliation Agreement through a prejudicial **[**40]** referral system; and 2) that St. John's is breaching the Affiliation Agreement by not

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[11] The Court asks, perhaps not so rhetorically, is that not the function of all non-compete agreements? To say that a covenant not to compete is invalid because it prohibits future competition would be to invalidate every single non-compete agreement ever entered into, without regard to reasonableness or legitimate interests.

guaranteeing network affiliation for any new physicians hired by Woman's Clinic. Woman's Clinic claims that these actions have hindered the physician plaintiffs, however Woman's Clinic makes no request for damages nor does Woman's Clinic seek any injunctive relief to stop St. John's. Woman's Clinic simply requests that this Court declare St. John's is breaching the Affiliation Agreement.

There is a dispute over whether the federal Declaratory Judgment Act, *28 U.S.C. § 2201*, or the Missouri Declaratory Judgment Act, *Mo. Rev. Stat. 527.010* should govern this claim, but this dispute need not detain the Court long. The case which St. John's uses to support its claim that the federal statute governs is not controlling here because this is not a diversity case. Instead, jurisdiction of this Court was founded upon federal question jurisdiction as provided in *28 U.S.C. § 1331*. Briefly stated, the declaratory judgment claim of Count IV is a supplemental state law claim brought as part of the federal antitrust action. See *28 U.S.C. § 1367*. **[**41]** Thus, Missouri law controls on the declaratory judgment claim.

HN14[] Under Missouri law, a valid plea for declaratory relief requires three things; 1) the existence of a justiciable controversy; 2) the presence of a legally protectable interest; and 3) the existence of a question ripe for judicial decision. *Lake Ozark Constr. Indus., Inc. v. North Port Assocs., 859 S.W.2d 710, 714 (Mo. Ct. App. 1993)*. Having said that much, it is also true that a declaratory judgment remedy is not a panacea for any real or imagined legal ills. *Cronin v. State Farm Fire & Cas. Co., 958 S.W.2d 583,* ***[*873]*** *587 (Mo. Ct. App. 1997)*. Absent an exceptional circumstance, a declaratory judgment remedy should not be used when an adequate remedy already exists, either in law or in equity. Id.

Based on relevant case law, the issue of this claim comes down to whether Woman's Clinic is seeking to construe portions of the Affiliation Agreement or whether Woman's Clinic is merely asserting a breach of contract claim. In the former situation, Missouri law looks more favorably upon granting declaratory relief. See *Washington Univ. v. Royal Crown Bottling Co. of St. Louis, 801 S.W.2d 458, 463 (Mo. Ct. App. 1990)*. **[**42]** In the latter, courts in Missouri have ruled that the plaintiffs had adequate remedies at law or equity and found declaratory relief inappropriate. See *Michigan Sporting Goods Distribs., Inc. v. Lipton Kenrick Assoc., L.P., 927 S.W.2d 570, 572 (Mo. Ct. App. 1996)*; and *Love Mortgage Properties, Inc. v. Horen, 639 S.W.2d 839, 841 (Mo. Ct. App. 1982)*.

The Royal Crown case involved a claim for declaratory relief in order to resolve the obligations of a lessor to make repairs to leased property. The court found that declaratory judgment was proper, in part, because there was no adequate remedy at law. *Royal Crown, 801 S.W.2d at 463*. The court noted that the lease involved was ongoing and did not terminate until 2001, and that other issues of repair obligations might arise in the future. Id. Additionally the court made mention of the fact that the plaintiffs had not requested a declaration that the lease had been breached. Id. Instead, the plaintiffs requested that the court interpret the repair obligation contained in the lease. Id. The court concluded that the case presented a situation in which "it [would] be desirable **[**43]** that the relationship of all the parties be established because there may be a continuing relationship or future acts which depend on the outcome [of the declaratory judgment proceeding]." Id. (quoting *Polk County Bank v. Spitz, 690 S.W.2d 192, 194 (Mo. Ct. App. 1985)*.

By contrast, the court in Love Mortgage and in Lipton found that plaintiffs had alternate remedies available and, thus, declaratory relief was inappropriate. *Lipton, 927 S.W.2d at 572*; *Love Mortgage, 639 S.W.2d at 841*. In Lipton, the court noted that the plaintiffs had requested that the court declare the lease agreement breached. *Lipton, 927 S.W.2d at 572*. The court distinguished the Lipton case from the Royal Crown decision stating that, in Lipton, the claim was really for breach of the lease and that an award of money damages would settle the parties' dispute. Id. The court had decided a nearly identical issue earlier in Love Mortgage. In that case, the plaintiff also requested a declaration that the defendant had breached the lease. *Love Mortgage, 639 S.W2d at 841*. The court found that while **[**44]** the plaintiffs purported to seek declaratory relief, the claim was really one for breach of contract. Id. Thus, the court stated, declaratory relief was inappropriate. Id.

As to the present case, factually it is similar to all three cases. The Affiliation Agreement is ongoing and continues to govern the actions of the parties. In that sense, it is analogous to Royal Crown and it would seem that declaratory relief is necessary to resolve the dispute. However, the pleadings of this case are more similar to Love Mortgage and Lipton. Woman's Clinic seeks the Court to declare the Affiliation Agreement breached on account of two separate actions of St. John's. No request to construe the terms of the Affiliation Agreement has been made, though because Woman's Clinic claims breach of the ever so amorphous "good faith and fair dealing" condition, it would be necessary to construe such a condition to determine whether it was broad enough to cover St. John's conduct. Ultimately **[*874]** however, the present dispute is more similar to Love Mortgage and Lipton and declaratory relief is inappropriate in this case.

The Court is most persuaded by Woman's Clinic's own pleadings. **[**45]** The fact it is seeking a declaration for breach of the agreement leads this Court to conclude that Count IV is a thinly veiled attempt to establish breach of contract. As such, the more proper remedy for Woman's Clinic is at law requesting money damages or in equity seeking injunctive relief. Because Woman's Clinic has alternative remedies available, declaratory relief is inappropriate. Thus, St. John's Motion for Summary Judgment on Count IV of Woman's Clinic's Complaint is GRANTED.

CONCLUSION

For the above reasons, Defendant St. John's Motion for Summary Judgment is GRANTED in full. Plaintiff Woman's Clinic's Motion for Partial Summary Judgment is DENIED.

IT IS SO ORDERED.

/s/ GARY A. FENNER, JUDGE

United States District Court

DATED: **November 12, 2002**

Gross v. Woodman's Food Mkt.

Court of Appeals of Wisconsin

July 25, 2002, Oral Argument ; November 14, 2002, Decided ; November 14, 2002, Opinion Filed

Appeal No. 01-1746

Reporter

2002 WI App 295 *; 259 Wis. 2d 181 **; 655 N.W.2d 718 ***; 2002 Wisc. App. LEXIS 1244 ****; 2002-2 Trade Cas. (CCH) P73,885

James J. Gross and Mall Mart, Inc., both d/b/a Citgo Quick Mart, Plaintiffs-Respondents, v. Woodman's Food Market, Inc., d/b/a Woodman's Food Market Gas Station, a Wisconsin corporation, Defendant-Appellant, ABC Corporation, Defendant.

Subsequent History: Review denied by *Gross v. Woodman's Food Mkt., 2003 WI 32, 661 N.W.2d 100, 2003 Wisc. LEXIS 232 (2003)*

Prior History: [**1]** APPEAL from a judgment and an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. Cir. Ct. No. 98-CV-679.

Disposition: Circuit court judgment affirmed in part and reversed in part. Cause remanded with directions and for a jury trial.

Core Terms

prices, diesel fuel, competitor, sales, diesel, motor vehicle fuel, terminal, summary judgment, retailer, fuel, circuit court, pump, formula, documents, divert, semi-trucks, violations, seller, wholesaler, supplemental, averred, calculations, proscribed, vagueness, closest, lowered, selling, chart, prima facie evidence, injure a competitor

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN1[] **Public Enforcement, State Civil Actions**

Wisconsin's Unfair Sales Act prohibits any sale of any item of merchandise either by a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor. *Wis. Stat. § 100.30(3)*. In proving a violation, evidence of any sale of any item of merchandise at less than cost as defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(3)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(1)*.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Price Terms

Energy & Utilities Law > Taxation Issues

HN4[] **Gasoline Fuels, Gasoline Dealers & Distributors**

Under the Wisconsin Unfair Sales Act, "cost" for retail sales of motor vehicle fuel is defined as the higher of two computations, one using the seller's invoice or replacement cost as a base (invoice/replacement formula) and the other using the average posted terminal (APT) price as a base (APT formula). *Wis. Stat. § 100.30(2)(am)* 1m.b and c. Motor vehicle fuel is purchased at terminals. The APT price is defined by statute and, in general terms, is the terminal price as published by a petroleum reporting service, plus taxes, transportation, and other charges not already included. The APT formula then adds a markup of 9.18% to cover the cost of doing business. *Section 100.30(2)(am)*1m.b and c.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(2)(am)l*m.b and c.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(2)(a)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(2)(cg)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(6)(a)7*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN9[] **Public Enforcement, State Civil Actions**

Those invoking the exception to the Wisconsin Unfair Sales Act in *Wis. Stat. § 100.30(6)(a)7* are required to notify the Department of Agriculture, Trade and Consumer Protection (DATCP) of the lower price before the close of business on the day on which the price was lowered in the form and manner required by the department. *Section 100.30(7)(a)*. If that is done, the DATCP may not proceed against that person or entity, and there is immunity from liability for a private cause of action. *Section 100.30(7)(c)*. Failure to comply with the notification requirement creates a rebuttable presumption that the price was not lowered to meet a competitor's price. *Section 100.30(7)(b)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN10[] **Pleadings, Amendment of Pleadings**

See *Wis. Stat. § 802.09(3)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN11[] **Amendment of Pleadings, Leave of Court**

Wis. Stat. § 802.09(3) applies to an amendment to add a plaintiff. If the claim asserted in the amendment arises out of the same transaction, occurrence, or event set forth in the original pleading, relation back is presumptively appropriate; however, the circuit court has the discretion to deny leave to amend when it would result in prejudice to the other party.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN12[] **Standards of Review, Clearly Erroneous Review**

An appellate court will affirm discretionary decisions if the circuit court applied the correct law to the relevant facts of record in a reasoned manner.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN13[] **Supporting Materials, Affidavits**

Courts are to disregard conclusions of law contained in affidavits on motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN14[] **Summary Judgment, Supporting Materials**

See *Wis. Stat. § 910.06*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(5m)*.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN16[] **Appellate Jurisdiction, Interlocutory Orders**

See *Wis. Stat. § 808.03(2)*.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

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

HN17[] **Supporting Materials, Affidavits**

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. An appellate court employs the same methodology as the circuit court, and its review is de novo. Where the complaint states a claim for relief and the answer joins issue, the appellate courts examines the moving party's affidavits to determine whether that party has made a prima facie case for summary judgment. If it has, the appellate court then looks to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Evidence > Types of Evidence > Documentary Evidence > Affidavits

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN18[] **Opposing Materials, Accompanying Documentation**

Affidavits in support of or opposition to summary judgment shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. *Wis. Stat. § 802.08(3)*. On summary judgment, the party relying on evidence need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relied upon in its affidavits. The party producing the evidence need only make a prima facie showing that the evidence would be admissible. The burden then shifts to the opposing party to show that the evidence is inadmissible or to show facts which put the evidence at issue. If the admissibility of the evidence is challenged, the court must then determine whether the evidence would be admissible.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN19[] **Standards of Review, De Novo Review**

Although an appellate court employs the summary judgment methodology de novo, it reviews the circuit court's decision allowing supplemental affidavits under the deferential standard for discretionary decisions, since that decision is committed to the circuit court's discretion.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN20[] **Summary Judgment, Supporting Materials**

Wisconsin Stat. § 802.08(3) provides that a trial court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. Similarly, the decision whether a submission meets the requirements of *§ 802.08(3)* that affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence, may involve evidentiary rulings that are committed to the circuit court's discretion.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN21[] **Testimony, Expert Witnesses**

See *Wis. Stat. § 907.02*.

Evidence > ... > Testimony > Lay Witnesses > Personal Knowledge

HN22[] **Lay Witnesses, Personal Knowledge**

See *Wis. Stat. § 906.02*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 100.30(2)*.

Governments > Legislation > Interpretation

HN24[] **Legislation, Interpretation**

The purpose of statutory construction is to discern the intent of the legislature, and, to this end, an appellate court first considers the language of the statute. If the language clearly and unambiguously sets forth the intent of the legislature, the appellate court applies that language to the facts at hand. Statutory language is clear and unambiguous when it has only one reasonable meaning, and, conversely, it is ambiguous when it is capable of being reasonably understood in two or more different ways. An appellate court avoids constructions of statutory language that are unreasonable.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN25[] Public Enforcement, State Civil Actions

The terms "intent" and "effect" as used in Wis. Stat. § 100.30(3) are the same. However, each term plainly has a different meaning. The common meaning of "intent" is "purpose," and the common meaning of "effect" is "result."

Governments > Legislation > Interpretation

HN26[] Legislation, Interpretation

Reviewing court is to interpret language in statutes according to its common and ordinary usage, unless another meaning is indicated, and it may consult a standard dictionary for the common meaning of a word. Use of a dictionary to establish the meaning of a word does not mean that it is ambiguous.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN27[] Public Enforcement, State Civil Actions

Wis. Stat. § 100.30(3) prohibits a sale at less than statutory cost if there is either the intent or effect of injuring a competitor in ways other than unfairly diverting trade from a competitor.

Evidence > Types of Evidence > Demonstrative Evidence > General Overview

Evidence > ... > Exceptions > Business Records > General Overview

HN28[] Types of Evidence, Demonstrative Evidence

Generally, records prepared in anticipation of litigation are not business records under Wis. Stat. § 908.03(6), the business records exception to the hearsay rule.

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

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN29[] Standards of Review, De Novo Review

The constitutionality of a statute presents a question of law, which an appellate court reviews de novo.

Civil Procedure > Appeals > Standards of Review > General Overview

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN30[] Appeals, Standards of Review

Like all statutes, the Wisconsin Unfair Sales Act enjoys a strong presumption of constitutionality, and every presumption must be indulged to sustain the Act.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Vagueness

HN31[] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

The degree of vagueness that the U.S. Constitution tolerates--as well as the relative enforcement of fair notice and enforcement--depends in part on the nature of the enactment and also depends on whether there are civil or criminal penalties.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Interpretation

Governments > Legislation > Vagueness

HN32[] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

The standard for a civil statute is whether it is so vague and uncertain that it is impossible to execute it or to ascertain the legislative intent with reasonable certainty.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Vagueness

HN33[] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

A criminal statute is unconstitutionally vague if it either fails to afford proper notice of the conduct it seeks to proscribe or fails to provide an objective standard for enforcement. To give proper notice, a criminal statute must warn people who wish to obey the law that their conduct comes near the proscribed area.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Interpretation

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview

Governments > Legislation > General Overview

Governments > Legislation > Vagueness

HN34[] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

Even where criminal statutes are concerned, a statute is not void for vagueness if, by the ordinary process of statutory construction, a reviewing court can give a practical or sensible meaning to the statute, and this rule applies even if a statute is ambiguous. In addition, where the First Amendment is not implicated, a vagueness challenge must be examined in the context of the facts in the particular case.

Constitutional Law > Substantive Due Process > Scope

Governments > Legislation > Interpretation

Governments > Police Powers

HN35[] **Constitutional Law, Substantive Due Process**

Imposition of liability without fault-even when the statute imposes punitive sanctions-does not in itself violate due process. Statutes that are within the police power of the state may impose even criminal liability on a person whose acts violate the statute, even if the person did not intend to do so.

Constitutional Law > Substantive Due Process > Scope

Governments > Police Powers

HN36[] **Constitutional Law, Substantive Due Process**

The police power of the state includes not only regulations or statutes designed to promote public health and safety but also those designed to promote economic prosperity. Such regulations and statutes do not offend substantive due process if they are not unreasonable, arbitrary or capricious, and the means selected have a real and substantial relation to the object sought to be attained.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > ... > Defendant's Rights > Right to Jury Trial > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Evidence > Inferences & Presumptions > Presumptions

HN37[] **Constitutional Law, Substantive Due Process**

A rebuttable presumption that does not prevent a criminal defendant from presenting a defense or take any question of fact from a jury does not abridge the right to a jury trial or deny due process of law.

Counsel: On behalf of the defendant-appellant, the cause was orally argued by and submitted on the briefs of Thomas L. Basting, Sr., Brennan of Steil, Basting & MacDougall, S.C., Janesville.

On behalf of the plaintiffs-respondents, the cause was orally argued by and submitted on the brief of Michael L. Stoker of Johns & Flaherty, S.C., La Crosse.

On behalf of Petroleum Marketers Association of Wisconsin/Wisconsin Association of Convenience Stores, Inc., the cause was orally argued by and submitted on the brief of Thomas L. Skalmoski of Weiss Berzowski Brady LLP, Milwaukee.

Judges: Before Vergeront, P.J., Roggensack and Lundsten, JJ. LUNDSTEN, J. (dissenting).

Opinion by: VERGERONT

Opinion

[*P1] [*723] [**193]** VERGERONT, P.J. Woodman's Food Market, Inc. appeals the circuit court's summary judgment concluding that it violated the Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30* (1999-2000), [1] by selling motor vehicle fuel below cost as defined in the statute on 295 days, and ordering **[****2]** Woodman's to pay $ 590,000 to James Gross and Mall Mart, Inc. Woodman's operates a grocery store and adjacent gas station in Onalaska, Wisconsin, and Gross operates Citgo Quick Mart, a convenience store owned by Mall Mart, Inc. that sells motor vehicle fuel in Holmen, Wisconsin.

[*P2] We conclude that, with respect to 293 days, there are no genuine issues of material fact, and Gross and Mall Mart, Inc. are entitled to judgment as a matter of law that on those dates Woodman's violated the Act by selling motor vehicle fuel below cost as defined in the statute (statutory cost) with the effect of injuring a competitor. In reaching this conclusion, we decide that the circuit court properly exercised its discretion in allowing relation back of the second amended complaint, and we make the following rulings regarding the Act: (1) whether Woodman's is a wholesaler or retailer under the Act is irrelevant in this case **[****3]** because either way **[***724]** the proper terminal for computing the "average posted terminal price" is the terminal closest to Woodman's gas station in Onalaska; (2) Woodman's is a competitor of Gross and Mall Mart, Inc. with respect to diesel fuel because both Woodman's and Citgo Quick Mart offer that fuel for sale to non-Woodman vehicles in **[**194]** the same geographic area; (3) *Wis. Stat. § 100.30(3)* prohibits sales below statutory cost with either the proscribed intent or the proscribed effect; (4) it is undisputed that Woodman's did not come within the exception of *§ 100.30(6)(a)*7 for meeting a competitor's price; (5) the Act is not unconstitutionally vague as applied to Woodman's; and (6) the Act does not offend due process by prohibiting certain conduct and its effect regardless of the seller's intent.

[*P3] Woodman's also appealed the circuit court's ruling allowing Gross and Mall Mart, Inc. to withdraw their demand for a jury trial, which Woodman's had also demanded, and ordering that trial would be to the court. However, Gross and Mall Mart, Inc. have conceded that under ***Village Food & Liquor Mart v. H&S Petroleum, Inc.**, 2002 WI 92, 254 Wis.2d 478, 647 N.W.2d 177*, **[****4]** Woodman's has a constitutional right to a jury trial on any factual issues.

[*P4] Accordingly, we affirm the summary judgment for 293 days of violations, reverse it as to two days, and remand to the circuit court with instructions to reduce the monetary award on summary judgment to $ 586,000. We also reverse the court's order that trial will be to the court and remand for a jury trial on all remaining factual issues.

STATUTORY BACKGROUND

[*P5] ***HN1***[] Wisconsin's Unfair Sales Act prohibits "any sale of any item of merchandise either by a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor…." *Wis. Stat. § 100.30(3)*. In proving a **[**195]** violation, "evidence of any sale of any item of merchandise … at less than cost as

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor." ***Id.*** [2]

[*P6] [**5] [***725]** "***HN4***[] Cost" for retail sales of motor vehicle fuel, as relevant to this case, is defined as the *higher* of two computations, one using the seller's invoice or replacement cost as a base (invoice/replacement formula) and the other using the average posted terminal (APT) price **[**196]** as a base (APT formula). *Wis. Stat. § 100.30(2)(am)1*m.b and c. [3] **[****6]** Motor vehicle fuel is purchased **[**197]** at terminals. [4] The APT price is defined by statute and, in general terms, is the terminal price as published by a petroleum reporting service, plus

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[2] ***HN2***[] *Wisconsin Stat. § 100.30(3)* provides in full:

(3) Illegality of loss leaders. Any sale of any item of merchandise either by a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare and is unfair competition and contrary to public policy and the policy of this section. Such sales are prohibited. Evidence of any sale of any item of merchandise by any retailer, wholesaler, wholesaler of motor vehicle fuel or refiner at less than cost as defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

The policy underlying the Act is expressly stated in ***HN3***[] *Wis. Stat. § 100.30(1)*:

Unfair sales act. (1) Policy. The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression.

[3] ***HN5***[] *Wisconsin Stat. § 100.30(2)(am)l*m.b and c provide:

1m. With respect to the sale of motor vehicle fuel, "cost to retailer" means the following:

….

b. In the case of the retail sale of motor vehicle fuel by a wholesaler of motor vehicle fuel, who is not a refiner, at a retail station owned or operated either directly or indirectly by the wholesaler of motor vehicle fuel, the invoice cost of the motor vehicle fuel to the wholesaler of motor vehicle fuel within 10 days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or replacement cost of the motor vehicle fuel, plus a markup of 9.18 of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retail station plus a markup of 9.18 of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.

c. In the case of the retail sale of motor vehicle fuel by a person other than a refiner or a wholesaler of motor vehicle fuel at a retail station, the invoice cost of the motor vehicle fuel to the retailer within 10 days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel, plus a markup of 6 of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18 of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.

[4] "Terminal" is defined as the "storage and distribution facility that is supplied by a pipeline or marine vessels, from which facility motor vehicle fuel may be removed at a rack and from which facility at least 3 refiners or wholesalers of motor vehicle fuel sell motor vehicle fuel." *Wis. Stat. § 100.30(2)(j)*.

taxes, transportation, and other charges not already included. [5] **[****7]** The APT formula then adds a markup of 9.18% to cover the cost of doing business. *Section 100.30(2)(am)*1m.b and c. [6]

[*P7] [198] [***726]** The requirements of the Act do not apply to sales in certain specified situations, and the exception relevant in this case is for meeting a competitor's price. ***HN8***[] *Wisconsin Stat. § 100.30(6)(a)7* provides that the provisions of the Act do not apply when:

7. The price of merchandise is made in good faith to meet an existing price of a competitor and is based on evidence in the possession of the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner in the form of an advertisement, proof of sale or receipted purchase, price survey or other business record maintained by the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner in the ordinary **[****8]** course of trade or the usual conduct of business.

HN9[] Those invoking this exception are required to notify the Department of Agriculture, Trade and Consumer Protection (DATCP) "of the lower price before the close of business on the day on which the price was lowered in the form and manner required by the department." *Section 100.30(7)(a)*. If that is done, the DATCP may not proceed against that person or entity, and there is immunity from liability for a private cause of action. *Section 100.30(7)(c)*. Failure to comply with the notification requirement creates a rebuttable presumption that the price was not lowered to meet a competitor's price. *Section 100.30(7)(b)*.

RELATION BACK OF AMENDED COMPLAINT

[*P8] Gross filed this action on November 16, 1998, as the individual owner of Citgo Quick Mart. The complaint alleged that Woodman's had sold gasoline and diesel fuel at a price below statutory cost and had **[**199]** injured him as a result. [7] However, although Gross had initially owned the Citgo Quick Mart as a sole proprietor, he created Mall Mart, Inc. in August of 1998 and transferred the ownership of the store to the corporation on October 1, 1998. Gross filed a motion for leave to amend **[****9]** on December 14, 1999, seeking to add Mall Mart, Inc. as the real party in interest for all violations of the Act occurring after October 1, 1998, and to have the amendment relate back to the date on which the original complaint was filed. The affidavit of Gross's counsel averred that he first learned of the incorporation of Mall Mart, Inc. at Gross's deposition on October 20, 1999; that Gross advised him that he (Gross) had told a former associate of counsel's firm about the corporation, but neither had brought it to counsel's attention, apparently believing it was not relevant to the case. Woodman's consented to the amendment, but objected to its relation back.

[*P9] The circuit court granted the motion of Gross and Mall Mart, Inc. to allow the amendment to relate back to the filing of the original complaint. The court concluded that the amendment related to the same transactions and

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[5] ***HN6***[] *Wisconsin Stat. § 100.30(2)(a)* provides:

(2)(a) "Average posted terminal price" means the average posted rack price, as published by a petroleum price reporting service, at which motor vehicle fuel is offered for sale at the close of business on the determination date by all refiners and wholesalers of motor vehicle fuel at a terminal plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale, any cost incurred for transportation and any other charges that are not otherwise included in the average posted rack price. In this paragraph, "average" means the arithmetic mean.

HN7[] *Wisconsin Stat. § 100.30(2)(cg)* defines "determination date" as:

(cg) 1. Except as provided in subd. 2., "determination date" is the day preceding the day of the sale at retail of motor vehicle fuel.

[6] Under the invoice/replacement formula, one starts with the invoice cost within ten days of the sale or replacement cost, whichever is lower, deducts specified discounts, and adds taxes, transportation, other charges not already included, and a markup to cover the cost of doing business-6 for a retailer and 9.18 for a wholesaler. *Wis. Stat. § 100.30(2)(am)1*m.b and c.

[7] The complaint alleged other claims that Gross is not pursuing.

operative facts as those in the original complaint, and **[****10]** the failure to name Mall Mart, Inc. in that complaint had not prejudiced Woodman's ability to defend against the claims.

[*P10] The applicable statute, ***HN10***[] *Wis. Stat. § 802.09(3)*, provides:

(3) Relation back of amendments. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment **[**200]** relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted **[***727]** relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

[*P11] ***HN11***[] This statute applies to an amendment to add a plaintiff. ***Korkow v. Gen. Cas. Co. of Wisconsin**, 117 Wis. 2d 187, 196, 344 N.W.2d 108 (1984)*; **[****11]** ***Estate of Kitzman v. Kitzman**, 163 Wis. 2d 399, 402, 471 N.W.2d 293 (Ct. App. 1991)*. If the claim asserted in the amendment arises out of the same transaction, occurrence, or event set forth in the original pleading, relation back is presumptively appropriate; however, the circuit court has the discretion to deny leave to amend when it would result in prejudice to the other party. ***Korkow**, 117 Wis 2d at 196-97*. ***HN12***[] We affirm discretionary decisions if the circuit court applied the correct law to the relevant facts of record in a reasoned manner. ***Grothe v. Valley Coatings, Inc.**, 2000 WI App 240, P12, 239 Wis. 2d 406, 620 N.W.2d 463*.

[*P12] Woodman's contends the circuit court erroneously exercised its discretion in allowing relation back because Gross knew that Mall Mart, Inc. was the owner of the store, as did an associate of the law firm, and thus there was no mistake about the identity of the proper party. According to Woodman's, the second sentence of *Wis. Stat. § 802.09(3)* does not permit an amendment adding a plaintiff to relate back unless there was a mistake concerning the proper party.

[*P13] [**12] [**201]** We do not agree with Woodman's reading of the statute. The plain language of the second sentence refers only to a party against whom a claim is asserted. The cases applying this sentence are therefore not applicable in deciding under what circumstances a court may properly allow an amendment adding a plaintiff to relate back. *See, e.g.,* ***Groom v. Professionals Ins. Co.**, 179 Wis. 2d 241, 251-52, 507 N.W.2d 121 (Ct. App. 1993)*.

[*P14] Woodman's counsel argued at oral argument that Woodman's was prejudiced because if the motion did not relate back, Woodman's would not be liable for violations occurring after October 1, 1998. [8] However, the proper prejudice inquiry, as the circuit court recognized, is: was Woodman's prejudiced by not knowing from November 16, 1998 to December 14, 1999, that Mall Mart, Inc., rather than Gross, was the owner of Citgo Quick Mart? Woodman's does not explain how this caused it prejudice.

[*P15] [**13]** There is no question that the claims that Mall Mart, Inc. is asserting against Woodman's are factually and legally the same claims that Gross asserted against Woodman's in the initial complaint. We conclude the circuit court applied the correct law to the relevant facts and properly exercised its discretion in allowing the amendment adding Mall Mart, Inc. to relate back to the filing of the original complaint. [9]

[202]** SUMMARY JUDGMENT

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[8] Private causes of action must be brought within 180 days of the violation. *Wis. Stat. § 100.30(5m)*.

[9] From here on, we use "Gross" to refer to both plaintiffs unless the context indicates otherwise.

Background

[*P16] Gross moved for summary judgment, initially claiming that there were 738 **[***728]** occasions on which Woodman's sold motor vehicle fuel below statutory cost without filing a notice with DATCP, and there was no evidence to overcome the presumption of a violation on any of those occasions.

[*P17] In Gross's first affidavit, he averred the following. Citgo Quick Mart and Woodman's sell the same grades of motor fuel, including diesel, although in October **[****14]** 1999, Woodman's began selling an ethanol blend of unleaded fuel, which he does not sell. Generally speaking, Gross uses the APT formula as the statutory cost because that results in a higher price than the invoice/replacement formula. The terminal nearest to his station and Woodman's Onalaska store is at Eyota, Minnesota (outside Rochester). Gross subscribes to a "OPIS Reporting Service" that sends him the APT price at that terminal for each grade of motor vehicle fuel on each weekday. With his affidavit, Gross submitted a chart which, he averred, showed for each violation occurring between September 13, 1998 and June 3, 2000: (1) the APT price for the motor vehicle fuel at the Eyota terminal based on the OPIS reports he received; (2) the price based on the APT formula for a retailer; (3) the highest price using that formula for the preceding ten days; [10] and (4) Woodman's price based on documentation received in discovery. Gross stated that his transportation costs were between 2 to 2.3 cents per gallon for the time period involved, and Woodman's in **[**203]** discovery had stated its transportation costs were between 2.5 and 3 cents per gallon. Gross specified the combined tax and transportation **[****15]** cost he used in applying the APT formula for both gasoline and diesel fuel. [11] Gross explained he was not submitting the OPIS reports and other supporting documentation for the chart because it was so voluminous, but he would provide them to the court or opposing counsel upon request.

[*P18] Gross averred that it is his business practice to do a survey to obtain prices of his competitors to see what the market price is for various grades of motor vehicle fuel. In conducting those surveys, he has observed that Woodman's prices for various grades of motor fuels have at times been below the statutory minimum price, and, "in order to compete with the **[****16]** market that is skewed based on Woodman's reduced price, [he has] been forced to lower [his] price to meet or approach the market rate, thus reducing [his] profit margin."

[*P19] Gross also submitted depositions that showed that Tom Wysocki manages Woodman's grocery store and gas station in Onalaska and is responsible for the daily setting of motor vehicle fuel prices at that gas station. Wysocki stated that he computes the prices on a daily basis, using the cost for the day faxed to him by Woodman's supplier as a "general guideline," plus taxes and transportation plus 9.18% of that sum. He does not receive information on motor vehicle fuel prices from a price reporting service. He regularly drives around the area to check on the prices at other gas stations, and **[**204]** that includes Gross's station, and he may adjust the price based on his competitors' prices. Woodman's sets the same price for diesel fuel as for unleaded gasoline; it does not calculate a separate price. Wysocki, prior to December 1, 1999, did not record or retain price survey information in the regular course of Woodman's business. **[***729]** Woodman's has not filed any "meet competition" notice with DATCP.

[*P20] **[****17]** Woodman's responded to Gross's motion for summary judgment by arguing that Gross's affidavit was deficient because it did not provide the data and calculations to support his assertions on Woodman's price violations, and Gross was not an expert on setting prices under the statute. Woodman's also objected to two attachments to Gross's affidavit-a memorandum to gas station owners from DATCP on the Act which, Gross averred, he received from DATCP, and seminar materials on the Act which, Gross averred, he received from a

[10] The ten-day window relates to the "determination date," which affects the ATP price. *See* Wis. Stat. § 100.30(2)(c)2(cg).

[11] The figures he used changed during three time periods, which he identified, and were: for gasoline, 48.8 cents, 49.2 cents, and 49.8 cents, and for diesel fuel, 55.1 cents, 55.5 cents, and 56.1 cents.

seminar he attended. Woodman's contended that neither was legally binding and the former was not authenticated and was inadmissible hearsay. [12]

[*P21] [205] [****18]** In addition, Woodman's contended it was entitled to summary judgment because the undisputed facts showed: Gross had used the wrong formula in that Woodman's was a wholesaler, not a retailer; Woodman's had used the correct statutory cost except as necessary to meet a competitor's price; Gross was not Woodman's competitor with respect to diesel fuel; Woodman's did not intend to divert trade from or injure its competitors, and its pricing did not have an effect on competition; and the Act was unconstitutional. Alternatively, Woodman's argued that since intent was an issue, summary judgment was improper.

[*P22] Wysocki's affidavit in support of Woodman's motion for summary judgment averred as follows with respect to diesel fuel. Diesel fuel is available at one pump for the purpose of supplying diesel fuel for Woodman's own semi-trucks that haul products to and from Woodman's various grocery stores. Because of the location of this pump, in order for a semi-truck to use it, the semi-truck must drop its trailer at another location. Since this pump is not readily accessible to non-Woodman's semi-trucks, the sales of diesel fuel made to non-Woodman's vehicles are not made **[****19]** to semi-truck drivers, but to drivers of older cars that still use diesel fuel. Woodman's does not have a marketing strategy to attract either non-Woodman's semi-trucks or diesel cars. Woodman's does not advertise its diesel prices through posted signs or in any other way, and to determine the price, a person has to look at the pump. The sales of diesel fuel to the public at this gas station are insignificant compared to the sales of regular, mid-grade, and premium unleaded fuel. Woodman's **[**206]** does not have a policy of setting diesel prices below cost or for the purpose of diverting trade from competing gas stations, and Wysocki has never done so. Attached to Wysocki's affidavit were records of the amount of diesel fuel Woodman's sold to non-Woodman's vehicles on the days Gross asserted there were violations.

[*P23] Wysocki also averred that when he lowered Woodman's prices to match a competitor's price, he made a notation of **[***730]** the competitor's prices on documents entitled "Sparta Co-op Services" (Sparta documents), [13] copies of which were attached to his affidavit. There were also handwritten price calculations on the Sparta documents, which, Wysocki averred, he had made for each **[****20]** day that Gross alleged there was a violation.

[*P24] In response to Woodman's objections, Gross submitted a supplemental affidavit, along with the OPIS reports and Woodman's discovery responses on which he had relied in preparing the chart. The discovery responses included Woodman's fuel prices and Woodman's transportation costs-2-1/2 to 3 cents a gallon.

[*P25] Gross averred in his supplemental affidavit that:

In my experience, when a gas station or stations lower their prices, others follow suit in order to compete.... On many occasions, including but not limited to the dates listed on the charts that were previously submitted to the Court as I have lowered the price at the Citgo [Quick] Mart after finding that Woodman's was selling **[**207]** motor vehicle fuel, including diesel, at a price below the statutory minimum. On those dates, I lost **[****21]** revenue.

[*P26] Woodman's objected to Gross's supplemental affidavit as untimely. The court decided that it had the authority to consider the affidavit and attachments, that it was in the interests of judicial economy to do so, and that

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[12] Woodman's also objected to certain of Gross's statements as legal conclusions, and the circuit court agreed with Woodman's and did not consider them. For reasons that are not clear to us, Woodman's renews these objections on appeal. We do not discuss them further because the circuit court correctly did not consider Gross's legal conclusions in deciding whether Gross's submissions established a prima facie factual case, and we do not either. ***Hooper v. City of Madison**, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977)* (***HN13***[] court is to disregard conclusions of law contained in affidavits on motion for summary judgment). Woodman's challenged other submissions of Gross in the circuit court, which it renews on appeal: the affidavits of Kevin LeRoy, Joseph Veenstra, Paul Dingee, and Michael Stoker (paragraph 17 of his January 2001 affidavit). We do not discuss these objections because these submissions are not necessary to our analysis.

[13] Sparta Co-op Services is Woodman's fuel supplier and is not relevant to this appeal; we identify the documents in this way for ease of reference.

it was fair to both parties. With respect to Woodman's other objections to Gross's affidavits, the court decided that the memorandum Gross attached from DATCP was neither legally binding nor hearsay, and was admissible for the purpose of establishing that Gross, as the operator of a gas station, had received it, and, by inference, Woodman's would have received it, too. [14] **[****22]** The court apparently did not separately address Woodman's objection to the seminar materials. The court decided that the charts appended to Gross's first affidavit were admissible even without the underlying documentation under *Wis. Stat. § 910.06*, [15] and that Gross had in any event provided that documentation. Finally, the court decided that Gross had the requisite knowledge and experience regarding pricing of motor vehicle fuels under the Act to testify concerning the calculation of the price mandated by the Act.

[*P27] **[**208]** In response to Woodman's submissions, Gross modified his request for summary judgment to 323 violations. Gross explained that he deducted alleged violations for: (1) diesel fuel on days for which Woodman's records showed it made no sale of diesel fuel, (2) sales other than diesel fuel that occurred after September 1999 when Woodman's asserted it began selling ethanol-based gasoline, and (3) those for which Woodman's service records had notations that might arguably be considered an informal price survey.

[*P28] **[***731]** The court first decided that Gross's submissions established a prima facie case for a violation of the statute. It **[****23]** next decided that Woodman's submissions (1) did not show that there was an inaccuracy in Gross's calculations except for March 8 through March 14, 2000, which the court excluded; (2) did not show Woodman's had ever filed a notice with DATCP; and (3) except for a few dates which the court eliminated, did not show that Woodman's had documentation even arguably meeting the requirement of *Wis. Stat. § 100.30(6)(a)7* for the "meet competition" exception. [16]

[*P29] **[****24]** The court rejected Woodman's argument that summary judgment was inappropriate because intent was an issue. It concluded *Wis. Stat. § 100.30(3)* prohibited selling at less than statutory cost with the **[**209]** proscribed intent or with the proscribed effect, and a sale at less than statutory cost was prima facie evidence of that intent or effect. *Section 100.30(3)*. The court decided that, since Woodman's had not presented any evidence that rebutted the statutory presumption arising from sales below statutory cost, Gross was entitled to summary judgment that Woodman's violated the Act on 295 days. The court identified these dates in an addendum to its decision. [17] **[****25]** The court rejected Woodman's arguments that it was a retailer, that it was not a competitor of Gross with respect to diesel fuel, and that the Act was unconstitutional. The court awarded $ 2,000 for

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[14] The court added that the later affidavit of Joseph Veenstra contained the certification necessary to authenticate the DATCP documents. However, that certification was of other DATCP records, which are not relevant to our analysis. *See* footnote 12.

[15] ***HN14***[] *Wisconsin Stat. § 910.06* provides:

Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

[16] At the hearing before the circuit court, counsel for Woodman's explained that the calculations on the copies of Sparta documents that Wysocki submitted with his affidavit were added in response to the litigation to explain what Wysocki had done when he set the prices. The court stated that, in deciding whether any of Woodman's business records arguably met the "meets competition exception," it would not consider that set of copies, but only the set of copies Woodman's produced in discovery, which Gross had submitted with his supplemental affidavit.

[17] The court arrived at these dates by eliminating from the chart Gross filed: (1) days on which Woodman's did not sell diesel fuel; (2) days on which Woodman's sold only ethanol-blend fuel; (3) days on which any of Woodman's service records had a notation of another competitor's fuel price; (4) days when there was incomplete data on Gross's chart; (5) March 8 through March 14 where a factual dispute exists over Woodman's motor vehicle fuel price; and (6) Christmas Day, when Woodman's was not open for business.

each day of violation pursuant to *§ 100.30(5m)*. [18] We granted Woodman's petition for **[**210]** leave to appeal the trial court's order granting summary judgment. [19]

[**26]**

[*732]** *Standard of Review*

[*P30] ***HN17***[] Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten****, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987)*. We employ the same methodology as the circuit court, and our review is de novo. ***Id.*** Where, as here, the complaint states a claim for relief and the answer joins issue, we examine the moving party's affidavits to determine whether that party has made a prima facie case for summary judgment. ***Brownelli v. McCaughtry****, 182 Wis. 2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994)*. If it has, we then look to the opposing party's affidavits to determine whether **[**211]** there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** *at 372-73, 514 N.W.2d at 49-50*.

[*P31] ***HN18***[] Affidavits in support of or opposition to summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." *Wis. Stat. § 802.08(3)*. On summary judgment, the party relying on evidence **[****27]** need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relied upon in its affidavits. ***Dean Medical Center v. Frye****, 149 Wis. 2d 727, 734-35, 439 N.W.2d 633, 636 (Ct. App. 1989)*. The party producing the evidence need only make a prima facie showing that the evidence would be admissible. ***Id.*** The burden then shifts to the opposing party to show that the evidence is inadmissible or to show facts which put the evidence at issue. ***Id.*** *at 735, 439 N.W.2d at 636*. If the admissibility of the evidence is challenged, the court must then determine whether the evidence would be admissible.

[*P32] ***HN19***[] Although we employ the summary judgment methodology de novo, we review the circuit court's decision allowing supplemental affidavits under the deferential standard for discretionary decisions, since that decision is committed to the circuit court's discretion. ***HN20***[] *Wisconsin Stat. § 802.08(3)* provides that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Similarly, the decision whether a submission **[****28]** meets the requirements of *§ 802.08(3)* that "affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be **[**212]**

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[18] ***HN15***[] *Wisconsin Stat. § 100.30(5m)* provides:

(5m) Private cause of action. Any person who is injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel in violation of sub. (3) may bring an action against the person who violated sub. (3) for temporary or permanent injunctive relief or an action against the person for 3 times the amount of any monetary loss sustained or an amount equal to $ 2,000, whichever is greater, multiplied by each day of continued violation, together with costs, including accounting fees and reasonable attorney fees, notwithstanding s. 814.04 (1). An action under this subsection may not be brought after 180 days after the date of a violation of sub. (3).

[19] ***HN16***[] *Wisconsin Stat. § 808.03(2)* provides:

(2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

The trial court's order granting summary judgment was a nonfinal order because the alleged violations eliminated by Gross and the court for summary judgment remained for trial.

admissible in evidence," may involve evidentiary rulings that are committed to the circuit court's discretion. For example, the question whether a witness qualifies as an expert is generally left to the circuit court's discretion. ***State v. Robinson**, 146 Wis. 2d 315, 332, 431 N.W.2d 165 (1988)*.

Admissibility and Sufficiency of Gross's Submissions

[*P33] Woodman's contends many of Gross's submissions should not have been considered by the court. We examine each objection and conclude that Gross's relevant submissions were admissible under *Wis. Stat. § 802.08(3)*, and further that they establish a prima facie case of entitlement to summary judgment.

[*P34] We address first Woodman's contention that the circuit court erroneously exercised its discretion in accepting Gross's supplemental affidavit because he was required to submit all the evidence he relied on with his motion and should not have been allowed to "rectify evidentiary flaws" with a supplemental affidavit. As we have **[****29]** already stated, the statute specifically authorizes the court to allow supplemental affidavits. *Wis. Stat. § 802.08(3)*. We are satisfied the court properly exercised its discretion in doing so here. The court observed that the case had been **[***733]** continued several times, both parties had been given the opportunity to fully present their case, and Woodman's had been "at least as active as Gross in requesting or stipulating to continuances." The court also reasoned that considering all the parties' filings would more likely result in a fair resolution and avoid an unnecessary trial. These are proper factors to consider and the court's result is reasonable. Woodman's has pointed to no unfair prejudice **[**213]** resulting from the court's consideration of Gross's supplemental affidavit, nor does Woodman's assert that it did not have an opportunity to respond if it chose.

[*P35] We next address Woodman's objections to the admissibility of the memorandum from DATCP and the seminar materials attached to Gross's first affidavit. We conclude the court properly exercised its discretion in considering these for the purpose of showing that Gross received them. Gross was competent **[****30]** to testify to what he received and to his attendance at a seminar. The court understood that the contents were not legally binding, and it did not consider them for the truth of the matters they asserted; therefore they were not inadmissible hearsay under *Wis. Stat. § 908.01(3)*, nor did they need to be authenticated.

[*P36] Woodman's also argues that the court erroneously exercised its discretion in concluding that Gross had the knowledge and experience to testify regarding the correct statutory minimum price. [20] Our analysis differs somewhat from the circuit court's because we conclude there are aspects of that testimony that do not require expertise. However, we conclude that, for those aspects that do require expertise, the circuit court reasonably decided that Gross's submission established an adequate foundation and were properly admissible under *Wis. Stat. § 802.08(3)*.

[*P37] **[****31]** **[**214]** With respect to the factors involved in the APT formula, [21] we conclude that expert testimony is needed to establish the following: (1) the correct tax, (2) that the Eyota terminal is the closest terminal to Citgo Quick Mart and Woodman's in Onalaska that meets the statutory definition, and (3) that the OPIS reporting

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[20] ***HN21***[] *Wisconsin Stat. § 907.02* provides:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[21] The question whether the invoice/replacement formula or the ATP formula is the correct one depends on which results in a higher cost. *Wis. Stat. § 100.30(2)(am)1*m.b and c. Since Gross's submissions showed that Woodman's prices were below cost based on the ATP formula, it was unnecessary for him to establish, as part of a prima facie case, what the results of application of the invoice formula would be. If the invoice/replacement formula results in a lower cost than the ATP formula, the ATP formula is the statutory minimum; if the invoice/replacement formula results in a higher cost than the ATP formula, that would not reduce the number of sales below the statutory minimum.

service supplies the APT price, as defined in the statute, for the Eyota terminal. We conclude that the foundation supplied by Gross's affidavits-that he had been setting motor fuel prices since 1995, had reviewed the statute and regulations, had attended some seminars and trade shows regarding gas pricing, and had received and read communications from DATCP-provides a reasonable basis for concluding that he had the experience and knowledge to testify on these matters. Gross does not need to be an expert to testify to his own transportation costs, because he has personal knowledge of those, *Wis. Stat. § 906.02*; [22] **[****33]** **[***734]** and **[**215]** Woodman's transportation costs were supplied by Woodman's discovery responses. Finally, the calculations required by the APT formula, once the necessary facts are established, are not a matter requiring expert testimony, **[****32]** but are simply a matter of adding and multiplying as directed by the statute. [23]

[*P38] We also conclude the court properly exercised its discretion in deciding that the chart appended to Gross's first affidavit was admissible. Gross explained in his affidavit the formula and the data he used in arriving at the statutory minimum price and the source of the data he used for Woodman's prices, and he provided the terminal price documentation and the documentation for Woodman's prices with his supplemental affidavit. There was therefore an adequate foundation **[****34]** for the chart. Gross did not need to supply his calculations; those are simply a matter of adding and multiplying, which Woodman's can do if it wishes to verify the accuracy of Gross's arithmetic.

[*P39] **[**216]** Finally, we reject Woodman's contention that Gross's averments regarding the injury to his business are inadmissible because they are too conclusory. Gross's testimony in his supplemental affidavit that he lowered his price "on many occasions, including but not limited to the dates listed on the charts that were previously submitted to the Court ... after finding that Woodman's was selling motor vehicle fuel, including diesel, at a price below the statutory minimum" and that "on those dates, [he] lost revenue" is admissible because it contains evidentiary facts of which Gross has personal knowledge. True, they are general statements of fact, but nothing in *Wis. Stat. § 802.08(3)* requires more specificity. Woodman's had the opportunity to require Gross through discovery to produce more specific evidence of lost profits and to use that to controvert Gross's averments if warranted.

[*P40] We conclude that Gross's submissions establish a prima facie **[****35]** case for summary judgment. They show that Woodman's sold motor vehicle fuel at below the statutory minimum price on 295 days without filing a notice under *Wis. Stat. § 100.30(7)(a)*. This constitutes prima facie evidence of a violation of the statute under *§ 100.30(3)* and creates a rebuttable presumption under para. (7)(b) that Woodman's did not lower prices to meet the competition.

Retailer vs. Wholesaler

[*P41] Woodman's contends that it is entitled to summary judgment because the Madison terminal is the correct one to use for the APT price, not Eyota, and if Madison is used, Woodman's submissions show that **[**217]** its prices were always below statutory cost. Madison is the correct terminal, **[***735]** Woodman's argues, because Woodman's is a retailer under the statute and therefore must use the terminal that is "closest to the retailer," *Wis. Stat. § 100.30(2)(am)1*m.c, not that "closest to the retail station," which applies to wholesalers. *Section*

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[22] ***HN22***[] *Wisconsin Stat. § 906.02* provides:

Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

[23] Woodman's argues that the general rule is that expert opinion testimony may not be considered on summary judgment, citing ***Dean Medical Center v. Frye****, 149 Wis. 2d 727, 733, 439 N.W.2d 633 (Ct. App. 1989)*. However, we concluded in ***Dean*** that this rule did not apply if the issue is one on which expert testimony must be produced at trial. ***Id.*** *at 734-35*. Woodman's itself argues that expert testimony is needed on the correct statutory minimum price; its objection is that Gross does not have the requisite expertise. Therefore, ***Dean*** does not support its position.

100.30(2)(am)1m.b. [24] Woodman's argues that the terminal "closest to the retailer" is properly interpreted as the terminal closest to its corporate headquarters, which is in Janesville, making **[****36]** Madison the closest terminal.

[*P42] [**37] [**218]** This issue presents a question of statutory construction, a question of law, which we review de novo. ***HN24***[] The purpose of statutory construction is to discern the intent of the legislature, and to this end we first consider the language of the statute. ***State v. Setagord**, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997)*. If the language clearly and unambiguously sets forth the intent of the legislature, we apply that language to the facts at hand. ***Id.*** Statutory language is clear and unambiguous when it has only one reasonable meaning, and, conversely, it is ambiguous when it is capable of being reasonably understood in two or more different ways. ***Id.*** We avoid constructions of statutory language that are unreasonable. ***Maxey v. Redevelopment Authority**, 120 Wis. 2d 13, 20, 353 N.W.2d 812 (Ct. App. 1984)*.

[*P43] We conclude that Woodman's proposed construction of "closest to the retailer" is not reasonable, because the location of the corporate headquarters of a company has no relationship to the location of the retail sale. Under Woodman's construction, for example, if a corporate retailer has headquarters in a **[****38]** distant state, the terminal price in that distant state determines the motor vehicle fuel price in Wisconsin, thereby affecting the market in Wisconsin. The only reasonable construction, we conclude, is that "terminal closest to the retailer" means the terminal closest to the location where the retail sale occurs. It is therefore not necessary to decide whether Woodman's is a retailer or a wholesaler under the statute in order to apply the APT formula, because in both cases the proper terminal is the one closest to Woodman's Onalaska store, the location **[**219]** of the retail sale. Based on the submissions, there is no dispute that this terminal is located at Eyota, Minnesota.

Woodman's and Gross as Competitors

[*P44] Woodman's contends that *Wis. Stat. § 100.30(3)* requires that the seller must be competing for customers for the particular grade or type of motor **[***736]** vehicle fuel that was sold below statutory cost. According to Woodman's, it is not a competitor in the diesel fuel market because its submissions show that its sales of diesel fuel to the public are insignificant in number and it does not try to attract customers for diesel fuel. Since Gross's submissions **[****39]** do not dispute this evidence, Woodman's continues, Woodman's did not as a matter of law violate the statute with respect to any sale of diesel fuel. [25]

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[24] ***HN23***[] *Wisconsin Stat. § 100.30(2)* defines "retailer" and "wholesaler":

(2)(e) "Retailer" includes every person engaged in the business of making sales at retail within this state, but, in the case of a person engaged in the business of selling both at retail and at wholesale, such term shall be applied only to the retail portion of such business.

....

(m) "Wholesaler of motor vehicle fuel" includes any of the following:

1. A person who stores motor vehicle fuel and sells it through 5 or more retail outlets that the person owns or operates.

2. A person who acquires motor vehicle fuel from a refiner or as a sale at wholesale and stores it in a bulk storage facility other than a retail station for further sale and distribution.

3. A person engaged in the business of making sales at wholesale of motor vehicle fuel within this state.

4. A person engaged in the business of selling diesel fuel if that person's sales of diesel fuel accounted for at least 60 of that person's total sales of motor vehicle fuel in the previous year or, if that person did not engage in the business of selling diesel fuel in the previous year, if that person reasonably anticipates that sales of diesel fuel will account for at least 60 of that person's total sales of motor vehicle fuel in the current year.

[25] Woodman's does not argue that it is not Gross's competitor with respect to the sale of regular, mid-grade, and premium unleaded gasoline.

[*P45] We assume without deciding that Woodman's premise is correct-that *Wis. Stat. § 100.30(3)* requires that the seller and the alleged injured party be competitors with respect to the particular grade or type of motor vehicle fuel that was sold below statutory cost. However, we do not agree that the statute imposes the limited definition of "competitor" that Woodman's proposes. A wholesaler or retailer of motor vehicle fuel violates the statute if it sells fuel below statutory cost with the specified intent or effect. Evidence of the effort the seller makes to market a motor vehicle fuel and the actual number of sales it makes may be relevant to the **[**220]** seller's intent and may also be relevant **[****40]** to the effect of the sales it does make. However, we see nothing in the statutory language to indicate that the statute does not apply at all unless the seller intends to have or does have a particular market share. We conclude that Gross is Woodman's competitor with respect to diesel fuel within the meaning of *Wis. Stat. § 100.30(3)* because, based on the undisputed facts, they both sell diesel fuel to non-Woodman's vehicles in the same geographic area.

Calculation of APT Formula

[*P46] Woodman's contends that a discrepancy in transportation costs creates a factual dispute over the correct calculations applying the APT formula. According to Woodman's, Gross used 2 cents per gallon for unleaded gasoline and 2.3 cents per gallon for diesel fuel in his calculations instead of using Woodman's actual transportation costs. However, Woodman's responses in discovery show that its transportation costs are between 2.5 cents and 3 cents per gallon. Use of these costs would have resulted in a higher statutory minimum price, which would not be to Woodman's advantage and would not reduce the number of sales below the statutory minimum price. Therefore, the dispute **[****41]** over whether Gross should have used Woodman's actual transportation costs is not material.

[*P47] We conclude, as did the circuit court, that the undisputed facts are that Woodman's sold fuel on 295 days at below the statutory minimum price.

[221]** *Evidence of Intent or Effect*

[*P48] Woodman's contends that it submitted uncontroverted testimony that it did not intend to violate the statute, and therefore it has overcome any prima facie evidence of a violation of the statute and is entitled to summary judgment. It appears that Woodman's may be assuming that ***HN25***[] "intent" and "effect" as used in *Wis. Stat. § 100.30(3)* are the same. However, we agree with the circuit court that each term plainly has a different meaning. The common meaning of "intent" is "purpose," and the common meaning of "effect" is "result." [26] The plain meaning of *§ 100.30(3)*, **[***737]** therefore, is that it prohibits a sale at less than statutory cost if Woodman's had either an intent that is proscribed by the statute or the sale had an effect proscribed by the statute.

[*P49] **[****42]** We observe that the proscribed intent and effect in the first sentence of *Wis. Stat. § 100.30(3)* do not include the phrase, "or to otherwise injure a competitor," whereas the sentence describing prima facie evidence of intent or effect states that a sale at less than statutory cost is "prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor." *Section 100.30(3)*. Neither party **[**222]** comments on this apparent discrepancy. We conclude the only reasonable construction of subsec. (3), read as a whole, is that it ***HN27***[] prohibits a sale at less than statutory cost if there is either the intent or effect of injuring a competitor in ways other than unfairly diverting trade from a competitor. It makes no sense to provide that a sale below statutory cost is prima facie evidence of a category of intent or effect that is not a violation of the statute.

[*P50] This reading is confirmed by the history of the statute. From 1941 until 1987, *Wis. Stat. § 100.30(4)* defined the elements of the violation, as well as the penalty, and **[****43]** included the phrase, "or to otherwise injure a

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[26] American Heritage Dictionary (3rd ed. 1993) pp. 707, 437. ***HN26***[] We are to interpret language in statutes according to its common and ordinary usage, unless another meaning is indicated, and we may consult a standard dictionary for the common meaning of a word. ***Swatek v. County of Dane**, 192 Wis. 2d 47, 61, 531 N.W.2d 45, 50 (1995)*. Use of a dictionary to establish the meaning of a word does not mean that it is ambiguous. ***State v. Curiel**, 227 Wis. 2d 389, 404-05, 597 N.W.2d 697 (1999)*.

competitor." [27] When that subsection was revised by 1987 Wis. Act 175 to replace fines and imprisonment with a civil forfeiture, the language defining a violation was removed and replaced by "For any violation of sub. 3," which was then identical to the present subsec. (3). We are satisfied that the legislature did not intend to alter the elements of a violation, but simply overlooked the fact that the first sentence of subsec. (3) did not contain the phrase, "or to otherwise injure a competitor." [28]

[*P51] [223] [****44]** Because the statute is violated if there is either the proscribed intent or the proscribed effect, we need address Woodman's evidence only with respect to effect. [29] The evidence of Woodman's sales below statutory cost on 295 days is, under *Wis. Stat. § 100.30(3)*, prima facie evidence that those sales had the effect of unfairly diverting trade from Gross or otherwise injuring him. Gross averred that he lost **[***738]** revenue because he lowered his prices after finding that Woodman's was selling motor vehicle fuel, including diesel, at a price below statutory cost. Woodman's evidence that it sold little diesel fuel to non-Woodman's vehicles, that it did not advertise diesel fuel, and that one could not see the prices from the road creates a reasonable inference that its diesel fuel prices did not divert diesel customers from Gross. However, this evidence does not dispute the evidence that Gross was injured by losing profits from setting his prices, including diesel, lower to compete with Woodman's prices. Woodman's has pointed to no other evidence that would arguably show that Gross did **[**224]** not lose profits as a result of setting his prices lower to meet Woodman's. **[****45]** Accordingly, we conclude that there is no dispute that the sales below statutory cost on 295 days did have the effect of injuring Gross.

[**46]** *Exception for Meeting a Competitor's Price*

[*P52] Woodman's acknowledges that it did not submit any notices to DATCP, and there is therefore a rebuttable presumption that it did not lower prices to meet a competitor's price, *Wis. Stat. § 100.30(7)(b)*. However, Woodman's contends that its submissions overcome this presumption and establish as a matter of law that it has fulfilled the requirements of the exception in *§ 100.30(6)(a)*7. Woodman's asserts that Wysocki's deposition, affidavit, and attachments show that when he lowered prices, it was a good-faith effort to meet the existing price of a competitor. Woodman's contends that the notations on the Sparta documents are "other business records maintained by [it] in the usual course of business." *Section 100.30(6)(a)*7. Woodman's focuses its argument on sales of fuel other than diesel because of its position that Woodman's is not a competitor of Gross with respect to diesel fuel and therefore those sales are not subject to the Act. However, since we have rejected that position, we consider all fuels in deciding whether the Sparta documents satisfy *§ 100.30(6)(a)*7 for any of the 295 days in the **[****47]** circuit court's addendum.

[*P53] Woodman's appears to rely in its argument on notations and calculations Wysocki made on the Sparta documents after copies were provided to Gross in discovery. However, we agree with the circuit court that in analyzing whether Woodman's has evidence that **[**225]** meets the requirement of *Wis. Stat. § 100.30(6)(a)7*, the proper set of Sparta documents to consider are those Woodman's produced in discovery and that Gross submitted

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[27] *Wisconsin Stat. § 100.30* was originally enacted by Laws of 1939, ch. 56. With the changes made by Laws of 1941, ch. 75, § 4 defined a violation only in terms of proscribed intent; "or effect" was added to § 4 by Laws of 1965, ch. 629.

[28] Although we may not use legislative history to create an ambiguity in a statute, we may use it to reinforce a conclusion that the statute is indeed unambiguous. ***Novak v. Madison Motel Assoc.**, 188 Wis. 2d 407, 416, 525 N.W.2d 123 (Ct. App. 1994)*.

[29] Woodman's refers us to two California cases- ***Tri-Q, Inc. v. Sta-Hi Corp.**, 63 Cal. 2d 199, 404 P.2d 486, 488, 491, 45 Cal. Rptr. 878 (1965)*, and ***Dooley's Hardware Mart v. Food Giant Markets, Inc.**, 21 Cal. App. 3d 513, 98 Cal. Rptr. 543 (1971)*. However these cases are not helpful because the language of the California statute differs significantly from that of *Wis. Stat. § 100.30(3)* in that it prohibits a below cost sale if "for the purpose of injuring competitors or destroying competition" and "proof of [such a sale], together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition." *Cal. Bus. & Prof. Code §§ 17043*, *17071*, cited in ***Tri-Q**, 404 P.2d at 488, 491*, and ***Dooley's**, 21 Cal. App. 3d at 516 n.2, 517 n.4*. We also note that these cases do not address the evidence of intent that is sufficient to entitle a defendant to summary judgment, but, rather, address findings made after a trial to the court.

with his supplemental affidavit. *See* footnote 16. Notations of competitor's prices and calculations or comments based thereon that Wysocki later made on those records to explain, for purposes of this litigation, how and why he had set those prices are not "records maintained in the usual conduct of business," which *§ 100.30(6)(a)*7 requires. *See* ***State v. Williams**, 2002 WI 58, PP42* and *49, 253 Wis. 2d 99, 644 N.W.2d 919* (***HN28***[] generally records prepared in anticipation of litigation are not business records under *Wis. Stat. § 908.03(6)*, the business records exception to the hearsay rule).

[*P54] We have examined all Sparta documents attached to **[****48]** Gross's supplemental affidavit. When there is a notation of a competitor's price, we assume for purposes of this appeal that notation arguably meets the requirements of *Wis. Stat. § 100.30(6)(a)7* and therefore there is no violation of the statute if Woodman's sets its price the same or lower for that grade **[***739]** of fuel on that date. [30] **[****49]** Our review leads us to conclude that **[**226]** on all but two of the dates in the circuit court's addendum-March 9, 1999 and March 12, 1999-there is no notation for at least one grade of fuel that is included on Gross's chart on that date. [31] Accordingly, we conclude there are 293 dates on which it is undisputed that there was a sale of at least one of Woodman's products at a price below the statutory minimum price and for which there is no evidence that the exception in *§ 100.30(6)(a)*7applies.

[227]** *Constitutional Challenges*

[*P55] Woodman's challenges the constitutionality of the Act on two grounds: it is so vague that it constitutes a denial of due process, and it violates due process because a seller may be penalized even if the seller lacks the intent to violate the Act. ***HN29***[] The constitutionality of a statute presents a question of law, which we review de novo. ***State v. Zarnke**, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999)*. In considering **[****50]** both challenges, we bear in mind that, ***HN30***[] like all statutes, the Act "enjoys a strong presumption of constitutionality," and "every presumption must be indulged to sustain" the Act. ***Jackson v. Benson**, 218 Wis. 2d 835, 853, 578 N.W.2d 602 (1998)*.

[*P56] Woodman's contends the Act is vague because the meaning of the following terms are not clear: "wholesaler," "retailer," and "competitor" in *Wis. Stat. § 100.30(3)*; "any cost incurred for transportation" and "other charges that are not otherwise included in the average posted rack price" in *§ 100.30(2)(a)*; and "direct competitor" in *§ 100.30(2)(cj)*, which term is used in the "meets competition" exception in subd. (6)(a)7. The parties assert different standards for judging unconstitutional vagueness, with Gross drawing from civil cases and Woodman's asserting that, because it is subject to treble damages, the statute is penal in nature and therefore a stricter standard should apply. [32] **[****52]** **[**228]** *See* ***Village [***740] of Hoffman Estates v. Flipside, Hoffman***

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[30] For example, the Sparta document for January 22, 1999, contains this handwritten notation at the bottom: "94.9 Matching Conoco West Salem." Gross's chart and the circuit court's addendum show Woodman's price on that date was 94.9 cents for regular gasoline and 99.9 for mid-grade gasoline, and that the statutory minimum price was, respectively, 96.10 and 101.690. We do not count the regular gasoline as a violation because we assume, for purposes of this appeal, that the notation is a business record that satisfies *Wis. Stat. § 100.30(6)(a)7* and shows that Woodman's lowered the price of regular gasoline below the statutory minimum price to match Conoco's price. However, this notation does not even arguably explain why the price for mid-grade gasoline was set below the statutory minimum price. Therefore, Woodman's price of mid-grade gasoline is not based on evidence in Woodman's possession as required by subd. (6)(a)7. We set out this example because Woodman's appears to be of the view that if the Sparta documents show a competitor's price for any grade of fuel on a particular date, sales of all grades on that date come within the exception in subd.(6)(a)7. However, we conclude the only reasonable interpretation of subd. (6)(a)7, as applied to this case, is that the exception must be established for each grade of fuel Woodman's sells.

[31] For March 9, 1999, Gross's chart lists only diesel fuel, with Woodman's price at 99.9, which is below the statutory minimum for that day and for the ten-day window as shown on the chart. However, the notation on the Sparta document for that day says "95.9 to 99.9 matching Kwik Trip," which arguably refers to diesel fuel, since we have no record of another fuel that was matched on that date. The same is true for March 12: Gross's chart lists only diesel fuel, with Woodman's price at 99.9, below the statutory minimum for that day and the ten-day window; the Sparta document notation shows competitor's prices from 95.9 to 105.9.

Estates, Inc.**, 455 U.S. 489, 498, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)* ("HN31***[] The degree of vagueness that the Constitution tolerates-as well as the relative enforcement **[****51]** of fair notice and enforcement-depends in part on the nature of the enactment" and also depends on whether there are civil or criminal penalties.). Gross relies on ***Moedern v. McGinnis**, 70 Wis. 2d 1056, 1073-74, 236 N.W.2d 240 (1975)*, which states that ***HN32***[] the standard for a civil statute is whether it is "so vague and uncertain that it is impossible to execute it or to ascertain the legislative intent with reasonable certainty." With respect to a criminal statute, we have stated ***HN33***[] it is unconstitutionally vague if it either fails to afford proper notice of the conduct it seeks to proscribe or fails to provide an objective standard for enforcement, ***State v Hahn**, 221 Wis. 2d 670, 677, 586 N.W.2d 5 (Ct. App. 1998)*. To give proper notice, a criminal statute must warn people who wish to obey the law that their conduct comes near the proscribed area. ***Id.*** [33]

[*P57] [229]** It is not necessary to decide which standard to apply, because we conclude that Woodman's assertions of vagueness fail even if we apply the standard for criminal statutes. ***HN34***[] Even where criminal statutes are concerned, a statute is not void for vagueness **[****53]** if, by the ordinary process of statutory construction, we can give a practical or sensible meaning to the statute, and this rule applies even if a statute is ambiguous. ***Hahn**, 221 Wis. 2d at 677, 678*. In addition, where, as in this case, the First Amendment is not implicated, the vagueness challenge must be examined in the context of the facts in the particular case. ***United States v. Mazurie**, 419 U.S. 544, 550, 42 L. Ed. 2d 706, 95 S. Ct. 710 (1975)*. We have already concluded the only reasonable construction of the Act is that, whether Woodman's is a wholesaler or retailer, the terminal closest to the location of the retail sale is the correct terminal to use in applying the APT formula. We have also concluded that the statutory language does not support Woodman's construction of the term "competitor." There are no ambiguities on these points, much less vagueness. As for Woodman's other assertions of vagueness, the facts in this case do not show that uncertainty about the meaning of "any cost incurred for transportation" or "other charges …" affected how Woodman's set its prices; nor do the facts show that uncertainty about the meaning of "direct competitor" had any relationship **[****54]** to Woodman's inability to prove that it comes within the exception for meeting the price of a competitor.

[*P58] Woodman's next contends that *Wis. Stat. § 100.30* violates its right to due process because the statute does not **[***741]** require proof of intent or wrongdoing, but instead may be violated based on the effect of a sale, **[**230]** and the sale itself is prima facie evidence of the proscribed effect. However, the ***HN35***[] imposition of liability without fault-even when the statute imposes punitive sanctions-does not in itself violate due process. ***State v. Stepniewski**, 105 Wis. 2d 261, 276, 314 N.W.2d 98 (1982)*; ***State v. Collova**, 79 Wis. 2d 473, 480-84, 255 N.W.2d 581 (1977)*. Statutes that are within the police power of the state may impose even criminal liability on a person whose acts violate the statute, even if the person did not intend to do so. ***State v. Dried Milk Products Coop.**, 16 Wis. 2d 357, 362-63, 114 N.W.2d 412 (1962)*.

[*P59] It is well established that ***HN36***[] the police power of the state includes not only regulations or statutes designed to promote public health and safety, but also those **[****55]** designed to promote economic prosperity.

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[32] Woodman's relies on ***Open Pantry Food Marts of Southeastern Wisconsin v. Falcone**, 92 Wis. 2d 807, 810-11, 286 N.W.2d 149 (Ct. App 1979)*, in which we held that the treble damages provision of *Wis. Stat. § 133.01*, the Wisconsin ***Antitrust Law***, made it punitive as well as remedial, and therefore the statute of limitations in *Wis. Stat. § 893.21*, for private party actions "upon a statute penalty or forfeiture …," applied.

[33] We have also, in the context of an ordinance that provides for a forfeiture, applied the following standard:

A law regulating conduct must give adequate notice of what is prohibited, so as not to delegate "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." ***Grayned v. City of Rockford**, 408 U.S. 104, 108-109, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)*. Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." ***Connally v. General Constr. Co.**, 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926)*.

***Dog Fed'n v. City of South Milwaukee**, 178 Wis. 2d 353, 377-78, 504 N.W.2d 375 (Ct. App. 1993)*.

State v. Ross**, 259 Wis. 379, 48 N.W.2d 460 (1951)*; ***State v. Eau Claire Oil Co.**, 35 Wis. 2d 724, 151 N.W.2d 634 (1967)*. Such regulations and statutes do not offend substantive due process if they are "'not … unreasonable, arbitrary or capricious, and … the means selected … have a real and substantial relation to the object sought to be attained.'" ***Liberty Homes, Inc. v. DIHLR**, 136 Wis. 2d 368, 374-75, 401 N.W.2d 805 (1987)*, citing ***Nebbia v. New York**, 291 U.S. 502, 525, 78 L. Ed. 940, 54 S. Ct. 505 (1934)*. In examining a constitutional challenge to prior versions of *Wis. Stat. § 100.30*, the Wisconsin Supreme Court in ***Ross and ***Eau Claire Oil Co.*** applied this test and concluded that *§ 100.30* was constitutional. Woodman's argues that these cases are inapplicable because they concerned prior versions of the Act which prohibited only sales below statutory cost with injurious intent, and did not include injurious effect. While that is true, the principles applied in these cases are applicable here.

[*P60] [231]** At the time ***Ross*** **[****56]** was decided, *Wis. Stat. § 100.30(4)* (1949) prohibited advertising, offering for sale, and sale below statutory cost "with intent of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor," and evidence of such advertisement, offer, or sale was prima facie evidence of that intent. The challenger argued that this presumption was unreasonable because it amounted to a conclusion of guilt. The court rejected this argument because the statute afforded the opportunity to come forward with evidence to overcome the presumption and the opportunity to show that one of the numerous defenses applied. ***Ross**, 259 Wis. at 386-87*.

[*P61] In ***Eau Claire Oil Co.***, the court again considered a constitutional challenge to the same provision regarding prima facie evidence that was at issue in ***Ross***. *Wis. Stat. § 100.30(4)* (1963). [34] The court concluded the presumption was constitutional because there was a rational connection between the facts presumed-that is, "intent to induce the purchase of other merchandise, or to unfairly divert trade **[****57]** from a competitor or to otherwise injure a competitor," **[**232]** *§ 100.30(4)* (1963)-and the evidence of selling the items below statutory **[***742]** cost. ***Eau Claire Oil Co.**, 35 Wis. 2d at 734*.

[*P62] Applying the principles of ***Ross*** and ***Eau Claire Oil Co.*** to the provisions of *Wis. Stat. § 100.30(3)* **[****58]** regarding the effect of sales below statutory cost, we conclude they do not offend due process. The prohibition of sales below statutory cost that have the effect of inducing the purchase of other merchandise, unfairly diverting trade from a competitor, or otherwise injuring a competitor has a real and substantial relationship to the purpose of the statute, which is to prevent the economic harms that result from such sales. *Section 100.30(1)*. Indeed, the prohibition of sales with the specified injurious effects arguably bears a closer relationship to achieving that purpose than the prohibition with injurious intent, since the former focuses on the very results of below-cost sales that the legislature sought to protect against. For that same reason, there is a rational connection between below-cost sales and the specified injurious effects; therefore, the rebuttable presumption that evidence of the former is proof of the latter does not offend the constitution.

[*P63] There is, finally, no question that the presumption or effect is rebuttable, like the presumption of intent at issue in ***Ross***: the seller has the opportunity of presenting evidence to rebut the presumption, **[****59]** as well as presenting evidence of statutory defenses. ***Ross***, 259 Wis. 386-87; *see also,* ***State ex rel. Strykowski v. Wilkie**, 81 Wis. 2d 491, 531, 261 N.W.2d 434 (1978)* (***HN37***[🡅] a rebuttable presumption that does not prevent a criminal defendant from presenting a defense or take any **[**233]** question of fact from a jury does not abridge the right to a jury trial or deny due process of law). [35]

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[34] In ***State v. Eau Claire Oil Co.**, 35 Wis. 2d 724, 151 N.W.2d 634 (1967)*, the seller also objected to the requirement under then *Wis. Stat. § 100.30(2)(j)* (1963) that, when items of merchandise were sold in combination but separately priced, each separate item was subject to the markup provisions of the statute. The seller asserted there was no economic justification for this when there was an overall profit, and that it was arbitrary in comparison to the manner in which gifts were treated under the statute. The court concluded that these were policy judgments for the legislature to make and were not unconstitutional. ***Id.** at 735-37*.

[35] Woodman's also argues that the current statute, unlike the statute at issue in ***State v. Ross**, 259 Wis. 379, 48 N.W.2d 460 (1951)*, and ***State v. Eau Claire Oil Co.**, 35 Wis. 2d 724, 151 N.W.2d 634 (1967)*, mandates a minimum markup, thus forcing sellers of motor vehicle fuel to set prices above those that take into account their actual costs. Woodman's does not elaborate further on the specific provisions it is challenging. Presumably Woodman's means that the specified markup for doing business

[**60]** CONCLUSION

[*P64] We conclude the circuit court properly exercised its discretion in allowing the second amended complaint to relate back to the filing of the original complaint. We also conclude: (1) there is no genuine material factual dispute that on 293 days Woodman's sold motor vehicle fuel at less than the statutory cost and did not file a notice with DATCP under *Wis. Stat. § 100.30(7)* or have in its possession the evidence required by *§ 100.30(6)(a)*7 for those sales; and (2) Woodman's did not present evidence to dispute the evidence of actual injury submitted by Gross. Accordingly, we hold that Gross is entitled as a matter of law to summary judgment that on 293 days Woodman's violated the Act, and to $ 2,000 for each day of violation **[**234]** for a total of $ 586,000. Because the circuit court held there were 295 days of violations with a resulting award of $ 590,000, we affirm in part, reverse in part and remand with instructions to enter a judgment that is modified to conform to this decision. In addition, we reverse the circuit **[***743]** court's order that trial will be to the court and remand for a jury trial on the alleged violations for March 9 and March 12, 1999, as **[****61]** well as all other remaining factual issues.

By the Court.-Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Dissent by: LUNDSTEN

Dissent

[*P65] LUNDSTEN, J. (*dissenting*). I agree with all parts of the majority opinion, except its conclusion that Woodman's submissions did not create a disputed issue of fact regarding the "effect" of Woodman's diesel fuel pricing. Accordingly, I respectfully dissent.

[*P66] The majority correctly concludes that Woodman's may overcome James Gross's prima facie case by showing it did not intend to violate *Wis. Stat. § 100.30* and that its diesel fuel pricing did not have a negative effect covered by the statute. The majority explains that Gross sufficiently asserted injury by alleging that he lowered his diesel prices in response to Woodman's diesel prices, thereby losing revenue. Majority at PP39, 51. The majority acknowledges that Woodman's presented evidence regarding the inconvenient location of its diesel pump, lack of marketing, and low sales volume to non-Woodman's customers, and that this evidence "creates a reasonable inference that [Woodman's] diesel fuel prices did **[****62]** not divert diesel customers from Gross." Majority at P51. However, in the majority's view, such evidence does not contradict Gross's assertion that he lowered his prices in response to Woodman's diesel **[**235]** prices and lost revenue, thereby suffering an injurious "effect" under *§ 100.30(3)*. Majority at PP48-51. The majority's reasoning seems to be that, regardless whether Woodman's diverted trade from Gross and regardless whether Gross sensibly lowered his diesel prices to compete with Woodman's, it is uncontroverted that Gross did lower his diesel prices in response to Woodman's prices. I view the matter differently.

[*P67] As the majority rightly concludes, Woodman's is a "competitor" within the meaning of *Wis. Stat. § 100.30(3)*. I agree that a party is a competitor under the statute simply by virtue of selling the same fuel product in the relevant geographic area. Majority at PP44-45. More to the point here, I agree with the majority that, although the effort "the seller makes to market a motor vehicle fuel and the actual number of sales it makes" are not relevant to whether the seller is a "competitor," such evidence may be relevant to the effect of the **[****63]** seller's sales. Majority at P45. Stated differently, I agree with the majority's conclusion that just because Woodman's is a "competitor" under the statute does not necessarily mean Woodman's is the sort of competitor whose pricing has an effect on the market. I part company with the majority because I agree with Woodman's that its submissions created a factual dispute regarding Gross's assertion that he lowered his diesel fuel prices in response to

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is required now in all cases, whereas in earlier versions the seller could use a lower markup if it could prove its cost of doing business was less. *Cf. Wis. Stat. § 100.30(2)(am)1*m.b and c with *§ 100.30(2)(a)* and *(b)* (1949) and (1963). Woodman's, however, has presented no evidence that its cost of doing business is less than the statutory markup, and the evidence is that Woodman's used the statutory markup in setting its prices. In the absence of a developed argument that relates the facts of this case to the provision Woodman's challenges, we decline to address it.

Woodman's diesel fuel pricing. Woodman's factual assertions tend to show that no reasonable diesel fuel seller would care about the diesel fuel prices charged by Woodman's.

[*P68] The affidavit of Thomas Wysocki, manager of Woodman's Onalaska store, contains the following assertions. Woodman's Onalaska store has had only one diesel pump since the store opened its fuel station. Woodman's installed the single diesel pump for the sole **[**236]** purpose of fueling its own semi-trucks, which haul products to and from Woodman's stores. "Woodman's [diesel pump] is not readily accessible to or customer friendly for non-Woodman's semi-trucks." A semi-tractor must first drop its trailer in order to maneuver **[***744]** up to the pump, and there is no room in the **[****64]** "driveway/parking cement area of the gas station" to drop trailers. Woodman's semi drivers drop their trailers at a different location, such as the warehouse docks, before heading to the pump to fill up. Diesel fuel sales not made to Woodman's own semi-trucks are not made to other semi-trucks, but to "owners of older cars that still utilize diesel fuel." Wysocki has been the manager of Woodman's Onalaska store since it opened in 1994 and he has never seen a non-Woodman's semi-truck fill up with diesel fuel at the Woodman's station. Woodman's has no marketing policy or strategy to sell diesel fuel to the public. Woodman's did not post or advertise its diesel price. The only way a customer could determine Woodman's diesel fuel price was to read the price on the pump itself.

[*P69] Wysocki's affidavit avers that diesel fuel sales are "insignificant" compared with sales of other types of fuels. A chart, prepared by Wysocki and attached to his affidavit, addresses the 421 days, between September 13, 1998, and June 3, 2000, on which Gross originally asserted violations. Not counting sales to Woodman's own semi-trucks, the chart documents 179 days with no diesel fuel sales at all, 227 **[****65]** days with less than ten gallons sold, and 275 days with less than twenty gallons sold. Thus, not counting Woodman's own trucks, the chart shows that on 42% of the days Gross initially alleged violations, Woodman's made no diesel fuel sales at all, and on 65% of those days, Woodman's sold less than twenty gallons.

[*P70] **[**237]** Wysocki asserted, in contrast, that Gross's Citgo Quick Mart station advertises diesel prices, along with other fuel prices, on a sign clearly visible from an adjacent four-lane highway. Gross's diesel pumps are situated so that a semi-truck driver can easily pull right up to the pumps without dropping its trailer.

[*P71] Based on Wysocki's assertions, it could reasonably be inferred that Gross never saw billboards or other signs advertising Woodman's as a diesel fuel seller, that Gross never saw Woodman's diesel prices posted in a place visible from the street, that Gross himself had to go up to Woodman's diesel pump to see the price, and that Gross never saw a non-Woodman's semi-truck at Woodman's diesel pump and seldom saw any vehicle at that pump. The question naturally arises whether Gross actually lowered his diesel prices in response to Woodman's **[****66]** diesel prices and, therefore, whether Woodman's diesel pricing and sales had any effect on Gross.

[*P72] The majority acknowledges that Woodman's evidence "creates a reasonable inference that [Woodman's] diesel fuel prices did not divert diesel customers from Gross." Majority at P51. I conclude that this same evidence casts doubt on Gross's claim of injury. Just as the facts suggest that Woodman's did not divert diesel customers from Gross, they also suggest that Gross *knew* Woodman's posed no threat to Gross's diesel fuel business.

[*P73] It might be argued that Woodman's failed to offer evidence contradicting Gross's assertion because Woodman's did not offer evidence showing that semi-tractors are the main market for diesel fuel. I disagree. In his deposition, Willard Woodman, president of Woodman's, (1) expressed an unspecified degree of familiarity with the market for motor vehicle fuels, (2) **[**238]** explained what goes into Woodman's fuel pricing decisions, and (3) said he sometimes assists in making gasoline pricing decisions. Willard Woodman averred that diesel fuel is "really [a] truck stop business." Jurors could interpret this assertion, in light of common experience, **[****67]** to mean that semi-trucks are the main market for diesel fuel. While additional expert **[***745]** testimony might be desirable at trial, it is not needed to place this factual issue before a jury. "The requirement of expert testimony is an extraordinary one, and [should be] applied by the trial court only when unusually complex or esoteric issues are before the jury." ***White v. Leeder****, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989)*.

[*P74] I note that the lengthy majority decision only begins to reveal the complicated factual and legal issues dealt with before the circuit court. The narrow issue I address was one of dozens. While Woodman's made the argument I adopt here, it did so primarily in the context of arguing that it was not a "competitor" under *Wis. Stat. § 100.30(3)* and that it did not "intend" to violate the statute. Nonetheless, Woodman's also argued, both before the circuit court and before this court, that its evidence put in dispute whether its diesel sales had an *effect* on Gross. With focused hindsight, I conclude that this argument should have prevailed.

[*P75] Having rejected the majority's conclusion regarding "effect, **[****68]** " I must briefly address "intent." The submissions show there is a factual dispute regarding intent with respect to diesel fuel sales. The same evidence summarized above-including the assertions that Woodman's had only one diesel pump, did not advertise its diesel price (except at the pump), and had **[**239]** no diesel fuel marketing strategy-suggests there was no intent to unfairly divert trade or otherwise injure a competitor.

[*P76] Accordingly, I would reverse the circuit court's order granting summary judgment in favor of Gross with respect to the alleged violations involving diesel fuel sales below the ATP formula.

Scana Energy Mktg. v. Cobb Energy Mgmt. Corp.

Court of Appeals of Georgia, Second Division

November 14, 2002, Decided

A03A0038, A03A0039.

Reporter

259 Ga. App. 216 *; 576 S.E.2d 548 **; 2002 Ga. App. LEXIS 1459 ***; 2002 Fulton County D. Rep. 3416

SCANA ENERGY MARKETING, INC. v. COBB ENERGY MANAGEMENT CORPORATION et al.; and vice versa.

Subsequent History: [*1]** Reconsideration Denied January 15, 2003. Certiorari Applied For.

Writ of certiorari denied *Scana Energy Mktg., Inc. v. Cobb Energy Mgmt. Corp., 2003 Ga. LEXIS 454 (Ga., Apr. 29, 2003)*

Prior History: Arbitration. Cobb Superior Court. Before Judge Staley.

Disposition: Judgment affirmed in Case No. A03A0038. Judgment reversed in Case No. A03A0039.

Core Terms

arbitrators, customers, territories, discriminatory, default, vacate, rates, natural gas, overstepping, retail, arbitration award, Electric, superior court, trial court, baseball, remedies, grounds, terms

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

HN1[] **Alternative Dispute Resolution, Validity of ADR Methods**

In baseball arbitration, the panel is limited to selecting one alternative in order to reinforce the incentives of moving the parties toward their best judgment of a realistic outcome.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Financing > Grants & Reservations > General Overview

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Contracts for Service

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN2[] **Natural Gas Industry, Distribution & Sale**

By statute and regulations, a certified gas marketer has the right to set retail natural gas prices in Georgia; however, the marketer, by its contracts, may voluntarily limit or surrender such rights to set rates, even if the Georgia Public Service Commission lacks such power. *O.C.G.A. § 46-4-160*.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN3[] **Contract Conditions & Provisions, Arbitration Clauses**

An arbitration award should be consistent with terms of the underlying agreement and reflect the "essence" of that contract; it must not demonstrate an "imperfect execution" of the arbitrator's authority. Although an arbitrator has some latitude in fashioning remedies, he is not free to ignore the express terms of a valid and enforceable contract.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN4[] **Alternative Dispute Resolution, Judicial Review**

An arbitration award cannot be set aside for mistakes of fact made by the arbitrators, but an award may only be set aside for violation of one or more of the statutory grounds, because these are the exclusive grounds to vacate all or part of an arbitration award: (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of an arbitrator appointed as a neutral; (3) an overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) a failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection. *O.C.G.A. § 9-9-13(b)*.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Governments > Courts > Common Law

HN5[] **Alternative Dispute Resolution, Judicial Review**

A court reviewing an arbitration award is prohibited from weighing the evidence or determining the sufficiency of the evidence. The review must be confined to the four statutory grounds under *O.C.G.A. § 9-9-13(b)* because the Georgia Arbitration Code, *O.C.G.A. § 9-9-1 et seq.*, is in derogation of the common law and must be strictly construed.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN6[] Alternative Dispute Resolution, Judicial Review

Inasmuch as the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., does not list manifest disregard of the law as a grounds for vacating an arbitration award, it cannot be used as an additional ground for vacatur. Nor can it be said that a manifest disregard of the law fits within the framework of the third statutory ground listed, overstepping of the arbitrator's authority. That ground only comes into play when an arbitrator determines matters beyond the scope of the case. It is not applicable where the issue to be decided, i.e., defaults under the agreement, are properly before the arbitrators.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN7[] Alternative Dispute Resolution, Validity of ADR Methods

See O.C.G.A. § 9-9-13(d).

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN8[] Contract Conditions & Provisions, Arbitration Clauses

To obtain a resolution, arbitrators are free to apply broad principles of justice and good conscience, and decide according to their concept or notion of justice. This is particularly true where the parties, by contractual agreement, have entered into "baseball arbitration," because the parties have tied the hands of the arbitrators, requiring them to select without changing among remedies presented, i.e., the best of a bad lot.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN9[] Jurisdiction, Exclusive Jurisdiction

To the extent that either an agreement or a remedy imposed by the arbitrators as a remedy constitutes a violation of federal antitrust laws, exclusive jurisdiction of such issues lies within the federal courts.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Governments > Courts > Authority to Adjudicate

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Governments > Courts > Common Law

HN10[] **Alternative Dispute Resolution, Arbitration**

Since the Georgia Arbitration Code, *O.C.G.A. § 9-9-1 et seq.*, is in derogation of common law, requiring strict construction, a trial court can only enter judgment on the award or vacate it under one or more of the statutory grounds. The trial court lacks the statutory authority to alter an arbitrators' award. *O.C.G.A. § 9-9-13(b)*. The arbitration code demands that courts give extraordinary deference to the arbitration process and awards so that the trial court cannot alter the award. The power of a court to vacate an arbitration award has been severely limited in order not to frustrate the legislative purpose of avoiding litigation by resort to arbitration.

Counsel: Crim & Bassler, Harry W. Bassler, Joseph M. Murphey, for appellant.

Brock, Clay, Calhoun, Wilson & Rogers, Charles C. Clay, Nicholas P. Panayotopoulos, Paul, Hastings, Janofsky & Walker, William B. Hill, Jr., for appellees.

Judges: ELDRIDGE, Judge. Johnson, P. J., and Mikell, J., concur.

Opinion by: ELDRIDGE

Opinion

[550]** **[*216]** ELDRIDGE, Judge.

This case is an appeal, Case No. A03A0038, and a cross-appeal, Case No. A03A0039, from an arbitration award. The facts are: Scana Energy Marketing, Inc. ("SCANA") entered into a Natural Gas Retail Service Alliance Agreement ("Agreement") with Cobb Energy Management Corporation, Upson Electric Membership Corporation, Lamar Electric Membership Corporation, Central Georgia Electric Membership Corporation, Greystone Power Corporation, and Snapping Shoals Energy Management Corporation ("Allies"), all EMCs, to help SCANA penetrate the deregulated retail natural gas market in Georgia and to keep them from possibly qualifying to become competitors. The Allies had the obligation of assisting SCANA in locating and acquiring residential and commercial customers in the areas where the Allies each provided electric services from among its customers or those familiar with the Allies within the EMCs' territories. Upon obtaining a 30 percent market share, SCANA sought to terminate the **[***2]** obligation, avoiding the payment of fees and compensation to the Allies under the Agreement. The Allies invoked the mandatory binding arbitration provision under the Agreement to resolve disputes and under the CPR Institute for Dispute Resolution ("CPR") rules. The Agreement's arbitration clause provided for "baseball arbitration" where the arbitrators had to choose between one of the parties' proposed remedies in its entirety and without alteration. Agreement, § 9.3; see for explanation of "baseball arbitration" *Pennsylvania Envtl. Def. Fund v. Canon-McMillan School Dist., 152 F.3d 228, 239 (3d Cir. Pa. 1998)* (Garth, C. J., dissenting) *HN1*[] (in baseball arbitration, the Panel is limited to selecting one alternative in order to reinforce the incentives of moving the parties toward their best judgment of a realistic outcome). In turn, SCANA sought to avoid arbitration, arguing that either the Agreement was void or that SCANA had terminated the Agreement. On December 11, 2000, the superior court ordered the parties to commence arbitration of the disputes under the Agreement. SCANA sought to have the award vacated, alleging that the arbitrators overstepped **[*217]** their authority under **[***3]** the Agreement and the law, but the superior court confirmed the award. SCANA appeals. Finding no error, we affirm in Case No. A03A0038.

Case No. A03A0038

1. SCANA contends that the superior court erred in denying its motion to vacate the arbitrators' award, because the arbitrators overstepped their authority without any legal or contractual authority in making the award. We do not agree.

Of the parties' proposed remedies, the arbitrators, under the Agreement's arbitration provisions, selected the Allies' Remedy No. 5, which was stated as a remedy to the defaults or in the alternative as an offer of amendment to the Agreement:

from and after the Panel's Order, SCANA shall pay the Petitioners the fees and reimbursements as set forth in the Alliance Agreement, and SCANA shall remove the one dollar additional charge and not impose any additional charge on gas customers located within the Petitioners' territories, where such charges are not also imposed on all SCANA gas customers in the State of Georgia; *provided however*, that SCANA shall have the option to be exercised not later than 90 days from the date of the Panel Final Order to elect, by written notice to the Petitioners, **[***4]** that the Petitioners shall provide all Call Center Services and Billing Services for a flat fee of $ 3.95 per customer per month, each such amount escalated annually at the rate of the Consumer Price Index, and in that instance SCANA shall remove the $ 1.00 additional charge imposed on gas customers within the Petitioners' territories and not thereafter impose any additional charge on gas customers located within the Petitioners' territories where such charges are not also imposed on all SCANA gas customers in the State of Georgia.

[551]** SCANA asserts that in selecting this remedy the arbitrators, by a vote of two to one, overstepped their authority as arbitrators *O.C.G.A. § 9-9-13 (b) (3)*. SCANA opposes the award and has rejected the alternative offer of amendment to the Agreement contained in the award.

(a) To the contrary, there has been no overstepping of authority by the arbitrators, because in the Agreement, SCANA granted such power and authority to prohibit discriminatory treatment against gas customers in the Allies' territories by agreeing to bind itself in its fees and rates applicable to gas customers in the Allies' territories and set forth that discriminatory **[***5]** rates applicable to such gas customers within the Allies' territories would constitute a default of the Agreement. The Agreement provides: "[if] SCANA fails materially to provide gas and related customer service at market rates or better, in accordance with Prudent Utility Practice[, then such discriminatory rate constitutes a default of the Agreement]." See Agreement, Article XI -- Default, 11.2 Performance Default, (a) (iii). Thus, the dollar per customer fee charged to all gas customers within the Allies' territories **[*218]** and not charged to all other SCANA gas customers statewide constituted a clear act of default by such discriminatory conduct under the clear, plain, and unambiguous terms of the Agreement. Further, SCANA failed to establish that such discriminatory fee was in any way justified under any "Prudent Utility Practice."

Since the Agreement prohibited SCANA from imposing discriminatory fees and rates on gas customers within the Allies' territories, then such remedy was clearly within the scope of the arbitrators' authority and was properly before the arbitrators as one of the defaults under the Agreement, along with the failure to pay or to reimburse the *Allies. Ralston v. City of Dahlonega, 236 Ga. App. 386, 388 (3) (512 S.E.2d 300) (1999)*. **[***6]** Since SCANA, by agreement, had contractually limited its ability to set fees or rates that discriminated against the gas customers in the Allies' territories, such remedy was not prejudicial nor the product of overstepping of the arbitrators' authority. See *O.C.G.A. § 9-9-13 (b) (3)*; *Bennett v. Builders II, Inc., 237 Ga. App. 756, 757 (3) (516 S.E.2d 808) (1999)*.

(b) ***HN2***[] By statute and regulations, SCANA, as a certified gas marketer, has the right to set retail natural gas prices in Georgia; however, SCANA, by its contracts, may voluntarily limit or surrender such rights to set rates, even if the Georgia Public Service Commission lacks such power *O.C.G.A. § 46-4-160*.

(c) Here the arbitrators' award compelled SCANA to remove the discriminatory fee of $ 1 from the monthly billing to each gas customer in the Allies' territories to avoid defaulting on the Agreement.

HN3[] An arbitration award should be consistent with terms of the underlying agreement and reflect the "essence" of that contract; it must not demonstrate an "imperfect execution" of the arbitrator's authority. Although an arbitrator has some latitude **[***7]** in fashioning remedies, he is not free to ignore the express terms of a valid and enforceable contract.

(Citations omitted.) *Sweatt v. International Dev. Corp., 242 Ga. App. 753, 755 (1) (531 S.E.2d 192) (2000)*. Here, the arbitrators found the scope of their authority within the four corners of the contract and were resolving one of several acts of default under the Agreement by SCANA.

(d) SCANA contends that the arbitrators made a factually incorrect determination that all retail gas customers in the Allies' territories were electric customers of the Allies, because some of the gas customers were not the Allies' electric customers. Article XI, Sec. 11.2, (a) (iii) makes no distinction between customers of the Allies and all retail gas customers within the Allies' territories, so that such **[*219]** provision applies to all retail gas customers within the Allies' territories.

Further, ***HN4***[] an arbitration award cannot be set aside for mistakes of fact made by the arbitrators, but an award may only be set aside for violation of one or more of the statutory grounds, because these are the exclusive grounds to vacate all or part of an arbitration award:

(1) Corruption, fraud, or **[***8]** misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping by the arbitrators of **[**552]** their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

O.C.G.A. § 9-9-13 (b); *Progressive Data Systems, Inc. v. Jefferson Randolph Corp., 275 Ga. 420 (568 S.E.2d 474) (2002)*; *Greene v. Hundley, 266 Ga. 592, 596-597 (3) (468 S.E.2d 350) (1996)* ***HN5***[] (reviewing court prohibited from weighing the evidence or determining sufficiency of the evidence); *Ralston v. City of Dahlonega, supra at 386*. "Review must be confined to the four statutory grounds. [This] is because the Georgia Arbitration Code is in derogation of the common law and must be strictly construed." (Citations and punctuation omitted.) *Progressive Data Systems, Inc. v. Jefferson Randolph Corporation, supra.*

(e) To the extent that the arbitrators disregarded Georgia contract law in construing **[***9]** the Agreement or in fashioning a remedy from the remedies available to them under baseball arbitration provided by the Agreement,

HN6[] inasmuch as the Code does not list "manifest disregard of the law" as a ground for vacating an *arbitration award*, it cannot be used as an additional ground for vacatur. Nor can it be said that a "manifest disregard of the law" fits within the framework of the third statutory ground listed . . . -- overstepping of the arbitrator's authority. That ground only comes into play when an arbitrator determines matters beyond the scope of the case. It is not applicable where, as here, the issue to be decided, i.e., [defaults under the Agreement, are] properly before the arbitrators.

(Citations omitted; emphasis supplied.) *Progressive Data Systems, Inc. v. Jefferson Randolph Corporation, supra.*

(f) Remedy No. 5 does not regulate SCANA's rates beyond the terms of the Agreement in regard to retail natural gas sales throughout the State of Georgia, because in the Agreement, SCANA agreed **[*220]** to treat gas customers within the Allies' territories in the same fashion as natural gas customers throughout the rest of Georgia.

However, in the alternative to the remedy, Remedy No. 5 offers, **[***10]** but does not order, an alternative remedy that SCANA could choose to apply to all natural gas customers in the Allies' territories, and which SCANA could of its own volition choose to implement and set as a fee as part of its rates. Such offer was to amend the Agreement between SCANA and the Allies, setting a flat fee for services. Only SCANA has the power and authority to impose such fee as part of its rate-making power. If SCANA chose to impose such fee uniformly, then the Agreement would prohibit the $ 1 fee on gas customers within the Allies' territories, which is within the Agreement terms to prohibit. Such alternative remedy, which the arbitrators could not order into effect, does not void the remedy of the prohibition of the $ 1 fee within the Allies' territories, which is within the terms of the Agreement's remedies. Had the arbitrators ordered such alternative remedy to be implemented, instead of stating it as an alternative offer of contract amendment to be implemented in the discretion of SCANA, this would be "overstepping by the arbitrators," because the Agreement did not contemplate any effect on rates and fees throughout the rest of the State or even within the Allies' **[***11]** territories. The plain and unambiguous reading of Remedy No. 5, itself, excluding the offer of contract amendment, does not order SCANA to do anything except to cease the imposition of the $ 1 fee within the Allies' territories in a discriminatory fashion and to pay the Allies what it owes to them, which provisions are within the terms of the Agreement.

(g) SCANA contends that the arbitrators should not have dealt with the discriminatory rate paid by gas customers in the Allies' territories, because the arbitrators used equity in reaching an equitable remedy *O.C.G.A. § 9-9-13 (d)* states: ***HN7***[] "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not [a] ground for vacating or refusing to confirm the award." See *Greene v. Hundley, supra at 595*. ***HN8***[] To obtain a resolution, arbitrators "'are free to apply **[**553]** broad principles of justice and good conscience, and decide according to their concept or notion of justice.'" *Bartlett v. Dimension Designs, Ltd., 195 Ga. App. 845, 848 (3) (395 S.E.2d 64) (1990)*, overruled on other grounds, *Pace Constr. Corp. v. Northpark Assoc., 215 Ga. App. 438, 439 (450 S.E.2d 828) (1994)*. **[***12]** This is particularly true where the parties, by contractual agreement, have entered into "baseball arbitration," because the parties have tied the hands of the arbitrators, requiring them to select without changing among remedies presented, i.e., the best of a bad lot.

[*221] (h) ***HN9***[] To the extent that either the Agreement or Remedy No. 5 constitutes a violation of Federal Antitrust Laws, exclusive jurisdiction of such issues lies within the federal courts.

Case No. A03A0039

2. The arbitrators' Remedy No. 5 provided for SCANA to accept or to reject the alternative remedy, the offer of contract amendment, and of setting a $ 3.95 flat rate for Call Center and Billing Services by the Allies within 90 days from the award by November 2, 2001; the superior court changed such date to the date of the trial court's order of May 7, 2002, which had the effect of extending the time within which SCANA could accept the offer that the Allies intended to be on the table for a finite time. In their cross-appeal, the Allies contend that such change by the trial court was error. We agree.

The superior court erred in altering the date in the arbitrators' award. ***HN10***[] Since the Georgia Arbitration Code is in derogation of **[***13]** common law, requiring strict construction, the trial court could only enter judgment on the award or vacate it under one or more of the statutory grounds. The trial court lacked statutory authority to alter the arbitrators' award in this fashion. See *O.C.G.A. § 9-9-13 (b)*; *Progressive Data Systems, Inc. v. Jefferson Randolph Corporation, supra*; *Greene v. Hundley, supra at 597*; *Ralston v. City of Dahlonega, supra at 387*. The Arbitration Code demands that courts give extraordinary deference to the arbitration process and awards so that the trial court cannot alter the award. See generally *Bartlett v. Dimension Designs, Ltd., supra at 848* (3). "The power of a court to vacate an arbitration award has been *severely limited* in order not to frustrate the legislative purpose of avoiding litigation by resort to arbitration." (Citation omitted; emphasis in original.) *Haddon v. Shaheen & Co., 231 Ga. App. 596, 597 (1) (499 S.E.2d 693) (1998)*.

Since the making or setting of rates, except where limited by the Agreement as determined in Division 1, is a discretionary right of SCANA, then neither **[***14]** the arbitrators nor the trial court could mandate SCANA to exercise such discretion by any date certain. SCANA could exercise the discretion to impose a $ 3.95 rate upon all natural gas users in the Allies' territories to be paid to the Allies for its services at any time, except as otherwise limited by the Agreement.

First, Remedy No. 5 of the Allies constituted a remedy in which the Allies, under the express terms of the Agreement, would be paid the fees owed and gas customers within the Allies' territories would be relieved of the $ 1 discriminatory fees; second, in the alternative, the Allies made a time-limited offer to SCANA that the Agreement be amended, requiring the Allies to receive $ 3.95 per customer within the Allies' territories, and the $ 1 fee per customer would be **[*222]** dropped. Such offer to modify the Agreement in no way constituted rate making, because for such fee to become effective, SCANA had to agree to it within 90 days of the final award of the arbitrators. SCANA, by its affirmative action in accepting the offer of amendment as an alternative to the remedy, would itself exercise discretion to change the natural gas rates within the Allies' territories. The arbitrators **[***15]** accepted the Allies' Remedy No. 5 with the alternative offer of a remedy, which constituted an offer of contract modification made by the Allies to be accepted or rejected within 90 days of the arbitrators' award. The failure of SCANA to accept such offer of modification to the Agreement within 90 days of the arbitrators' award and its action to vacate the award caused such offer to lapse by its express terms, leaving the first part of Remedy No. 5 **[**554]** under the Agreement still in effect. Since SCANA has not chosen to accept such Agreement amendment and impose such rate, then SCANA is bound under the arbitrators' award to pay all fees and reimbursements to the Allies and to remove the $ 1 discriminatory charge on all gas customers within the Allies' territories.

Judgment affirmed in Case No. A03A0038. Judgment reversed in Case No. A03A0039. Johnson, P. J., and Mikell, J., concur.

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Cadence Design Systems, Inc. v. Avant! Corp.

Supreme Court of California

November 21, 2002, Decided ; November 21, 2002, Filed

No. S098266.

Reporter

29 Cal. 4th 215 *; 57 P.3d 647 **; 127 Cal. Rptr. 2d 169 ***; 2002 Cal. LEXIS 7960 ****; 2002 Cal. Daily Op. Service 11301; 2002 Daily Journal DAR 13129; 65 U.S.P.Q.2D (BNA) 1678

CADENCE DESIGN SYSTEMS, INC., Plaintiff and Appellant, v. AVANT! CORPORATION, Defendant and Appellant.

Prior History: [**1]** Ninth Cir.Ct.App. Nos. 99-17648, 99-17649. U.S. Dist. Ct. No. CV 95-20828.

Cadence Design Sys. v. Avant! Corp., 253 F.3d 1147, 2001 U.S. App. LEXIS 12093 (9th Cir. Cal. 2001).

Disposition: We conclude that a plaintiff's claim for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use or disclosure of the secret augments the initial claim rather than arises as a separate claim.

Core Terms

misappropriation, trade secret, single claim, disclosure, occurring, purposes, misuse, improper means, parties, secret, infringement, patent, separate claim, give rise, confidential, continuing wrong, cause of action, source code

LexisNexis® Headnotes

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Economic Value

HN1[] **Business Torts, Unfair Business Practices**

See *Cal. Civ. Code § 3426.1(d)*.

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Trade Secrets Law > Misappropriation Actions > Definitions of Misappropriation

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

HN2[] **Elements of Misappropriation, Acquisition**

See *Cal. Civ. Code § 3426.1(b)*.

Torts > Business Torts > Unfair Business Practices > General Overview

HN3[] **Business Torts, Unfair Business Practices**

See *Cal. Civ. Code § 3426.1(a)*.

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

Trade Secrets Law > Misappropriation Actions > Unfair Competition

Trade Secrets Law > Nonprotected Information > Reverse Engineering

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN4[] **Federal Versus State Law, *Antitrust Law***

The legal protection accorded trade secrets is fundamentally different from that given to patents, in which the patent owner acquires a limited term monopoly over the patented technology, and use of that technology by whatever means infringes the patent. The owner of the trade secret is protected only against the appropriation of the secret by improper means and the subsequent use or disclosure of the improperly acquired secret. There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Unfair Business Practices > General Overview

HN5[] **Statute of Limitations, Time Limitations**

See *Cal. Civ. Code § 3426.6*.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Governments > Legislation > Statute of Limitations > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN6[] Tolling of Statute of Limitations, Discovery Rule

Cal. Civ. Code § 3426 of the California Uniform Trade Secrets Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Definitions of Misappropriation

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Disclosures

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

HN7[] Legislation, Statute of Limitations

Under Cal. Civ. Code § 3426 of the California Uniform Trade Secrets Act, "continuing misappropriation" is the continuing use or disclosure of a trade secret after that secret was acquired by improper means or as otherwise specified in Cal. Civ. Code § 3426.1(b). Thus, for statute of limitations purposes, a continuing misappropriation is viewed as a single claim. Misappropriation does not give rise to multiple claims each time the trade secret is misused or improperly disclosed.

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > General Overview

HN8[] **Legislation, Statute of Limitations**

A misappropriation within the meaning of *Cal. Civ. Code § 3426* of the California Uniform Trade Secrets Act occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. However, a claim for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in *§ 3426.6*. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation, rather than as giving rise to a separate claim.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN9[] **Bad Faith, Fraud & Nonuse, Misappropriation**

A misappropriation of trade secret claim must be defined in the context of litigation.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > General Overview

HN10[] Bad Faith, Fraud & Nonuse, Misappropriation

Under *Cal. Civ. Code § 3426.6* of the California Uniform Trade Secrets Act, separate "claims" accruing at different times cannot have the same limitations period.

Governments > Legislation > Statute of Limitations > General Overview

HN11[] Legislation, Statute of Limitations

Each civil action possesses its own statutorily prescribed limitations period. *Cal. Code Civ. Proc. § 312*.

Torts > Business Torts > Unfair Business Practices > General Overview

HN12[] Business Torts, Unfair Business Practices

See *Cal. Civ. Code § 3426.10*.

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Federal Versus State Law > Common Law

Trade Secrets Law > Misappropriation Actions > General Overview

HN13[] Business Torts, Unfair Business Practices

A continuing misappropriation of trade secrets is not necessarily a single claim. Rather, the claim must be divided in two if the continuing misappropriation took place partly before January 1, 1985: one common law claim for misappropriation occurring before that date, and one claim under *Cal. Civ. Code § 3426* of the California Uniform Trade Secrets Act for misappropriation occurring thereafter.

Torts > Procedural Matters > Multiple Defendants > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > General Overview

HN14[] Procedural Matters, Multiple Defendants

An act of continuing misappropriation of trade secrets constitutes more than one claim when multiple defendants are involved.

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Uniform Act

Trade Secrets Law > Misappropriation Actions > Definitions of Misappropriation

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Disclosures

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

HN15[] **Elements of Misappropriation, Acquisition**

Under *Cal. Civ. Code § 3426* of the California Uniform Trade Secrets Act, the definition of misappropriation includes disclosure or use of a trade secret by persons who knew or had reason to know that the trade secret was acquired by improper means. *Cal. Civ. Code § 3426.1(b)(2)(B)(i)-(ii)*.

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > Unfair Business Practices > Defenses

Torts > Procedural Matters > Multiple Defendants > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

HN16[] **Trade Secret Determination Factors, Continuous Use**

There may be separate claims of continuing misappropriation of trade secrets among different defendants, with differing dates of accrual and types of tortious conduct: some defendants liable for initial misappropriation of the trade secret, others only for later continuing use.

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Property Rights

HN17[] **Business Torts, Unfair Business Practices**

The nature of a trade secret as a property interest and the means by which the interest can be vindicated are matters of state law.

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Uniform Act

HN18[] Business Torts, Unfair Business Practices

For litigation purposes, *Cal. Civ. Code § 3426* of the California Uniform Trade Secrets Act defines an act of continuing misappropriation of trade secrets as a single claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN19[] Defenses, Demurrers & Objections, Affirmative Defenses

Parties to a release in a trade secret dispute remain free to fashion the release as broadly or narrowly as they choose.

Civil Procedure > Remedies > General Overview

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > Remedies > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

HN20[] Civil Procedure, Remedies

Under *Cal. Civ. Code § 3426* of the California Uniform Trade Secrets Act, a trade secret infringer is not rewarded for its infringement with a license to use the infringed technology. Rather, a successful trade secret plaintiff is entitled to the full panoply of remedies, including injunctive relief against further misappropriation, *Cal. Civ. Code § 3426.2*, damages for actual loss, *Cal. Civ. Code § 3426.3*, and relief from unjust enrichment, *§ 3426.3*.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

A corporation in the field of integrated circuit design automation sued a competitor for misappropriation of trade secrets after its vice-president joined the competitor. The parties negotiated a settlement of the claims and signed a release. Thereafter, plaintiff sued defendant for misuse of the secrets occurring after the date of the release. The trial court ruled on summary judgment motions that all of the claims for postrelease misuse were barred by the release. (U.S. Dist. Ct. No. CV 95-20828.) On plaintiff's appeal, the Ninth Circuit Court of Appeals certified the following question to the California Supreme Court: Under the California Uniform Trade Secrets Act (UTSA) (*Civ. Code, § 3426*), when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret? (Ninth Cir. U.S. Ct. App., Nos. 99-17648 and 99-17649.) The Supreme Court accepted the certification under Cal. Rules of Court, rule 29.5.

The Supreme Court held that a plaintiff's claim under the UTSA for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use of disclosure of the secret augments the initial claim rather than arises as a separate claim. Under this interpretation of the UTSA, a trade secret infringer is not rewarded for its infringement with a license to use the infringed technology

after the parties settle a claim and execute a release. The parties to the release remain free to fashion the release as broadly or as narrowly as they choose, and a successful is entitled to the full panoply of remedies, including injunctive, damages for actual loss, and relief from unjust enrichment. (Opinion by Moreno, J., with Kennard, Acting C. J., Baxter, Chin, and Brown, JJ., Nares, J., * and Nott, J.,+ concurring.)

Headnotes

CA(1a)[] **(1a)** ***CA(1b)***[] **(1b)** ***CA(1c)***[] **(1c)**

Unfair Competition § 7—Use of Trade Secrets—California Uniform Trade Secrets Acty—When Claim for Continuing Misappropriation Arises—Single or Multiple Claims.

--A plaintiff's claim under the California Uniform Trade Secrets Act (*Civ. Code, § 3426*) for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated. Each subsequent use or disclosure of the secret does not give rise to a separate claim, but rather augments the initial claim. This interpretation is supported by *Civ. Code, § 3426.6*, the act's statute of limitations, which provides that "a continuing misappropriation constitutes a single claim." The drafters of that provision explicitly affirmed prior case law supporting this interpretation, and rejected the contrary view that each misappropriation gives rise to a separate claim. This provision, as well as the act's definition of "misappropriation" (*Civ. Code, § 3426.1, subd. (b)*), reveal a distinction between a "misappropriation" and a "claim." A "misappropriation" occurs not only at the time of the initial acquisition of the trade secret, but also with each misuse or wrongful disclosure of the secret. A "claim" for misappropriation arises against a given defendant only once, at the time of the initial misappropriation, with each new misuse or wrongful disclosure augmenting that single claim. In the context of a settlement and release of a claim, this interpretation does not effectively reward the defendant with a license to use the misappropriated technology after execution of the release or discourage parties from entering into such releases. The parties remain free to fashion the release as broadly or narrowly as they choose, and a successful plaintiff is entitled to the full panoply of remedies, including injunctive relief, damages for actual loss, and relief from unjust enrichment. **[****2]**

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 108 et seq.]

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

Appellate Review § 119—Dismissal—Mootness—Settlement—Exception.

--When parties settle a case after oral argument, the Supreme Court may nonetheless exercise its discretion to issue an opinion to resolve the legal issues raised, which are of continuing public interest and are likely to recur.

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

Unfair Competition § 7—Use of Trade Secrets—Protection—Distinction from Patents.

--The legal protection accorded trade secrets is fundamentally different from that given to patents, in which the patent owner acquires a limited term monopoly over the patented technology, and another party's use of that technology by whatever means infringes the patent. By contrast, the owner of a trade secret is protected only

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

+ Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

against the appropriation of the secret by improper means and the subsequent use or disclosure of the improperly acquired secret. There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used.

Counsel: Keker & Van Nest, John W. Keker, Jeffrey R. Chanin, Michael H. Page and Ragesh K. Tangri for Plaintiff and Appellant.

James Pooley as Amicus Curiae on behalf of Plaintiff and Appellant.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Bernard A. Burk and Jeffrey E. Faucette for Oracle Corporation, Xilinx, Inc., and 3Com Corporation as Amici Curiae on behalf of Plaintiff and Appellant.

O'Melveny & Myers, Daniel H. Bookin, Darin W. Snyder, James W. Shannon, Erika R. Frick and Hiro N. Aragaki for Defendant and Appellant.

Horvitz & Levy, H. Thomas Watson and Jason R. Litt for Truck Insurance Exchange as Amicus Curiae on behalf of Defendant and Appellant.

Robert G. Bone as Amicus Curiae on behalf of Defendant and Appellant.

Judges: (Opinion by Moreno, J., with Kennard, Acting C. J., Baxter, Chin, and Brown, JJ., Nares, J., [*] and Nott, J., [*] concurring.)

Opinion by: MORENO

Opinion

[*217] MORENO, [*170] J.**

[647]** We granted the request for certification of the United States Court of Appeals for the Ninth Circuit pursuant to **[**648]** California Rules of Court, rule 29.5, to address the following question:

CA(1a)[] **(1a)** Under the California Uniform Trade Secrets Act (UTSA), *Civil Code, section 3426*, [1] when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret?

CA(2)[] **(2)** (See fn. 2.) *CA(1b)*[] **(1b)** We conclude that in a plaintiff's action against the same defendant, the continued improper use or disclosure of a trade secret after defendant's initial misappropriation is viewed under the UTSA as part of a single claim of "continuing **[****3]** misappropriation" accruing at the time of the initial misappropriation. [2]

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[*] Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

[*] Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] All statutory references are to the Civil Code unless otherwise indicated **[*218]** .

[2] Shortly before the filing of this opinion, we were informed by the parties to this case that they have settled the underlying litigation, although they do not seek dismissal of proceedings in this court. When parties settle a case after oral argument, we may nonetheless exercise our discretion to issue an opinion "to resolve the legal issues raised, which are of continuing public interest and are likely to recur." (*People v. Eubanks (1996) 14 Cal.4th 580, 584, fn. 2 [59 Cal. Rptr. 2d 200, 927 P.2d 310]*.) The certified question asks us to decide a general point of law regarding an aspect of California's trade secret statute. Accordingly, although the matter is apparently rendered moot, we exercise our discretion to resolve the legal question.

I. STATEMENT OF FACTS

The relevant facts, as stated in the Ninth Circuit's certification order to this court, are as follows:

Cadence Design Systems, Inc., and Avant! Corporation compete in the field of **[****4]** integrated circuit design automation. Both companies design "place and route" software, which enables computer chip designers to place and connect tiny components on a computer chip. Cadence formed in 1988 through the merger of several companies. Four senior employees left Cadence in 1991 to found Avant!, originally known as ArcSys.

In March 1994, Cadence vice-president Gerald Hsu resigned from Cadence to sign on with Avant!. Because Hsu possessed valuable business trade secrets and other confidential information, Cadence informed Hsu that it objected to his working at Avant!. Concerned that Hsu would reveal proprietary Cadence information when managing Avant!, Cadence sent Avant! a draft complaint naming Avant! and Hsu as defendants. Cadence alleged trade secret misappropriation and other causes of action. In negotiating a settlement of Cadence's claims, Cadence and Avant! apparently did not discuss Avant!'s alleged use of Cadence's Framework II (DFII) trade secret source code. [3]

[**5]** **[***171]** After extensive negotiations, in June 1994, the parties entered into a confidential settlement agreement (the Agreement or Release) that included a mutual general release, which provided in part:

"Cadence, [Avant!] and Hsu . . . hereby forever release and discharge each other . . . of and from any and all manner of action, claim or cause of **[*219]** action, in law or in equity, suits, debts, liens, contracts, agreements, promises, liabilities, demands, losses, damages, costs or expenses, including without limitation court costs and attorneys' fees, which they may have against each other at the time of the execution of this Agreement, known or unknown, including but not limited to any claims arising out of, or in connection with, or relating directly or indirectly to the following: Hsu's employment with Cadence, the cessation of Hsu's employment with Cadence, any wrongful termination of Hsu, any age or race discrimination by Cadence with respect to Hsu, any anticompetitive activity or unfair competition or trade secret misappropriation by Cadence, Hsu or [Avant!] with respect to Cadence, Hsu or [Avant!] with respect to Cadence, Hsu or [Avant!] . . . or any other actions taken by Cadence **[****6]** to with respect to Hsu or [Avant!] or by Hsu or [Avant!] with respect to Cadence."

The Agreement also contained in capital letters a waiver of *Civil Code section 1542* with the following language:

[649]** "THESE RELEASES EXTEND TO CLAIMS WHICH THE PARTIES DO NOT KNOW OR SUSPECT TO EXIST IN THEIR FAVOR, WHICH IF KNOWN BY THEM WOULD HAVE MATERIALLY AFFECTED THEIR DECISION TO ENTER INTO THIS RELEASE.

"In connection with such waiver and relinquishment, the Parties acknowledge that they are aware that, after executing this Agreement, they or their attorneys or agents may discover claims or facts in addition to or different from those which they now know or believe to exist . . . but that it is their intention hereby fully, finally and forever to settle and release all of the claims, matters, disputes and differences known or unknown, suspected or unsuspected, which now exist, may exist, or heretofore may have existed against each other in connection with the released matters. In furtherance of this intention, the release herein given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different **[****7]** claim or fact."

In the summer of 1995, a Cadence engineer discovered a "bug" (an error) in Avant!'s ArcCell software program that was similar to a bug he had inadvertently created several years earlier when writing source code for Cadence's DFII product. In December 1995, the Santa Clara County District Attorney executed a search of Avant!'s headquarters.

[3] Computer software programs are written in specialized languages called source code. The source code, which humans can read, is then translated into language that computers can read. The computer readable form, which operates on a binary system, is called object code.

Among the items seized was a log that showed line-by-line copying of Cadence source code in 1991 by a former Cadence employee and Avant! founder.

In December 1995, Cadence sued Avant! for theft of its copyrighted and trade secret source code and sought a preliminary order enjoining the sale of **[*220]** Avant!'s ArcCell and Aquarius products. In anticipation of trial, both sides filed cross-motions for partial summary judgment concerning the effect of the Release. Avant! argued that because Cadence had released all its claims existing at the time of the Release, any claims based on continuing or future misuse of trade secrets that were stolen prior to the **[***172]** date of the Release were now barred. Cadence maintained that the only claims it had released were those for misappropriation occurring before the effective date of the Release, and not claims **[****8]** to redress Avant!'s continuing or new misuses of its trade secrets after the date of the Release.

The federal district court ruled on these summary judgment motions on October 13, 1999. Reversing its initial order, the district court held that all of Cadence's trade secret claims for post-Release misuse of its DFII trade secrets taken before the Release were barred by the Release. Cadence now is appealing this decision to the Ninth Circuit. If the Release barred Cadence's claims existing at the time of the Agreement, but did not bar future claims, the question still remains: What claims existed at the time of the Agreement? Are all of Cadence's claims for Avant!'s trade secret misappropriation part of the same claim, or does each successive misuse of Cadence trade secret source code give rise to a separate claim? [4]

[**9]** II. DISCUSSION

Avant! argues that a cause of action for misappropriation of a given trade secret by a particular plaintiff against a particular defendant arises only once, when the trade secret is initially misappropriated. In support of this position, it relies in large part on the rationale set forth in *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp. (9th Cir. 1969) 407 F.2d 288* (*Monolith*), which applied the California common law of trade secrets. The *Monolith* court rejected the position exemplified by *Underwater Storage, Inc. v. United States Rubber Co. (1966) 125 U.S. App. D.C. 297, 371 F.2d 950*, "that the wrong is the adverse use of the secret disclosed **[**650]** in confidence; each use is a new wrong, and a continuing use is a continuing wrong. Underlying this theory is the concept that a trade secret is in the nature of property, which is damaged or destroyed by the adverse use . . . . California does not treat trade secrets as if they were property. It is the *relationship* between the parties at the time the secret is disclosed that is protected. (**[*221]** *Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279 [23 Cal.Rptr. 198]*.) **[****10]** The protected relationship, contractual or confidential, is one to which, as Mr. Justice Holmes observed, 'some rudimentary requirements of good faith' are attached. 'Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property . . ., but that the defendant stood in confidential relations with the plaintiffs . . . .' (*E. I. Du Pont de Nemours Powder Co. v. Masland (1917) 244 U.S. 100, 102 [61 L. Ed. 1016, 37 S. Ct. 575, 1917 Dec. Comm'r Pat. 426]*.) *The fabric of the relationship once rent is not torn anew with each added use or disclosure, although the damage suffered may thereby be aggravated. The cause of action arises but once* . . . ." (*Monolith, supra, 407 F.2d at p. 293*, italics added.)

On the other hand, Cadence asserts that the UTSA, which as discussed below was adopted by California in 1984, changed the common law view typified by *Monolith*, and now views trade secrets as property rather than simply as the protection of a **[***173]** confidential **[****11]** relationship. It further reasons that because trade secret

[4] In the present case, it is unclear from the above facts whether the acquisition of the trade secret was itself improper and therefore a misappropriation, or whether the subsequent use of the secret was the initial misappropriation. In any case, the parties agree that Avant! had both acquired and used the trade secret prior to signing the Release. We will assume for purposes of addressing the certified question that the initial misappropriation occurred with the first use of the secret and will, for purposes of this case, equate "initial misappropriation" with "initial use."

misappropriation is the wrongful taking or use of protected property, *each* new use represents a new claim of misappropriation. As will be discussed, neither Cadence's nor Avant!'s position is entirely correct.

In order to answer the certified question, we must examine the pertinent language of the UTSA. As the Court of Appeal explained in *Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal.App.4th 1018, 1023 [98 Cal. Rptr. 2d 661]* (*Glue-Fold*), the UTSA "was approved by the National Conference of Commissioners on Uniform State Laws in 1979 and adopted without significant change by California in 1984. (14 West's U. Laws Ann. (1990) U. Trade Secrets Act, p. 433; Stats. 1984, ch. 1724, § 1, pp. 6252-6253.)" (Fn. omitted.) Section 3426.1 defines certain key terms of the UTSA. ***HN1***[] "Trade secret" is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [P] (1) Derives independent economic value, actual or potential, from not being generally known **[****12]** to the public or to other persons who can obtain economic value from its disclosure or use; and [P] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (*§ 3426.1, subd. (d)*.)

HN2[] "Misappropriation" is defined as "(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or [P] (2) Disclosure or use of a trade secret of another without express or implied consent by a person who: [P] (A) Used improper means to acquire knowledge of the trade secret; or [P] **[*222]** (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was: [P] (i) Derived from or through a person who had utilized improper means to acquire it; [P] (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or [P] (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or [P] (C) Before a material change of his or her position, knew or had reason to know that **[****13]** it was a trade secret and that knowledge of it had been acquired by accident or mistake." (*§ 3426.1, subd. (b)*.)

HN3[] "Improper means" is defined to "include[] theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means." (*§ 3426.1, subd. (a)*.)

CA(3)[] **(3)** Thus, ***HN4***[] the legal protection accorded trade secrets is fundamentally different from that given to patents, in which the patent owner acquires a limited term monopoly over the **[**651]** patented technology, and use of that technology by whatever means infringes the patent. The owner of the trade secret is protected only against the appropriation of the secret by improper means and the subsequent use or disclosure of the improperly acquired secret. There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used. (See 2 Callman, The Law of Unfair **[****14]** Competition, Trademarks, and Monopolies (1981) § 14.01, p. 14-6; *id*., § 14.15, p. 14-102.)

CA(1c)[] **(1c)** The most critical section of UTSA for purposes of this case is section 3426.6, which provides: ***HN5***[] "An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. *For the purposes of this section, a continuing misappropriation constitutes a single claim*." (Italics added.)

[*174]** As the Court of Appeal recognized in *Glue-Fold, supra, 82 Cal. App. 4th at pages 1023-1024*, "[s]ection 3426.6 is derived almost verbatim from section 6 of the Uniform Act as originally drafted. (See 14 West's U. Laws Ann., *supra*, U. Trade Secrets Act, com. to § 6, p. 462.) It is therefore appropriate to accord substantial weight to the commissioners' comment on the construction of what is now section 3426.6. [Citations.] [P] THAT COMMENT IS: 'There presently is a conflict of authority as to whether trade secret misappropriation is a continuing wrong. *Compare* *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288* **[****15]** (CA9, 1969) (not a **[*223]** continuing wrong under California law--limitation period upon all recovery begins upon initial misappropriation) with *Underwater Storage, Inc. v. U.S. Rubber Co., 125 U.S. App. D.C. 297, 371 F.2d 950* (CADC, 1966) . . . (continuing wrong under general principles--limitation period with respect to a specific act of misappropriation begins at the time that the act of misappropriation occurs). [P] ***HN6***[] This Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.' (14 West's U. Laws Ann., *supra*, U. Trade Secrets Act, com. to § 6, p. 462.)" (Fns. omitted.)

The UTSA does not define the term "continuing misappropriation," but its meaning appears evident in light of the definition of "misappropriation."***HN7***[] **[****16]** It is the continuing use or disclosure of a trade secret after that secret was acquired by improper means or as otherwise specified in *section 3426.1, subdivision (b)*. Thus, for statute of limitations purposes, a continuing misappropriation is viewed as a single claim. The drafters of the UTSA explicitly affirmed *Monolith* and rejected the contrary view that misappropriation gives rise to multiple claims each time the trade secret is misused or improperly disclosed.

From our examination of the above statutes, a distinction between a "misappropriation" and a "claim" emerges. ***HN8***[] A *misappropriation* within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in *section 3426.6*. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing **[****17]** misappropriation rather than as giving rise to a separate claim.

Cadence makes much of the language in *section 3426.6* that states, "[*f*]*or the purposes of this section*, a continuing misappropriation constitutes a single claim." (Italics added.) Based on that language, Cadence argues that a continuing misappropriation constitutes a single claim only for statute of limitations purposes. This argument cannot withstand scrutiny. The certified question asks when a *claim* for trade secret infringement arises. The term "claim" does not have some theoretical meaning apart from the context in which it is used. In the present case, the certified question is asked in the context of a release, which is intended to settle or prevent litigation. Therefore, ***HN9***[] "claim" must be defined **[**652]** in the context of litigation. If "continuing **[*224]** misappropriation" is viewed as a single claim for statute of limitations purposes (see *Glue-Fold, supra, 82 Cal. App. 4th at pp. 1026-1028* **[***175]**), then it is difficult to fathom how it could be treated as more than one claim for purposes of litigation generally. For example, a plaintiff could **[****18]** not legitimately plead separate claims of misappropriation for each misuse of a trade secret, for to do so would impermissibly evade the statute of limitations. Nor can it be asserted that ***HN10***[] separate "claims" accruing at different times can have the same limitations period, because that position is contrary to the rule that ***HN11***[] each civil action possesses its own statutorily prescribed limitations period. (See *Code Civ. Proc., § 312*.) The only other alternative is to hold that the term "claim" means one thing in the context of litigation and something else in the context of releases. There is no indication the Legislature intended this kind of inconsistency.

In fact, the phrase "for purposes of this section" can plausibly be explained as a means of contrasting *section 3426.6* with *section 3426.10*, the only other section to refer to "continuing misappropriation." THAT SECTION STATES:***HN12***[] **[****19]** "This title does not apply to misappropriation occurring prior to January 1, 1985. If a *continuing misappropriation* otherwise covered by this title began before January 1, 1985, this title does not apply to the part of the misappropriation occurring before that date. This title does apply to the part of the misappropriation occurring on or after that date unless the appropriation was not a misappropriation under the law in effect before the operative date of this title." (*§ 3426.10*, italics added.) In other words, ***HN13***[] for purposes of *section 3426.10*, a continuing misappropriation is not necessarily a single claim. Rather, the claim must be divided in two if the continuing misappropriation took place partly before January 1, 1985--one common law claim for misappropriation occurring before that date, and one UTSA claim for misappropriation occurring thereafter. Indeed, if each misappropriation constituted a single claim, all that *section 3426.10* would have had to have said is: This title does not apply to misappropriation occurring prior to January 1, 1985. There would be no need to refer **[****20]** to continuing misappropriation because, according to Cadence's theory, that concept does not exist outside the statute of limitations section and it would have been meaningless to refer to "the part of the misappropriation occurring on or after that date." (*Ibid.*)

Another occasion in which ***HN14***[] an act of continuing misappropriation may be said to constitute more than one claim is when multiple defendants are involved. For example, in *PMC, Inc. v. Kadisha (2000) 78 Cal.App.4th 1368 [93 Cal. Rptr. 2d 663]*, officers, directors, and investors of a corporation were sued personally for a trade secret misappropriation initiated before their involvement in the corporation. They sought summary judgment in part on the grounds that they could not be held liable because the initial misappropriation had occurred before they assumed their positions. The Court of **[*225]** Appeal rejected that position, reasoning that ***HN15***[] the definition of misappropriation includes disclosure or use of a trade secret by persons **[****21]** who knew or had reason to know that the trade secret was acquired by improper means. (*Id. at p. 1382*, citing *§ 3426.1, subd. (b)(2)(B)(i)-(ii)*.) But Cadence's assertion that *Kadisha* advances its position is incorrect. That case holds only that ***HN16***[] there may be separate claims of continuing misappropriation among *different* defendants, with differing dates of accrual and types of tortious conduct--some defendants liable for initial misappropriation of the trade secret, others only for later continuing use. This holding does not conflict with our conclusion that there is only a single UTSA claim against a **[***176]** single defendant misappropriating a single plaintiff's trade secret.

Cadence cites *Penal Code section 499c*, providing criminal penalties for theft of trade secrets, in support of its argument. It quotes the noncodified statutory purpose of that statute as, in part, "to make clear that articles representing trade secrets, including the trade secrets represented thereby, constitute goods, chattels, materials and property and can be the subject **[****22]** of criminal acts." (Stats. 1967, ch. 132, § 1, p. 1163.) Avant!'s arguments notwithstanding, it appears indisputable that trade secrets are a form of **[**653]** property. But ***HN17***[] the nature of the property interest and the means by which the interest can be vindicated are matters of state law. ***HN18***[] The UTSA defines an act of continuing misappropriation for litigation purposes as a single claim.

Cadence cites *Remington Rand Corporation v. Amsterdam-Rotterdam Bank, N.V. (2d Cir. 1995) 68 F.3d 1478, 1485*, in which the court, considering a release similar to the one at issue here, concluded the release did not shield defendants from liability for continuing wrongful use of trade secrets after the date of the release. The case was decided under either New York or New Jersey law. (*Remington Rand Corp., 68 F.3d at p. 1483, fn. 2* [acknowledging uncertainty as to which state law applied].) Neither of these states has adopted the UTSA. (14 West's U. Laws Ann. (2002 supp.) U. Trade Secrets **[****23]** Act, p. 128.) Moreover, the court did not analyze the relevant state statutes, and it is unclear whether its conclusion was based on statutory interpretation or interpretation of the intent of the parties to the release. It is therefore not persuasive authority for holding that each new trade secret misuse in California gives rise to a separate claim.

Cadence also cites federal case law holding that each act of patent infringement gives rise to a separate cause of action. (*Augustine Medical, Inc. v. Progressive Dynamics, Inc. (Fed. Cir. 1999) 194 F.3d 1367, 1371*.) Again, this case law has little relevance to the question presented. Although there are similarities between trade secret and patent law, there are also significant differences discussed above. Quite apart from these differences, our conclusion in the present case does not rest on reasoning from general principles of **[*226]** intellectual property law, but rather on the construction of the specific statutory language of the UTSA. Nor is there any indication that the UTSA was patterned after patent law. [5]

[**24]** Cadence also argues that viewing Avant!'s continuing misappropriation as a single claim effectively rewards Avant! with a license to use the misappropriated technology and to discourage parties from entering into releases in the future. But however the UTSA defines a trade secret claim, ***HN19***[] parties to a release in a trade secret dispute remain free to fashion the release **[***177]** as broadly or narrowly as they choose. Moreover, ***HN20***[] under our interpretation of the USTA, a trade secret infringer is by no means rewarded for its infringement with a license to use the infringed technology. Rather, a successful trade secret plaintiff is entitled to the full panoply of

[5] Patent law has no equivalent to *section 3426.6*. The limitations on patent actions set forth in *35 United States Code section 286* differ considerably from *section 3426.6*. It provides in pertinent part: "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." (*35 U.S.C., § 286*.) "This provision has been said not to constitute a 'statute of limitations' in the usual sense of the term, in that *35 U.S.C. section 286* does not say that no suit shall be maintained. . . . The limitation contained in the *35 U.S.C. section 286* . . . does not bar infringement actions, but merely limits recovery of damages to infringements occurring during the six years preceding any damages action brought." (Rosenberg, 3 Patent Law Fundamentals (rev. 2d ed. 2001) § 17.06 [1][d], p. 17-100.) The federal statute does not employ "continuing misappropriation" or any equivalent concept.

remedies, including injunctive relief against further misappropriation (*§ 3426.2*), damages for actual loss (*§ 3426.3*), and relief from unjust enrichment (*ibid.*). [6]

[**25]** Our answer to the certified question is narrow. As stated, we do not accept Avant!'s position, at least stated in its strongest form, **[**654]** that only the initial misappropriation of a trade secret via the breach of a confidential relationship constitutes misappropriation--the UTSA plainly states otherwise. The potential damages encompassed by a continuing misappropriation claim may expand with each illicit use or disclosure of the trade secret. Nor do we address how the parties intended to define the term "claim" in the present release. All we decide is that the UTSA views a continuing misappropriation of a trade secret of one party by another as a single claim.

[*227] III. CONCLUSION

We conclude that a plaintiff's claim for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use or disclosure of the secret augments the initial claim rather than arises as a separate claim.

Kennard, Acting C. J., Baxter, J., Chin, J., Brown, J., Nares, J., [*] and Nott, J., [*] concurred.

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[6] Cadence also cites in support of its position a letter from Assemblyman Elihu Harris, the sponsor of the UTSA, to Governor Deukmejian urging him to sign Assembly Bill No. 501 (1983-1984 Reg. Sess.), the UTSA, in order to bring "clarity and uniformity into this important area of law." (Assemblyman Harris, letter to Governor Deukmejian, Sept. 12, 1984, p. 2.) From this and other general statements in that letter, Cadence wishes to deduce a general policy of strengthening trade secret protection that would lead to support of its position. We are not persuaded. We do not discern how these general statements have any particular bearing on the certified question. Moreover, even if we assume that the UTSA was generally intended to strengthen trade secret protection (a point Avant! disputes), nothing we say in the present opinion vitiates such protection, as discussed immediately above.

[*] Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Acting Chief Justice pursuant to *article VI, section 6 of the California Constitution* **[****26]** .

[*] Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Acting Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

Fieldturf, Inc. v. Southwest Rec. Indus.

United States District Court for the Eastern District of Kentucky, Lexington Division

November 21, 2002, Decided ; November 21, 2002, Filed

CIVIL ACTION NO. 00-12-JMH

Reporter

235 F. Supp. 2d 708 *; 2002 U.S. Dist. LEXIS 24806 **

FIELDTURF, INC. and FIELDTURF INTERNATIONAL, INC., PLAINTIFFS, v. SOUTHWEST RECREATIONAL INDUSTRIES, INC., DEFENDANT.

Subsequent History: Motion to strike denied by, Motion denied by *FieldTurf, Inc. v. Southwest Rec. Indus., 212 F.R.D. 341, 2003 U.S. Dist. LEXIS 553 (E.D. Ky., Jan. 10, 2003)*

Vacated by, in part, Remanded by, in part *Fieldturf, Inc. v. Southwest Rec. Indus., 357 F.3d 1266, 2004 U.S. App. LEXIS 1642 (Fed. Cir., Feb. 4, 2004)*

Prior History: *Southwest Rec. Indus., Inc. v. FieldTurf, Inc., 2002 U.S. App. LEXIS 30245 (5th Cir. Tex., Aug. 13, 2002)*

Disposition: **[**1]** Defendants' Motion for Partial Summary Judgment granted. Defendants' Motion for Summary Judgment granted. Action dismissed and stricken from the active docket.

Core Terms

installations, settlement agreement, patent, infringement, customers, parties, fields, filled, infill, sand, artificial turf, surfaces, products, accrued, antitrust, turf, rubber, pile, patent infringement, Sports, patented invention, expiration, supplied, fabric, pad, Lanham Act, testing, summary judgment, cause of action, literally

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Under *Fed. R. Civ. P. 56(c)*, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

On a motion for summary judgment, the moving party may discharge its burden by showing that there is an absence of evidence to support the nonmoving party's case. The nonmoving parties cannot rest on their pleadings, and must show the court that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Summary Judgment, Entitlement as Matter of Law**

In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > Settlements > Settlement Agreements > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Contract Interpretation > General Overview

HN4[] **Types of Contracts, Settlement Agreements**

In interpreting a settlement agreement, the court is guided by general rules of contract construction and must first resort to the contract language to determine the intention of the parties. Only if the terms remain ambiguous after such an examination will the court turn to extrinsic evidence.

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN5[] **Justiciability, Ripeness**

According to the United States Court of Appeals for the Sixth Circuit, a plaintiff's right of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action. This is to say that all the events necessary to establish a claim must have occurred such that a suit may be successfully maintained on a particular cause of action.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Civil Procedure > ... > Justiciability > Ripeness > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN6[] Monopolies & Monopolization, Actual Monopolization

In the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in conduct that harms the plaintiff. The repeated violation of a plaintiff's interests by a continuing antitrust violation would likely make it appropriate to reach back beyond the date of a settlement agreement to completely understand the breadth and reach of the violation as it continued to accrue after the agreement. This is to say that simply because certain incidents of a continuing violation accrued prior to a cut-off date imposed, somewhat artificially, by a settlement agreement or other such device, the court would not necessarily be amiss in considering them where the antitrust wrong continued to accrue after that date.

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

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

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

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

HN7[] Private Actions, State Regulation

While it has been stated that the antitrust provision of the Kentucky Consumer Protection Act provides no civil remedies to private plaintiffs for violations of *Ky. Rev. Stat. § 367.175*, it is also stated that the Kentucky Consumer Protection Act was broadly designed to curtail unfair, false misleading or deceptive practices in the conduct of commerce.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN8[] Public Enforcement, State Civil Actions

Kentucky's ***antitrust law*** is so similar to its federal counterpart, the Sherman Antitrust Act, that it may be interpreted where appropriate with regard to federal law.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Actual Monopolization, Anticompetitive & Predatory Practices

Causes of action for monopolization arise upon (1) certain conditions, i.e., a defendant's possession of "monopoly power" or possession of sufficient market power that there is a dangerous probability of the defendant attaining monopoly power, and (2) where the party has acquired that power through willful conduct, i.e., unlawful predicate acts (as distinguished from acquiring that power as a consequence of a superior product, business acumen or historical accident). A party cannot be liable for attempted monopolization under *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*, absent proof of a market and specific intent to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Real Property Law > Ownership & Transfer > Public Entities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Under the Sherman Act, where a defendant allegedly acquires or maintains monopoly power, the commission of the unlawful predicate act must either itself establish monopoly power or occur at a time when the defendant already possesses monopoly power. Where the defendant allegedly attempts to monopolize, the predicate act must occur at a time when the defendant is dangerously close to establishing monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

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

HN11[] **Monopolies & Monopolization, Actual Monopolization**

It is axiomatic that a firm cannot monopolize a market in which it does not compete, and it is imperative to understand which market is addressed in order to measure a defendant's ability to lessen or destroy competition. In order to determine the relevant product market, one must utilize the "reasonable interchangeability" standard. This is to say, one must identify those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service. The United States Court of Appeals for the Sixth Circuit teaches that reasonable interchangeability may be gauged by (1) the product uses, i.e., whether the substitute products or services can perform the same function, and/ or (2) consumer response (cross-elasticity); that is, consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] **Monopolies & Monopolization, Actual Monopolization**

On a monopolization claim under the Sherman Act, in defining a relevant product market, the goal is to delineate markets which conform to areas of effective competition and to the realities of competitive practice. So it is that in measuring the relevant product market, one may also utilize the submarket criteria as taught in Brown Shoe Co. v. United States: A submarket may be determined by examining such practical indicia as (1) industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.

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

HN13[] **Private Actions, Remedies**

Antitrust plaintiffs must prove an antitrust injury of the type that the antitrust laws were intended to prevent and that flows from that which makes a defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN14[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Low prices which remain above predatory levels do not constitute an antitrust injury because they benefit consumers regardless of how they are set. "Predatory pricing" becomes actionable where the defendant prices its products below the cost of producing them for the purpose of driving its competitors out of business so that the defendant may then raise prices to anticompetitive levels and recoup its past losses. Where the defendant's prices are below the "average variable costs" of producing the product, a prima facie case of predatory pricing is established and the burden shifts to the defendant to show that the pricing was justified. Where the pricing is above "average variable costs" but below the defendant's "total costs" it is presumed that the pricing scheme is not predatory and the plaintiff may not prevail absent detailed and convincing economic analysis establishing a clear correlation between the pricing scheme and an untimely anticompetitive result. When the defendant's prices are above the "average total costs" of producing the product; a claim for predatory pricing will not survive.

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

HN15[] **Private Actions, Remedies**

To be actionable under antitrust statutes, the defendant's actions must harm competition-not just one competitor in the form of mere economic injury. According to the United States Court of Appeals for the Sixth Circuit, the antitrust plaintiff must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions. Failure to allege an injury to competition is reason enough to dismiss an antitrust claim.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN16[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Entry of new competitors to a market proves the existence of a competitive market and the absence of barriers to entry.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN17[] **Consumer Protection, False Advertising**

The Lanham Act serves to protect harm to a plaintiff's commercial interests caused by a competitor's false statements.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN18[] **False Designation of Origin, Elements of False Designation of Origin**

See *15 U.S.C.S. § 1125(a)(1)(B)*.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

HN19[] **Consumer Protection, False Advertising**

To recover for a claim of "false advertising" under the Lanham Act, a plaintiff must show that (1) the defendant made a false or misleading statement of fact concerning his own product or another's; (2) the statement actually deceived or tended to deceive a substantial portion of the intended audience; (3) the statement was "material" in that it will likely influence the deceived customer's purchasing decisions; (4) the statement was introduced into interstate commerce; and (5) there is a causal link between the statement and harm to the plaintiff. To be actionable, a statement must be a "statement of fact," in other words a specific and measurable claim, capable of being proved false. Thus, a statement of fact can be adjudged true or false through empirical verification. Neither statements of opinion nor "puffing statements" are actionable. "Puffing" is a claim of general superiority or an exaggerated blustering or boasting statement.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN20[] **Consumer Protection, False Advertising**

Where a false or misleading statement is literally false, the plaintiff does not need to establish proof that consumers were actually deceived by the statements in order to recover under the Lanham Act, but such deception is presumed from the literal falsity. If the factual statement is literally true or too ambiguous to be literally false, it is not actionable unless it is also misleading and actually deceives customers. Further, when construing the allegedly false or misleading statement to determine if it is actionable under section 43(a) of the Lanham Act, the statement must be viewed in the light of the overall context in which it appears.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN21[] **Consumer Protection, False Advertising**

When a defendant has buttressed a claim of superiority by attributing it to the results of scientific testing, a plaintiff must prove only that the tests relied upon were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited. To ensure vigorous competition and to protect legitimate commercial speech, courts applying this standard should give advertisers a fair amount of leeway, at least in the absence of a clear intent to deceive or substantial consumer confusion.

Civil Procedure > ... > Justiciability > Standing > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

HN22[] **Justiciability, Standing**

Federal statute provides that only a patentee has a remedy by civil action for patent infringement. *35 U.S.C.S. § 281*. "Patentee" is defined as the person to whom the patent issued and his or her successors in title. *35 U.S.C.S. § 100(d)*. Thus, the statute limits standing in a patent infringement case to a party holding legal title to the patent at the time of infringement. As it is axiomatic that one cannot grant what does not belong to oneself, a basic principle applying with full force to patents, "legal title" to the patent at the pertinent time must be established in order to establish standing to seek remedy for patent infringement. A conveyance of legal title by the patentee can be made only of the entire patent, an undivided part or share of the entire patent, or all rights under the patent in a specified geographical region of the United States. In the first and third cases, the assignee may sue in its name alone; in the second case, it may sue jointly with the assignor. A transfer of any of these is an assignment and vests the assignee with title in the patent, and a right to sue infringers, but any less of a transfer is not an assignment of legal title but a mere license giving the licensee no right to sue for infringement at law in the licensee's own name.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN23[] **Preclusion of Judgments, Res Judicata**

The doctrine of claim preclusion or "true" res judicata teaches that parties are precluded from advancing in a new action all claims or defenses that were or could have been raised in a prior proceeding in which the same parties or their privies were involved, and that resulted in a judgment on the merits. Claim preclusion serves not only to bar parties from relitigating issues that were actually litigated but also to prevent from relitigating issues that could have been raised in an earlier action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Patent Law > Infringement Actions > Prosecution History Estoppel > General Overview

Patent Law > Preclusion > Res Judicata

HN24[] **Preclusion of Judgments, Res Judicata**

Claim preclusion in patent infringement cases is defined as a valid and final judgment rendered in an action extinguishing the plaintiff's claims pursuant to the rules of merger and bar. The claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose. Thus, the court must first focus on whether the second suit rests upon the same transactional facts as the first suit.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN25[] **Preclusion of Judgments, Res Judicata**

For the purposes of a claim preclusion determination, dismissal with prejudice is a final adjudication on the merits.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Patent Law > Infringement Actions > Prosecution History Estoppel > General Overview

Patent Law > Preclusion > Res Judicata

HN26[] **Preclusion of Judgments, Res Judicata**

The United States Court of Appeals for the Federal Circuit teaches that, in determining the application of claim preclusion in a patent case, the requirement of the same transactional facts is satisfied when the devices at issue in the second suit are essentially the same as the device(s) at issue in the first suit.

Patent Law > Infringement Actions > Doctrine of Equivalents > General Overview

HN27[] **Infringement Actions, Doctrine of Equivalents**

The doctrine of equivalents prevents infringers from creating the infringing product with only insubstantial changes to avoid directly replicating the exact claims of the patent and to disingenuously avoid the prohibitions of the patent laws.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Offers to Sell & Sales

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN28[] **Infringing Acts, Offers to Sell & Sales**

One who offers to sell the patented invention within the United States during the term of the patent infringes the patent. *35 U.S.C.S. § 271(a)*. Once a patent expires, there is no longer a patent to infringe.

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN29[] **Infringement Actions, Infringing Acts**

Title *35 U.S.C.S. § 271(i)* provides that an "offer for sale" or "offer to sell" by a person other than the patentee, or any designee of a patentee, is that in which the sale will occur before the expiration of the term of the patent. *35 U.S.C.S. § 271 (i)*

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

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN30[] **Estoppel, Collateral Estoppel**

It is taught that issue preclusion applies: (1) when the issue presently asserted was actually litigated in an earlier trial, (2) when it was actually and necessarily determined by a court of competent jurisdiction, and (3) when preclusion in the second trial does not work an unfairness.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Making & Manufacturing Infringement

International Trade Law > General Overview

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Patent Law > Infringement Actions > Infringing Acts > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Offers to Sell & Sales

HN31[] **Infringing Acts, Making & Manufacturing Infringement**

The right conferred by a patent under United States law is confined to the United States and its territories, and infringement of this right cannot be predicated on acts wholly done in a foreign country. This is not to say, however, that certain actions taken within the United States cannot lead to liability for patent infringement for an infringing product otherwise made, used, or sold outside of the United States. Title *35 U.S.C.S. § 271(a)* is intended to prevent infringers from generating interest in a potential infringing product to the commercial detriment of the rightful patentee. In order to prevail on such a theory of patent infringement, plaintiffs must demonstrate that there was (1) an offer to sell made in the United States, a violation of *§ 271(a)*, *(2)* that the defendant supplied or caused to be supplied in or from the United States a substantial portion of the components of the patented invention in violation of *§ 271(f)(1)*, or *(3)* that the defendant supplied or caused to be supplied in or from the United States a component of the patented invention that is especially made or adopted for use in the invention and is not a staple article or commodity of commerce suitable for non-infringing use per *§ 271(f)(2)*.

Contracts Law > Contract Formation > Offers > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN32[] **Contract Formation, Offers**

The offer to sell a patented invention would need to be accomplished within the United States in order to fall under the blanket of protection afforded by *35 U.S.C.S. § 271(a)*. Such a sale would require the traditional commercial offer for a sale under contract law, or communicate to the offeree a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. This is to say that directing such communications and other marketing materials from within the United States is not necessarily excluded as an offer for sale within the meaning of *§ 271(a)*. However, mere visits by other parties would be insufficient to evidence an extension of the requisite commercial offer by the defendant to sell any infringing product during these visits by overseas representatives and their clients.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Offers to Sell & Sales

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN33[] **Infringing Acts, Offers to Sell & Sales**

An offer to sell a component of a patented invention is not, as a matter of law, an offer to sell the patented invention.

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN34[] **Infringement Actions, Infringing Acts**

See *35 U.S.C.S. § 271(f)(1)*.

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN35[] **Infringement Actions, Infringing Acts**

The language of *35 U.S.C.S. § 271(f)(1)* speaks in terms of "components" (plural) that are combined or are to be combined as opposed to the language of *§ 271(f)(2)* which imposes liability in connection with certain supplies of a singular "component."

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN36[] **Infringement Actions, Infringing Acts**

Courts have interpreted the language of *35 U.S.C.S. § 271 (f)(1)* narrowly in order to avoid giving extraterritorial effect to otherwise domestic patent protection.

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN37[] Infringement Actions, Infringing Acts

Recognizing the tension between providing protection for patented inventions and avoiding extraterritorial effect of United States patent law, the United States District Court for the Eastern District of Kentucky, Lexington Division is convinced that exporting a single component of a patented invention abroad will not rise to the level of providing "a substantial portion of the patented invention."

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Making & Manufacturing Infringement

Patent Law > Infringement Actions > Infringing Acts > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Use

HN38[] Infringing Acts, Making & Manufacturing Infringement

Title *35 U.S.C.S. § 271(f)(2)* creates liability for infringement if one supplies any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial non-infringing use. *35 U.S.C.S. § 271(f)(2)*. To establish that the article is a staple article or commodity of commerce suitable for substantial non-infringing use, the plaintiff must have proof that the article has no use except in the patented invention.

Torts > Business Torts > Unfair Business Practices > General Overview

HN39[] Business Torts, Unfair Business Practices

See *Ky. Rev. Stat. § 367.170(1)*.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN40[] Types of Contracts, Lease Agreements

Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real, or personal, a result of the use or employment by another person of a method, act or practice declared unlawful by *Ky. Rev. Stat. § 367.010*, may bring an action *Ky. Rev. Stat. § 367.220(1)*.

Torts > Business Torts > Unfair Business Practices > General Overview

HN41[] Business Torts, Unfair Business Practices

"Unfair competition" at common law in Kentucky requires proof that the defendant engaged in acts or practices for the purposes of pirating the trade of a competitor, such as misappropriation or misrepresentation, and such acts injured the plaintiff by reason of the loss of business or impairment of good will.

Torts > ... > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN42[] **Defamation, Elements**

The failure to demonstrate that statements made by a defendant's representatives are literally false for the purposes of the Lanham Act defeats any action on the part of the plaintiffs for defamation under Kentucky law. In order to demonstrate a claim, the plaintiffs would necessarily have to produce evidence that the allegedly defamatory language was not true, among other elements of the claim.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN43[] **Intentional Interference, Elements**

In Kentucky, to successfully support a claim for tortious interference with economic relations at common law, plaintiffs must demonstrate (1) the existence of a valid business relationship or expectancy, (2) the defendant's knowledge of that relationship or expectancy, (3) the defendant's intentional act of interference with that relationship or expectancy, (4) an improper motive, (5) causation, and (6) special damages. It is taught in the Commonwealth that it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct.

Counsel: For Fieldturf International Incorporated, Fieldturf, Incorporated, PLAINTIFFS: Susan J Mohler, Frost Brown Todd LLC, Lexington, KY USA.

For Fieldturf International Incorporated, Fieldturf, Incorporated, PLAINTIFFS: Arthur S Beeman, Frost Brown Todd LLC, Louisville, KY USA.

For Fieldturf International Incorporated, Fieldturf, Incorporated, PLAINTIFFS: Susan L Williams, Frost, Brown, Todd LLC, New Albany, IN USA.

For Fieldturf, Incorporated, PLAINTIFF: W Bruce Baird, Frost Brown Todd LLC, Louisville, KY USA.

For Southwest Recreational Industries, Incorporated, DEFENDANT: P Douglas Barr, William L Montague, Jr, Richard B Warne, Joanne Richards, Stoll, Keenon & Park, LLP, Lexington, KY USA.

For Southwest Recreational Industries, Incorporated, DEFENDANT: Raymond E White, Chris P Perque, Richard A Fordyce, Gregory C Mathis, Adam D Sheehan, Akin, Gump, Strauss, Hauer & Feld, Austin, TX USA.

Judges: JOSEPH M. HOOD, JUDGE.

Opinion by: JOSEPH M. HOOD

Opinion

[*713] MEMORANDUM [2] OPINION AND ORDER**

This action is before the Court on Defendant's motions. First, the Court will consider the defendant's Renewed Motion for Partial Summary Judgment Regarding Claims Accruing Before May 20, 1999 [Record No. 342]. Plaintiffs have responded [Record No. 363], to which Defendant has replied [Record No. 365]. The Court will also consider Defendant's Motion for Summary Judgment [Record No. 350]. Plaintiffs have responded [Record No. 363] and Defendant has replied [Record No. 365]. These matters are now ripe for decision.

FACTUAL BACKGROUND

Plaintiffs FieldTurf, Inc. and FieldTurf International, Inc. ("FieldTurf") and Defendant Southwest Recreational Industries, Inc. ("Southwest") are competitors in the artificial turf market. The artificial, carpet-like surfaces made by these parties and other competitors have shown themselves to be useful alternatives to natural grass surfaces and include both "conventional" (knitted nylon surfaces) and "filled" turf systems (tufted polyolefin surfaces with granular top-dressing). These systems are used in a variety of settings in the sporting world, including golf, soccer, football, and baseball facilities.

Plaintiffs **[**3]** manufacture a product called FieldTurf(R). [1] Defendant Southwest Recreational Industries, Inc. ("Southwest") manufactures, sells, and installs several artificial turf systems, including AstroPlay(R). [2] Both of these products are filled turf systems.

[4]**

1. United States Patent No. 4,337,283

In the early 1970s, a professional golfer-turned-inventor, Frederick T. Haas, developed a product he called "Mod-Sod," a "filled" turf system using an infill of sand and cork and a pile fabric available in the market at that time. This combination of goods was later patented as U.S. Patent No. 4,337,283 (the " '283 Patent").

The patent application for the invention that would eventually be embodied in the '283 Patent was filed on September 11, 1980, by Haas, for a "synthetic turf playing surface with [a] resilient top-dressing." [3] **[*714]** On December 29, 1980, Haas assigned the patent to "Mod-Sod Sports Surfaces, a partnership consisting of Frederick T. Haas, Jr., Rebecca Ann Bain[,] Haas Cloudman, Frederck T. Haas, III, and Michael Howard Haas" ("Mod-Sod").

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[1] Plaintiffs allege that their product, FieldTurf(R), embodies the claims of U.S. Patent No. 4,337,283 and is, in keeping therewith, a playing surface for athletic games, comprising a firm, stable subsurface, blades of synthetic grass tufted to a uniform height, and having a specially-mixed infill composed of resilient material and specially graded silica sand. The history of this patent and its subsequent assignment and licensing is recited hereinbelow.

[2] Southwest entered the sports surfacing business as a manufacturer and installer of running tracks in 1984, later expanding into the artificial turf business by first acquiring the rights and assets in the United States for a well-known conventional turf system, AstroTurf(R), from Balsam AG and its American subsidiary in a bankruptcy sale. In 1994, Southwest began developing a "filled" turf product, later marketed as AstroPlay(R), placing a layer of granulated rubber against a carpet backing and trapping it there, so that it could not be displaced by the sand also contained in the product over time, preventing the sand from compacting. Curled nylon fibers were sewn into the carpet backing, and the nylon "root zone" fibers held the rubber particles in place. Defendant subsequently modified the specifications of some AstroPlay(R) systems such that they contained no sand, only granulated rubber. The AstroPlay(R) "filled" systems are marketed with the option of an underlying shock-absorbing pad.

[3] Claim 1 of the '283 Patent defines the patented invention as a "playing surface for athletic games comprising: (a) a firm, stable subsurface; (b) a pile fabric having a flexible backing and normally upstanding pile elements resembling grass; the length of said pile elements being substantially uniform and lying in the range from 1/2 to 2 inches; and (c) a compacted top-dressing layer comprising a mixture of from 25 to 95 volume percent resilient particles and from 5 to 75 volume percent fine sand interspersed among the pile elements and on the backing to a substantially uniform dept at least 1/2 the length of the pile elements."

The assignment was recorded at the U.S. Patent and Trademark Office ("USPTO") on January 2, 1981. From December 29, 1980, until the expiration of the '283 Patent on September 11, 2000, there were no further conveyances recorded in the USPTO to any person or entity of any rights in the '283 Patent. Specifically, there are no records of any rights conveyed back to **[**5]** Haas as an individual or to the corporation called Mod-Sod Sports Surfaces, Inc. ("Mod-Sod Corp."), formed on April 4, 1982.

However, Haas has stated in deposition testimony in an action in the Covington Division of this District (discussed below) that he assigned the title and rights to the '283 patent to Mod-Sod Corp. Plaintiffs refer to an exhibit to that deposition entitled "Patents **[**6]** Issued to MSSS, Inc." and listing the '283 Patent along with Haas's testimony to demonstrate a binding and legal conveyance rights to that patent. Haas, reviewing the document contained in that exhibit, stated:

> These [the patents] were issued, I think first to me and I assigned them at a later date to Mud-Sod [*sic*] Sports Surfaces, Inc.

[Haas Covington Depo. at 13:12-14:6.] In response to a question about whether the "form of business had gone from [himself] individually to the Mud-Sod [*sic*] Sports Surfaces partnership all of the way to Mod-Sod Sports Surfaces the corporation …," Haas replied, "Yes." [*Id.*]

The preamble to the 1994 "Exclusive License Agreement" signed by SynTenniCo, Prevost, Mod-Sod, Inc., and Haas, as a representative of Mod-Sod Corp., provided that the:

> Licensor has the sole right to grant for the United States its territories and possessions and for the entire World (collectively, the "Territory"), licenses under the Inventions, of the scope hereinafter granted …

[Exclusive License Agreement at Preamble.] Further, the agreement provided that "licensor hereby grants to Licensee the exclusive and irrevocable **[**7]** (except as otherwise reserved and provided for herein) right and license to make, have made, use sell and otherwise commercialize and exploit, through the Territory, products embodying the inventions …" [*Id.* at P1.]

However, there exists a subsequent "letter agreement", dated June 19, 1998 and apparently still in force, stating that it "cancels and replaces the exclusive license agreement" signed by the parties in 1994. The letter, written to Mod-Sod Sports Surfaces, Inc., and Haas, states that "[SynTenniCo] will *continue* to be the exclusive licensee of your U.S. patent, number 4,337,283 except for golf products." [Letter Agreement at P3 (emphasis added).]

2. The Ascendancy of Filled Artificial Turf Systems in the Artificial Turf Market

When FieldTurf's predecessor-in-interest, SynTenniCo, began marketing its filled products in 1997, most artificial turf surfaces were the relatively more expensive conventional systems. The new filled turf systems would prove to be significantly less expensive than their conventional counterparts, including Defendant's AstroTurf product, as a result of the less expensive raw materials and the lowered expense **[*715]** associated with **[**8]** the manufacturing process. Additionally, the amount of raw material needed to produce similarly sized fields was significantly lower for the filled turf systems. [4]

With the popularity of these filled systems, the number of customers has risen dramatically every year since 1998 and the market has seen the **[**9]** ascendancy of the filled field over the traditional conventional systems. FieldTurf's sales increased significantly during that time, and the number of fields sold went from 22 in 1998 to 43 in 1999, 118 in 2000, and a projected 135 (in 2001). That said, Plaintiffs allege that Defendant still holds a 90% market share for the artificial turf market when all conventional and filled systems are included. Defendant alleges

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[4] FieldTurf's President, John Gilman, has stated in deposition testimony that his company's infill products have typically been more expensive than comparable Southwest products, this in spite of the fact that FieldTurf does not use a shock-absorbing pad under its products, a measure that arguably translates into savings for customers. While Plaintiffs describe the price differential as a distinction in quality, Plaintiffs do not deny and a principal of their distributor, TurfUSA, has testified that FieldTurf's system of distributorship creates a mark-up in price on their systems not experienced by Southwest with its vertically integrated system of manufacture, sale, distribution, and installation of fields.

and Plaintiffs do not dispute that if the filled system submarket is examined, the reality is that both parties have relatively equal market share. In any event, Gilman has boasted that FieldTurf became Southwest's major competitor, taking substantial market share from Southwest in 2000, decreasing Southwest's sales and reducing its profits.

3. History of Litigation Between the Parties and Their Predecessors-in-Interest With Regard to the '283 Patent and Other Claims; the Parties' Settlement Agreement

Over the years, the parties (or their predecessors-in-interest) have competed for contracts on hundreds of artificial turf fields. Some of those contracts have been awarded to Plaintiffs; some have been awarded to Defendant.

In the fall **[**10]** of 1998, Southwest installed an AstroPlay(R) system (constructed with sand and rubber infill) at the Town and Country soccer complex in Northern Kentucky. At that time, SynTenniCo instituted suit against Southwest and its parent company, American Sports Products Group, Inc. ("ASPG"), in the Covington Division of the Eastern District of Kentucky (the "Covington Action") alleging violations of the Lanham Act and patent infringement. [5]

On May 20, 1999, the parties entered into a settlement agreement to resolve the matter ("Settlement Agreement"), releasing Southwest "from any and all claims, demands, and causes of action, known and unknown, which accrued or are alleged to have accrued up to the date of this Agreement, including the claims in the [Covington] Action." [Settlement Agreement, at 2, P1(c).] SynTenniCo stated that it had no cause of action against Southwest for the "manufacture **[**11]** and sale" of the AstroPlay(R) product having an infill composed entirely of resilient particles, including rubber crumb, and expressly waived and released any such action. Further, SynTenniCo agreed that after the expiration of the '283 Patent, AstroPlay(R) would not be subject to an action for infringement under any patent relating to a filled turf system containing both sand and a resilient particle infill. It is notable that, even while defending the Covington Action, Southwest was changing its AstroPlay(R) **[*716]** specifications to provide and market all-rubber infill to its customers worldwide, although specifically in the United States, with the option of a pad under the infill.

In a subsequent jury trial in Austin, Texas (the "Austin Action"), litigation wherein Southwest sued FieldTurf for breach of the Settlement Agreement, FieldTurf raised as a defense that Southwest had admittedly marketed and sold AstroPlay(R) with a rubber and sand infill outside of the United States after the Settlement Agreement was enacted. [6] Upon testimony indicating that the Settlement Agreement was intended to apply only in the United States and did not extend to foreign instalations, the jury determined **[**12]** that Southwest had not failed to comply with a material obligation of the Settlement Agreement by marketing and selling AstroPlay(R) with a rubber and sand infill abroad after the Settlement Agreement was in effect.

4. Southwest's Marketing Efforts

In its American marketing efforts, Southwest has focused primarily on the lack of a pad in the FieldTurf product. A memorandum sent to Defendant's sales staff referencing FieldTurf as the "No Pad Guys" provided instructions to stress the liability that could result from injuries that could occur on the FieldTurf product without an underlying pad. Putting this campaign into action, Southwest sales staff sent numerous letters to customers referencing this No Pad "mantra."

Southwest also enlisted the services of a public relations firm in its "Play Within the Safety Zone" campaign, directed at the sports industry and the **[**13]** media. In a letter to Southwest, the firm stated the gist of the campaign: "it's time to play hardball. It's time to hit FieldTurf where they have no line of defense-the long term safety (or lack of) sand and rubber filled turf and its potential to cause life-altering injuries."

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[5] *SynTenniCo, Inc. v. American Sports Products Group, Inc., et al.,* Civil Action No. 98-208 (E.D.Ky.--Covington Division).

[6] *Southwest Recreational Industries, Inc. v. FieldTurf, Inc., et al.,* Civil Action No. A-00-CA-063-55 (W.D.Tex.--Austin Division).

Southwest's "research and testing" staff performed ASTM F-355 testing on several FieldTurf installations. The results of these tests demonstrated that those fields were significantly harder than comparable non-FieldTurf fields of comparable age, many FieldTurf sand and rubber installations testing in hardness ranges that exceeded the recommendations for artificial turf safety. By contrast, FieldTurf has relied on the Clegg Tester to test the hardness of its product, a test generally yielding results suggesting that the product as configured is within the recommended safety guidelines for certain surfaces. Defendant claims and has stated to customers that the Clegg Tester is inappropriate for artificial turf as it is designed for natural grass surfaces and does not yield accurate hardness readings.

There is no shortage of evidence that the Southwest sales team advanced this information as it employed its marketing **[**14]** strategy on the offense in the marketplace. Another Southwest employee admitted that he frequently told customers that Southwest felt the sand in the FieldTurf product presented a safety hazard for athletes because of the risk of compaction. Andy Belles, a vice-president for Defendant, testified in deposition that it "would be typical for me to say those-that sand-filled or combination-filled fields become hard. [Belles Depo. at 60:22-24.]

The correspondence sent out into the market was described by former Director of Marketing for Southwest, Troy Squires:

> We were writing these letters, you know, to any customer that would put down a field without a pad. You know **[*717]** this would basically be the same story that we would say, was that, you know, this is a game that we really recommend that you put a pad down.

[Squires Depo. at 198:23-199:3.]

James Savoca, the head of Southwest' stadium sales program and a prolific letter writer, corresponded with customers concerning the shock absorbent qualities of the FieldTurf(R) and AstroPlay(R) products. Referencing Southwest's use of the alleged industry standard ASTM F-355 test as the key to "long term player protection," Savoca **[**15]** stated that the importance of a "separate, distinct shock pad" could not be emphasized enough and that using tests other than the ASTM F-355 as a basis for accepting a sand/ rubber product would place the customer "in an undefendable legal position." A December 13, 1999 letter exemplifies his tact, challenging the awarding of the field project to FieldTurf and claiming the lack of underlying pad rendered the product unsafe. The letter reads in pertinent part:

> You must be made aware that the synthetic turf you selected has an unacceptable shock absorbency levels initially. It's anyone's guess what will happen in the next 5, 7 or 10 years.

He continued, stating that the recipient "could ask [the] FieldTurf distributor for more data-but their entire experience of installing synthetic turf consists of three or four full sized fields." A July 21, 2000, letter to another customer focused on the need for a pad and stated that with "basically zero test data, [FieldTurf] says a pad is not needed-a very new vendor at that."

Southwest also focused on FieldTurf's public gaffes and never hesitated to share such information with customers. Specifically, Plaintiffs make much **[**16]** of the FieldTurf contract to install two playing fields in the City of Lake Oswego, Oregon. Having received a warranty in the contract that the "unprepared" fields would test below certain hardness limits at certain time intervals using the ASTM F-355 method, Lake Oswego shut down the FieldTurf(R) fields as the hardness exceeded the agreed limits. The city claimed that FieldTurf had used the Clegg Tester on "prepared" fields in order to achieve acceptable results. Newspaper articles were published about the debacle and the subsequent lawsuit against FieldTurf. [7] Not surprisingly, Southwest proceeded to provide copies of those articles and report information on the Lake Oswego happenings to customers. [8]

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[7] *Tigard Sportsurfaces, LLC v. SynTenniCo, Inc., et al.,* Civil Action No. 98-1359-JE (D. Oregon).

[8] Plaintiffs allege that Defendant provided information on ASTM testing as compared to Clegg testing to the City of Lake Oswego. Plaintiffs also allege that, without permission of the City or its consultants, Southwest conducted its own ASTM testing on the fields, publishing the results so obtained to customers and to the city.

[17]** Southwest even turned to FieldTurf's marketing efforts for ammunition in its own marketing campaign, with representatives writing to customers about FieldTurf's showcase fields at the University of Nebraska and Husky Stadium in Washington State. These letters expressed doubts about the hardness test results or the qualifications of the individuals who were affiliated with the choice or promotion of such fields to evaluate the safety of the fields. At other times, Southwest focused on FieldTurf's status as a newcomer to the artificial turf market, allegedly stating that it was doubtful whether or not Plaintiffs would even be around to honor warranties in the future, or the fact that FieldTurf was a *Canadian* company marketing a *Canadian* product.

In the artificial turf market abroad, Southwest was continuing to market its **[*718]** AstroPlay(R) product with both a rubber infill, as in the United States, and a sand and rubber infill. Southwest's Director of International Business Development, Harry Salomons, has stated in deposition testimony that Southwest also produced nylon fibers and "carpet" in the United States for use in both rubber-only and rubber and sand infill installations **[**18]** outside of the United States. [9] This pile fabric was used not only in both kinds of fields but as a grass-like surface in window-dressing.

Southwest advertises abroad using materials and promotions developed by agencies in the United States that are subsequently shipped to representatives abroad. Southwest also maintains a website, available internationally, advertising their services and products and inviting interested parties to contact FieldTurf. An administrative assistant in Southwest's Texas headquarters retrieves international inquiries submitted via Southwest's website, many of them inquires about rubber-and-sand infill installations, and redirects them to the appropriate regional representatives abroad.

Salomons recounted in his **[**19]** deposition testimony that he has entertained these international representatives and their clients in the United States on a number of occasions during which time the representatives and their clients would view various Southwest installations, including the rubber and sand infill system at the Town and Country site in Kentucky.

5. The Instant Matter

Upon these facts, Plaintiffs have alleged that Defendant has participated in conduct in violation of the Sherman Antitrust Act, the Lanham Act, applicable patent law, the Kentucky Consumer Protection Act, and the common law of the Commonwealth of Kentucky. Defendant has moved this Court to grant summary judgment on all counts, by virtue of the prior agreements of the parties and on the evidence at hand.

APPLICABLE STANDARD OF REVIEW

HN1[] Under *Fed. R. Civ. P. 56(c)*, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." ***HN2***[] The moving party may discharge its burden by showing "that there is an absence of evidence **[**20]** to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The nonmoving parties, which in this case are the plaintiffs, "cannot rest on [their] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett, 128 F.3d 418, 422 (6th Cir. 1997)*. ***HN3***[] In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

DISCUSSION

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[9] Plaintiffs rely on shipping and invoice records describing rolls of "ASTROPLAY" shipped from sources within the United States to demonstrate the movement of the product from the United States to sites abroad and that billing was initiated from within the United States.

1. The Release Effected by the May 20, 1999 Settlement Agreement Extends to All Claims Accrued by That Date and Is Not Limited to Those Claims and Issues Raised in the Covington Action

In the Covington Action, Plaintiffs' predecessor in interest, SynTenniCo, asserted **[*719]** claims of patent infringement involving the '283 Patent, claims under the Lanham Act, and others for tortious interference with economic relations. SynTenniCo advanced claims associated with "sales talk" in that action, stating that Southwest made untrue statements about FieldTurf, its **[**21]** products and/ or owners (or false statements about Southwest's products) which statements caused customers to reject the FieldTurf product and enter into contracts with Southwest. Concluding that action and entering into the Settlement Agreement, the parties stated that they "desired and intended to settle, conclude and dismiss the claims and disputes which exist between them as expressed in the Action, the Appeal and the Related Actions." [Settlement Agreement at 2, P7.] The Settlement Agreement between the parties provides in pertinent part:

> [FieldTurf's predecessor] hereby releases and forever discharges Southwest and ASPG, their successors, assigns, officers, directors and insurers, from any and all claims, demands, and causes of action, known and unknown, which accrued or are alleged to have accrued up to the date of this Agreement, including the claims in the [Covington] Action.

[Settlement Agreement, at 2, P1(c).]

The present action was filed in January 2000, and, two months later, Defendant moved for summary judgment releasing all claims which had been released by the Settlement Agreement. At that time, Plaintiffs expressly denied that their claims **[**22]** in this action had accrued prior to May 20, 1999 and denied that their claims were premised on conduct which occurred before May 20, 1999:

> FieldTurf does not base this action on conduct which occurred prior to May 20, 1999, or claims which accrued prior to May 20, 1999. In fact, in its pleadings, FieldTurf specifies that the conduct at issue in this action took place after that date.

[Def. Memo. in Opp. To Plaint. Mot. to Dismiss, p. 8]. The Court denied Southwest's motion but held, to the extent that it was demonstrated that the claims in the case had accrued prior to May 20, 1999, Southwest was entitled to summary judgment.

HN4[] In interpreting the Settlement Agreement, the Court is "guided by general rules of contract construction" and "must first resort to the contract language to determine the intention of the parties." *Gilbert v. Monsanto Co., 216 F.3d 695, 700 (8th Cir. 2000)*; *FDIC v. Prince George Corp., 58 F.3d 1041, 1046 (4th Cir. 1995)*. Only if the terms remain ambiguous after such an examination will the court turn to extrinsic evidence. *Prince George Corp., 58 F.3d at 1046*.

Plaintiffs argue that the Settlement **[**23]** Agreement's reach is limited to those claims involved in and related to the Covington Action or that there is a genuine issue of material fact as to whether FieldTurf intended to release claims other than those involved in and related to the Covington Action by entering into the Settlement Agreement. Specifically, Plaintiffs cite to that portion of the Agreement stating the desire and intent of the parties "to settle, conclude and dismiss the claims and disputes which exist between them as expressed in the Action, the Appeal and the Related Actions." [Settlement Agreement at 2, P7.] However, the Settlement Agreement clearly provides for release "from any and all claims, demands, and causes of action, known and unknown, which accrued or are alleged to have accrued up to the date of this Agreement, including the claims in the [Covington] Action." [Settlement Agreement, at 2, P1(c).]

[*720] This Court finds that the plain language of the Agreement cannot yield an interpretation as suggested by Plaintiffs. Common sense and a general knowledge of how any agreement functions includes the fact that parties are seeking *quid pro quo.* Anything and everything could arguably serve as consideration **[**24]** in such an agreement, including issues and events not related to the underlying dispute. Reading the Agreement *in toto* reveals that any and all concessions made by either party in the Settlement Agreement certainly relate back to their stated desire to "settle, conclude and dismiss" those issues at bar in the Covington Action and that any concessions made in the Agreement, no matter how broadly sweeping, are consideration therefor.

The parties specifically stated that the claims in the Covington Action were *included* in that body of "any and all claims, demands, and causes of action," clearly contemplating a larger body of "claims, demands, and causes of action" of which the Covington Action was merely a discrete portion. [Settlement Agreement, at 2, P1(c).] Thus, it is clear to this Court that FieldTurf's predecessor-in-interest conceded not only those claims in the Covington Action but all others accrued at the time of the Agreement. As the language of this Settlement Agreement is clear and unambiguous, the Court need not inquire further into those extrinsic sources suggested by Plaintiffs.

HN5[] The Sixth Circuit teaches that a plaintiff's right of action accrues "when the **[**25]** plaintiff knows or has reason to know of the injury which is the basis of his action." *Sevier v. Turner, 742 F.2d 262, 272 (6th Cir. 1984)*. This is to say that all the events necessary to establish a claim must have occurred such that a suit may be successfully maintained on a particular cause of action. *See* *Hodge v. Service Mach. Co., 438 F.2d 347, 349 (6th Cir. 1971)*; *Schoonover v. Consolidated Freightways, 49 F.3d 219, 221 (6th Cir. 1985)*.

As an initial matter, Plaintiffs allege that the individual acts of which they complain must be viewed as "component parts of a larger concerted effort by Southwest to perpetuate its domination of the market for synthetic grass surface" and that Southwest's attempts isolate those individual examples of alleged wrongdoing as cited in the Complaint and the discovery produced by FieldTurf is inappropriate. [Pl. Resp. at 10.] The "larger concerted effort" of which Plaintiffs speak is the alleged antitrust violation. Plaintiffs correctly point out that ***HN6***[] "in the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant **[**26]** engages in conduct that harms the plaintiff." *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 669 F.2d 490, 494 (7th Cir. 1982)*. The repeated violation of a plaintiff's interests by a continuing antitrust violation would likely make it appropriate to reach back beyond the date of the Settlement Agreement to completely understand the breadth and reach of the violation as it continued to accrue after May 20, 1999. *See* *DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462, 467 (6th Cir. 1996)*. This is to say that simply because certain incidents of a continuing violation accrued prior to a cut-off date imposed, somewhat artificially, by settlement agreement or other such device, the Court would not necessarily be amiss in considering them where the antitrust wrong continued to accrue after that date.

That said, the Court remarks that Plaintiffs have failed to adequately state a claim for the antitrust violations on which this argument is premised. As determined hereinbelow, Plaintiffs have failed to allege the types of injury necessary or certain **[*721]** requisite elements of such a claim. Accordingly, this Court need not now consider which **[**27]** incidents, if any, would fall within the realm of consideration as predicate acts of an antitrust violation. Such circumstances absent, this Court notes the terms of the Settlement Agreement and shall not consider those actions having accrued prior to May 20, 1999.

2. Plaintiffs Fail to Allege Facts Sufficient to Sustain Their Claim Under the Sherman Antitrust Act and *KY. REV. STAT. 367.175* [10]

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[10] Defendant argues that Plaintiffs lack standing to pursue a claim under *KY. REV. STAT. 367.175*, the antitrust provision of the Kentucky Consumer Protection Act. ***HN7***[] While it has been stated that the Act "provides no civil remedies to private plaintiffs for violations of 367.175," it is also stated that "Kentucky Consumer Protection Act was broadly designed to curtail unfair, false misleading or deceptive practices in the conduct of commerce." *Kentucky Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp.2d 755, 773 (W.D.Ky. 1998)*; *Com ex rel. Stephens v. North American Van Lines, Inc., 600 S.W.2d 459, 462 (Ky. App. 1979)*. Considering such a broad reading and the statement of a federal antitrust claim, Judge Wilhoit's order of October 6, 2001, stated that FieldTurf had standing to pursue a claim under *KY. REV. STAT. 367.175*. Accordingly, the Court will not now dismiss the state antitrust claim for lack of standing.

As ***HN8***[] the ***antitrust law*** of the Commonwealth is so similar to its federal counterpart, the Sherman Antitrust Act, and may be interpreted where appropriate with regard to federal law, the Court shall dispatch with the claim under *KY. REV. STAT. 367.175* upon its analysis of the federal antitrust claim as stated in this order. *See* *Mendell v. Golden-Farley of Hopkinsville, Inc., 573 S.W.2d 346, 349 (Ky.App. 1978)*.

[28]** Plaintiffs contend that Defendant violated § 2 of the Sherman Act by monopolizing or attempting to monopolize the market for "synthetic turf sports fields." 15 U.S.C. § 2. Primarily, Plaintiffs argue that Defendant engaged in "predatory pricing" to establish or maintain its alleged monopoly, then engaged in various anti-competitive predicate acts, including patent infringement, "disparagement," unfair competition, and "prosecution of baseless trademark claims while possessing monopoly power."

HN9[] Causes of action for monopolization arise upon (1) certain conditions, i.e., a defendant's possession of "monopoly power" or possession of sufficient market power that there is a dangerous probability of the defendant attaining monopoly power, and (2) where the party has acquired that power through willful conduct, i.e., unlawful predicate acts (as distinguished from acquiring that power as a consequence of a superior product, business acumen or historical accident). [11] *United States v. Grinnell Corp., 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. A party cannot be liable for attempted monopolization under § 2 of the Sherman Act "absent **[**29]** proof of a market and specific intent to monopolize." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*.

HN11[] It is axiomatic that a firm cannot monopolize a market in which it does not compete, and it is imperative to understand which market is addressed in order to measure a defendant's ability to lessen or destroy competition. *Walker Process* ***[*722]*** *Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*; **[**30]** *see* *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1061-62 (2nd Cir.)*, *reversed and remanded on other grounds, 525 U.S. 128, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1996)*; *see* *White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104-105 (4th Cir. 1987)*, *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755, 759 (9th Cir. 1986)*. In order to determine the relevant product market, one must utilize the "reasonable interchangeability" standard. *White and White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983)*. This is to say, one must identify those products or services that are either (1) identical to or (2) available substitutes **[*723]** for the defendant's product or service. *Id.* (citing *United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*. The Sixth Circuit teaches that:

> … reasonable interchangeability may be gauged by (1) the product uses, *i.e.,* whether the substitute products or services can perform the same function, and/ or (2) consumer response (cross-elasticity); that is, **[**31]** consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service.

723 F.2d 495, 500-01 (internal citation omitted).

HN12[] "In defining a relevant product market, the goal is 'to delineate markets which conform to areas of effective competition and to the realties [*sic*] of competitive practice.'" *City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157, 1166 (6th Cir. 1984)* (quoting *L.G. Balfour Co. v. F.T.C., 442 F.2d 1, 11 (7th Cir.1971))* (no error in designating retail rather than wholesale power market as relevant product market where there was no evidence that parties ever competed in or intended to compete in wholesale power market). So it is that in measuring the relevant product market, one may also utilize the submarket criteria as taught in *Brown Shoe Co. v. United States:*

> A submarket may be determined by examining such practical indicia as (1) industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, **[**32]** (6) sensitivity to price changes, and (7) specialized vendors. *Id. 370 U.S. 294 at 325, 82 S. Ct. at 1523*.

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[11] **HN10**[] Where a defendant allegedly acquires or maintains monopoly power, the commission of the unlawful predicate act must either itself establish monopoly power or occur at a time when the defendant already possesses monopoly power. *See* *Re/ Max Int'l., Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)*. Where the defendant allegedly attempts to monopolize, the predicate act must occur at a time when the defendant is dangerously close to establishing monopoly power. *See* *White and White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 506 (6th Cir. 1983)*.

Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (district court, recognizing industry practice and public perception, appropriately found separate footwear markets, later characterized as submarkets, of "men's," "women's," and "children's" shoes); White and White, Inc., 723 F.2d at 501-502; *see also* International Boxing Club of New York v. United States, 358 U.S. 242, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959) (affirming a narrower product market than "professional boxing" as supported by evidence of far greater interest in championship boxing by the public and broadcasters; further stating that evidence showed that nonchampionship fights were not "reasonably interchangeable" with championship fights, "which is the basic inquiry of the standard product market test").

Looking to the product market in which FieldTurf and Southwest participate, determining the relevant market under the "reasonable interchangeability" standard seems initially straightforward for the product market would **[**33]** appear to be artificial turf fields upon which sports are played. Such fields could be described as relatively flat swathes of artificial turf substituting for natural grass, and accommodating certain sporting activities. Upon considering consumer response, or "cross-elasticity," consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service delimits the relevant product market in this matter. The type of artificial turf systems at issue are those styled "filled." Both parties see this market as "growing" and rapidly replacing older, more traditional, and more expensive artificial turf systems.

This is to say that based on the admittedly lower price for this filled product and the fact that Plaintiffs and Defendant find themselves locked in a battle over this sub-marketplace, a battle in which Plaintiffs are holding their own in fiercely developed competition with Defendant, a smaller relevant product market exists than that otherwise stated by Plaintiffs. Thus, the broader and more basic substitutability recognized in the first place--a field for a field--must yield to the lack of "cross-elasticity" between the submarket for filled artificial **[**34]** turf systems, like FieldTurf(R) and AstroPlay(R), and those other products available within the larger category of artificial turf systems. Plaintiffs have not provided evidence that Defendant was monopolizing the filled turf submarket or that Defendant was even dangerously close to monopolizing the submarket. Rather, the evidence demonstrates relatively equal market share on the part of Plaintiffs and Defendant in this relevant product submarket.

However, even if this Court assumes, *arguendo,* that Plaintiffs' suggested market (all synthetic turf sports surfaces in excess of 25,000 feet) is the proper one and that Defendant controlled approximately 90% of that market, Plaintiffs have failed to demonstrate that Defendant, in addition to its alleged high market share, had the ability to control prices or exclude competition. American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, 185 F.3d 606, 622-23 (6th Cir. 1999). The Court notes that overall average prices were declining in the artificial turf business during the relevant period, and that Plaintiffs have not demonstrated how Defendant could have unilaterally affected **[**35]** the supply of raw materials, customers, or the construction capabilities in the artificial turf business to the detriment or exclusion of other competitors. *See* Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997).

HN13[] Antitrust plaintiffs must prove an antitrust injury of the type that the antitrust laws were intended to prevent and that flows from that which makes a defendant's acts unlawful. [12] The injury should **[*724]** reflect the

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[12] ***HN14***[] For example, "low prices which remain above predatory levels do not constitute an antitrust injury because they benefit consumers regardless of how they are set." Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metropolitan Bottling Co., Inc., 94 F. Supp.2d 804, 814 (E.D.Ky. 1999). "Predatory pricing" becomes actionable where the defendant prices its products below the cost of producing them for the purpose of driving its competitors out of business so that the defendant may then raise prices to anticompetitive levels and recoup its past losses. Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993); Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823 (6th Cir. 1982).

Where the defendant's prices are below the "average variable costs" of producing the product, a *prima facie* case of predatory pricing is established and the burden shifts to the defendant to show that the pricing was justified. D.E. Rogers Assoc., Inc., 718 F.2d 1431, 1436 (6th Cir. 1983). Where the pricing is above "average variable costs" but below the defendant's "total costs" it is presumed that the pricing scheme is not predatory and the plaintiff may not prevail absent detailed and convincing economic anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

[36]** ***HN15***[] To be actionable under antitrust statutes, the defendant's actions must harm *competition*-not just one competitor in the form of mere economic injury. *Valley Prods. Co. v. Landmark, 128 F.3d 398, 402 (6th Cir.1997)*; *see, e.g., Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metropolitan Bottling Co., Inc., 94 F. Supp.2d 804 (E.D.Ky. 1999)* (plaintiff failed to state an antitrust injury and district court dismissed the case on summary judgment where plaintiff sued its chief rival alleging monopolization of the local soft drink market by virtue of money paid by soft drink companies to retailers to be used for local advertising and promotion as it resulted in lower prices). The Sixth Circuit Court of Appeals teaches that:

> The antitrust plaintiff must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions.

Tennessean Truck Stop v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989) (citation omitted). Failure to allege an injury to competition **[**37]** is reason enough to dismiss an antitrust claim. *Id. at 90-91*.

Both Plaintiffs and Defendant indicate that competition increased and average prices were reduced in the filled turf industry during the relevant time period in this matter. Gilman himself testified that once filled turf became an accepted product in 1998, competitors or "imitators" began entering the market. Plaintiffs identify no fewer than eleven new "imitators" that introduced products in 1999 and 2000. [13] Further and according to Plaintiffs' own information, the number of sales of fields per year has risen dramatically between 1998 and 2001, and Plaintiffs' expert, James Langenfeld, finds that increased sales of cheaper filled turf systems have resulted in a decrease in the average price for artificial turf since May 20, 1999.

[38]** Based on this evidence, Defendant argues that the Amended Complaint does not allege an antitrust injury or any harm to competition and terms the losses of jobs or contracts of which Plaintiffs complain as losses of business by FieldTurf, not a loss of business because of reduction in competition. This Court does not find any reason based on the evidence presented by either party to determine otherwise. For all of the aforementioned reasons, the Court grants Defendant's motion for summary judgment on the issue of antitrust claims, both those alleged under the Sherman Antitrust Claim and the Kentucky Consumer Protection Act, *KY. REV. STAT. 367.175*.

[*725] 3. Plaintiffs Fail to Allege Facts Supporting Its Claims of Lanham Act Violations Because Statements Made by Defendant Are Not Literally False and Evidence Does Not Demonstrate that Potential Customers Were Misled or Deceived

HN17[] The Lanham Act serves to protect harm to a plaintiff's commercial interests caused by a competitor's false statements. *Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 563 (5th Cir. 2001)*; *Hutchinson v. Pfeil, 211 F.3d 515, 520 (10th Cir. 2000)*. The relevant portions of **[**39]** the Lanham Act provide that:

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analysis establishing a clear correlation between the pricing scheme and an untimely anticompetitive result. *Id.* When the defendant's prices are above the "average total costs" of producing the product; a claim for predatory pricing will not survive. *Id.*

Defendant's pricing remained not only above its average variable costs, but also above its average total costs. This is to say that between May 1999 and the end of 2000, Southwest was earning "net profits" (its sales revenues exceeded its total costs)-*making,* not losing, money in the arguably relevant time period. Notably, FieldTurf's expert, J. Donald Fancher, indicated that during the relevant time Defendant maintained profit margins around 20%. It follows, inexorably, that Plaintiffs' claims premised on predatory pricing would necessarily fail, as well.

[13] ***HN16***[] Entry of new competitors proves the existence of a competitive market and the absence of barriers to entry. *Richter Concrete Corp., 691 F.2d at 827*; *Barr Laboratories, Inc., v. Abbott Laboratories, 978 F.2d 98, 113-14 (3rd Cir. 1992)*. FieldTurf has suggested that the fact that certain customers excluded competitors who lacked certain "experience" requirements demonstrates a barrier to entry into the artificial turf market. However, experience requirements are not substantial barriers to entry as they apply to everyone equally. *See Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995)*.

> ***HN18***[] any person who, on or in connection with any goods or services … uses in commerce any … false or misleading description of fact, or false or misleading representation of fact, which … misrepresents the nature, characteristics, [or] qualities … of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B).

HN19[] To recover for a claim of "false advertising" under the Lanham Act, a plaintiff must show that (1) the defendant made a false or misleading statement of fact concerning his own product or another's; (2) the statement actually deceived or tended to deceive a substantial portion of the intended audience; (3) the statement was "material" in that it will likely influence the deceived customer's purchasing decisions; (4) the statement was introduced into interstate commerce; and (5) there is a causal link between the statement and harm to the plaintiff. *American Council, 185 F.3d at 613*.

To be actionable, a statement must be a "statement **[**40]** of fact," in other words "a specific and measurable claim, capable of being proved false." *Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 496 (5th Cir. 2000)*, *cert. denied, 532 U.S. 920, 149 L. Ed. 2d 285, 121 S. Ct. 1355*. In other words, a statement of fact can be adjudged true or false through empirical verification. *Presidio Enters, Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674 (5th Cir. 1986)*. Neither statements of opinion nor "puffing statements" are actionable. [14] *American Council, 185 F.3d at 615* and *Pizza Hut, 227 F.3d at 495*.

HN20[] Where a false or misleading statement is literally false, the plaintiff does not need to establish proof that consumers were actually deceived by the statements in order to recover under the Lanham Act, but such deception is presumed from **[**41]** the literal falsity. *Balance Dynamics Corporation v. Schmitt Industries, Inc., 204 F.3d 683, 690 (6th Cir. 2000)* (quoting *American Council, 185 F.3d at 614*). If the factual statement is literally true or too ambiguous to be literally false, it is not actionable unless it is also misleading and actually deceives customers. *American Council, 185 F.3d at 614*. Further, "when construing the allegedly false or misleading statement to determine if it is actionable under section 43(a), the statement must be viewed in the light of the overall context in which it appears." *Pizza Hut, Inc, 227 F.3d at 495* (citing *Avis Rent A Car System, Inc. v. Hertz Corp., 782 F.2d 381, 385 (2nd Cir. 1986)*; *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997))*.

[*726] FieldTurf alleges that by "literally false" statements to customers, Southwest disparaged FieldTurf and FieldTurf(R) products in a number of ways: (1) by accusing the FieldTurf(R) product of being unsafe for American football because it lacked an underlying pad and, therefore, allegedly has not measured up to certain testing **[**42]** standards creating the potential for litigation by players injured on such fields; (2) by making allegedly disparaging comments about FieldTurf's showcase fields; (3) by utilizing the controversy surrounding an installation at Lake Oswego, Oregon to disparage FieldTurf and attempting to interfere with FieldTurf's contract at that installation; and (4) by publically questioning FieldTurf's longevity and its ability to honor warranties.

Insofar as Defendant has made reference to the potential for future legal action by those injured on fields that are produced by Plaintiffs, for whatever reasons such legal action should arise, those statements are predictions, not specific or measurable nor capable of being proved false. The same analysis applies to statements concerning Plaintiffs' anticipated longevity and ability to honor warranties for the FieldTurf(R) product, premised on the relative youth of the company. They are predictions of future performance, not specific or measurable statements so as to be actionable under the Lanham Act. Similarly, Defendant's comments about Plaintiffs' showcase field installations are not actionable specific or measurable statements. Rather they state **[**43]** Southwest's opinion of those involved in the field selection process and the product itself. Try as it might, this Court cannot find that Southwest has expressed more than a prediction or opinion so as to actionably mislead others with regard to the fields installed by FieldTurf or the company's future in the industry.

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[14] "Puffing" is a claim of general superiority or an exaggerated blustering or boasting statement. *Pizza Hut, 227 F.3d at 496*.

With regard to statements about the Lake Oswego installation and the controversy surrounding it, neither the protestations of Plaintiffs nor the power of this Court can undo history. The events that Defendant describes to customers did occur and are a matter of public record, not "literally false" statements as alleged by Plaintiffs.

Finally, with regard to those statements concerning whether the Plaintiffs' product is or is not safe for American football and the relative superiority of Defendant's own product, it is taught that ***HN21***[] when a defendant has buttressed a claim of superiority by attributing it to the results of scientific testing, a plaintiff must prove only "that the tests [relied upon] were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited." [15] *United Industries Corp. v. Clorox Co., 140 F.3d 1175, 1182 (8th Cir. 1998)* **[**44]** (quoting *Rhone-Poulenc, 93 F.3d 511, 514-15)*.

In the matter at hand, Plaintiffs have not suggested that the ASTM testing relied upon by Defendant was necessarily unreliable for establishing the rate of shock absorbency and related safety conclusions drawn therefrom. [16] Furthermore, this Court finds that those statements taken from FieldTurf's witnesses that other **[*727]** testing procedures were also accurate or usable cannot, by themselves, undermine the alleged usefulness or acceptance of the ASTM testing referenced by Defendant.

[45]** In any event and in spite of the negative tenor of all of Southwest's statements, they are not actionable in this matter as Plaintiffs have failed to provide any evidence suggesting that customers were, in fact, misled by these statements. Accordingly, such claims are appropriately dismissed. [17]

Plaintiffs have demonstrated that much has been said about their product and that Southwest has not spoken of it in glowing terms. However, the *poids net* of the evidence provided to this Court notwithstanding, Plaintiffs have not demonstrated that any of the statements were literally false or, even if literally true or ambiguous but misleading, that customers were actually misled by the statements in making their choice between the competing products. It is clear **[**46]** that FieldTurf wants nothing more in the world than for Defendant to stop talking about their product, but their desire cannot yield relief under the Lanham Act on the facts at hand.

4. While Plaintiffs May Have Standing With Regard to the '283 Patent, FieldTurf Has Failed to Identify Actionable Infringing Behavior and the Claim Will Be Dismissed

a. Standing

HN22[] Federal statute provides that only a patentee has a remedy by civil action for patent infringement. *35 U.S.C. § 281*. "Patentee" is defined as the person to whom the patent issued and his or her successors in title. *35 U.S.C. § 100(d)*. Thus, the statute limits standing in a patent infringement case to a party holding legal title to the patent at the time of infringement. *See, e.g., Arachnid, Inc. v. Merit Industries, Inc., 939 F.2d 1574, 1578-79 (Fed. Cir. 1991)*. As it is axiomatic that one cannot grant what does not belong to oneself, a basic principle applying with full force to patents, "legal title" to the patent at the pertinent time must be established in order to establish standing to seek remedy for patent **[**47]** infringement. *See Prima Tek II, L.L.P. v. A-Roo Co., 222 F.3d 1372, 1382 (Fed. Cir. 2000)*.

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[15] To "ensure vigorous competition and to protect legitimate commercial speech, courts applying this standard should give advertisers a fair amount of leeway, at least in the absence of a clear intent to deceive or substantial consumer confusion." *Rhone-Poulenc Rorer Pharmaceuticals, Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 515 (8th Cir. 1996)*.

[16] The Court further remarks that the relative safety of Defendant's own product with a pad, insofar as it is supported by ratings on appropriate tests, accomplishes little more than the type of "puffery" one anticipates in any competitive sales environment.

[17] Plaintiffs have relied only on the testimony of John Ingram to substantiate that consumers were misled by Southwest's alleged statements. Such testimony by Ingram has been excluded from this matter as hearsay on the Court's order of November 4, 2002.

"A conveyance of legal title by the patentee can be made only of the entire patent, an undivided part or share of the entire patent, or all rights under the patent in a specified geographical region of the United States." [18] Rite-Hite Corp. v. Kelley Co., Inc. 56 F.3d 1538, 1551-1552 (Fed. Cir. 1995) (citing Waterman v. Mackenzie, 138 U.S. 252, 255, 34 L. Ed. 923, 11 S. Ct. 334, 1891 Dec. Comm'r Pat. 320 (1891)). "A transfer of any of these is an assignment and vests the assignee with title in the patent, and a right to sue infringers," but any less of a transfer is not an assignment of legal title but a mere license giving the licensee no right to sue for infringement at law in the licensee's own name. *Id.*

[48]** When the patent was issued on June 29, 1982, the Mod-Sod Partnership owned the patent by virtue of the December 29, 1980 assignment and operation of law. *See* Filmtec Corp. v. Allied-Signal, Inc., 939 F.2d 1568 (Fed. Cir. 1991). Haas's testimony about the subsequent assignment to Mod-Sod Corp. creates an issue of material fact with regard to whether or not **[*728]** rights in the '283 Patent were successfully transferred to the parties in the matter at hand. Assuming, for the purposes of summary judgment, that such an assignment from the Mod-Sod Partnership to the Mod-Sod Corp. occurred, it is the opinion of this Court that the "letter agreement" that Mod-Sod Sports Surfaces, Inc. and Haas granted to SynTenniCo, as licensee, the right to practice the invention contained within the '283 patent within the previously agreed upon territory and impliedly promised that others would be excluded from practicing the invention within that territory, except as related to the practice of the invention with regard to golf products. Accordingly, insofar as Mod-Sod Corp. and Haas had the requisite "legal title" to the patent and SynTenniCo has transferred the rights obtained in **[**49]** the "letter agreement" to Plaintiffs, Plaintiffs can state their status as "patentee" with regard to standing to sue for infringement of the '283 patent.

However, even as this Court has determined that Plaintiffs could have standing to bring this claim as "patentees," the Court must now dismiss the claims for patent infringement.

b. The Doctrine of Claim Preclusion Bars Plaintiffs' Claims of Patent Infringement with Regard to U.S. Installations by Defendant

HN23[] The doctrine of claim preclusion or "true" *res judicata* teaches that parties are precluded "from advancing in a new action all claims or defenses that were *or could have been* raised in a prior proceeding in which the same parties or their privies were involved, and that resulted in a judgment on the merits." J.Z.G. Resources, Inc. v. Shelby Ins. Co., 84 F.3d 211, 214 (6th Cir. 1996) (quoting In re PCH Associates, 949 F.2d 585, 594 (2nd Cir.1991) (emphasis added)). Claim preclusion serves not only to bar parties from relitigating issues that were actually litigated but also to prevent from "relitigating issues that could have been raised in an earlier action." *Id.* (citing Commissioner v. Sunnen, 333 U.S. 591, 597, 92 L. Ed. 898, 68 S. Ct. 715 (1948); **[**50]** In re PCH Assocs., 949 F.2d 585 at 594; Westwood Chem. Co. v. Kulick, 656 F.2d 1224, 1227 (6th Cir.1981)).

HN24[] Claim preclusion in patent infringement cases is defined as "a valid and final judgment rendered in an action extinguishing the plaintiff's claims pursuant to the rules of merger [and] bar". [19] Foster v. Hallco Mfg. Co., 947 F.2d 469, 478 (Fed. Cir. 1991). "The claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose." *Id.* Thus, the Court must first focus on whether the second suit rests upon the same transactional facts as the first suit. Id. at 479.

[51]** ***HN26***[] The Federal Circuit teaches that the requirement of the same transactional facts is satisfied when the devices at issue in the second suit are essentially the same as the device(s) at issue in the first suit. 947 F.2d

[18] "In the first and third cases, the assignee may sue in its name alone; in the second case, it may sue jointly with the assignor." Rite-Hite Corp., 56 F.3d at 1552 n. 10 (*citing* Waterman, 138 U.S. at 255).

[19] ***HN25***[] A dismissal with prejudice is a final adjudication on the merits. England v. Automatic Canteen Co., 349 F.2d 988, 989 (6th Cir. 1965), *cert. denied*, ***383 U.S. 925, 15 L. Ed. 2d 845, 86 S. Ct. 928 (1966)*** (dismissal of a suit with prejudice bars subsequent action seeking the same relief); *see also* ***Hallco Mfg. Co. v. Foster, 256 F.3d 1290, 1297***.

469, 479-80. So it is in the matter at hand, wherein Plaintiffs continue to claim that Southwest's AstroPlay(R) product, however configured, infringes claim 1 of the '283 patent.

As recounted above, Plaintiff's predecessor in interest, SynTenniCo, sued Defendant for infringement of the '283 **[*729]** Patent in the Covington Action. Following mediation, the parties signed a Settlement Agreement on May 20, 1999. Section 1, titled "SynTenniCo's Agreements," states that SynTenniCo has no cause of action against Southwest for the "manufacture and sale" of the AstroPlay(R) product having an infill composed entirely of resilient particles, including rubber crumb, and expressly waives and releases any such action. Further, SynTenniCo agreed that after the expiration of the '283 Patent, AstroPlay(R) would not be subject to an action for infringement under any patent relating to a filled turf system containing both sand and a resilient particle infill."

This Court finds **[**52]** it quite clear that the Settlement Agreement permits the Defendant to produce its AstroPlay(R) product, where appropriately modified to contain only a resilient particle infill, within the United States without fear of infringing the '283 Patent. Further, such an Agreement anticipates the eventual expiration of the '283 Patent and subsequent inflow of products similar, if not identical, to that described in the claims of the patent.

Whereas any claims for patent infringement were extinguished in that proceeding by virtue of the Settlement Agreement and a subsequent dismissal of that matter with prejudice, Plaintiffs are barred by the doctrine of claim preclusion from attempting to relitigate any claims for infringement within the United States premised on the '283 Patent with regard to the AstroPlay(R) product having a composition entirely of resilient particles. Much is made of the pile length in these installations, but Plaintiffs have failed to offer evidence of AstroPlay(R) systems installed in the United States during the period following the Settlement Agreement release of all claims accruing prior to May 20, 1999 but before the expiration of the '283 Patent having other than **[**53]** resilient particles therein. [20] Accordingly, those claims related to such products during such times are *res judicata* and are summarily dismissed.

[54]** Further, Plaintiffs cannot state an infringement claim for any sand and rubber infill systems produced by Defendant upon expiration of the '283 Patent per applicable law and the Agreement. **[*730]** § 271(a) provides that ***HN28***[] one who offers to sell the patented invention within the United States *during the term of the patent* infringes the patent. 35 U.S.C. § 271(a). Once a patent expires, there is no longer a patent to infringe, which is to say that if sand were added to an otherwise all-rubber infill turf system after the expiration of the '283 patent, there could necessarily be no infringement, even if the resulting product satisfied the claims of the '283 Patent.

Even where Defendant offered to add sand after the '283 Patent expired but made such an offer before the expiration of the '283 Patent, such an offer does not constitute a violation of the governing statute, 35 U.S.C. § 271(a). [21] ***HN29***[] § 271(i) provides that an "'offer for sale' or 'offer to sell' by a person other than the patentee, or

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[20] Plaintiffs' novel theory that the Settlement Agreement states that all AstroPlay(R) is, by definition, in violation of Claim 1 of the '283 Patent (by virtue of the pile length stated therein) is bold but nonsensical. Following FieldTurf's interpretation, if the paper on which this order is printed or the computer monitor on which it appears were called "AstroPlay," they would infringe the '283 Patent notwithstanding their lack of an "infill" or usefulness as a location for sporting events. This Court will not stand for such obnoxious and inflated interpretation of the clear language of an agreement between the parties.

For the same reason, the Court declines to apply the doctrine of equivalents as suggested by Plaintiffs. ***HN27***[] The doctrine prevents infringers from creating the infringing product with only insubstantial changes to avoid directly replicating the exact claims of the patent and to disingenuously avoid the prohibitions of the patent laws. Graver Tank & Mfg. Co. v. Lande Air Prods. Co., 339 U.S. 605, 94 L. Ed. 1097, 70 S. Ct. 854, 1950 Dec. Comm'r Pat. 597 (1950). Regardless of the length of the pile in the allegedly infringing installations, which by Defendant's accounts would exceed the length claimed in the invention described in the '283 Patent, so long as Defendant's product did not contain the sand infill, it would both lack an element required by the patent as intimated in the Settlement Agreement. Where the pile length was less than or in excess of the 1/2 to 2 inch length stated in Claim 1 of the '283 Patent, this Court is not convinced that doctrine of equivalents is implicated as FieldTurf has stated that even minor changes in the length of the pile elements substantially affect performance. This is to say that, as FieldTurf itself suggests, the installation would no longer perform as the patented invention was designed to perform and such installations could not be the patented invention.

any designee of the patentee, is that in which the sale will occur before the expiration of the term of the patent." 35 U.S.C. § 271 **[**55]** (i); *see* Rotec Indus., Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1252 (Fed. Cir. 2000). The Court finds that FieldTurf has not provided evidence indicating that any such "sales" of such "sand additions" took place prior to the expiration of the '283 Patent. Rather, FieldTurf recognizes that the offers at bar contemplated that sand would be added to the infill and, thus, the sale would occur, i.e., be completed by Southwest, only upon the expiration of the '283 Patent. Accordingly, those claims for patent infringement resting upon the offer to add sand to the infill in Defendant's U.S. installations must fail and will be dismissed.

c. The Geographic Scope of the Settlement Agreement is Limited to the United States, and the Settlement Agreement is Not Implicated with Regard to Those Installations Outside the United States; However, Plaintiffs Have Not Stated a Claim for Infringement of the '283 Patent with Regard to Foreign Installations by Defendant

[56]** ***HN30***[] It is taught that issue preclusion applies "(1) when the issue presently asserted was actually litigated in an earlier trial, (2) when it was actually and necessarily determined by a court of competent jurisdiction, and (3) when preclusion in the second trial does not work an unfairness." Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 840 (6th Cir. 2000) (quoting United States v. Berman, 884 F.2d 916, 922 (6th Cir. 1989)).

In a prior action between the parties in Austin, Texas, a jury held that Southwest's foreign installation of an otherwise infringing artificial turf product was not in violation of the Settlement Agreement, effectively determining that the application of the Settlement Agreement was limited in geographic scope to the United States. Similarly, in the matter at hand, Defendant asserts that the alleged infringements of the '283 Patent by AstroPlay(R) installations abroad are not governed by the provisions of the Settlement Agreement.

From all appearances, this is the same issue litigated in the Austin Action where it was "actually and necessarily" decided by jury trial in a court of competent jurisdiction. Further, **[**57]** this Court does not find that such preclusion works an unfairness **[*731]** in the matter at hand. Insofar as Plaintiffs' predecessor-in-interest did not include foreign installations as consideration in the Settlement Agreement bargain, Plaintiffs cannot derive such a benefit out of the ether. Accordingly, neither Southwest nor FieldTurf were bound by the terms of that Settlement Agreement with regard to their actions outside of the geographic limits of the United States. As the claims of patent infringement outside of the United States are not contemplated by the Settlement Agreement, the Court will now consider the allegations of patent infringement related to installations outside of the United States independent of the Settlement Agreement terms.

With regard to those installations at issue outside of the United States -- made, used, or sold in foreign countries -- the Court must recognize that ***HN31***[] the "right conferred by a patent under our law is confined to the United States and its territories, and infringement of this right cannot be predicated on acts wholly done in a foreign country." *See* Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U.S. 641, 650, 59 L. Ed. 398, 35 S. Ct. 221, 1915 Dec. Comm'r Pat. 320 (1915); **[**58]** Waymark Corp. v. Porta Systems Corp., 245 F.3d 1364 (Fed. Cir. 2001); Ortho Pharm Corp. v. Genetics Institute, Inc., 52 F.3d 1026, 1033 (Fed. Cir. 1995). This is not to say, however, that certain actions taken within the United States cannot lead to liability for patent infringement for an infringing product otherwise made, used, or sold outside of the United States. § 271(a) is intended to prevent infringers from "generating interest in a potential infringing product to the commercial detriment of the rightful patentee." *See* 3 D Systems, Inc. v. Aarotech Laboratories, Inc., 160 F.3d 1373, 1379 (Fed. Cir. 1998). In order to prevail on such a theory of patent infringement, Plaintiffs must demonstrate that there was (1) an offer to sell made in the United States, a violation of Section 271(a), (2) that Defendant supplied or caused to be supplied in or from the United States a substantial portion of the components of the patented invention in violation of Section 271(f)(1), or (3) that Defendant supplied or caused to be supplied in or from the United States a component of the patented

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[21] To decide otherwise would effectively extend the term of a patent beyond its expiration date by requiring competitors to wait until after the expiration to "gear up" to offer competing and no-longer infringing products in the marketplace, a result that this Court finds untenable with the *limited* monopoly, both temporally and substantively, permitted under patent law.

invention that is especially made or adopted **[**59]** for use in the invention and is not a staple article or commodity of commerce suitable for non-infringing use per 271(f)(2).

Southwest admitted in the Austin Action and does not otherwise dispute that immediately after the Settlement Agreement was signed that Southwest advertised and made available outside of the United States an AstroPlay(R) surface with sand and rubber infill. FieldTurf alleges that Defendant marketed that infringing fill system from within in the United States and sold certain pile fabrics as attached to a flexible backing from the United States for use abroad during the relevant time period in violation of relevant U.S. patent law. Specifically, Plaintiffs allege that Southwest contacted customers, received proposals, sent out quotations, made shipping and customs arrangements, instructed on delivery and installations, and had shipped and accepted payment for the pile fabric and flexible backing components of the AstroPlay(R) product supplied from the U.S.

This Court is not convinced that Plaintiffs have set forth evidence to create a material issue of fact with regard to any offer to sell an allegedly infringing product from within the United States as required **[**60]** under *35 U.S.C. § 271(a)*. ***HN32***[] The offer to sell the '283 patented invention would need to be accomplished within the United States in order to fall under the blanket of protection afforded by *§ 271(a)*. *See* Rotec Indus., Inc., 215 F.3d 1246. [22] Such a sale **[*732]** would require the traditional commercial offer for a sale under contract law, or communicate to the offeree a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id. at 1252-53* (quoting *Restatement (Second) of Contracts § 24* (1979)). This is to say that directing such communications and other marketing materials from within the United States is not necessarily excluded as an offer for sale within the meaning of *§ 271(a)*. *See 3 D Systems, Inc, 160 F.3d at 1379* (price quotation letters could be regarded as "offers to sell" where letters described allegedly infringing item and price at which it could be purchased).

[61]** While Plaintiffs offer evidence that the Defendant met in the United States with representatives from overseas who were soliciting offers for AstroPlay(R) to be accepted for installation and use at overseas playing fields, the evidence suggests that these overseas visitors were present in the United States merely to observe the artificial turf installations with their own clients. Even viewing these visits in the light most favorable to the Plaintiffs, mere visits by other parties would be insufficient to evidence an extension of the requisite commercial offer by Defendant to sell any infringing product during these visits by overseas representatives and their clients.

More troubling are Plaintiffs' allegations based on the deposition testimony of Harry Salomons and documents produced suggesting that quotes, pricing information and orders for the AstroPlay(R) product were directed and accepted by Southwest from its home office in Leander, Texas, and that Southwest faxed offers and acceptances from its offices in the United States to installations overseas.

However, upon reading the deposition transcript of Salomons, upon which Plaintiffs rely in substantial part, this Court finds **[**62]** that Salomons's testimony describes a system of deflecting inquiries from abroad to representatives outside of the United States, a practice that hardly reveals the requisite content manifesting an "offer for sale" as sought by Plaintiffs.

Further, Salomons's testimony about the elements of the foreign installations that are produced in the U.S., taken in context, show only that the pile fiber, termed a "carpet" therein, were produced in and exported from the United States. Even where his terminology might be otherwise construed, the Court notes that the documents relied upon in Plaintiff's Response are shipping documents and invoices for rolls of a product referenced only as "AstroPlay," paint, thread or nylon, and adhesive. Assuming, in the absence of proof otherwise, that a completed filled system cannot be shipped in rolls, the referenced documents reveal only that Defendant shipped and provided invoices for the pile fiber system described by Defendant.

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[22] Even where prospective customer visited defendant's headquarters in the United States weeks before defendant submitted a bid, defendant worked on bid proposal and prepared pricing information in the United States, the Federal Circuit found the actual offer to sell took place *outside* the United States and other activities were insufficient as matter of law to establish an "offer for sale" within the boundaries of the United States of the infringing equipment at issue. *Rotec Indus., Inc., 215 F.3d 1246*.

Insofar as any offers to sell the AstroPlay(R) pile fabric, an element of the allegedly infringing installations, were made within the United States, Plaintiffs' argument is insufficient to rise to the level of patent infringement **[**63]** notwithstanding the evidence presented. ***HN33***[] An offer to sell a component of a patented invention is not, as a matter of law, an offer to sell the patented invention. *See* *Rotec Indus., Inc., 215 F.3d 1246 at 1250, 1255*. Nor is the AstroPlay(R) pile fabric a "staple article or **[*733]** commodity of commerce" unsuitable for substantial uninfringing use as the pile fabric has uses in addition to those in the patented invention. *See* *C.R. Baird, Inc. v. Advanced Cardiovascular Systems, Inc., 911 F.2d 670, 674-75 (Fed. Cir. 1990)* (*citing* *Dawson Chem Co. v. Rohm & Haas Co., 448 U.S. 176, 199, 65 L. Ed. 2d 696, 100 S. Ct. 2601 (1980))*.

HN34[] *§ 271(f)(1)* provides as follows:

> Whoever without authority supplies or causes to be supplied in or from the United States *all or a substantial portion* of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer. **[**64]** [23]

35 U.S.C. § 271(f)(1) (emphasis added). ***HN35***[] The language of *§ 271(f)(1)* speaks in terms of "components" (plural) that are combined or are to be combined as opposed to the language of *§ 271(f)(2)* which imposes liability in connection with certain supplies of a singular "component." *Id.* at n. 5.

Considering the other components of the '283 Patent-the subsurface, sand, and the resilient particles, this Court cannot find that the plain meaning of *§ 271(f)(1)* yields liability for infringement where only one component of four comprising the patent is supplied from within the United States. [24] *See* *Bristol-Myers Squibb Co., 2001 U.S. Dist. LEXIS 16895 **[**65]** at *12* (supplying from the United States one component of a patented two-component chemical product did not rise to the level of a violation of *§ 271(f)(1)*). ***HN37***[] Recognizing the tension between providing protection for patented inventions and avoiding extraterritorial effect of U.S. patent law, the Court is convinced that exporting a single component, here the pile fabric, of a patented invention abroad will not rise to the level of providing "a substantial portion of the patented invention."

[66]** Finally, ***HN38***[] *35 U.S.C. § 271(f)(2)* creates liability for infringement if one supplies "any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial non-infringing use." *35 U.S.C. § 271(f)(2)*. To establish that the article is a staple article or commodity of commerce suitable for substantial non-infringing use, the plaintiff must have proof that the article has no use except in the patented invention. *See* *C.R. Baird, Inc., 911 F.2d at 674-75*.

Plaintiffs suggest that there is no evidence to indicate that Southwest made any market overseas of the pile fabric as a "staple article," rather stating that the evidence reveals that the pile fabric was custom made by Defendant in the United States for overseas AstroPlay(R) installations and installed in at least 99 of 100 installations in Europe, all of which used an allegedly infringing sand and rubber **[*734]** infill. Notwithstanding Plaintiffs' statements concerning the pile fabric's use in allegedly infringing sand and rubber infill installations, Plaintiffs **[**67]** have not contradicted Defendant's evidence that the "pile fabric" at issue was used in other non-infringing products as well, including those playing surfaces filled only with rubber particles in several countries and, interestingly, to

[23] ***HN36***[] Courts have interpreted this language narrowly in order to avoid giving extraterritorial effect to otherwise domestic patent protection. *See* *Waymark Corp., 245 F.3d at 1368*; *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 2001 U.S. Dist. LEXIS 16895 at *20*.

[24] Plaintiffs attempts to divide the pile fabric component into two parts, having previously treated the pile fabric as a single component of the '283 Patent, are not well taken by this Court. In any event, where the two alleged elements are so intimately intertwined and distinct from the other stated elements as to have been previously construed by the parties as a single element of the invention, the Court finds that whether 1 of 4 or 2 of 5 elements are so provided it will not rise to the level of providing the requisite "substantial portion of the patented invention."

department stores for use in window dressings to create the appearance of grass. [25] Plaintiffs demonstration that such pile is used in allegedly infringing fields abroad cannot alone create a violation of *35 U.S.C. § 271(f)(2)* where Defendant has demonstrated other uses for the pile product that it supplies overseas. *See* *C.R. Baird, Inc., 911 F.2d at 674-75*.

Having so decided, it will not be necessary **[**68]** for this Court to reach the issue of whether the installations overseas were, in fact, the patented invention of the '283 Patent. The foreign installations alleged to infringe the '283 Patent do not fall within the realm of protection afforded by U.S. patent law.

5. Plaintiffs Lack Standing with Regard to Claims under the Kentucky Consumer Protection Act, *KY. REV. STAT. 367.010*

Plaintiffs have alleged that Defendant participated in unfair competition in violation of the Kentucky Consumer Protection Act. *KY. REV. STAT. 367.170*.

HN39[] *KY. REV. STAT. 367.170(1)* states that "unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." As stated in then-Chief Judge Henry Wilhoit's Order filed on October 6, 2001, *KY. REV. STAT. 367.220(1)* sets forth the standing requirements for such a Kentucky Consumer Protection Act claim under *KY. REV. STAT. 367.170*:

> ***HN40***[] Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real, or personal, a result of the use or employment by another person of a method, act **[**69]** or practice declared unlawful by *KY. REV. STAT. 367.010*, may bring an action …

KY. REV. STAT. 367.220(1). Judge Wilhoit's order continues, "FieldTurf has not alleged privity with Southwest and is not a consumer for Kentucky Consumer Protection Act purposes." [October 6, 2002 Order at 11.] Accordingly, Plaintiff's claims pursuant to *KY. REV. STAT. 367.010* will be dismissed with prejudice.

6. Plaintiffs Have Failed to Provide Evidence Sufficient to Maintain the Remaining Causes of Action Under Kentucky Common Law

Defendant also states that summary judgment is appropriate for Plaintiffs' claims of common law unfair competition, commercial disparagement and defamation [26], and tortious interference with economic relations. In their own way, these claims are Plaintiffs' catch-all claims with regard to Defendant's alleged behavior, relying on the proof underlying the other claims to make these actions lie.

[70]** ***HN41***[] "Unfair competition" at common law in Kentucky requires proof that the Defendant engaged in acts or practices **[*735]** "for the purposes of pirating the trade of a competitor," such as misappropriation or misrepresentation, and such acts injured the plaintiff "by reason of the loss of business or impairment of good will." *Covington Inn Corp. v. White Horse Tavern, Inc., 445 S.W.2d 135, 138-39 (1969)*. No one has alleged that Southwest has attempted to misappropriate FieldTurf's goods, and the alleged misrepresentations by Southwest are nowhere to be found. Specifically, as stated hereinabove, FieldTurf has failed to state that statements made by Southwest are false or that any customers were deceived by said statements.

Similarly, ***HN42***[] the failure to demonstrate that statements made by Southwest's representatives are literally false for the purposes of the Lanham Act defeats any action on the part of Plaintiffs for defamation under Kentucky

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[25] Further, as Defendant reminds the Court, inventor Haas has testified that the pile fabric was manufactured prior to the time Haas applied for his patent. This suggests, and Plaintiffs do not demonstrate otherwise, that the pile fabric is hardly a feature specific only to those fields constructed with '283 Patent technology.

[26] Commonwealth common law does not recognize a separate cause of action for "commercial disparagement."

law. In order to demonstrate a claim, Plaintiffs would necessarily have to produce evidence that the allegedly defamatory language was not true, among other elements of the claim. *CMI, Inc. v. Intoximeters, Inc., 918 F. Supp. 1068, 1083 (W.D.Ky. 1995).* **[**71]** Having failed to provide that evidence, the claim must also fail.

Finally, ***HN43***[] to successfully support a claim for tortious interference with economic relations at common law, Plaintiffs must demonstrate (1) the existence of a valid business relationship or expectancy, (2) Defendant's knowledge of that relationship or expectancy, (3) Defendant's intentional act of interference with that relationship or expectancy, (4) an improper motive, (5) causation, and (6) special damages. *CMI, Inc., 918 F. Supp. at 1080*. It is taught in the Commonwealth that "it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung, 754 S.W.2d 855, 859 (Ky. 1988)*. Further, it is stated:

> Kentucky courts have been very cautious in expanding unduly the tort remedies available to those in contractual relationships. There are sound reasons for this caution. The actual language of § 766A is so all encompassing and vague that to adopt it directly would cause tremendous confusion without creating a clear societal benefit. The conduct conceivably **[**72]** within its scope could be indistinguishable from the kind of unfettered commerce upon which courts have been reluctant to pass judgment. Moreover, the available remedies address the most direct and readily identifiable harms. The torts discussed in § 766A necessarily involve highly speculative damages. Parties to contracts have a full array of contractual remedies to resolve inequities of performance caused by third persons. The Court is not persuaded that this new tort is necessary to correct a glaring inequity among commercial parties. Finally, the kind of conduct which is theoretically actionable under this new tort may be of an entirely different quality and character than that found in this case. As examples of actionable conduct Haynes cites destroying building supplies, illegally preventing issuance of building permits, physical intimidation of employees or other kinds of physical interference. Haynes. *Kentucky Jurisprudence,* § 12-11 (1987).

CMI, Inc., 918 F. Supp. at 1079-1080.

Plaintiffs rely upon incidents surrounding the FieldTurf(R) installation at the City of Lake Oswego to demonstrate Southwest's alleged interference with FieldTurf's business **[**73]** and contractual relations. It is unclear to this Court how providing its ASTM test results to the City of Lake Oswego-the act that seems to be the gravamen of Plaintiffs' argument-rises to the level of "significantly wrongful conduct," particularly in light of **[*736]** this Court's analysis of such testing hereinabove with regard to the Lanham Act. Even assuming that Southwest did, as FieldTurf alleges, test the fields without permission of the city or its consultants, Plaintiffs have failed to demonstrate that Defendant's trespass onto the city's property had the destructive quality-preventing something from taking place or destroying something-anticipated by Kentucky courts in recognizing torts of interference such as the one at bar. Having failed to demonstrate the necessary conduct by Southwest, Plaintiffs claim shall be dismissed.

Conclusion

For the foregoing reasons, this Court finds that Plaintiffs have failed to demonstrate that "there is a genuine issue for trial." *Hall, 128 F.3d at 422*. Having so concluded, all of Plaintiffs' claims shall be dismissed with prejudice.

Accordingly, **IT IS ORDERED:**

(1) That the Defendants' Motion for Partial Summary Judgment **[**74]** [Record No. 342] be, and hereby is, **GRANTED;** and

(2) That the Defendants' Motion for Summary Judgment [Record No. 350] be, and hereby is, **GRANTED.**

This the 21st day of November, 2002.

JOSEPH M. HOOD, JUDGE

Date and Entry of Service:

JUDGMENT

In accordance with the Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is, **DISMISSED AND STRICKEN FROM THE ACTIVE DOCKET.**

(2) That all pending motions be, and the same hereby are, **DENIED AS MOOT.**

(3) That all scheduled proceedings be, and the same hereby are, **CONTINUED GENERALLY.**

(4) That this Order is **FINAL AND APPEALABLE** and **THERE IS NO JUST CAUSE FOR DELAY.**

This the 21st day of November, 2002.

JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

Smithkline Beecham Corp. v. E. Applicators

United States District Court for the Eastern District of Pennsylvania

December 3, 2002, Decided ; December 3, 2002, Filed

CIVIL ACTION NO. 99-CV-6552

Reporter

2002 U.S. Dist. LEXIS 23511 *; 2002 WL 31750188

SMITHKLINE BEECHAM CORPORATION, Plaintiff, v. EASTERN APPLICATORS, INC., RICHARD W. GREAR, PROFESSIONAL ROOF SERVICES, INC., BLAINE CHIPOLA, JOTTAN, INC., TOBY CHROSTOWSKI, D'ONOFRIO GENERAL CONTRACTORS CORP., and JOHN D'ONOFRIO, Defendants.

Disposition: **[*1]** Motion in limine of plaintiff was granted in part and denied in part.

Core Terms

bids, reliability, expert testimony, scientific, collusion, roofing, special knowledge, methodology, estimates

LexisNexis® Headnotes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN1[] Testimony, Expert Witnesses

See *Fed. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN2[] Expert Witnesses, Daubert Standard

Under *Fed. R. Evid. 702*, when faced with a proffer of expert scientific testimony, a trial judge must determine at the outset, pursuant to *Fed. R. Evid. 104(a)* whether an expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This gatekeeping function extends beyond scientific testimony to testimony based on "technical" and "other specialized" knowledge.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN3[] **Expert Witnesses, Daubert Standard**

The Court of Appeals for the Third Circuit has established that *Fed. R. Evid. 702* as interpreted by Daubert and its progeny embodies three distinct substantive restrictions on the admission of expert testimony: (1) qualifications; (2) reliability; and (3) fit.

Evidence > Admissibility > Expert Witnesses

Evidence > Burdens of Proof > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN4[] **Admissibility, Expert Witnesses**

The proponent of expert testimony pursuant to *Fed. R. Evid. 702* bears the burden of establishing its admissibility by a preponderance of the evidence.

Evidence > Admissibility > Expert Witnesses

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN5[] **Admissibility, Expert Witnesses**

Fed. R. Evid. 702 requires an expert witness to have "specialized knowledge" regarding the area of testimony. The basis of this specialized knowledge can be practical experience as well as academic training and credentials. Courts have interpreted the specialized knowledge requirement liberally, and have stated that this policy of liberal admissibility of expert testimony extends to the substantive as well as the formal qualification of experts. However, at a minimum, a proffered expert witness must possess skill or knowledge greater than the average layman.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6[] **Testimony, Expert Witnesses**

The factors which govern reliability of expert testimony for purposes of *Fed. R. Evid. 702* are as follows: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN7[] **Expert Witnesses, Daubert Standard**

For purposes of *Fed. R. Evid. 702*, Daubert makes certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. A trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony. These factors are not exhaustive and the inquiry remains flexible. Where the testimony is not scientific in nature, relevant reliability concerns may focus upon personal knowledge or experience, as opposed to scientific foundations.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN8[] **Testimony, Expert Witnesses**

The fit requirement for purposes of evaluating the admission of expert testimony under *Fed. R. Evid. 702* stems from the textual provision that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Admissibility under this factor turns on the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case. This measure is not intended to be a high one. Its standard is not dissimilar to the general liberal standard of relevance under the Federal Rules of Evidence.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN9[] **Expert Witnesses, Daubert Standard**

An expert witness must explain the means by which he reached his conclusions, and such means must satisfy at least one of the Daubert factors of reliability. An expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

Collusion, for purposes of ***antitrust law***, is defined as an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law, or a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > Pretrial Matters > Motions in Limine > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

HN11[] **Expert Witnesses, Daubert Standard**

For purposes of a motion in limine to determine the admissibility of expert testimony pursuant to *Fed. R. Evid. 702*, there is no need for a district court to provide a plaintiff with an open-ended and never-ending opportunity to meet a Daubert challenge until plaintiff gets it right.

Counsel: For SMITHKLINE BEECHAM CORPORATION, PLAINTIFF: ROBERT N. DE LUCA, JENNIFER RIDDLE SLETVOLD, WILLIAM A. DE STEFANO, SAUL, EWING, REMICK AND SAUL, MARCI A. LOVE, SAUL, EWING LLP, PHILADELPHIA, PA USA.

For EASTERN APPLICATORS, INC., RICHARD W. GREAR, DEFENDANTS: STEPHEN P. GALLAGHER, STEPHEN P. GALLAGHER & ASSOCIATES, CHARLES J. CUNNINGHAM, PHILADELPHIA, PA USA.

For PROFESSIONAL ROOF SERVICES, INC., BLAINE CHIPOLA, DEFENDANTS: JAMES A. BACKSTROM, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA USA.

For JOTTAN, INC., TOBY CHROSTOWSKI, DEFENDANTS: NICHOLAS M. CENTRELLA, CONRAD, O'BRIEN, GELLMAN AND ROHN, PHILA, PA USA.

Judges: LOWELL A. REED, JR., S.J.

Opinion by: LOWELL A. REED, JR.

Opinion

MEMORANDUM

This is an antitrust action in which plaintiff alleges that the defendants colluded in the bidding process for a roofing project, to ensure that defendant Eastern Applicators, Inc. submitted the winning bid. In support of its defense, defendants have offered Laurence E. Parisi as an expert witness pursuant to *Federal Rule of Evidence 702*. [1] Mr.

[1] *Federal Rule of Evidence 702*, as amended December 1, 2000, states:

> ***HN1***[] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is

Parisi offers his opinion "that the bids received in May **[*2]** of 1997 for the re-roofing project were reasonable and non-collusive." (Pl. Mot., Exh. D at 1.) Now before the Court is the motion *in limine* of plaintiff SmithKline Beecham Corporation ("SmithKline") to suppress the Mr. Parisi's expert testimony. For the reasons set forth below, the motion of plaintiff will be denied in part and granted in part.

Legal Standard

HN2[] Under *Rule 702*, when "faced with a proffer of **[*3]** expert scientific testimony … the trial judge must determine at the outset, pursuant to *Rule 104(a)* whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharms. 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993)* (footnotes omitted). This gatekeeping function extends beyond scientific testimony to "testimony based on … 'technical' and 'other specialized' knowledge." *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999)*. ***HN3***[] The Court of Appeals for the Third Circuit has established that *Federal Rule of Evidence 702* as interpreted by *Daubert* and its progeny embodies "'three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.'" *United States v. Mathis, 264 F.3d 321, 335* (3d Cir. Aug. 30, 2001) (quoting *Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000))*. ***HN4***[] The proponent of the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence. **[*4]** *See* *Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3d Cir. 2000)*, *cert. denied, 121 S. Ct. 1357 (2001)*.

The Third Circuit Court of Appeals has set the following standard to qualify as an expert:

> ***HN5***[] *Rule 702* requires the witness to have "specialized knowledge" regarding the area of testimony. The basis of this specialized knowledge "can be practical experience as well as academic training and credentials." We have interpreted the specialized knowledge requirement liberally, and have stated that this policy of liberal admissibility of expert testimony "extends to the substantive as well as the formal qualification of experts." However, "at a minimum, a proffered expert witness … must possess skill or knowledge greater than the average layman …."

Elcock, 233 F.3d at 740 (quoting *Waldorf v. Shuta, 142 F.3d 601, 625 (3d Cir. 1998))*.

HN6[] The factors which govern reliability are as follows:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the **[*5]** technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Elcock, 233 F.3d at 745-46 (quoting *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 n.8 (3d Cir. 1994))*. It has been noted that ***HN7***[] *Daubert:*

> makes certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field …. The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.

Elcock, 233 F.3d at 745-46 (quoting *Kumho Tire, 526 U.S. at 152, 119 S. Ct. at 1176*). Thus, the **[*6]** factors outlined above are not exhaustive and the inquiry remains flexible. *See* *Elcock, 233 F.3d at 746*. Where the

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the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

testimony is not scientific in nature, "relevant reliability concerns may focus upon personal knowledge or experience," as opposed to "scientific foundations." *Kumho Tire, 526 U.S. at 150, 119 S. Ct. at 1175*.

HN8[] The fit requirement stems from the textual provision that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Mathis, 264 F.3d at 335* (quoting *F.R.E. 702*). Admissibility under this factor turns on "the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case. *Oddi, 234 F.3d at 145*. This measure is "not intended to be a high one." *Id.* Its standard is not dissimilar to the general liberal standard of relevance under the Rules. *See* *Mathis, 264 F.3d at 335*.

Analysis

Mr. Parisi is an architect with a bachelor degree in architecture from the New York Institute of Technology. (Pl. Mot., Exh. A.) Since **[*7]** 1977, he has been the owner and president of his own architectural firm, Laurence E. Parisi, P.C. *(Id.)* His practice began primarily in residential gut renovation projects, but has expanded to include commercial, institutional, and public work renovations and additions such as new roofs and exterior renovations. (Pl. Mot., Exh. B at 10.) In his position, Mr. Parisi calculates his own estimates for bids to evaluate the bids he receives in his various projects. (*Id.* at 25.) Plaintiff's experts, Robert P. Piccione and John DiNenna, were previously found qualified to testify regarding the reasonableness of the bids at issue based on their years of experience in the roofing industry. (Order of November 29, 2001, Doc. No. 52.) I find that Mr. Parisi's practical experience and background has similarly provided him with specialized knowledge beyond the ken of the average layman in this area. Consequently, I find that Mr. Parisi is qualified to testify as an expert witness on what constitutes a reasonable bid for commercial roofing projects in 1997. Because of Mr. Parisi's knowledge and experience in the Northern New Jersey and New York area, I find him facially competent to evaluate **[*8]** the bids in this case arising in nearby Philadelphia, Pennsylvania.

Because the proffered testimony is not scientific in nature, the methodology need not be subjected to rigorous testing for scientific foundation or peer review, but must still provide a methodology that can be proven to be reliable. In calculating his review of the bids for plaintiff's roofing project, Mr. Parisi reviewed the following materials: (1) the bid specifications; (2) the bids submitted by the actual bidders on the first and second round of bids; and (3) the roof surveys. (Pl. Mot., Exh. D, Parisi Letter; Exh. B at 13-14.) He further inspected the roofs in question, and reviewed pictures of them taken prior to the completion of the project. (Pl. Mot., Exh. B at 18-19.) He further compared the controversial bids to the bids submitted for his own projects in 1997. (*Id.* at 21-22.) The method used by Mr. Parisi to derive an estimated bid is similar to the methods used by Mr. Piccione and Mr. DiNenna that were previously accepted as facially reliable by this Court. As well, the methodology is strongly rooted in Mr. Parisi's practical experience. As I have previously determined that there is no single standard **[*9]** formula for bid estimations, (Doc. No. 52 at 5-6), the fact that Mr. Parisi has maintained a successful architecture firm for many years lead to the conclusion that his estimation process and management of roofing bids for his clients, like those of Mr. Piccione and Mr. DiNenna, is within the realm of reasonable and acceptable methods.

To the extent Mr. Parisi's opinion regarding the reasonableness of the bids at issue would assist the jury in resolving the factual issue of whether they were competitive, it is relevant and helpful to the trier of fact, and therefore fits the purpose for which it is being offered. I thus conclude that Mr. Parisi's testimony regarding whether defendants' bids fell within the ambit of reasonable business estimates is admissible.

Nevertheless, with regard to Mr. Parisi's opinion that the bids at issue were not collusive, I find no support in the record to find Mr. Parisi qualified on this issue. Mr. Parisi has not claimed or shown any specialized knowledge, skill or experience that would qualify him as an expertise on matters of collusion. [2] **[*11]** Nor has Mr. Parisi set forth any

[2] ***HN10***[] Collusion is defined as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law," or "[a] secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose." BLACK'S LAW DICTIONARY 264 (6th ed. 1990).

reliable methodology to reach his opinion that there was no collusion. ***HN9***[] The expert **[*10]** must explain the means by which he reached his conclusions, and such means must satisfy at least one of the *Daubert* factors of reliability. "An 'expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'" *Oddi v. Ford Motor Co., 234 F.3d 136, 158 (3d Cir. 2000)* (quoting *In re Paoli R.R. Yard PCB Litig., 35 F.3d at 742*). In light of Mr. Parisi's statements, [3] his analysis of whether or not there was collusion among the bidders amounts to no more than speculation. Mr. Parisi's conclusion rises to nothing more than "ipse dixit [that] does not withstand Daubert's scrutiny." *Id.* The Court thus determines that his opinion, insofar as it attempts to set forth conclusions on the issue of collusion, poses no benefit in assisting "the trier of fact to understand or determine a fact in issue" as required under *Rule 104(a)* and *Daubert.* His opinion could only cause the jury to join in his speculation.

[*12] The Court further determines that, in light of these findings, there appears to be no need to hold an *in limine* hearing. *See id., 234 F.3d at 153-54* (record sufficient to exclude expert testimony without hearing) (***HN11***[] no need for a district court to "provide a plaintiff with an open-ended and never-ending opportunity to meet a *Daubert* challenge until plaintiff 'gets it right'") (quoting *In re TMI Litig., 199 F.3d 158, 159 (3d Cir. 1999)*, *cert. denied sub. nom. General Public Utilities Corp. v. Abrams, 530 U.S. 1225, 147 L. Ed. 2d 266, 120 S. Ct. 2238 (2000))*. Consequently, I conclude that Mr. Parisi's opinion on the collusive nature of the defendants' bids is inadmissible as expert testimony under *Rule 702*.

Conclusion

For the foregoing reasons, the motion of plaintiff will be granted in part and denied in part. Mr. Parisi's testimony regarding the reasonableness of the defendants' bids is admissible, but his opinion regarding any collusion or lack thereof among the defendants will be suppressed.

An appropriate Order follows.

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[3] Mr. Parisi's deposition transcript on this point provides as follows:

> Q: Let me ask about the other part of your conclusions where you concluded that they are not [sic] noncollusive. What is it that leads you to believe that these three bids are noncollusive?
>
> A: Well I see that the numbers are, again, consistent with what I'm familiar with. Nothing was glaring. I would have no reason to think that it was something that was conspired or together.
>
> Q: Okay. Is there a way to tell from the relationship of one bid to another, either from the relationship of one bid to another in terms of dollars or the relationship of one or more bids to a budget figure, whether or not the bids are collusive?
>
> [Objection to form]
>
> A: Well, you know, when I look at these numbers -- like, for instance the Donofrio bid was high within the three -- I have about five years worth of work with him bidding, and he was the exact same way. I don't see him varying in any way from what he normally does for me in my bids. To me, you know, that was an indication that he -- unless he's collusive with my bids too.
>
> Q: Which we'll presume he is not.
>
> A: I didn't see anything here that would lead me to believe that it was collusive.
>
> Q: What hypothetically would you look for to see if, in your view, bids were collusive?
>
> A: I don't really look for that sort of thing. I don't take that approach to my business.
>
> Q: Okay.
>
> A: But I guess if I saw something that all the numbers were out of whack completely, I would just throw them all out. I wouldn't entertain any.

(Pl. Mot. Exh. B at 43-44.)

ORDER - ENTERED DEC-4 2002

AND NOW this 3rd day of December, 2002, upon **[*13]** consideration of the motion *in limine* of plaintiff SmithKline Beecham Corporation ("SmithKline") to exclude the expert testimony of Laurence E. Parisi (Doc. No. 77), and the response thereto, and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion *in limine* of plaintiff is **GRANTED IN PART AND DENIED IN PART.** Mr. Parisi may testify as to the factual issue of the reasonableness of the defendants' bids, but may not testify as to the issue of whether the bids were collusive.

LOWELL A. REED, JR., S.J.

Viazis v. Am. Ass'n of Orthodontists

United States Court of Appeals for the Fifth Circuit

December 11, 2002, Decided ; December 11, 2002, Filed

No. 01-41298

Reporter

314 F.3d 758 *; 2002 U.S. App. LEXIS 25428 **; 2002-2 Trade Cas. (CCH) P73,907; 60 Fed. R. Evid. Serv. (Callaghan) 428

ANTHONY D. VIAZIS, ET AL., Plaintiffs, ANTHONY D. VIAZIS, Plaintiff-Appellant, VERSUS AMERICAN ASSOCIATION OF ORTHODONTISTS, ET AL., Defendants, AMERICAN ASSOCIATION OF ORTHODONTISTS, SOUTHWESTERN SOCIETY OF ORTHODONTISTS, GAC INTERNATIONAL, INC., AND LEO A. DOHN, Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by *Viazis v. Am. Ass'n of Orthodontists, 2003 U.S. LEXIS 3726 (U.S., May 19, 2003)*

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Texas.

Viazis v. Am. Ass'n of Orthodontists, 182 F. Supp. 2d 552, 2001 U.S. Dist. LEXIS 16937 (E.D. Tex., 2001)

Disposition: AFFIRMED.

Core Terms

conspiracy, brackets, advertising, orthodontists, restrictions, manufacturer, orthodontic, contends, concerted action, per se rule, complaints

LexisNexis® Headnotes

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

The court of appeals reviews a judgment as a matter of law (JM) de novo. To defeat a motion for JM, the nonmovant must present substantial evidence opposed to the motion. In other words, the nonmovant must present evidence that is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Sherman Act, Claims**

Section 1 of the Sherman Act does not proscribe independent conduct. So, to establish a § 1 violation, a plaintiff must demonstrate concerted action. Evidence of conduct that is as consistent with permissible competition as with illegal conspiracy cannot support an inference of conspiracy. In essence, an antitrust plaintiff who is unable to present direct evidence of a conspiracy must introduce circumstantial evidence that tends to exclude the possibility of independent action.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

In the absence of direct evidence of a conspiracy, an antitrust plaintiff must present evidence tending to exclude the possibility of independent conduct. To do so, the plaintiff is required to demonstrate that the parties and had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > Acts Through Agents

HN4[] **Antitrust & Trade Law, Sherman Act**

A corporate entity can act only through its agents. Consequently, in the absence of evidence of formal decision making, an antitrust plaintiff must prove an association's conduct by demonstrating that the action was taken by individuals having apparent authority to act for the association.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

In the context of a § 1 of the Sherman Act claim, evidence that a manufacturer took certain actions does not tend to exclude the possibility of independent conduct if the actions were in the manufacturer's independent self-interest.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

Despite the fact that a trade association by its nature involves collective action by competitors, it is not by its nature a "walking conspiracy," its every denial of some benefit amounting to an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN7[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act prohibits only those agreements that constitute unreasonable restraints of trade. The question whether a particular restraint is unreasonable frequently turns on whether it is examined under the rule of reason or falls within the category of practices that are judged to be unreasonable per se. If application of the per se rule is appropriate, competitive harm is presumed, and further analysis is unnecessary. If, by contrast, the restraint should be judged according to the rule of reason, its net potential for competitive harm must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN8[] Antitrust & Trade Law, Sherman Act

Typically, it is the type of restraints that are "always or almost always" anticompetitive that are deemed to be unreasonable per se.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN9[] Antitrust & Trade Law, Sherman Act

In the context of a § 1 of a Sherman Act claim, what is required in cases involving advertising restrictions implemented by a professional association is an enquiry meet for the case. Under this approach, an analysis is sufficient if it openly addresses the circumstances, details, and logic of a restraint in reaching its conclusion.

Civil Procedure > Appeals > Standards of Review > General Overview

HN10[] Appeals, Standards of Review

The court of appeals may not disturb the district court's exclusion of the evidence if that ruling can be upheld on other grounds, regardless of whether the court relied on those grounds.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

HN11[] Inchoate Crimes, Conspiracy

Under the coconspirator exception, hearsay evidence is admissible only if the proponent proves by a preponderance of the evidence that (1) a conspiracy existed; (2) the statement was made in furtherance of that conspiracy; and (3) the coconspirator and the party opposing admission were members of the conspiracy.

Civil Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > Appeals > Reversible Error > Evidence

HN12[] **Appeals, Standards of Review**

A court of appeals will not reverse erroneous evidentiary rulings unless the aggrieved party can demonstrate substantial prejudice.

Counsel: For ANTHONY D VIAZIA, Plaintiff-Appellant: Branden Wheeler Sparks, Dallas, TX.

For ANTHONY D VIAZIS, Plaintiff-Appellant: Clark C Havighurst, Duke University, Durham, NC.

For AMERICAN ASSOCIATION OF ORTHONDONTISTS, SOUTHWESTERN SOCIETY OF ORTHONDONTISTS, Defendants-Appellees: David Paul Blanke, Vinson & Elkins, Austin, TX.

For AMERICAN ASSOCIATION OF ORTHONDONTISTS, SOUTHWESTERN SOCIETY OF ORTHONDONTISTS, Defendants-Appellees: Brian Edward Robinson, Vinson & Elkins, Dallas, TX.

For GAC INTERNATIONAL INC, LEO A DOHN, Defendants-Appellees: Margaret M Zwisler, Howrey, Simon, Arnold & White, Washington, DC.

Judges: Before KING, Chief Judge, and SMITH and EMILIO M. GARZA, Circuit Judges.

Opinion by: JERRY E. SMITH

Opinion

[*760] JERRY E. SMITH, Circuit Judge:

Anthony Viazis appeals a judgment as a matter of law ("j.m.l.") in favor of the American Association of Orthodontists ("AAO"), the Southwestern Society of Orthodontists **[*761]** ("SWSO"), GAC International, Inc. ("GAC"), and Leo A. Dohn. Finding no reversible error, we affirm.

I.

Viazis, an orthodontist practicing in the Dallas area, designed and patented a triangular orthodontic bracket in 1991.[1] He contends that his bracket is more effective than other designs in that it decreases the amount of time braces must be worn. In 1992, Viazis entered into a contract with GAC, a manufacturer of orthodontic devices, to market and distribute his bracket.

[2]** In April 1996, Viazis sent an advertising mailer to the parents of school age children in the Plano, Texas, area near Dallas, claiming that braces made using the Viazis bracket were faster, less expensive, and potentially safer than other products. In May of that year, Viazis held a seminar promoting his brackets directly to these parents. A member of the Greater Dallas Association of Orthodontists ("GDAO") and the AAO forwarded a complaint regarding

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[1] Brackets are components of braces that are fixed onto the teeth with an adhesive. Wires are then passed through the brackets, and forces are applied to straighten the teeth.

Viazis's advertisements to the AAO, indicating that Viazis's conduct might violate provisions of that organization's Code of Professional Responsibility.

Viazis alleged that the resulting controversy surrounding his advertisements resulted in the termination of the marketing aspect of his agreement with GAC. There was an ad verse impact on the relationship between Viazis and GAC, and their arrangement was re structured in mid-1997. GAC continued to manufacture the Viazis bracket but ceased all marketing activities.

In December 1997, the AAO advised Viazis that he could be subject to disciplinary action as a result of the claims of faster, safer, and more effective treatment made in his advertisements. In December 1999, after a hearing **[**3]** and appeal, the AAO suspended Viazis's membership in the organization.

Meanwhile, in August 1998, Viazis filed this action against the AAO, the SWSO, the GDAO, and various individuals who are no longer defendants. Viazis subsequently added Dohn and GAC as defendants. By the time of trial, Viazis's only remaining claim was that the AAO, SWSO, GAC, and Dohn had con spired to exclude his brackets from the market for orthodontic devices in violation of § 1 of the Sherman Act. At the conclusion of Viazis's case-in-chief at trial, the court granted defendants' motion for j.m.l.

II.

HN1[] We review a j.m.l. *de novo*. *Casarez v. Burlington N./Santa Fe Co., 193 F.3d 334, 336 (5th Cir. 1999)*. To defeat a motion for j.m.l., the nonmovant must present "substantial evidence opposed to the motion[]." [2] In other words, the nonmovant must present evidence that is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id*.

[4]** ***HN2***[] Section 1 of the Sherman Act does not pro scribe independent conduct. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. So, to establish a § 1 violation, a plaintiff must demonstrate concerted action. *Id*. Further, although in ruling on a motion for j.m.l. the court must consider all the evidence offered by either party "in the light and with all reasonable inferences in favor of" the party opposed **[*762]** to the motion, *Giles v. GE, 245 F.3d 474, 481 (5th Cir. 2001)* (internal quotation marks omitted), in this case the range of permissible inferences is limited by particular principles of ***antitrust law***, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Accordingly, evidence of conduct that is "as consistent with permissible competition as with illegal conspiracy" cannot support an inference of conspiracy. *Id*. In essence, an antitrust plaintiff who is unable to present direct evidence of a conspiracy must introduce circumstantial evidence that "tends to exclude the possibility of independent action." *Monsanto, 465 U.S. at 768*. **[**5]**

Viazis contends that he introduced sufficient evidence of concerted action to avoid j.m.l. He alleges that GAC terminated the marketing agreement in response to threats made by AAO and its regional affiliates. He also contends that the decision of an AAO disciplinary committee to suspend him for one year was the result of unlawful concerted action. Viazis failed to introduce sufficient evidence to prove either allegation.

A.

Direct evidence of a conspiracy is that which "explicitly refers to an understanding" between the alleged conspirators. *See* *South way* *Theatres, Inc. v. Ga. Theatre Co., 672 F.2d 485, 493 n.8 (5th Cir. 1982)*. The letter written by Leo Dohn, then-CEO of GAC, which constitutes Viazis's primary evidence bearing on the existence of a conspiracy be tween the AAO and GAC, contains no explicit reference to an agreement between GAC and any

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[2] *Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)* (en banc), *overruled in part on other grounds by* ***Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997)*** (en banc).

party. Each of the statements from the letter offered by Viazis as evidence of a conspiracy depends on additional inferences. [3] **[**6]** Therefore, the letter is, at most, circumstantial evidence of a conspiracy. [4]

[7]** **[*763]** As discussed above, ***HN3***[] in the absence of direct evidence of a conspiracy, an antitrust plaintiff must present evidence tending to exclude the possibility of independent conduct. *Monsanto, 465 U.S. at 768*. To do so, Viazis was required to demonstrate that GAC and AAO "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id*. Although the Dohn letter contains evidence of complaints received by GAC from accounts in the Dallas area, such complaints are insufficient evidence of concerted action, because "dealer-initiated contact fails to establish that a manufacturer has imposed restrictions collusively, not based on its independent business judgment." [5] In *Culberson*, this court specifically held that a manufacturer's action in the face of customer complaints is not a sufficient basis for a finding of conspiracy. [6]

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[3] Viazis asserts that Dohn's statements to the effect that GAC might experience national repercussions are "inconsistent with localized complaints," and he claims that Dohn's prediction that Viazis would suffer adverse professional consequences as a result of his seminar are "consistent with ongoing communications." Neither these statements nor any other of the passages cited by Viazis contain explicit reference to an agreement between GAC and any other party.

[4] Viazis contends that he introduced evidence of a conspiracy through testimony that the district court improperly disregarded. The testimony at issue related to whether GAC had a policy against advertising directly to consumers before the events at issue. Dohn testified that GAC had a policy against advertising directly to the public, although Barry Mervine, GAC's representative in Dallas, testified that he was unaware of any such policy. In addition, Viazis testified that GAC had foreknowledge of, and input into, a mailer through which he advertised to the public but failed to object to its contents.

Although, in ruling on a motion for j.m.l., a district court should refrain from making credibility determinations, *see* *Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994)*, the court did not necessarily do so here. Mervine's testimony does not establish that GAC advertised directly to consumers, nor even that GAC lacked a policy prohibiting such advertising. All Mervine's testimony establishes is that if such a policy existed or such advertisement took place, he was unaware of it. His testimony, therefore, does not directly contradict Dohn's. Viazis's testimony has a greater tendency to undercut the existence of a longstanding policy against direct advertisement but does not contradict GAC's contention that it had not engaged in direct advertisement in the preceding decade.

In any event, even if the court improperly evaluated the credibility of these two witnesses in arriving at its conclusions, the legal result would be the same. Although proof of a preexisting policy tends to support an inference of independent con duct, *see* *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587, 594 (5th Cir. 1993)*; *Culberson, Inc. v. Interstate Elec. Co., 821 F.2d 1092, 1094 (5th Cir. 1987)*, the absence of such a policy does not necessarily support an inference of conspiracy. As discussed in part I.B.2 *infra*, GAC was entitled to act in response to customer complaints irrespective of whether it had a preexisting policy.

[5] *Culberson, 821 F.2d at 1094*; *see also* *Matrix Essentials, 988 F.2d 587*.

[6] *See* *Culberson, 821 F.2d at 1093*. Viazis's attempts to distinguish the *Monsanto* line of cases are unpersuasive. He accurately notes that the reasoning in *Monsanto* and its progeny reflects some concern that allowing dealer complaints to serve as evidence of conspiracy would deter legitimate business strategies, such as the adoption of marketing strategies using nonprice restrictions. Viazis contends that such concerns are not implicated here, because "conspiracies aimed at stamping out promising new technology should not be made unduly difficult to prove."

Even if manufacturers' ability to impose legitimate nonprice restrictions were the principal focus of *Monsanto*, this conclusional statement fails to offer any ground for distinguishing the present case. This case implicates GAC's ability to enforce its particular marketing strategy, namely, that of marketing to health professionals rather than the public, and therefore is not distinguishable from *Monsanto* on the ground argued by Viazis.

Further, Viazis ignores the fact that the *Monsanto* Court dealt with the "*two* important distinctions that are at the center of [any] distributor-termination case." *Monsanto, 465 U.S. at 761* (emphasis added). The distinction between price and nonprice restrictions was the second of these; the first was "the basic distinction between concerted and independent action." *Id*. The Court dealt with this distinction by reaffirming the principle that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id*. (citing *United States v. Colgate & Co., 250 U.S. 300,*

[8]** Viazis argues, however, that GAC was faced with more than mere dealer complaints. Instead, he maintains, the AAO itself threatened a nationwide boycott to coerce GAC to end its marketing efforts on behalf of Viazis, and GAC acceded to AAO's demands. Such an inference of conspiracy is appropriate only if Viazis presented evidence tending to exclude the possibility of independent conduct on the part of AAO and GAC. To meet this standard, Viazis needed to show both that the AAO threatened a boycott and that GAC's decision to cease marketing the Viazis bracket was inconsistent with its independent self-interest. He failed to do so.

HN4[] A corporate entity such as the AAO can act only through its agents. Consequently, in the absence of evidence of formal decision making, an antitrust plaintiff must prove an association's conduct by demonstrating that the action was taken by individuals having apparent authority to act for the association. *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 556-67, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*.

The Dohn letter contains no indication that any of the referenced complaints was initiated by individuals having either **[**9]** actual or apparent authority to speak for the **[*764]** AAO. Viazis introduced no evidence of a membership vote or other formal decisionmaking process through which the AAO acted to threaten GAC or authorized its agents to do so. Nor did he produce evidence that the unnamed Dallas accounts referred to in the Dohn letter had apparent authority to speak for the AAO on such a matter. Viazis has introduced no evidence that the AAO itself, as opposed to some of its individual members, took action with respect to GAC.

Moreover, ***HN5***[] evidence that a manufacturer took certain actions does not tend to exclude the possibility of independent conduct if the actions were in the manufacturer's independent self-interest. [7] In other words, even if Viazis proved that the AAO or its regional affiliates threatened GAC, he must also show that GAC decided to end its relationship in response to those threats. If GAC ignored the threats but ended the relationship with Viazis based on an independent evaluation of its best interests, GAC acted independently, and there was no conspiracy. *See* *Matrix Essentials, 988 F.2d at 594*; *Lovett v. General Motors Corp., 998 F.2d 575, 579-81*. Viazis failed to demonstrate that **[**10]** GAC's decision to alter its relationship with Viazis was contrary to its own interests.

Viazis introduced statements made by GAC regarding the enormous potential market for his bracket and argued that GAC could not have been acting in its own interests when it abandoned its marketing rights. This argument fails, because GAC could have deter mined that the potential benefits from its marketing agreement with Viazis would be out weighed by the loss of business that would result from its continued association with him. [8] Therefore, GAC's decision to alter its relationship with Viazis is not evidence tending to exclude the possibility of independent behavior.

[11]** B.

Although there is no evidence that any authorized agent of the AAO threatened GAC, Viazis does point to one instance of official conduct by the AAO, namely, his suspension pursuant to the finding of an AAO ethics committee that he had violated the organization's prohibition of false and misleading advertising. Because there is no connection be tween this proceeding and GAC, it can constitute action pursuant to a conspiracy only if the members of AAO were conspiring among themselves. Viazis failed to present sufficient evidence of such a conspiracy.

HN6[] Despite the fact that "[a] trade association by its nature involves collective action by competitors[,] . . . [it] is not by its nature a 'walking conspiracy', its every denial of some benefit amounting to an unreasonable restraint of

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307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)). GAC's ability to deal or refuse to deal with Viazis is implicated by these proceedings.

[7] *See* *Matrix Essentials, 988 F.2d at 594*; *Lovett v. Gen. Motors Corp., 998 F.2d 575, 579-81 (8th Cir. 1993)*.

[8] *See* *Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1030 (6th Cir. 1991)*; *see also* *Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 909 (4th Cir. 1986)* ("One [legitimate reason for terminating a relationship with a dealer] is to avoid losing the business of disgruntled dealers.").

trade." *Consolidated Metal Products, Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)*. In *Consolidated Metal Products*, we rejected a claim of conspiracy based on a trade association's delay in licensing the plaintiff's product, noting that the plaintiff had failed to offer evidence that the proceedings were "merely a ploy to obscure a conspiracy against competing **[**12]** producers." *Id. at 294*. Viazis similarly was unable to demonstrate that the ethics proceedings against him were a sham or that the standards applied were pre textual, [9] so he failed **[*765]** to establish the existence of an unlawful conspiracy. *See id.* To the ex tent that he challenges the promulgation of the advertising restrictions by the AAO, as opposed to their enforcement, his failure to demonstrate any competitive harm, as discussed below, is fatal to that claim.

[13]** III.

Even if Viazis had presented sufficient evidence of concerted action, ***HN7***[] § 1 of the Sherman Act prohibits only those agreements that constitute unreasonable restraints of trade. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)* (citation omitted). The question whether a particular restraint is unreasonable frequently turns on whether it is examined under the rule of reason or falls within the category of practices that are judged to be unreasonable *per se*. If application of the *per se* rule is appropriate, competitive harm is presumed, and further analysis is unnecessary. If, by contrast, the restraint should be judged according to the rule of reason, its net potential for competitive harm must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.

A.

Viazis contends that the advertising restrictions in question should be reviewed according to the *per se* rule. ***HN8***[] Typically, it is the type of restraints that are "always or almost always" anticompetitive that are deemed to be unreasonable *per se*. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. **[**14]** The Supreme Court has been reluctant to apply the *per se* rule to standards promulgated by professional organizations, such as the advertising restriction at issue here. [10]

In fact, the Court recently concluded that advertising restrictions imposed by a professional association are not subject to a *per se* analysis. In *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)*, a case dealing with the legality of advertising restrictions that are remarkably similar to those at issue here, the Court necessarily rejected the application of the *per se* rule by holding that even the truncated rule of reason, or "quick look," treatment applied by the Ninth Circuit was insufficient given the potential procompetitive effects of such restrictions in a market **[**15]** for professional services. *Id. at 763-81*. The *per se* rule likewise is inapplicable to the restrictions at issue in this case.

B.

Although *California Dental* rejected the application of *per se* or even quick-look analysis to advertising restrictions implemented by a professional association, it did not hold that a full market analysis is required in such cases. *Id. at 779*. Instead, the Court held that ***HN9***[] "what is required is an enquiry meet for the case." *Id. at 780*. **[*766]**

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[9] During the appeal of Viazis's suspension, Dr. Hershey, one of the panelists, told Viazis: "It's not your work Tony. Next time, play by the rules." This comment is certainly suspicious, but it is not direct evidence of conspiracy, because it does not explicitly reference any agreement. In addition, Hershey's statement is not inconsistent with the committee's finding that Viazis violated the AAO's prohibition of deceptive advertising. The committee could have found Viazis's bracket to be a good product, while still concluding that Viazis had used inappropriate methods to promote it. In any event, in light of the fact that GAC ended its marketing arrangement with Viazis over a year before his suspension, the exclusion of which Viazis complains had long since occurred.

[10] *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* ("We have been slow to condemn rules adopted by professional associations as unreasonable *per se*.").

Under this approach, an analysis is sufficient if it openly addresses the "circumstances, details, and logic of a restraint" in reaching its conclusion. *Id. at 781*.

In *California Dental*, the Court recognized that a restriction on advertising related to quality has several potential procompetitive justifications. [11] On remand, the Ninth Circuit determined that the FTC had failed to prove that the advertising restrictions at issue were a net harm to competition. *Cal. Dental Ass'n v. FTC, 224 F.3d 942, 957 (9th Cir. 2000)*. The court noted that the Federal Trade Commission had failed to prove actual harm by presenting relevant **[**16]** data from the precise market at issue. *Id*.

Viazis similarly has failed to present data demonstrating the anticompetitive effects of the advertising restrictions of which he complains. In the absence of such data, he has not carried his burden to demonstrate that the restrictions have a net anticompetitive effect. *See id.*

Viazis claims that competitive harm is demonstrated by the steep decline in sales of his brackets to orthodontists. There is no evidence, however, that the AAO has influence over its members' purchasing decisions or that it coerced them into rejecting Viazis's brackets. In *Consolidated Metal Products, 846 F.2d at 296*, we **[**17]** held that where an association's product recommendations were non binding and the association did not coerce its members to abide by its recommendations, its refusal to sanction plaintiff's product did not show that plaintiff was excluded from the market. Nor can a plaintiff show competitive harm merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product." *Id. at 297*.

Though there is evidence demonstrating a drastic reduction in the number of orthodontists purchasing Viazis's brackets, there is none connecting that decrease to anything other than the voluntary decisions of independent orthodontists. Moreover, GAC has, at most, a 20% market share in orthodontic brackets. Therefore, GAC's refusal to market on behalf of Viazis could not significantly impede his ability to market the brackets, either independently or through GAC's competitors.

Indeed, Viazis has been successful in marketing his brackets to dentists and remains free to sell them to any orthodontist willing to purchase them. In the absence of proof that the AAO and its member orthodontists are engaging in a conspiracy, Viazis cannot prove **[**18]** harm to competition, because he can demonstrate nothing more than that his product is no longer selling well, at least not to orthodontists.

IV.

Viazis challenges two evidentiary rulings. First, he contends that the court erred in refusing to admit expert testimony to the effect that "consumers would have been harmed by the suppression" of the brackets. The testimony was excluded based on the determination that the testimony was not contained in the expert's report, as required by Local Rule 26(d)(1). In challenging this ruling, Viazis cites a passage in the expert's report that contains the excluded testimony almost *verbatim*. It therefore appears that the district court may have erred in determining that the testimony should be excluded under the local rule.

[*767] Nonetheless, ***HN10***[] we "may not disturb the district court's exclusion of the evidence . . . if that ruling can be upheld on other grounds, regardless of whether the court relied on those grounds." *Metallurgical Indus., Inc. v. Fourtek, Inc., 790 F.2d 1195, 1207 (5th Cir. 1986)*. The excluded testimony concerned alleged harm to the orthodontic services market, rather than the relevant market for purposes of Viazis's **[**19]** claim, which is the market for orthodontic braces. The testimony therefore was arguably irrelevant, as noted by the district court, and could have been excluded on that ground as well. *See FED. R. EVID. 401*.

Viazis also asserts that the district court erred in refusing to allow cross-examination concerning portions of a note written by Dohn that recognized the possibility that Viazis could file a § 1 claim against GAC. The excluded portion

[11] *Cal. Dental, 526 U.S. at 778* (noting that a restriction on quality-related advertisement for professional services may be justified by the possibility "that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market").

was hearsay, but Viazis argues that it should have been admitted under the exception for statements made by coconspirators.

HN11[] Under the coconspirator exception, hearsay evidence is admissible only if the proponent proves by a preponderance of the evidence that (1) a conspiracy existed; (2) the statement was made in furtherance of that conspiracy; and (3) the coconspirator and the party opposing admission were members of the conspiracy. *Burton v. United States, 237 F.3d 490, 503 (5th Cir. 2000)*. Because no conspiracy was established here, the coconspirator exception cannot apply, and the evidence was not admissible against AAO and the other association defendants.

Additionally, GAC contends that the pass age in question was **[**20]** based on communications between Dohn and his attorney, and that it is therefore privileged attorney-client material and inadmissible. The district court did not abuse its discretion in excluding testimony regarding the note on either of these grounds.

In any event, HN12[] we will not reverse erroneous evidentiary rulings unless the aggrieved party can demonstrate "substantial prejudice." *Kona Tech. Corp. v. S. Pac. Transp. Co., 225 F.3d 595, 602 (5th Cir. 2000)*. Viazis failed to demonstrate that the exclusion of either of these pieces of evidence resulted in substantial prejudice.

AFFIRMED.

Elec. Inspectors, Inc. v. Vill. of E. Hills

United States Court of Appeals for the Second Circuit

June 17, 2002, Argued ; December 13, 2002, Decided

Docket No. 01-9483

Reporter
320 F.3d 110 *; 2002 U.S. App. LEXIS 28147 **; 2002-2 Trade Cas. (CCH) P73,900

ELECTRICAL INSPECTORS, INC., Plaintiff-Counter-Defendant-Appellant, - v. - VILLAGE OF EAST HILLS, VILLAGE OF ROSLYN and VILLAGE OF OYSTER BAY COVE, Defendants-Counter-Claimants, VILLAGE OF ISLANDIA, ALEXANDER PIRNIE and NEW YORK BOARD OF FIRE UNDERWRITERS, Defendants-Counter-Claimants-Appellees, VILLAGE OF ISLAND PARK, VILLAGE OF BROOKVILLE, VILLAGE OF NORTH HILLS, VILLAGE OF FLOWER HILL, VILLAGE OF GREAT NECK, VILLAGE OF GREAT NECK ESTATES, VILLAGE OF KINGS POINT, VILLAGE OF PORT WASHINGTON NORTH, VILLAGE OF SEA CLIFF, VILLAGE OF SADDLE ROCK and VILLAGE OF BAITING HOLLOW, Defendants.

Subsequent History: [1]** As Amended January 17, 2003. As Amended January 31, 2003.

US Supreme Court certiorari denied by *Vill. of Islandia v. Elec. Inspectors, Inc., 157 L. Ed. 2d 373, 124 S. Ct. 467, 2003 U.S. LEXIS 8021 (U.S., 2003)*

Prior History: Appeal from a decision of the United States District Court for the Eastern District of New York (Leonard D. Wexler, Judge) granting the defendants-counter-claimants-appellees' motion for summary judgment on the plaintiff's claims under the Sherman Act, *15 U.S.C. §§ 1 & 2*. The plaintiff alleges that a municipal ordinance of the defendant Village of Islandia effectively requiring all owners of commercial and residential buildings to submit to electrical wiring inspections by the defendant New York Board of Fire Underwriters, a private party designated by the municipality, created an illegal monopoly and has resulted in other ***antitrust-law*** violations. The district court concluded that the municipal ordinance was authorized by an act of the New York State Legislature, and that the municipality and the private party were therefore immune under the state-action doctrine from federal ***antitrust-law*** claims.

Elec. Inspectors, Inc. v. N.Y. Bd. of Fire Underwriters, 145 F. Supp. 2d 271, 2001 U.S. Dist. LEXIS 5940 (E.D.N.Y., 2001)
Elec. Inspectors, Inc. v. Vill. of East Hills, 313 F.3d 685, 2002 U.S. App. LEXIS 25533 (2d Cir. N.Y., 2002)

Disposition: Vacated and remanded.

Core Terms

Village, immunity, municipalities, private party, state-action, supervision, regulations, inspections, district court, electrical, anticompetitive, foreseeable, Sherman Act, prong, contracting, antitrust, ordinance, monopoly, doctrine of immunity, local government, anti trust law, suppression, state policy, ***antitrust-law***, authorization, purposes, argues, entity, antitrust liability, certificates

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. A district court must grant a motion for summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, *Fed. R. Civ. P. 56(c)*, i.e., where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. A fact is "material" for these purposes if it might affect the outcome of the suit under the governing law. An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Federal Government > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Transportation Law > Bridges & Roads > Billboards

HN2[] **Scope, Exemptions**

Under the state-action immunity doctrine established by the Parker decision the Sherman Act does not apply to anticompetitive restraints imposed by the states as an act of government. The doctrine is grounded in principles of federalism and state sovereignty. Local governments are not sovereign, and so their actions are not automatically immune under the Parker decision. Nonetheless, because states sometimes effect regulatory regimes through local government bodies, municipalities may avail themselves of Parker immunity to the extent their actions are an authorized implementation of state policy.

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN3[] Local Governments, Claims By & Against

Municipalities that wish to avail themselves of Parker immunity must show that their regulations were authorized by the state. The requisite showing of authority has two components: First, the municipality must have "authority to regulate"; second, it must have "authority to suppress competition."

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4[] Exemptions & Immunities, Parker State Action Doctrine

Federal courts, when determining state-action immunity for municipalities, must adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. This broader concept of authority is necessary because a doctrine of state-action immunity that transformed state administrative review into a federal antitrust job would undermine the very interests of federalism the Parker doctrine is designed to protect. For this reason, the inquiry into a municipality's authority to regulate should not be exacting. As long as the local enactment is within a broad view of the authority granted by the state, whether it is actually violative of that statute is a question for state authorities, not one of federal ***antitrust law***.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN5[] Zoning, Ordinances

With regard to the second component of the inquiry, i.e., whether the municipality has authority to suppress competition, the United States Supreme Court begins by rejecting the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition. Instead, the requirement is met if suppression of competition is the foreseeable result of what the statute authorizes. The Court then asks whether a logical relationship existed between the purpose of the state statute and its alleged anticompetitive effect, and observes that the very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Building & Housing Codes

Governments > Local Governments > Duties & Powers

HN6[] **Zoning, Building & Housing Codes**

N.Y. Exec. Law § 381 provides that every local government shall administer and enforce the uniform fire prevention and building code; *N.Y. Exec. Law § 371* states that it shall be the public policy of the state of New York to encourage local governments to exercise their full powers to administer and enforce the uniform code. *N.Y. Exec. Law §§ 381(2)*, *371(2)(d)*.

Governments > Local Governments > Duties & Powers

HN7[] **Local Governments, Duties & Powers**

N.Y. Exec. Law §§ 381(2), *371(2)(d)* can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Building & Housing Codes

Governments > Local Governments > Licenses

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

HN8[] **Zoning, Building & Housing Codes**

The regulations issued by the Secretary of State soon after the passage of the Uniform Fire Prevention and Building Code Act authorize municipalities to condition occupation and use of a building on the result of an electrical inspection, and by resolution provide that such inspection shall be performed by an inspector, designated or approved by the town. N.Y. Comp. Codes R. & Regs. tit. 19, § 429(b) (repealed 1996).

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN9[] **Local Governments, Claims By & Against**

The court's task in assessing the second component of authority identified in the Omni Outdoor decision is to determine whether the state intended or at least could have contemplated that its policy would result in "suppression of competition."

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN10[] **Local Governments, Claims By & Against**

By definition, the creation of a monopoly suppresses -- indeed eliminates -- all competition in that locality.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN11[] **Parker State Action Doctrine, Local Governments & Private Parties**

There are circumstances under which private parties may avail themselves of the Parker state-action immunity doctrine. The United States Supreme Court has explained the purpose of extending state-action immunity to private parties thus: the Parker decision is premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the states' ability to regulate their domestic commerce. If Parker immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a state would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. The Court declines to reduce Parker's holding to a formalism that would stand for little more than the proposition that the plaintiff sued the wrong parties.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN12[] **Securities Act Actions, Civil Liability**

The United States Supreme Court has established that private parties must satisfy a two-prong test to qualify for state-action immunity. First, the private party must show that the alleged anticompetitive acts were pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. Second, it must show that its conduct was actively supervised by the act itself.

Criminal Law & Procedure > ... > Driving Under the Influence > Blood Alcohol & Field Sobriety Testing > General Overview

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN13[] **Driving Under the Influence, Blood Alcohol & Field Sobriety Testing**

The United States Supreme Court has made clear that the first prong of the Midcal test is not as demanding as the Court's statement of it in the Midcal case suggests. It does not, for example, require a private party to show a specific, detailed legislative authorization for its challenged conduct. Rather, as long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the Midcal test is satisfied.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Regulated Industries > General Overview

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN14[] Scope, Exemptions

Under the second prong of the Midcal test -- active state supervision -- a private defendant must show not only that state officials have the power to supervise, but also that those officials exercise that power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. This requirement of official involvement seeks to prevent states from transforming the Parker doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties. This second part of the Midcal test thus serves as a counterweight to the first because it ensures that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > Local Governments > Finance

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Governments > Local Governments > Claims By & Against

HN15[] Parker State Action Doctrine, Local Governments & Private Parties

Municipalities need not show that the state actively supervises them for them to be immune with regard to their own anticompetitive behavior under the Parker doctrine because there is little or no danger that a municipality is involved in a private price-fixing arrangement. The only real danger is that the municipality will seek to further purely parochial public interests at the expense of more overriding state goals. By way of contrast, when a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN16[] Securities Act Actions, Civil Liability

The requirement of active state supervision ensures that anticompetitive acts are driven by the interests of the state, not the private party's own interests.

Governments > Local Governments > Claims By & Against

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN17[] **Local Governments, Claims By & Against**

Arrangements whereby states authorized horizontal price fixing among insurance companies, but required the companies to file collective tariffs that state agencies had the option to reject, lacked sufficient state supervision to qualify for immunity. To fulfill the active supervision prong, private parties must prove that state officials have undertaken the necessary steps to determine the specifics of the regulatory regime; a mere "negative option" among state agencies to reject prices proposed by private parties is insufficient. The mere potential for state supervision is not an adequate substitute for a decision by the state.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN18[] **Securities Act Actions, Civil Liability**

A company does not violate the antitrust laws when monopoly is "thrust upon it."

Counsel: FRANK AMBROSINO, Reilly, Like, **[**2]** Tenty & Ambrosino, Babylon, N. Y., for Defendant-Counter-Claimant-Appellee Village of Islandia.

DONALD T. RAVE, JR., Locust Valley, N.Y., for Defendants-Counter-Claimants-Appellees New York Board of Fire Underwriters and Alexander Pirnie.

RONALD C. BURKE, Brand, Brand & Burke, New York, N.Y., for Plaintiff-Counter-Defendant-Appellant.

Judges: Before: CALABRESI, SACK, and B.D. PARKER, JR., Circuit Judges.

Opinion by: SACK

Opinion

[*114] SACK, Circuit Judge:

This appeal requires us to determine whether the state-action immunity doctrine shields a municipality and a private corporation from alleged federal ***antitrust-law*** violations resulting from the municipality's conferral upon the corporation of exclusivity in the market for government-required electrical inspection services within the municipality.

The defendant Village of Islandia (the "Village") is a municipality located on New York's Long Island. In 1988, the Village adopted a policy of requiring building owners to obtain certificates of occupancy from the Village, and conditioning the issuance of such certificates on the positive results of an electrical wiring inspection conducted by the not-for-profit defendant **[**3]** New York Board of Fire Underwriters (the "Board"). Any property owner who wishes to use or occupy a building is required to submit to and pay the Board for the Board's inspection. The plaintiff, a for-profit corporation that also provides electrical inspection services in the State of New York, brought suit against both the Village and the Board in the United States District Court for the Eastern District of New York alleging that this arrangement resulted in violations of the *Sherman Act and* other federal and state laws. The district court (Leonard D. Wexler, Judge) concluded that the Village's policy was authorized by an act of the New York State Legislature, and that the actions of the Village and the Board were therefore exempt from the federal antitrust laws under the state-action immunity doctrine. *Elec. Inspectors, Inc. v. N.Y. Bd. of Fire Underwriters, 145 F. Supp. 2d 271, 279 (E.D.N.Y. 2001)* ("EII").

We agree with the district court that for purposes of the state-action immunity doctrine, the state authorized the Village to pass the ordinance that gave the Board exclusivity with respect to the performance of wiring inspections in Islandia. We disagree, **[**4]** however, with the district court's holding that this finding is sufficient in itself to support a dismissal of the plaintiff's federal ***antitrust-law*** claims. We conclude that such immunity for the Board against the plaintiff's claim for damages, and possibly for the Village against the plaintiff's claim for equitable relief, requires a finding that government officials actively supervised the Board. We therefore **[*115]** vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

In 1981, the New York State Legislature enacted the Uniform Fire Prevention and Building Code Act (the "Act"), *N.Y. Exec. Law § 370 et seq.* The Act required the creation of a state-wide uniform fire code for commercial and residential buildings, id. *§ 377*, and it directed New York's various local governments to "administer and enforce the uniform . . . code," id. *§ 381(2)*. To facilitate local governments' carrying out of their enforcement responsibilities, the Act directed the New York Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and **[**5]** enforcement of the uniform . . . code," id. *§ 381(1)*, and gave the Secretary powers to ensure that local governments enforced the code in compliance with the Secretary's regulations, id. *§ 381(4). The Act* required the regulations issued by the Secretary to address, inter alia, the frequency of building inspections and the number and quality of inspectors. Id. *§ 381(1)*.

Pursuant to the Act, the Secretary issued regulations providing that any property owner who wishes to use or occupy a commercial or residential building must obtain a certificate of occupancy from a local government body. N.Y. Comp. Codes R. & Regs. tit. 19, § 429(c)(1) (repealed 1996). Local governments, in turn, were forbidden from issuing a certificate of occupancy for any building unless a designated officer or agent inspected the building's electrical wiring and certified that it complied with the uniform electrical code. Id. § 429(b)(1) (repealed 1996). Finally, the Secretary's regulations (later withdrawn) authorized local governments to pass resolutions designating those who would conduct such inspections. The specified options were (1) "a designated officer or employee of the city, **[**6]** town, or village"; (2) "an employee or agent of another city, town, or village who is qualified to conduct such inspections"; (3) "a person who is qualified to conduct such inspections . . . pursuant to a contract with the city, town, or village"; (4) "an employee or agent of the county who is qualified to conduct such inspection"; and (5) "a competent inspector, designated or approved by the city, town, or village." Id. *§ 429.2(b)(2)(i) (iv)* (repealed 1996).

Pursuant to those regulations and prior to their repeal, on August 4, 1988, the trustees of the Village passed an ordinance resolving that the Village "accepts [the Board] as its only electrical inspecting agency." Thereafter, the Village required all applicants for certificates of occupancy to present proof that the Board had inspected the electrical wiring in their buildings and certified that it complied with the National Electric Code. [1]

[7]** The Board is a not-for-profit corporation that received its charter from the New York State Legislature in 1867. [2] Its members are ninety-six insurance companies authorized to write fire insurance policies in New York. According to an affidavit **[*116]** submitted by defendant Alexander Pirnie, the Board's former president, [3] the Board engages in two principal activities: It maintains the New York City Fire Patrol, a group of patrolmen who assist New York City's firefighters, and it inspects electrical equipment and issues certificates of compliance with the National

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[1] The National Electric Code is "a model code promulgated by the National Fire Protection Association," *Edison Elec. Inst. v. Occupational Safety & Health Admin., 270 U.S. App. D.C. 280, 849 F.2d 611, 614 (D.C. Cir. 1988)*, which is "an international nonprofit membership organization," see NFPA Overview, at *http://www.nfpa.org/Home/AboutNFPA/NFPAOverview/NFPAOverview.asp* (last visited December 12, 2002).

[2] On April 1, 1930, the New York State Legislature reconstituted and continued the Board "as a body, corporate and politic, in perpetuity."

[3] The distinction between the Board and Pirnie is not relevant for purposes of this appeal, and our legal conclusions regarding the Board apply equally to Pirnie.

Electric Code. Pirnie Aff. PP 4, 11. Approximately 250 New York municipalities have adopted policies that, like the Village's, effectively require building owners to obtain certificates of compliance from the Board. Id. P 12. The Board charges a fee for inspections to be paid by the property owner.

[8]** The plaintiff, Electrical Inspectors, Inc., is a for-profit corporation that, like the Board, inspects electrical wiring in commercial and residential properties in New York State and issues certificates of compliance with the National Electric Code. On March 1, 1999, the plaintiff brought this action in the district court against fifteen New York municipalities including the Village; on September 9, 1999, it amended its complaint to name the Board as a defendant. The plaintiff alleged various violations of the Sherman Act, *15 U.S.C. §§ 1 & 2*, the Donnelly Act, *N.Y. Gen. Bus. Law § 340(1)*, its federal due process rights, and its federal and state equal protection rights. According to the amended complaint, the municipalities' policies of conferring monopoly power within their respective boundaries on the Board were unauthorized by state law and had the illegal effect of excluding the plaintiff from local markets for electrical inspection services. Amend. Compl. P 139. The plaintiff also alleged that the Board actively sought and maintained such grants, and abused its exclusive positions by providing low-quality service and by seeking **[**9]** to expand its overall market share by threatening to retaliate in those locations where it has exclusivity against customers who use the plaintiff's services where competition is allowed. Id. PP 52, 69, 72, 112, 118. [4] The plaintiff sought monetary damages against the Board, and injunctive and declaratory relief against the municipalities, for their asserted violation of the federal antitrust laws.

The defendants assert in their answer, inter alia, that they are immune from the plaintiff's federal ***antitrust-law*** claims under the state-action doctrine. The plaintiff moved to strike this defense as insufficient pursuant to *Federal Rule of Civil Procedure 12(f)*, and the defendants cross-moved for summary **[**10]** judgment on the federal ***antitrust law*** claims.

On March 30, 2001, the district court issued a Memorandum and Order denying the plaintiff's motion to strike and granting the defendants' motion for summary judgment. *Elec., 145 F. Supp. 2d at 279*. The court held that the municipalities were immune from federal antitrust liability on the grounds that the Act gave them "broad . . . authority over a matter integral to public health and safety," and that appointing exclusive agents to conduct required electrical inspections was "a 'foreseeable' consequence of the state delegation of authority." *Id. at 277-78*. The district court then concluded that the municipalities' immunity under the state-action doctrine extended to the Board. "Because the municipal defendants' decisions appointing the Board as exclusive agent **[*117]** are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *Id. at 279* (citing *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1048 (2d Cir. 1986))*.

On September 21, 2001, the plaintiff voluntarily dismissed **[**11]** its federal constitutional claims against the municipal defendants. The district court subsequently issued a judgment dismissing with prejudice the plaintiff's federal ***antitrust-law*** claims, and dismissing without prejudice the plaintiff's state-law claims for want of supplemental jurisdiction. The plaintiff now appeals, challenging only the district court's dismissal of its federal ***antitrust-law*** claims against the Board and the Village.

DISCUSSION

I. Standard of Review

HN1[] We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999)*, cert. denied, *529 U.S. 1098, 146 L. Ed. 2d 776, 120 S. Ct. 1832 (2000)*. A district court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," *Fed. R. Civ. P. 56(c)*, i.e., "where the record taken as a whole could not lead a rational trier of fact to find for

[4] The plaintiff also challenged the legitimacy of the Board's status as a non-profit entity, alleging that the Board's exemption from income taxes enabled it to earn "excess profits" that accrued to the benefit of its for-profit members. Amend. Compl. PP 45, 113.

the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* **[**12]** A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* . An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

II. State-Action Immunity for the Village

The Village regulates the usage of local real estate by requiring all owners of commercial and residential buildings who wish to use or occupy their property to obtain from the Village a certificate of occupancy. In order to do so, for reasons of fire safety, a property owner must, under the Village ordinance, first submit the property to an electrical wiring inspection by the Board, pay the Board's fee, and receive from the Board certification that the wiring complies with the National Electric Code. The plaintiff alleged in its amended complaint that the Village's conferral of such exclusivity on the Board violates, inter alia, the Sherman Act, and sought injunctive and declaratory relief. [5] The Village asserts the affirmative defense that its action was pursuant to state **[**13]** policy and thus was exempt from the federal antitrust laws under the state-action immunity doctrine. The district court agreed with the Village. The plaintiff challenges this holding on appeal.

Because the district court granted judgment to the Village on its affirmative defense, neither the standing of the plaintiff under the antitrust laws to make all of the underlying claims it asserts nor the merits **[*118]** of the claims are at issue in this **[**14]** appeal. Our only task with regard to the plaintiff's claims against the Village is to evaluate the district court's conclusion that the Village is immune.

A. Immunity for Municipal Economic Regulation

In *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)* ("Omni Outdoor"), the Supreme Court addressed state-action immunity for municipal regulatory schemes. There, the City of Columbia, South Carolina, asserted immunity from a claim under the Sherman Act that its restrictions on the size, location, and spacing of billboards hindered the ability of newcomers to compete in the billboard construction market. *Id. at 367-69*. The Court began its analysis by noting that ***HN2***[] under the state-action immunity doctrine established by its decision in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, "the Sherman Act [does] not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *Omni Outdoor, 499 U.S. at 370* (quoting *Parker, 317 U.S. at 352*.) The Court explained that the doctrine is grounded in "principles **[**15]** of federalism and state sovereignty." *Omni Outdoor, 499 U.S. at 370*. Local governments are not sovereign, and so their actions are not automatically immune under *Parker. Omni Outdoor, 499 U.S. at 370*. Nonetheless, because states sometimes effect regulatory regimes through local government bodies, municipalities may avail themselves of Parker immunity to the extent their actions are "an authorized implementation of state policy." Id.

The Court held that ***HN3***[] municipalities that wish to avail themselves of Parker immunity must show that their regulations were authorized by the state. The requisite showing of authority has two components: First, the municipality must have "authority to regulate"; second, it must have "authority to suppress competition." *Id. at 372*; accord *Hertz Corp. v. City of New York, 1 F.3d 121, 128 (2d Cir. 1993)* (holding that under Parker a municipality must establish that "the resulting anticompetitive activities are a foreseeable consequence of [a] state delegation" (quoting *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1043 (2d Cir. 1986)* **[**16]** ("Cine"))), cert. denied, *510 U.S. 1111, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994)*.

To determine whether the City of Columbia had "authority to regulate," the Supreme Court looked to the terms of the relevant South Carolina statutes. *Omni Outdoor, 499 U.S. at 371*. At the same time, the Court held that

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[5] The plaintiff does not allege that the Village has created a monopoly in the sense that it forbade property owners from hiring the plaintiff. The plaintiff's allegation is, rather, that the Village's requirement that every owner submit a Board-issued certificate of compliance in order to receive a certificate of occupancy effectively eliminated demand for the plaintiff's services. The implicit assumption, which we have no reason to doubt, is that property owners have little need for additional inspection services once they have obtained a certificate of occupancy.

HN4[] federal courts, when determining state-action immunity for municipalities, must "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id. at 372*. This broader concept of authority is necessary, the Court explained, because a doctrine of state-action immunity that "transformed state administrative review into a federal antitrust job" would undermine "the very interests of federalism [the Parker doctrine] is designed to protect." *Id. at 372* (citation omitted). For this reason, the Court held, the inquiry into a municipality's authority to regulate should not be exacting. *Id. at 371*. The Court went on to decide that language in the South Carolina statute authorizing local governments to regulate the height and size **[**17]** of "structures" constituted sufficient authority for the City of Columbia's billboard regulations. *Id. at 372-73* & n.4. Although the statute also **[*119]** provided that municipal ordinances were valid only if they served "the purpose of promoting health, safety, morals or the general welfare of the community," the Court declined to inquire whether the city's ordinance fulfilled this requirement. *Id. at 370 n.3, 371-73* (citation and internal quotation marks omitted). The Court's decision not to inquire as to whether Columbia's ordinance was actually authorized by state statute suggests that as long as the local enactment is within a broad view of the authority granted by the state, whether it is actually violative of that statute is a question for state authorities, not one of federal ***antitrust law***.

HN5[] With regard to the second component of the inquiry, i.e., whether the City of Columbia had "authority to suppress competition," the Supreme Court began by "rejecting the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition." *Id. at 372*. Instead, the Court held, **[**18]** the requirement is met "if suppression of competition is the 'foreseeable result' of what the statute authorizes." Id. (quoting *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985))*. The Court then asked whether a logical relationship existed between the purpose of the state statute and its alleged anticompetitive effect, and observed that "the very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni Outdoor, 499 U.S. at 373*. On this basis, the Court concluded that suppression of competition was a foreseeable result of the South Carolina statute, and thus that the City of Columbia had met the requirements for immunity for its regulatory scheme. *Id. at 374*.

The Supreme Court's analysis in Omni Outdoor mirrored the approach that this Court had followed in Cine. There we examined the actions of the New York "Urban Development Corporation," or "UDC," a public entity designed by the New York State Legislature "to make the State an **[**19]** active participant in the financing and construction of urban renewal projects." *Cine, 790 F.2d at 1036*. The UDC purchased theaters in the Times Square area of New York City and then awarded leases on them to private developers, prompting parties whose applications for leases had been rejected to bring suit under the Sherman Act against both the UDC and the winning bidders. *Id. at 1037-38*. The defendants claimed state-action immunity. *Id. at 1038*.

We began our analysis by holding that because the UDC was a "political subdivision of the state," it was like a municipality for purposes of the Parker doctrine. *Cine, 790 F.2d at 1047*. We then concluded that in order to qualify for state-action immunity, the UDC was required to "show [1] that it acted pursuant to a clearly expressed state policy and [2] that the resulting antitrust consequences were reasonably contemplated by the state." *Id. at 1047-48*.

With regard to the first component, we found authority for the UDC's actions in language in the UDC's enabling statute that specifically empowered it to purchase, and issue leases on, real **[**20]** property. *Id. at 1045*. Under the second component, we concluded that harm to some businesses around Times Square was a foreseeable consequence of the creation of an entity whose purpose was to improve a blighted urban area:

> It is fair to conclude that the legislature contemplated that when it granted power **[*120]** to the UDC to determine what buildings and services would be provided in a particular redeveloped land use project, it knew those choices would affect businesses and residences in that entire area. Such a conclusion is based on common sense. As a result of cultural improvements, rents and property values would increase even though some competitors would be adversely impacted, and some would disappear.

Id. at 1047. On this basis, we held that the UDC had shown sufficient state authority for its actions, and thus was immune under the Parker state-action immunity doctrine.

B. The New York Act and the Village Ordinance

The Village argues that its actions effectively excluding the plaintiff from the market for electrical inspections within its boundaries were authorized by the Act and related regulations issued **[**21]** by the New York Secretary of State. To evaluate the Village's defense, we follow the two-step inquiry set forth and applied in *Omni Outdoor* and *Cine*.

1. Step One: Authority to Regulate. The Village cites two provisions of the Act for its authority to regulate: ***HN6***[] *§ 381*, which provides that "every local government shall administer and enforce the uniform fire prevention and building code"; and *§ 371*, which states that "it shall be the public policy of the state of New York" to "encourage local governments to exercise their full powers to administer and enforce the uniform code." *N.Y. Exec. Law §§ 381(2), 371(2)(d)*. The Village also cites for support the regulations issued pursuant to the Act by New York's Secretary of State.

The plaintiff disagrees that the Act confers any new powers on New York municipalities that they do not already have, and argues that the statutory language cited by the Village merely directs local governments to apply to a particular purpose powers arising from other statutory sources. If the plaintiff's interpretation of the Act is correct, then the state-action immunity defense is unavailable because the Village has not **[**22]** identified any other specific statutory source of regulatory power, and the principle is well established that a municipality may not fall back on its general police or "home-rule" powers to immunize anticompetitive regulations. See *Cmty. Communications Co. v. City of Boulder, 455 U.S. 40, 56, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*; *Hertz, 1 F.3d at 128*.

If the Village had only the language of the Act to rely upon, its authority for purposes of the Parker doctrine might be subject to doubt. ***HN7***[] The cited provisions can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power. See *Omni Outdoor, 499 U.S. at 370-71 n.3* (South Carolina statute providing that "the legislative bodies of cities and incorporated towns may by ordinance regulate . . . buildings and other structures"); *Cine, 790 F.2d at 1045* (New York statute empowering the UDC "to acquire . . . real, personal or mixed **[**23]** property[,] and to sell . . . [or] lease . . . the same").

We conclude, however, that ***HN8***[] the regulations issued by the Secretary soon after the passage of the state statute make clear that even if the Village's ordinance was not actually authorized by the state statute itself, it was within the broad grant of state authority. The Secretary's regulations authorized municipalities to condition occupation and use of a building on the **[*121]** result of an electrical inspection, and "by resolution provide that such inspection shall be performed by [an] inspector, designated or approved by the . . . town." N.Y. Comp. Codes R. & Regs. tit. 19, § 429(b) (repealed 1996). The regulations appeared to interpret the statute to authorize the Village, or at least to authorize the Secretary to authorize the Village, to do precisely that which the Village has done. [6]

[24]** We think that the Act, combined with the Secretary's apparent interpretation of it, sufficiently demonstrates the Village's broad "authority to regulate" for purposes of state-action immunity. The Village has cited statutory language that, although perhaps ambiguous on the question, can be interpreted as delegating a power to regulate, and it has cited regulations issued by the agency charged with enforcing the statute that confer a power to regulate in plain language. Even though those regulations were subsequently withdrawn, they establish the Village's contention that its action was within the broad authority to regulate granted by the state statute itself. Under the broad concept of authority that principles of federalism compel us to apply, we conclude that these sources are sufficient for purposes of Parker state-action immunity analysis.

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[6] While, under the principles announced Omni Outdoor, it is not for us as a federal court of appeals to decide on this appeal whether the Village's acts are ultra vires, neither do we decide that had a state court determined that the acts were ultra vires, we would nonetheless conclude that the municipality or the private actor was entitled to state-action immunity.

2. Step Two: Authority to Suppress Competition. We also conclude that the Act and the Secretary's regulations establish the second component of authority that municipalities must show under *Parker*. The specific anticompetitive harm that the plaintiff alleges results from the Village's actions is the plaintiff's complete exclusion **[**25]** from the market for required electrical inspection services. We think that such exclusion is a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents. "Common sense," *Cine, 790 F.2d at 1047*, indicates that a municipality in the course of enforcing a fire code is likely, for quality control purposes, to limit the set of persons who may issue certificates of compliance, "even though some competitors would be adversely impacted," *id.* And common experience indicates that municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon themselves exclusivity in the market for required inspection services at a cost to private entities that would perform the same services. The Secretary specifically authorized such town-operated monopolies. *N.Y. Comp. R. & Regs. tit. 19, § 429.2(b)(I)* (repealed 1996). Such a regime also appears to be contemplated by the section of the Act that provides that "local governments **[**26]** or counties may charge fees to defray the costs of administration and enforcement," *N.Y. Exec. Law § 381(2)*. Thus, complete exclusion of a potential competitor in the market was foreseeable.

The plaintiff argues that even if a town-operated monopoly was foreseeable, the designation of a private party as the party enjoying exclusivity was not. We think, however, that the plaintiff's argument misunderstands the nature of the foreseeability inquiry. ***HN9***[] Our task in assessing the second component of authority identified in Omni Outdoor is to determine whether **[*122]** the state intended or at least could have contemplated that its policy would result in "suppression of competition." *499 U.S. at 373*; accord *Cine, 790 F.2d at 1047*. Whom the municipality selected as the party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition. ***HN10***[] By definition, the creation of a monopoly suppresses -- indeed eliminates -- all competition in that locality, and in this sense the degree of suppression is the same whether the party exercising the power arising out of exclusivity is public **[**27]** or private. The foreseeability inquiry requires us to go no further. See *Cine, 790 F.2d at 1045-46* (identifying the relevant question as whether the UDC's entry into leases with private parties was foreseeable, and not inquiring into the foreseeability of its selection of any party in particular). We therefore conclude that the suppression of competition resulting from the Village's actions was a foreseeable consequence of what the state authorized.

C. The Supervision Issue with Regard to the Village

Before we can decide whether the Village is immune from the plaintiff's claims, however, we must confront yet one more issue. The plaintiff argues that for a municipality to be immune under the Parker state-action immunity doctrine, it must show, in addition to state authority for its regulatory scheme, that government officials actively supervise those private parties whom the municipality regulates.

Whether a municipality must make such a showing appears to be an open question. The Supreme Court held in Town of Hallie that a municipality need not show that it is supervised by state officials for it to qualify for state-action immunity. *471 U.S. at 46.* **[**28]** But the Supreme Court also indicated that "where state or municipal regulation by a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." *Id. at 46 n.10*. This raises the question of whether a failure to show active supervision of a private party can defeat both the municipality's claim of immunity and the private party's, or only the private party's. We are not aware of any decision that squarely addresses this issue.

The law regarding the active supervision requirement has developed almost entirely in the context of claims against private parties. We will therefore return to the question of whether the Village's immunity might depend upon a showing that the Board is actively supervised by the Village after we review the plaintiff's claims against the Board.

III. The Board's State-Action Immunity Defense

The plaintiff alleged in its amended complaint that the Board violated the Sherman Act by willfully seeking and maintaining monopolies in various New York municipalities, and by abusing its monopoly power by providing low-quality service and by attempting to expand its overall market **[**29]** share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed. The district court, citing our decision in Cine, held that the municipalities' immunity under the Parker doctrine necessarily also protected the Board: "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *Elec., 145 F. Supp. 2d at 279*. The plaintiff argues on appeal that the district court misapplied the law of **[*123]** state-action immunity for private parties. [7] **[**30]** The Board argues that the district court's holding was correct, and in the alternative that under the Noerr-Pennington doctrine, certain allegations by the plaintiff fail to allege an antitrust injury. [8]

A. The State-Action Defense for Private Actors

HN11[] There are circumstances under which private parties may avail themselves of the Parker state-action immunity doctrine. The Supreme Court has explained the purpose of extending state-action immunity to private parties thus:

> The Parker decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If Parker immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition **[**31]** among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce Parker's holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties.

S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985) (footnote omitted) ("Motor Carriers"). In *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*, ***HN12***[] the Supreme Court established that private parties must satisfy a two-prong test to qualify for state-action immunity. First, the private party must show that the alleged anticompetitive acts were pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace

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[7] The plaintiff also argues that the decision of New York Supreme Court, Broome County, in *Atlantic-Inland, Inc. v. Union, 126 Misc. 2d 509, 516, 483 N.Y.S.2d 612, 618*, collaterally estops the Board from asserting a state-action immunity defense in this case. The fact pattern of Atlantic-Inland was similar to that of the instant case: An electrical inspection firm, alleging violations of its constitutional rights and New York ***antitrust law*** (i.e., the Donnelly Act), sued a municipality that had designated the Board its exclusive provider of required electrical inspections. The Board intervened on the side of the municipality. The court entered judgment against the defendants, holding that "the [municipality's] ordinance is anticompetitive and an unwarranted monopoly in violation of the Donnelly Act." *Id. at 517, 483 N.Y.S.2d at 618*. Although the court's opinion in Atlantic-Inland does not mention the state-action immunity defense, the plaintiff argues that the Board could have raised the defense in that case, and so its defeat precludes it from raising the defense now.

The plaintiff's collateral estoppel argument fails as a matter of law. Unlike the federal antitrust laws, the Donnelly Act contemplates no state-action exception. *Elec. Inspectors, Inc. v. Village of Lynbrook, 293 A.D.2d 537, 538, 740 N.Y.S.2d 412, 413 (2d Dep't 2002)*. Thus, even if the Board raised state-action immunity in Atlantic-Inland, rejection of that defense was not necessary to the disposition, and so that case does not preclude the Board from raising the defense here. See *Fuchsberg & Fuchsberg v. Galizia, 300 F.3d 105, 109 (2d Cir. 2002)* (collateral estoppel applies only to issues necessarily resolved in previous proceeding).

[8] In a supplemental brief that we requested at oral argument, the Board asserted for the first time a defense under the Local Government Antitrust Act of 1984, *15 U.S.C. § 34 et seq.* Because the Board did not raise the defense in its principal appellate brief, the Board has abandoned the defense and we do not consider it. See, e.g., *Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999)*.

competition. Id. (citation and internal quotation marks omitted). Second, it must **[*124]** show that its conduct was "actively supervised by the State itself." Id. (citation and internal quotation marks omitted).

More recently, **[**32]** ***HN13***[] the Supreme Court made clear that the first prong of the Midcal test is not as demanding as the Court's statement of it in Midcal suggests. It does not, for example, require a private party to show "'a specific, detailed legislative authorization' for its challenged conduct." *Motor Carriers, 471 U.S. at 64* (quoting *Lafayette v. La. Power & Light Co., 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978))*. Rather, "as long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the Midcal test is satisfied." *Motor Carriers, 471 U.S. at 64*. For example, in Motor Carriers itself, the Court held that a private party accused of horizontal price fixing had satisfied the first prong of Midcal by showing that a state legislature had instructed a state agency to prescribe "just and reasonable" prices, and the agency, in turn, had "exercised its discretion by actively encouraging collective ratemaking." *Id. at 63-64*.

HN14[] Under the second prong of the *Midcal* test -- active state supervision -- a private defendant must **[**33]** show not only that "state officials have . . . [the] power" to supervise, but also that those officials "exercise [that] power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget, 486 U.S. 94, 101, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*. This requirement of official involvement seeks to prevent states from transforming the Parker doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties. See *Motor Carriers, 471 U.S. at 57* ("The supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." (quoting *Midcal, 445 U.S. at 106*)); *Parker, 317 U.S. at 351* ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). This second part of the Midcal test thus **[**34]** serves as a counterweight to the first because it "ensures that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick, 486 U.S. at 100-01*. [9]

[35]** The Supreme Court's most recent decision applying the active supervision prong is *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*. There, the Court held that ***HN17***[] arrangements whereby states authorized horizontal price fixing among insurance companies, but required the companies to file collective tariffs that state agencies **[*125]** had the option to reject, lacked sufficient state supervision to qualify for immunity. *Id. at 639*. To fulfill the active supervision prong, the Court held, private parties must prove that state officials "have undertaken the necessary steps to determine the specifics" of the regulatory regime; a mere "negative option" among state agencies to reject prices proposed by private parties is insufficient. *Id. at 638-39*. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id. at 638*.

The Supreme Court followed a similar approach in Patrick, a case that involved an accusation by a physician that a group of his peers had conspired to deprive him of hospital privileges in violation of the Sherman Act. *486 U.S. at 97-98.* **[**36]** Although the defendants presented evidence of state policies encouraging physician peer review, the Court rejected their immunity claims because they had failed to show that state actors actively reviewed "private decisions regarding hospital privileges to determine whether such decisions comported with state regulatory policy and to correct abuses." *Id. at 101*.

Although the Supreme Court has applied the two-part Midcal test in each of its subsequent cases involving an assertion of state-action immunity by a private party, we have twice declined to engage in an independent immunity inquiry for a private party whose alleged anticompetitive conduct was to participate in "concerted" action with a

[9] ***HN15***[] Municipalities need not show that the state actively supervises them for them to be immune with regard to their own anticompetitive behavior under the Parker doctrine because "there is little or no danger that [a municipality] is involved in a private price-fixing arrangement." *Town of Hallie, 471 U.S. at 47* (emphasis in the original). "The only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." Id. By way of contrast, ***HN16***[] when "a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." Id.

government entity authorized by the state to take such action. Our first decision in this line was Cine, a case which, as discussed in Part II.A., above, involved efforts by a state-created entity, the UDC, to improve the Times Square area by purchasing theaters and then leasing them to developers. Although the Cine plaintiffs asserted that "collusive and monopolistic" pricing policies would result from the coordinated action between the UDC and **[*126]** the **[**37]** private-party defendants, the only anticompetitive conduct alleged by the plaintiffs to be illegal was the private parties' seeking, and the UDC's awarding, long-term leases on theaters. *790 F.2d at 1037-38*; see also *Cine 42nd St. Theater Corp. v. Nederlander Org., 609 F. Supp. 113, 119 (S.D.N.Y. 1985)*, aff'd, *790 F.2d 1032 (2d Cir. 1986)* (setting forth the plaintiffs' contentions). After concluding that the UDC's actions were fully authorized by New York State and therefore immune, we held that such immunity extended automatically to the "private [parties] acting in concert with the UDC." *Cine, 790 F.2d at 1048*. We explained that "when the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC." Id.

Our second such decision was *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59 (2d Cir. 1998)*, which involved alleged ***antitrust-law*** **[**38]** violations arising from contracts between a state-operated waste-disposal entity and private waste-disposal companies promising to honor each other's exclusive service agreements with various towns. *Id. at 63*. After concluding that the state agency's actions were authorized under a state statute and thus immune from federal ***antitrust-law*** liability, we held, relying on Cine, that the private companies were also immune because "subjecting them to antitrust liability would effectively block [the state entity's] efforts to carry out its mandate through contracts with private parties." *Id. at 74*. As in Cine, the only anticompetitive actions allegedly taken by the private-party defendants were those of contracting with the state-created entity. *Id. at 71*.

The Board argues on appeal that the Supreme Court's decision in Ticor and ours in Cine and Wheelabrator stand for the proposition that the active state-supervision test of Midcal is applicable only in horizontal price-fixing cases. We disagree. With regard to *Ticor*, the Supreme Court did not limit Midcal to any particular form of private anticompetitive **[**39]** conduct, but instead simply cautioned that its holding that the private defendants were not immune "should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision." *504 U.S. at 639*. Four years before Ticor, moreover, the Supreme Court, without dissent, applied the active supervision prong in Patrick, a case that had nothing to do with price fixing. *486 U.S. at 100*. [10]

We think that Cine and Wheelabrator, rather than departing from the logic of Midcal and subsequent Supreme Court precedent, are consistent with it. We decided in both cases that the governmental entities were authorized to engage in contracting **[**40]** with private parties, establishing that the first prong of Midcal was satisfied with regard to the private parties' actions. We then went on to extend that immunity to the private parties, reasoning that to allow suits against private parties who contract with governmental entities, who are themselves authorized to contract with private parties, would effectively undermine the governmental entities' ability to contract. *Wheelabrator, 155 F.3d at 74*; *Cine, 790 F.2d at 1048*. The private parties are the necessary counterparts to the government's acts, and authorization of the government's contracting therefore necessitates authorization of the private parties' contracting.

In extending immunity from governmental entities to private parties where the only alleged antitrust violation was entering into a contract with the government, these decisions do not go through a separate Midcal analysis. But, as the Supreme Court observed in Town of Hallie, "where the actor is a municipality, there is little or no danger that it is involved in a private . . . arrangement." *471 U.S. at 47*. The private actions "in concert" with the governments' **[**41]** in Cine and Wheelabrator were part of an "anticompetitive scheme [that was] the State's own," *Ticor, 504*

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[10] While we suggested in Wheelabrator that Ticor might apply only where private horizontal price fixing is in issue, *Wheelabrator, 155 F.3d at 74*, Patrick makes clear that that is not the case, *Patrick, 486 U.S. at 100*.

U.S. at 635, thus satisfying the concern that the second Midcal prong -- active supervision -- was designed to address.

Cine and *Wheelabrator* do not stand for the proposition that private parties who contract with governmental agencies are always immune from antitrust liability. As the Supreme Court has made clear, the relevant object of analysis under the state-action immunity doctrine is the activity challenged, not the identity of the party. *Motor Carriers, 471 U.S. at 58-59* ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."). In *Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000)*, which involved an assertion of federal-action immunity from ***antitrust-law*** claims by a private party that had contracted with a federal agency, we applied Motor Carriers to conclude that the private party was immune for conduct "compelled by the explicit terms" of its **[*127]** contract and the government's explicit **[**42]** direction. *Name.Space, 202 F.3d at 582*. At the same time, however, we observed that the private party's "mere status as a government contractor does not entitle it to antitrust immunity for all its conduct," *id. at 581*, reinforcing the notion that the relevant unit of analysis is the activity challenged, not the status of the party. The suspension of the requirement for an independent immunity inquiry for the private parties in Cine and Wheelabrator, therefore, should be understood to apply only to their acts of contracting with an authorized government entity.

B. The Board's Actions

We now consider each of the Board's actions that the plaintiff alleges violate the Sherman Act. We note at the outset that, perhaps with ***HN18***[] *United States v. Aluminum Company of America, 148 F.2d 416, 429 (2d Cir. 1945)* (Hand, J.), and its observation that a person does not violate the antitrust laws when it has monopoly "thrust upon it" in mind, the plaintiff does not assert that the Board violated the Sherman Act merely because the Village passed an ordinance according it exclusivity within the Village. Instead, the plaintiff's claim is **[**43]** that the Board actively sought and abused monopoly power.

We conclude that the district court erred by holding that our decision in Cine relieved the Board of the need to satisfy Midcal's two-prong test to qualify for state-action immunity. None of the Board's alleged anticompetitive conduct involved acts of contracting with a governmental entity authorized to enter into contracts with private parties. Municipal ordinances, not contracts, created the monopolies within the municipalities at issue in this case. Moreover, when the Board conducts an inspection, or allegedly threatens those who hire the plaintiff, it is engaging in transactions or seeking to engage in transactions with other private parties, not the Village. "The nature of the activity challenged," *Motor Carriers, 471 U.S. at 58*, is private, and therefore poses the danger of reflecting the Board's "own interests, rather than the governmental interests of the State," *Patrick, 486 U.S. at 101*.

We therefore hold that *Cine* and *Wheelabrator* have no application in this regard to the Board's conduct, and state-action immunity is available for the Board's alleged acts in restraint **[**44]** of trade in violation of *Section One of the Sherman Act* only if it can satisfy Midcal's two-prong test. With respect to the Board's alleged continuing monopolization of electrical inspection services in violation of *Section Two of the Act and the* plaintiff's assertion that the Board is left free by the Village to use its power of exclusivity to determine the price, terms, and quality of its services, the Board must meet both parts of the *Midcal* test -- including active supervision by the Village -- to warrant protection under the state-action immunity doctrine. The Village "may not confer antitrust immunity" -- including immunity from such charges of monopolization -- " on private persons by fiat." *Ticor, 504 U.S. at 633* (citing *Midcal, 445 U.S. at 105*). Unless the Village maintains "ultimate control" over the monopoly it created, "there is a real danger that [the defendant] is acting to further [its] own interests, rather than the governmental interests of the State." *Town of Hallie, 471 U.S. at 47*.

1. The First Part of the Midcal Test. We concluded in Part II.B., above, that the Village's conferral of exclusivity **[**45]** upon the Board was "an authorized implementation of state policy." *Omni Outdoor, 499 U.S. at 370*. We think that this holding also satisfies the **[*128]** first prong of the *Midcal* test for the Board to the extent that the Board's alleged anticompetitive actions were "pursuant" to the grant of exclusivity. *Town of Hallie, 471 U.S. at 40*. The plaintiff's amended complaint alleges anticompetitive actions by the Board in municipalities other than the

Village, suggesting that the first prong of the Midcal test for purposes of these actions would depend on the authority of these other municipalities to confer monopoly powers upon the Board. On appeal, however, the plaintiff has not raised arguments addressing these municipalities' authority as distinct from the Village's, and so we assume that our analysis of the Village's authority applies equally to these other municipalities for the limited purpose of assessing the Board's satisfaction of the first prong of Midcal.

The plaintiff also alleges that the Board attempted to monopolize inspections services by seeking government-issued exclusivity. Amend. Compl. PP 55, 84. Because these actions **[**46]** were not pursuant to state policy, but rather in pursuit of it, they do not appear to qualify for Parker immunity. They may, however, be protected under the Noerr-Penington doctrine. See *Omni Outdoor, 499 U.S. at 379-80* (holding that the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, establish that "the federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government"). We leave any analysis of this issue to the district court in the first instance on remand.

The Board's alleged poor service and retaliatory threats within the Village, if they occurred, unlike the Board's alleged action in lobbying for exclusivity, were pursuant to the exclusivity granted to the Board in the sense that the Board's insulation from competition would have lent these actions much of their capacity to harm. We thus conclude that these alleged actions pass the first part of the **[**47]** Midcal test. [11] Further inquiry into whether the Board is immune with respect to them must be conducted under the second part of the Midcal test: whether there was adequate active supervision of the Board.

2. The Second Part of the Midcal Test. With respect to the active state supervision part of the Midcal test as applied to the Board's **[**48]** remaining alleged anticompetitive conduct, the Board argues in the alternative that adequate supervision was present. In support, the Board cites an affidavit in which the Village's mayor asserts that the Village's building department "maintained strict controls over the inspections" by "establishing policies as to the manner in which the electrical inspections were carried out . . . [,] enforcing the requirement that all inspectors . . . possess the appropriate qualifications . . . [and] providing guidance to the inspectors as to how to proceed." Mayor **[*129]** Frank Falco Aff. P 11. The mayor also asserts in his affidavit that the Village could have replaced the Board at any time by resolution had it become dissatisfied with the Board's services. Id. P 16.

As we have noted, the district court did not determine whether the Board was actively supervised, holding instead that this part of the Midcal test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us. We note that in this context that the Village's mere "negative option" to replace the Board at any time is alone likely inadequate supervision, *Ticor, 504 U.S. at 638* **[**49]** (noting that supervision must be "active"), and leave to the district court on remand the determination in the first instance of what degree or kind of supervision is adequate and suffices for the Board's assertion of immunity to succeed.

IV. The Village's Immunity - Redux

We now return to the question we left unanswered in Part II.C., above: whether the Village's immunity, like the Board's, depends upon a showing that the Board is actively supervised. As we indicated, we are unaware of an opinion of the Supreme Court or of this Court that has squarely addressed this issue. We note that the Supreme Court has never held that a state's failure to supervise a regulated private party can deprive the state of immunity under Parker, even though such a failure can result in liability for the private party. The federalism-based concerns underlying state immunity from an antitrust action seem to us less pressing in this case than in the immunity cases the Court and we have decided, however, in part because the Village is not a sovereign, and in part because the

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[11] The plaintiff also alleges that the Board has sought to improperly extend use of its monopoly power into localities that have not made it the exclusive provider of inspection services, by threatening customers who use plaintiff's services where they are salable with retaliation in those localities in which the Board has been granted exclusivity. Amend. Compl. PP 69-72. We leave it to the district court on remand to determine in the first instance whether such actions, if they occurred, were without state-action immunity because they were not reasonably foreseeable anticompetitive effects of the authorized implementation of state policy, or otherwise.

plaintiff seeks only injunctive and declaratory relief against the Village. An injunction might be an appropriate device for **[**50]** blocking municipal regulatory regimes that result in significant anticompetitive action by private parties and that constitute nothing more than a "gauzy cloak of state involvement." *Midcal, 445 U.S. at 106*.

But the question of the need for an injunction will arise in this case only if the district court ultimately determines that the Board is not actively supervised and thus not immune, and that there has in fact been a violation of the antitrust laws. We therefore decline to decide this issue since it may prove unnecessary to the disposition of the case. If the district court determines on remand that supervision is lacking, that antitrust violations have occurred, and that a damages award against the Board would be inadequate to deter future harms, it may consider for the first time whether the Parker antitrust immunity doctrine would allow an injunction to issue against the Village even though the Village's actions were authorized by the state.

V. Caveat

It bears both repetition and emphasis that we have done no more than decide that, on the record before us, the defendants are not entitled to Parker state-action immunity as a matter of law. Nothing **[**51]** we have said should be read to imply any views as to the plaintiff's standing under the antitrust laws to raise all of the issues with respect to which it pleads in its amended complaint or as to the possible ultimate merits of its legal claims.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court, and remand the case for further proceedings consistent with this opinion.

Morris Communs. Corp. v. PGA Tour, Inc.

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

December 13, 2002, Decided ; December 13, 2002, Filed

Case No.: 3:00-cv-1128-J-20TJC

Reporter
235 F. Supp. 2d 1269 *; 2002 U.S. Dist. LEXIS 25854 **; 2003-1 Trade Cas. (CCH) P73,972; 31 Media L. Rep. 1642; 2002 WL 32151637

MORRIS COMMUNICATIONS CORPORATION, a Georgia Corporation, Plaintiff, v. PGA TOUR, INC., Defendant.

Subsequent History: Affirmed by *Morris Communs. Corp. v. PGA Tour, Inc., 2004 U.S. App. LEXIS 5915 (11th Cir. Fla., Mar. 31, 2004)*

Prior History: *Morris Communs. Corp. v. PGA Tour, Inc., 117 F. Supp. 2d 1322, 2000 U.S. Dist. LEXIS 15620 (M.D. Fla., 2000)*

Disposition: **[**1]** Defendant's Motion for Summary Judgment GRANTED. Plaintiff's Motion for Partial Summary Judgment on liability DENIED. Defendant's Motion to Continue Trial DENIED as moot.

Core Terms

scores, media, real-time, golf, syndication, broadcast, television, free-riding, tournaments, property right, radio, competitors, website, restrictions, pgatour, anti trust law, public domain, monopoly power, monopolization, golf tournament, regulations, stations, summary judgment motion, credentials, reasons, argues, output, golf course, proprietary, coverage

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Supporting Materials, Affidavits**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. When a moving party has discharged its burden, the nonmoving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Evidence > Inferences & Presumptions > Inferences

HN2[] **Summary Judgment, Opposing Materials**

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the court must draw inferences from the evidence in the light most favorable to the nonmovant, and resolve all reasonable doubts in that party's favor. Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the Court should not grant the summary judgment motion. . It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, the requirement is that there be no genuine issue of material fact. A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Once the defendant asserts valid business justifications for its action, the plaintiff bears the burden of proving that the proffered business justification is pretextual.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Free-riding is obtaining a benefit at another's expense without contributing to it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] Price Fixing & Restraints of Trade, Tying Arrangements

Free-riding on "positive externalities" is accepted by society and courts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

To be a business justification free-riding does not have to reach the for a hot news exception. To be a valid business reason, a much lower level of free riding will justify excluding competitors.

Business & Corporate Compliance > ... > Computer & Internet Law > Content Regulation > Communications Decency Act

Computer & Internet Law > Civil Actions > Damages

Communications Law > Federal Acts > Telecommunications Act > Communications Decency Act

Communications Law > ... > Rules & Regulations > Regulated Entities > Internet Services

Computer & Internet Law > General Overview

Computer & Internet Law > Content Regulation > Indecent & Obscene Speech

Computer & Internet Law > Internet Business > Internet & Online Services > General Overview

Computer & Internet Law > Internet Business > Internet & Online Services > Service Types

Computer & Internet Law > Internet Business > Online Advertising > General Overview

HN7[] Content Regulation, Communications Decency Act

The Internet is not like traditional broadcast media, i.e., television or radio. The United States Supreme Court has distinguished the Internet and the radio transmission based on three distinctions. First, the Internet has not historically been regulated by an agency familiar with the medium. Second, available frequencies on the Internet are not scarce as they are on radio. And finally, affirmative steps are required to access information on the Internet. The Court has concluded that because of these differences, Congress cannot regulate the Internet the same way it can regulate radio. However, none of those differences mandates treating the Internet differently from radio or television in terms of property rights. Whether the government can regulate the Internet does not limit the value of Internet broadcasting or provide a rationale for restricting the use of that information. The Internet provides an opportunity to profit from a product by selling advertisement. Television, radio, and print media operate on a similar, if not identical, principle: the selling of advertisement to viewers, listeners, or readers of entertainment, be it sports, entertainment, or news.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN8[] **Scope, Monopolization Offenses**

Monopolization, an offense under *Section 2* of the Sherman Act, *15 U.S.C.S. § 2*, requires two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9[] **Regulated Practices, Monopolies & Monopolization**

Liability on the second element of a *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, claim turns, then, on whether valid business reasons can explain those actions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN10[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Under certain circumstances, a unilateral refusal to deal may constitute an antitrust violation. However, in order to prevail on a claim for refusal to deal, the plaintiff must show both the existence of monopoly power and anticompetitive intent. Courts have used two tests to determine whether a refusal to deal is a violation of ***antitrust law***: intent test and essential facilities test.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN11[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The intent test considers whether, under the circumstances of a case, a monopolist's conduct demonstrates an illegal intent to destroy competition. It is not just an intent to destroy competition, for that is the nature of a competitive market, but an illegal intent as evidenced by, conduct that unnecessarily excludes or handicaps competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN12[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A legitimate purpose renders any accompanying purpose irrelevant; regardless of motive no firm has a general duty to injure itself in order to benefit a rival.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN13[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The withholding of an essential facility is a violation of ***antitrust law***, and an essential facility is one without which a competitor cannot enter or compete in a market. An essential facilities claim requires a showing of four elements: (1) control of the essential facility by a monopolist, (2) competitor's inability to duplicate the facility, (3) denial of the facility, and (4) feasibility of providing the facility.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Essentiality is not proven when actual or potential rivals other than the plaintiff are able to compete without the claimed facility.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN15[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A court's role is not to force access to proprietary information in the name of competition, as that would reduce incentive to innovate and ultimately harm consumers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN16[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

One who controls an essential facility must provide access upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN17[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

It is not unlawful for a defendant - even one who possesses monopoly power- to refuse to deal with its competitors if there are legitimate pro-competitive reasons for that refusal.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN18[] **Regulated Practices, Monopolies & Monopolization**

Monopoly leveraging refers to a monopolist's use of its market power to gain a competitive advantage in a different level or in a different market. Neither the Eleventh Circuit nor the United States Supreme Court has accepted this theory of antitrust violation.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN19[] **Regulated Practices, Monopolies & Monopolization**

Under the Second Circuit's analysis of monopoly leveraging, a plaintiff must make a showing of anticompetitive intent or an unlawful exercise of power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN20[] **Monopolies & Monopolization, Attempts to Monopolize**

Attempted monopolization has three elements: (1) the defendant's specific intent to achieve monopoly power through predatory or exclusionary conduct, (2) the defendant engages in such conduct, and (3) there exists a dangerous probability that the defendant will succeed. Specific intent does not merely mean intent to prevail over ones rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

A finding of legitimate pro-competitive business reasons forecloses a finding of predatory or exclusionary conduct.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN22[] **Trade Practices & Unfair Competition, State Regulation**

The Florida Deceptive and Unfair Trade Practice Act (FDUPTA), *Fla. Stat. Ann. § 501.201 et seq.*, defines violation of the act in *Fla. Stat. Ann. § 501.203(3)*, as any violation of this act and may be based upon any of the following: (a) any rules promulgated pursuant to the Federal Trade Commission Act, *15 U.S.C.S. § 41 et seq.* or this act; (b) the standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) any law, statute, rule, regulation or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices. FDUPTA is to be construed consistently with ***antitrust law***.

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

HN23[] Intentional Interference, Defenses

Florida courts recognize that if a defendant interferes with a contract in order to safeguard a preexisting economic interest of his own, the defendant's right to protect his own established economic interest outweighs the plaintiff's right to be free of interference, and his actions are usually recognized as privileged and nonactionable.

Counsel: For SPORTSLINE.COM, INC., intervenor: C. Ryan Reetz, Greenberg Traurig, P.A., Miami, FL USA.

For MORRIS COMMUNICATIONS CORP., plaintiff: George D. Gabel, Jr., Timothy J. Conner, Holland & Knight LLP, Jacksonville, FL USA.

For MORRIS COMMUNICATIONS CORP., plaintiff: Jerome W. Hoffman, Holland & Knight, Tallahassee, FL USA.

For PGA TOUR, INC., defendant: Gregory F. Lunny, James M. Riley, Richard S. Vermut, Peter Andrew Smith, Rogers, Towers, Bailey, Jones & Gay, Jacksonville, FL USA.

For PGA TOUR, INC., defendant: Jeffrey A. Mishkin, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY.

Judges: HARVEY E. SCHLESINGER, United States District Judge.

Opinion by: HARVEY E. SCHLESINGER

Opinion

[*1271] ORDER

This cause is before the Court on Defendant's Motion for Summary Judgment (Doc. No. 109, filed June 24, 2002) and Plaintiff's Response (Doc. No. 136, filed June 24, 2002); Plaintiff's Motion for Partial Summary Judgment on Liability (Doc. No. 125, **[**2]** filed June 24, 2002) and Defendant's Memorandum of Law in Opposition (Doc. No. 139, filed June 24, 2002) [1]; and Defendant's Motion to Strike Plaintiff's Second Notice of Supplemental Authority (Doc. No. 150, filed July 16, 2002). Following a hearing during which both sides presented oral argument on the summary judgment motions, all pending motions are ripe for consideration.

As an initial matter, Defendant's Motion to Strike is **DENIED**.

I. Background

Introduction

Many issues revolve around the periphery of this case, and the Court will take a minute to address what the case is and is not about. The quintessential issue is who has the right to instantaneous information and its value. This case is not about the ability or right of a publisher to disseminate and profit from information and facts released into the public domain through radio or television **[**3]** broadcasts or through a web site. Nor is this case about the ability of the media to cover and publish information for a story in the next day's paper or even in that evening's television news coverage. The *First Amendment* freedom of the press, while at first blush might appear to be relevant, is not involved. See *National Broadcasting Co. v. Communication Workers of America, 860 F.2d 1022, 1024 (11th Cir. 1988)*(stating that the *First Amendment* right of Free Press does not apply absent state action). The case, in general, does not resolve issues of journalistic integrity. [2] **[**4]** This case is to some extent **[*1272]** about Morris's

[1] The summary judgment motions and responses were originally filed under seal, and were unsealed by Court Order on June 24, 2002.

claimed ability or need to track a single player, ranked 100, from a small town who is not currently covered by the leader-board or being covered by the broadcast station. Morris needs access to all the players' scores to relate to a local following in that small town where its native son or daughter stands in relation to the other players in the tournament. Finally, this case is not about "streaming" video and audio or "webcasting." [3]

Factual Background [4]

Plaintiff, Morris Communications Corporation ("Morris"), is a Georgia corporation that publishes over thirty traditional print newspapers as well as a number of Internet-based, electronic newspapers. Defendant, PGA Tour, Inc. ("PGA Tour"), is a Maryland corporation with its principal place of business in Ponta Vedra, Florida. The PGA Tour is mainly engaged in the business of promoting professional golf tournaments throughout North America, collectively known as the PGA Tour. Players on the PGA Tour, generally recognized to be among the best golfers in the world, assign all television, radio, motion picture and other **[**5]** rights related to PGA Tour events to the PGA Tour, and with limited exceptions, are restricted from competing in tournaments sponsored by other entities. The record evidence in this case shows that the PGA Tour is the most widely recognized professional golfing tour in the United States. Although there are other golf tournaments which generate fan interest, few can rival PGA Tour events in terms of overall popularity.

At issue in this case is the extent to which the PGA Tour may be allowed to limit the access of Morris and other media entities to its own private golf tournaments. Specifically, the Court must resolve whether the PGA Tour may legally condition access to its tournaments on Morris's agreement not to syndicate "real-time" golf scores obtained from an on-site media center. As this Court noted in its Order denying Morris's Motion for Preliminary Injunction [5] and as the parties have emphasized throughout these proceedings, this case is more than simply about golf scores. Rather, it presents a novel and compelling question of who has the "right" to report the news, produced and gathered by others, in an age of near-instantaneous information.

[6]** PGA Tour events are covered extensively by a number of different print, broadcast, and electronic media organizations. Although these events are conducted on private golf courses, the PGA Tour issues credentials to members of the media who **[*1273]** are thereby invited to its tournaments for the purpose of providing media coverage. Traditionally, Morris and its subsidiary publications have been among the entities that have received media credentials to PGA Tour tournaments. Both the PGA Tour and members of the media have traditionally benefitted from this arrangement in that the media are better positioned to satisfy the public's demand for golf-related information, and the PGA Tour enjoys enhanced publicity, which in turn generates greater demand for its golf tournaments and related goods and services, thus producing revenue for the PGA Tour.

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[2] Morris claims that journalistic integrity requires a journalist to report on news first-hand, if possible, instead of relying on what the creator of the news reports to the journalist or in some fashion to have the ability to verify questionable facts that come to their attention before publishing them. Morris's goal in this suit is to get access to the PGA Tour's scoring system, which will allow Morris to report scores of golfers, but only the scores that the PGA Tour relays to Morris, through a procedure the PGA Tour developed and has in place to gather simultaneous scores in its golf tournament. If Morris were to prevail on its claims, its journalists would, by its own standards, publish information gathered by others. Morris employees do not actually view the action they report on, but merely copy numbers provided by PGA Tour, whether in the media tent or through the PGA Tour's web site. If Morris's reporters believe the PGA Tour's information is incorrect, they may ask that the PGA Tour verify it in order to maintain journalistic integrity, but Morris would only seek to verify unusual scores. For example, if a golfer scores a 9 on a par 3 hole (par is the average or expected number of strokes a player would use to complete the hole), Morris contends that it would alert the PGA Tour and ask that the unusual score be verified. However, Morris would not ask to verify a golf score of 2 or 4 on a par 3 hole, even though that score might be as inaccurate as the score of 9.

[3] For a description and definition of "streaming" and "webcasting", see Fan, *When Channel Surfers Flip to the Web: Copyright Liability for the Internet Broadcasting*, *52 Fed. Comm. L.J. 619, 622-27 (2000)*.

[4] The parties do not dispute the facts, only their import.

[5] *Morris Communications Corp. v. PGA Tour, Inc., 117 F. Supp.2d 1322 (M.D. Fla. 2000)*.

Real Time Golf Scores

The parties' dispute in this case concerns the on-line publication of "real-time" golf scores. Real-time scores, as the term suggests, are scores that are transmitted electronically nearly contemporaneously to their actual occurrence on the golf course. In this way, Internet users are able to track during a golf tournament **[**7]** each participating player's progress on a hole-by-hole basis. In order to improve its scoring capabilities for its tournaments, including transmission of real-time golf scores over the Internet, the PGA Tour has designed and implemented an elaborate electronic relay known as the Real-Time Scoring System ("RTSS").

RTSS works as follows: During a given golf tournament, volunteer workers called "hole reporters" follow each group of golfers on the golf course and tabulate the scores of each player at the end of each hole. The scores are then collected by other volunteers located at each of the eighteen greens on the golf course, who, with the aid of hand-held wireless radios, relay the scoring information to a remote production truck staffed by personnel employed by the PGA Tour. [6] The scores of all participating golfers are then processed at the remote production truck and transmitted by the PGA Tour to its Internet web-site, pgatour.com. The PGA Tour claims that it takes "about five minutes" for the information to be routed from the production truck to pgatour.com. At the same time, real-time scores are also transmitted to an on-site media center where accredited members of the media **[**8]** are able to access the scores. The same information is also transmitted to various electronic "leaderboards" located throughout the golf course for public viewing by spectators. The leaderboards do not simultaneously show the real time scores of all participating golfers. Rather, they typically show only the top ten or fifteen scores.

Due to the nature and size of golf courses, which may span as much as 150 acres, comprehensive real-time scores--that is, up-to-the-minute scores of every competitor--can only be compiled using a relay system such as RTSS. During a golf tournament, different groups of players compete **[**9]** contemporaneously at different holes such that any one spectator can only view a limited number of players at any one of the eighteen holes. Thus, in order to generate real-time scores, it is necessary to have individuals stationed at each hole as the tournament progresses so that the entire golf course can be monitored simultaneously. Acknowledging that some kind of relay system is needed to generate the type of real-time scoring information it wishes to syndicate, Morris submits that it is unable to implement such a system itself due to the PGA Tour rules prohibiting **[*1274]** unauthorized use of wireless communication devices on the golf course at its tournaments. [7]

Although the exact amount is unknown, it appears that the PGA Tour has invested tens of millions of dollars in RTSS, dating back to the early 1980s. Nevertheless, not all of this investment has been devoted solely to developing **[**10]** Internet-based scoring. The Internet did not rise to prominence until at least the mid-1990s, and pgatour.com did not become operational until 1997. Moreover, the evidence in this case shows that RTSS was, and continues to be, developed with an eye toward enhancing the on-site scoreboards for live spectators and for television broadcasts. For example, Ken Finchem, who is presently the Commissioner of the PGA Tour, noted in 1990 that "the electronic scoreboard system was created to provide the growing number of spectators at PGA Tour tournaments with up to the minute information on action all around the course."

Additionally, the Internet presently represents only a small fraction of the PGA Tour's overall revenue. For example, the PGA Tour's annual revenues from its Internet syndication contracts is approximately $ 130,000. In contrast, a 1999 financial audit of the PGA Tour revealed "direct" revenues of $ 306,510,000, which included revenues from television and tournaments.

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[6] Under newly developed technology known as "Shotlink," the walking scorers themselves will be able to relay scores directly to the production truck. In addition, the new technology allows the scorers to transmit additional data such as club selection, the lie of the ball, and the distance to the pin. Morris has not sought to syndicate any information obtainable from Shotlink other than the raw score.

[7] Morris has also argued that it would be socially wasteful for it to duplicate the PGA Tour's efforts in implementing such a system.

Nevertheless, the PGA Tour has made no secret in this litigation of its desire to maintain a commercial advantage in the market for selling real-time golf scores and has vigorously defended its right to protect **[**11]** its proprietary investment in RTSS. To that end, it has enacted a series of regulations designed to prevent potential competitors from immediately selling scores obtained in the media center to third parties.

On Line Service Regulations

Prior to 1999, credentialed members of the media could view scores in the media center and then re-key them directly into their own computers for transmission to their company's Internet servers. The result was that competitors of pgatour.com, including Morris, were able to publish real-time scores on their web sites as fast as or possibly faster than pgatour.com. Beginning in January 1999, shortly after the PGA Tour entered into an exclusive syndication contract with USA Today, it instituted Online Service Regulations ("OLSR") applicable to all credentialed media invitees. Around the same time, Morris began publishing scores from PGA Tour tournaments on its web sites and selling them to third parties, and Morris appears to have been the PGA Tour's only major competitor in the syndication market. [8]

[12]** Under the terms of the original OLSR, scoring information obtained from the media center could be published on any web site, but not sooner than 30 minutes after the actual occurrence of the shots. The PGA Tour's admitted purpose for the new regulations was to allow it to have the first opportunity to post the real-time scores on its web site and those of its syndicates.

In April 1999, the PGA Tour amended its OLSR so that scoring information, obtained in the media center, could appear on an unaffiliated web site <u>either</u> no sooner **[*1275]** than 30 minutes after the actual occurrence of the shots <u>or</u> when the information became legally available as public information. [9] Shortly afterwards, the PGA Tour agreed to allow Morris to immediately publish scores obtained from the media center on its own web-sites, but not on the web-sites of non-credentialed third parties. In January 2000, the PGA Tour again amended its OLSR so that "no scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of the PGA Tour." Violators were subject to revocation of their media **[**13]** credentials.

In May 2000, the PGA Tour learned that Morris was planning to sell scoring information obtained directly from the media center to the Denver Post, in violation of the January 2000 OLSR. The PGA Tour reminded Morris of the prohibition against syndicating scores obtained in the media center. After some discussion between the parties, the PGA Tour agreed to allow Morris to syndicate scores to the Denver Post for one tournament only.

In August 2000, after some additional negotiations, the PGA Tour agreed to waive the restriction on selling real-time golf scores to third parties on the condition that Morris agree to collect the scores to be sold for syndication from pgatour.com rather than the on-site media center. Morris attempted **[**14]** to gather real-time golf scoring information using this alternative method but ultimately abandoned it as unworkable. Among other problems, there was an inevitable delay in scores taken directly from pgatour.com because of the time needed to re-key the scores from that web site onto Morris's servers. In the meantime, Morris continued to negotiate syndication contracts with a number of third parties, apparently assuming that some satisfactory resolution would be reached with the PGA Tour.

On September 13, 2000, Morris informed the PGA Tour that its attempts at obtaining real-time scores through pgatour.com had failed and requested that it be credentialed to syndicate real-time scores directly from the on-site

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[8] While Morris was the only major competitor in the syndication market, many competitors, such as *www.thegolfchannel.com*, *www.nbc.com*, and *www.golfonline.com*, still vied for market share in the distribution of golf scores on the Internet.

[9] Although it is a matter of contention when the scoring information becomes legally available to the public, the PGA Tour has conceded that golf scores are in the public domain once they are published on pgatour.com or are publically broadcasted on either television or radio.

media center. The PGA Tour refused to accommodate this request. It subsequently informed Morris that media credentials would only be provided on the condition that scoring information collected from the on-site media center be used only in publications within the Morris Communications Group, as required under the OLSR.

Motion for Preliminary Injunction

On October 11, 2000, Morris filed its Complaint and Motion for Preliminary Injunction, alleging violations of Section **[**15]** 2 of the Sherman Act, *15 U.S.C. § 2*, the Florida Antitrust Act, *Fla. Stat. § 542.19*, and the Florida Deceptive and Unfair Trade Practices Act, *Fla. Stat. § 501.201 et seq.* Morris alleged that the PGA Tour possesses monopoly power over access to its golf tournaments and has unfairly used that power by attempting to stifle competition in the separate market for syndicated real-time golf scores. In response, the PGA Tour argued that it enjoys a property right in RTSS and that its regulations restricting the syndication of real-time golf scoring information gathered and generated by RTSS constitute a reasonable safeguard against would-be free riders seeking to unfairly capitalize on its product.

This Court denied Morris's Motion for Preliminary Injunction, finding that Morris **[*1276]** had failed to meet its high burden for proving entitlement to injunctive relief. See *Morris Communs. Corp. v. PGA Tour, Inc., 117 F. Supp.2d 1322, 1326 (M.D. Fla. 2000)*. The Court found that Morris had failed to show a substantial likelihood of success on the merits of its *Section 2* monopolization claims. [10] Even assuming that the PGA Tour possessed monopoly power in the **[**16]** market for real-time golf scores, Morris had not shown that the PGA Tour lacked a legitimate business justification for its restrictions on syndication of real-time scores. Specifically, the Court was without sufficient evidence regarding the extent to which it would be condoning free riding on the PGA Tour's proprietary investment in RTSS if it ordered the PGA Tour to allow Morris unconditional access to its on-site media centers. *Id. at 1326-30*.

Effects of the On Line Service Regulations

Both parties have submitted substantial evidence regarding the OLSR's possible effects on competition. Not surprisingly, the evidence is somewhat contradictory in this regard. For example, the PGA Tour produced the deposition transcript of the new **[**17]** media sports producer of The Augusta Chronicle, which is owned by Morris. He stated that at least one Internet syndication customer, insidetheropes.com, "never made any demands as to time length [between the occurrence of scores and their real time publication]." Similarly, Mike McLeod, the project manager for golf at CNN/SI, with whom Morris has a syndication contract, stated that even when Morris was required to transmit golf scores remotely, i.e., off of pgatour.com rather than directly from the media center, "for CNN/SI's editorial purposes, the scores were reported fast enough to be editorially acceptable."

This evidence, however, is belied by other evidence presented by Morris suggesting that both consumers [11] in the syndication market and the PGA Tour itself place a premium on speed. This evidence suggests that OLSR have the effect of harming competitors' ability to compete for the sale of syndicated real-time golf scores. For example, Mr. McLeod's comments notwithstanding, it appears that the value of Morris's syndication contract with CNN/SI has decreased dramatically since the OLSR were implemented. Under the original syndication agreement, executed in 1999, CNN/SI agreed **[**18]** to pay Morris approximately $ 431,666 annually for real-time golf scores. In 2001, when the OLSR were in effect, that amount was $ 185,599. By 2002, it had been further reduced to $ 150,000. By the same token, the record reflects that the PGA Tour has raised the prices for real-time golf scores in its own syndication agreements with USA Today. Moreover, in its most recent contract with USA Today, the PGA Tour no

[10] The Court also concluded that Morris had not satisfied its burden with respect to showing irreparable harm or that the balance of harms and the public interest weighed in favor of injunctive relief. *Morris, 117 F. Supp.2d at 1330-31*.

[11] The "consumers" in the syndication market refer generally to web-site publishers who pay other publishers for real-time scoring information; advertisers, who usually represent the primary source of revenue for Internet web sites; and Internet users, who log on to the various web sites.

longer promises exclusive syndication rights, which arguably makes the agreement less valuable to USA Today despite the higher price. [12] The higher prices for real-time scores may reflect a consumer preference **[*1277]** for more up-to-date scores, which is reflected elsewhere in the record. For example, hits on pgatour.com have increased by 50 to 100% since the PGA Tour first instituted its OLSR.

[19]** Perhaps most tellingly, the PGA Tour itself has acknowledged that the OLSR were implemented in order to maintain a commercial advantage. In a January 1999 letter to Carl Cannon, Vice President of Morris and Publisher of the Florida Times Union, Commissioner Finchem stated that:

> The primary reason for requiring this delay [in the OLSR] is so that pgatour.com, the PGA TOUR's own web site, can have a window of exclusivity for the provision to the public of our basic product, official real time scores from our events. We have found that the appearance of exclusive real time scores on our web site drives tremendous traffic volume to the site during times when tournaments are being conducted, particularly outside the television coverage window. Requiring a thirty (30) minute delay in the dissemination of scores enables us to preserve the value of our real time scoring.

Thus, the record seems to clearly indicate that the OLSR have the purpose and effect of giving the PGA Tour a commercial advantage in the syndication market and disadvantaging potential competitors, including Morris. As discussed below, this does not necessarily mean that the PGA Tour has violated any antitrust **[**20]** laws. Nevertheless, it is important to identify the OLSR's potentially deleterious effect on competitors, if not competition.

Moreover, Morris notes that if the PGA Tour is either unable or unwilling to publish real time golf scores from its tournaments on pgatour.com, consumers are foreclosed from obtaining such information on the Internet. Morris cites the example of the recent World Golf Championship, where pgatour.com did not publish real-time scores. As a result, the real-time scores were simply unavailable on line.

In its summary judgment papers, Morris responds to the concerns raised in the Court's Preliminary Injunction Order by arguing that it has successfully demonstrated a lack of any pro-competitive justification for the OLSR. For its part, the PGA Tour continues to assert that it has a proprietary right in RTSS and the OLSR represent a commercially reasonable way to protect its investment. The PGA Tour also argues that Morris cannot show monopoly power in any relevant market, a prerequisite to prevailing on a monopolization claim. Specifically, it asserts that there is no distinct product market for "real-time" golf scores, and Morris's monopolization claims must therefore **[**21]** be dismissed.

II. Standard of Review

HN1[] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991)*. When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. **[*1278]**

HN2[] In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court **[**22]** must draw inferences from the evidence in the light most favorable to the nonmovant, *Key West Harbor v. City of Key West, 987 F.2d*

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[12] PGA Tour counters by noting that "cash" consideration (as opposed to promotional equivalents) is the same and that the new contract provides USA Today with more advertising funds and greater technical assistance, as well as expanded use of PGA Tour trademarks.

723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the Court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The inquiry is "whether the evidence **[**23]** presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

The parties assert, and the Court agrees, that there is no genuine issue of material fact, and summary judgment is appropriate.

III. Analysis

A. Antitrust claims

Morris asserts four antitrust claims: 1) monopolization of the Internet markets, 2) unlawful refusal to deal, 3) monopoly leveraging, and 4) attempted monopolization of the Internet markets. Before addressing the elements of each of the antitrust claims, the Court will first address the PGA Tour's assertions that valid business reasons justify the exclusionary practice found in the OLSR, because valid business reasons are a defense to the antitrust claims. ***HN3***[] Once the PGA Tour asserts valid business justifications for its action, Morris bears the burden of proving that the proffered business justification is pretextual. See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986, 1002 (11th Cir. 1993).

Free-riding [13]

[24]** Morris asks the Court to force the PGA Tour to provide Morris with the compilation of scores, for which the PGA Tour spends considerable money and time creating, at no cost to Morris. While Morris does invest its own cost in re-keying the scores for syndication, Morris free-rides on the PGA Tour's efforts in compiling the scores. As Morris admits in its Memorandum of Law, "Morris cannot duplicate the functions of RTSS, which depends on the efforts of hundreds of volunteers each week." Even if it is the efforts of "volunteers", the PGA Tour has still invested time and money in the organization and technology to make RTSS possible. [14]

Morris contends that it is not free-riding and cites to the *Kodak, Motorola*, and *Aspen* cases. Eastman Kodak Co. v. Image ***[*1279]*** Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992); **[**25]** Nat'l Basketball Ass. v. Motorola, Inc., 105 F.3d 841, 854 (2nd Cir. 1997); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). However, none of these cases is applicable to the instant case. In *Motorola*, the court found that Motorola did not free-ride when it created a network that disseminated scores from NBA basketball games. See Motorola, 105 F.3d at 854. Three distinctions between Motorola and the instant case make Morris's claim untenable. First, the *Motorola* court used a very high standard

[13] ***HN4***[] Free-riding is obtaining a benefit at another's expense without contributing to it. See Garner, *Black's Law Dictionary*, 7th ed. at 676.

[14] Morris's claim that replication of RTSS would be socially wasteful belies its claim that it does not free-ride. Replication would be wasteful, precisely because the PGA Tour has invested time, money, and resources that Morris has not and does not wish to expend.

for free-riding that is applicable only in cases with the hot-news exception, which will be discussed in greater detail below. More importantly, the information that Motorola used to create its product was in the public domain, having been broadcast on television or radio. See *id. at 843*. Specifically, Motorola-paid reporters, who had heard the radio or television broadcast scores, reported the information to a central location and merely relayed what had been known to the world. See *id. at 844*. Golf, unlike basketball, precludes a single person **[**26]** gathering all the information occurring on all 18 holes. So when television and radio cover a basketball game [15], the score is presented to the public through those media outlets, allowing Motorola to obtain the information and republish it. If Morris were able to gather scores from all 18 holes through a television or radio broadcast, Morris could then republish that information, absent a hot-news exception. [16] However, golf's atypical format prevents any single television or radio broadcast from providing results from all 18 holes live. [17] The PGA Tour does publish the scores in the media center, [18] **[**28]** but the media cannot disseminate that information except as the PGA Tour's press credentials allow them to do. [19] As a result, the scores, which are not protected by copyright, remain outside the public domain and within the PGA Tour's control, because the PGA Tour provides access with certain restrictions. [20] Finally, Motorola benefitted from the NBA's costs in producing and marketing the games and from the radio and television stations who paid for broadcast rights: that is Motorola capitalized on the NBA's positive externalities. However, the NBA and the broadcast stations had **[**27]** already reaped the profits of their investment, and the information was in the public domain at the moment of **[*1280]** broadcasting. Additionally, once in the public domain, Motorola "expended their own resources to collect purely factual information generated in NBA games." *Id. at 854*. While here, Morris does not expend its own resources in gathering information, which is not in the public domain, but instead free-rides on the PGA Tour's compilation of scores.

Reliance on the *Kodak* case is similarly misplaced. Kodak claimed that the independent service providers (ISP) of Kodak's copiers free-rode on Kodak's investment in product development. See *Kodak, 504 U.S. at 485.* ***[**29]*** "According to Kodak, the ISP's are free-riding because they have failed to enter the equipment and parts markets;" the Court rejected Kodak's free-riding claim. *Id.* However, this is not the type of free-riding that the PGA Tour is trying to prevent. The PGA Tour is not arguing that Morris free-rides on the PGA Tour's investment in the promotion of championship golf tournaments, but on its investment in the compilation of golf scores. Morris wants to commercially exploit information that the PGA Tour has expended money in gathering and has not reaped the full benefit possible from its investment.

Morris claims that the plaintiff in *Aspen* could not have won, if this Court accepts the PGA Tour's definition of free riding. However, *Aspen* was not a case about free riding, as the plaintiff ski company in *Aspen* did not free ride on defendant ski company's investments. The defendant, in *Aspen*, refused to sell plaintiff lift tickets at any price or

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[15] Similarly, any single spectator at a basketball, baseball, or football game knows the score of the game, as all the action takes place within his or her sight.

[16] As the Court finds the "hot-news" claim inapplicable, it does not address the five requirements to prove a "hot-news" claim. See *Motorola, 105 F.3d at 845*.

[17] Nor can a single spectator at a golf tournament know the score of all the players.

[18] The PGA Tour also publishes the scores of the top players to the spectators, who are present under a license from the PGA Tour which prevents their dissemination of the scores off the course.

[19] Currently, the PGA Tour allows Morris to publish the scores as quickly as it can re-key them from the media center, but the PGA Tour does not allow Morris to sell or syndicate that information. Also, a compiler of information can limit the dissemination of that information through contracts, including contracts found on tickets. See *ProCD Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996)*

[20] Even if the information were in the public domain, the PGA Tour would have the ability to limit the use of the information it provides to Morris under contract law. See *ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)*(holding that producers of a CD, consisting of the content of publicly available phone books, could, under contract law, enjoin purchasers from selling the information, which was clearly in the public domain and not protected by copyright).

even honor vouchers for tickets and discontinued a profitable joint arrangement with the plaintiff without a business justification. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 594-95, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). **[**30]*** The plaintiff in *Aspen* was not free riding, because it was willing and attempted to pay for its customers to ski at defendant's resort.

Morris further argues that although even if it is free-riding on the collection of scores, ***antitrust law*** does not condemn such free-riding. The Court agrees with Morris in its assertion that ***HN5***[] free-riding on "positive externalities" is accepted by society and courts. See Areeda, ***Antitrust Law***, Vol. III, P1613(b). However, what Morris seeks is not a positive externality. If Morris were selling the scores after the scores were released on a website, Morris would be benefitting from PGA Tour's positive externality, *i.e.*, the public's interest in information about championship golf. [21] As the near instantaneous scores are not in the public domain and as the PGA Tour maintains an interest in the score until they are in the public domain, the scores are not externalities until the PGA Tour has reaped its reward or forgone that possibility.

[31]** Morris additionally argues that even if there is free-riding, it must reach the level that would justify a "hot news" property right. However, the Court finds that ***HN6***[] to be a business justification free-riding does not have to reach the level that the *Motorola* court held necessary for a hot news exception. The *Motorola* court required the free-riding to be so pervasive that all incentives to undertake an activity would be lost. See *Motorola, 105 F.3d at 853*. However, to be a valid business reason, a much lower level of free riding will justify excluding competitors. See Areeda, ***Antitrust Law***, Vol. III, P1658(f)("once a proffered business purpose has been accepted as asserted in good faith and not as pretense, the defense does not require 'balancing' **[*1281]** of social gains against competitive harms…").

Property Right in the Scores

The PGA Tour claims that the restrictions have a valid business justification, because they are necessary to protect a property right in the scores that it compiled by use of RTSS. Morris argues that the PGA Tour lacks a property right in the score, thus negating the claimed business justification. For the following reasons, **[**32]** the Court finds that the PGA Tour does have a property right in the scores compiled by the use of RTSS, but that property right vanishes when the scores are in the public domain. [22]

The PGA Tour's property right does not come from copyright law, as copyright law does not protect factual information, like golf scores. See *Feist Publications v. Rural Tel. Serv Co., 499 U.S. 340, 348, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991)*. However, the PGA Tour controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect.

In the early half of the 20th Century, the Supreme Court dealt with a similar issue in several cases, known as the "ticker cases". In *Board of Trade of the City of Chicago v. Christie Grain and Stock Company, 198 U.S. 236, 49 L. Ed. 1031, 25 S. Ct. 637 (1905), **[**33]*** the appellee sought an injunction preventing the use and distribution of "continuous quotations of prices on sales of grain." See *id. at 245*. There the Supreme Court held, "plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself…. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public." *Id. at 250*. The Supreme Court further stated, "time is of the essence in matters like this . . . if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough." *Id. at 251*.

[21] Morris has been capitalizing on this type of externality, ever since it has included golf scores in its newspapers' sports sections.

[22] The Court, in its discussion of free-riding *supra*, found that the information and scores when first published in the media center are not in the public domain.

In *Moore v. New York Cotton Exchange, 270 U.S. 593, 70 L. Ed. 750, 46 S. Ct. 367 (1926)*, plaintiff sought an injunction forcing defendant to furnish plaintiff with a ticker and a declaration that defendant was a monopolist. See *id. at 603*. The Supreme Court held that **[**34]** the allegations did not support a claim under the *Sherman Act* and refused to grant the injunction. See *id. at 603-05*. The Supreme Court reiterated the holding of the *Christy* Court that the exchange had a property right in the information "which relates solely to its own business upon its own property." *Id. at 606-07*. Further, the exchange was able to determine to whom it will sell: "the ordinary right of a private vendor of news or other property." *Id. at 605*. Accordingly, the Court found that the exchange's actions were appropriate and legitimate to protect and to further its business. See *id. at 606*.

Like the "ticker cases", the instant case deals with facts that are not subject to copyright protection. The compiler of the information in both cases collects information, which it created, at a cost. Also the events occur on private property to which the general public does not have unfettered access, and the creator of the event can place restrictions upon those who enter the private property. The vastly increased **[*1282]** speed that the Internet makes available does not change the calculus or the underlying property **[**35]** right. Accordingly, the PGA Tour, like the exchanges in the ticker cases, has a property right in the compilation of scores, but that property right disappears when the underlying information is in the public domain.

Broadcast Rights on the Internet

Whether the PGA Tour has a separate right to license or sell broadcast rights on the Internet, like sports and entertainment producers currently enjoy in dealing with television and radio, is a novel question. The Supreme Court indirectly addressed the issue in *Reno v. ACLU, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997)*, when deciding the constitutionality of Communications Decency Act. In *Reno*, the Supreme Court held that ***HN7***[] the Internet, which the Supreme Court repeatedly referred to as a new medium, was not like traditional broadcast media, *i.e.*, television or radio. *Id. at 867*. The Supreme Court distinguished the Internet and the radio transmission found in *FCC v. Pacifica Foundation, Inc., 438 U.S. 726 748-50, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978)* based on three distinctions. First, the Internet has not historically been regulated by an agency familiar with the medium. **[**36]** Second, available frequencies on the Internet are not scarce as they are on radio. And finally, affirmative steps are required to access information on the Internet. See *Reno, 521 U.S. at 868-69*. The Supreme Court concluded that because of these differences, Congress cannot regulate the Internet the same way it can regulate radio.

However, none of those differences mandates treating the Internet differently from radio or television in terms of property rights. Whether the government can regulate the Internet does not limit the value of Internet broadcasting or provide a rationale for restricting the use of that information. Both parties would certainly agree that the Internet provides an opportunity to profit from a product by selling advertisement. Television, radio, and print media operate on a similar, if not identical, principle: the selling of advertisement to viewers, listeners, or readers of entertainment, be it sports, entertainment, or news. [23] Therefore, the Court finds that the PGA Tour has a right to sell or license its product, championship golf, and its derivative product, golf scores, on the Internet in the same way the PGA Tour currently sells its **[**37]** rights to television broadcasting stations. [24]

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[23] In *Bruce v. Weekly World News, Inc., 150 F. Supp.2d 313 (D. Mass. 2001)*, the court accepted the opinion of both sides' experts who agreed that the Internet was a separate medium, distinct from print media, requiring a separate license for use on the Internet. The court awarded additional damages because of the infringing use on the Internet. *Id. at 321*. If a separate license is required to use a copyrighted picture on the Internet, the producers of a marketable product, like golf scores, should also be able to sell rights on that new meduim.

[24] With the emergence of "web-casting" and "streaming" video and other rapid advancements in technology, a negative answer to the question of whether the PGA Tour has broadcast rights on the Internet would stymie advancement and reduce incentive to create entertainment and sports programming by foreclosing a lucrative market. See generally, Kellis, *Note: A new Technology Question of Olympic Proportions: Should NBC's License to Broadcast the Games Include Internet Broadcasting Rights?*, *8 J.*

[38]** Accordingly, the Court finds that the PGA Tour is justified in its restrictions because (1) Morris free-rides on the PGA **[*1283]** Tour's efforts, (2) the PGA Tour has a property right in the scores before they are in the public domain, and (3) the PGA Tour has the right to license or sell broadcasting rights of its products over the Internet.

Monopolization of the Internet Markets

HN8[] Monopolization, an offense under *Section 2 of the Sherman Act*, requires two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Tech. Serv. Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

1) Possession of Monopoly Power

Morris argues that the PGA Tour has monopoly power in the relevant market, real-time golf scores, and that power is evidenced by a reduction in output, citing *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*. Morris misreads the import of that decision. In *NCAA*, the district court found that **[**39]** absent the NCAA's regulation more college football games would be broadcast, and therefore the restrictions limited output. See *id. at 119*. In the instant case, Morris argues that the PGA Tour's restrictions have reduced output as evidenced by the reduced number of web sites with real-time golf scores. Morris misconstrues outlets with output. Although the number of web sites with real-time golf scores might be reduced, the output of the product is not. Output is restricted in the same manner as an exclusive television broadcast contract: only one station is broadcasting any given tournament. Certainly there would be greater output if two television stations broadcast the golf tournament at the same time, but this is not the output reduction condemned by the *NCAA* court. There the Supreme Court's concern was the number of games being broadcast, not the number of stations broadcasting a single game. Morris further argues that when the PGA Tour's web site does not work, viewers have no access to real-time golf scores on the Internet. The Court disagrees with that argument, as the logical conclusion would be to force the PGA Tour to allow several television stations **[**40]** to broadcast a tournament, because occasionally one of the stations has technical difficulties. Output has not been reduced, and consumers have not been harmed, evidencing an absence of monopoly power exerted by the PGA Tour. [25]

2) Willful acquisition or maintenance of that power

HN9[] "Liability [on the second element of a *§ 2* claim] turns, then, on whether valid business reasons can explain" those actions. See *Kodak at 483*. As the Court has already found legitimate business reasons, Morris fails to meet the second element of a *§ 2* claim.

As Morris has failed to prove either element of a *§ 2* claim as a matter of law, the PGA Tour's motion for summary judgment on Morris's claim of monopolization of the Internet markets is **GRANTED**.

Unlawful Refusal to Deal

HN10[] Under certain circumstances, **[**41]** a unilateral refusal to deal may constitute an antitrust violation. See *Mr. Furniture Warehouse, Inc. v. Barclay's American/Commercial Inc., 919 F.2d 1517, 1522 (11th Cir. 1990)*. However, in order to prevail on a claim for refusal to deal, the **[*1284]** plaintiff must show both the existence of monopoly power and anticompetitive intent. *See id*. ("It is clear that monopolistic or other anticompetitive intent is

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Intell. Prop. L. 245 (2001). To hold otherwise would be similar to a court finding that Major League Baseball could not sell broadcasting rights to television stations in the 1940s with the advent of television.

[25] Whether it would be a violation of ***antitrust law*** for the PGA Tour to be the sole outlet of golf scores on the Internet without offering to sell or license that information is not a question before the Court.

the key factor in determining whether a violation of *§ 2* has occurred."); see also *Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1388 (5th Cir. 1980)*; *Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970)*. Courts have used two tests to determine whether a refusal to deal is a violation of ***antitrust law***: intent test and essential facilities test.

1) Intent Test

HN11[] "The intent test considers whether, under the circumstances of a case, a monopolist's conduct demonstrates an illegal intent to destroy competition." *Consolidated Gas of Fla., Inc. v. City Gas Co. of Fla., 912 F.2d 1262, 1302 (11th Cir. 1990)*. It is not just an intent to destroy **[**42]** competition, for that is the nature of a competitive market, but an illegal intent as evidenced by, "conduct that unnecessarily excludes or handicaps competitors." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985)*.

Morris asserts that *Aspen* controls the outcome of this case. Morris argues that, like in *Aspen*, the PGA Tour's restriction is a stark departure from past practice and against the PGA Tour's economic interest. The facts indicate that the PGA Tour's actions are a departure from the unfettered access previously granted to the media. However, where the defendant in *Aspen* refused to deal only in order to injure the plaintiff, offering no valid justification, the PGA Tour has provided valid business justifications. See *id. at 610*; see also Areeda, ***Antitrust Law***, Vol. IIIA, P773, pg. 211 ***HN12***[] ("A legitimate purpose renders any accompanying purpose irrelevant; regardless of motive no firm has a general duty to injure itself in order to benefit a rival.") Also, unlike in *Aspen*, the PGA Tour is not discontinuing a profitable joint arrangement with Morris like the defendant in *Aspen*. See Areeda, P658(f), **[**43]** pg 136 (arguing for a narrow reading of Aspen to unexplained interruptions of preexisting arrangement). The Court finds that the PGA Tour's actions do not unnecessarily exclude competition or handicap competitors, but are reasonable means to protect a valuable property right.

Also, Morris argues that the restrictions hurt the PGA Tour's interest by limiting the amount of press coverage of its tournament; Morris's claim is disingenuous at best. The PGA Tour's ability to profit from marketing its compilation of scores does not reduce the amount of coverage that the press has traditionally provided of the PGA Tour's tournaments. The posting of real-time golf scores on the Internet supplements traditional press coverage. The PGA Tour's restrictions, then, are not against its self-interest, as the PGA Tour has the traditional press coverage, plus the coverage and income generated by the real-time scoring on the Internet. [26]

[44]** Consequently, the Court finds that although the PGA Tough might have an intent to harm a competitor, it is not an illegal intent.

[*1285] 2) Essential Facilities

HN13[] The withholding of an essential facility is a violation of ***antitrust law***, and an essential facility is one without which a competitor cannot enter or compete in a market. See *Covad Comm. Co. v. BellSouth Corp., 314 F.3d 1282, 2002 WL 1777009, *9(11th Cir. 2002)*. An essential facilities claim requires a showing of four elements: 1) control of the essential facility by a monopolist, 2) competitor's inability to duplicate the facility, 3) denial of the facility, and 4) feasibility of providing the facility. *See id.*

Initially, the Court finds that access to the media center is not an essential facility. This Court can find no case to indicate that access to proprietary information, not in the public domain, is an essential facility. Although it may be true that Morris will not be able to compete as effectively with the PGA Tour without access to RTSS, that alone does not make access an essential facility. See *Alaska Airlines v. United Airlines, 948 F.2d 536, 544 (9th Cir. 1991)*("plaintiff must show more than **[**45]** inconvenience, or even some economic loss; he must show that an

[26] Theoretically, the PGA Tour could limit the media's access to the tournament and the media center to those willing to pay a fee or to the one willing to pay the highest price. Although such a practice would be a departure from its past practice, it would not violate *Aspen*. The PGA Tour could justify the change with the business justification that the PGA Tour would be better off charging the press an access fee, than gaining the corollary benefit of increased publicity. A court would not be in a position to second guess the business model selected by a company, unless it unnecessarily excluded competitors.

alternative to the facility is not feasible.") Additionally, other web sites, such as *www.thegolfchannel.com*, *www.nbc.com*, and *www.golfonline.com*, who do not have access to the media center, still compete with the PGA Tour's web site in the Internet distribution of golf scores. ***HN14***[] "Essentiality is not proven when actual or potential rivals other than the plaintiff are able to compete without the claimed facility...." See Areeda, ***Antitrust Law***, Vol. IIIA, pg 204. Many competitors would compete more efficiently with access to proprietary information, but ***HN15***[] a court's role is not to force access to proprietary information in the name of competition, as that would reduce incentive to innovate and ultimately harm consumers. See id. Vol. III, pg 129 ("It would be inconsistent with patent policy to use the antitrust laws to dissipate monopoly power still resting entirely or almost entirely on the unexpired patents that first created it.")

Assuming *arguendo* that access to the media center is an essential facility, ***HN16***[] one who controls an essential facility must provide access "upon such just and reasonable terms and regulations **[**46]** as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*. However, in this case, Morris is seeking access to the media center and the scoring system at no cost, putting it at a competitive advantage to the PGA Tour. [27] The PGA Tour offers access to the scores through a license as evidenced by its contract with USA Today, and Morris is free to negotiate for the purchase of a license which would put it on a competitive plane with the PGA Tour.

[47]** As this Court stated in its denial of a preliminary injunction, ***HN17***[] "it is not unlawful for a Defendant- even one who possesses monopoly power- to refuse to deal with its competitors if there are legitimate pro-competitive reasons for that refusal." *Morris Communications Corp. v. PGA Tour, Inc., 117 F. Supp. 2d at 1327 (M.D. Fla. 2000)*. As the Court finds that the PGA Tour's restrictions are justified and not against its economic self interest, Morris's claim under the intent test or essential facilities test cannot stand as a matter of **[*1286]** law. Accordingly, the PGA Tour's motion for summary judgment on Morris's claim of unlawful refusal to deal is **GRANTED**.

Monopoly Leveraging

HN18[] Monopoly leveraging refers to a monopolist's use of its market power to gain a competitive advantage in a different level or in a different market. See *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, 912 F.2d 1262, 1284-85 (11th Cir. 1990)*(Tjoflat, C.J., dissenting). Neither the Eleventh Circuit nor the Supreme Court has accepted this theory of antitrust violation, and the Court finds that it is unnecessary to determine its applicability in the **[**48]** instant case. See *Aquatherm Industries Inc. v. Florida Power and Light Co., 971 F. Supp. 1419, 1432 (M.D. Fla. 1997)*.

HN19[] Under the Second Circuit's analysis of monopoly leveraging, a plaintiff must make a showing of anticompetitive intent or an unlawful exercise of power. See *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272-75(2d Cir. 1979)*. As the Court found *supra*, the PGA Tour's conduct is not anti-competitive nor an unlawful exercise of power. Although it might harm Morris, the conduct is an attempt to protect proprietary information and avoid free-riding by a competitor. Accordingly, the PGA Tour's motion for summary judgment on Morris's claim of monopoly leveraging is **GRANTED**.

Attempted Monopolization of the Internet Markets

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[27] If the Court were to rule for Morris, the Court would have to decide what price Morris would need to pay in order for it to be placed on an equal footing with the PGA Tour. Such rate making is not the appropriate role for a court. See generally, *Consolidated Gas Co. of Florida v. City Gas Co., 912 F.2d 1262, 1320 (11th Cir. 1990)*(Tjoflat, C.J. dissenting).

HN20[] Attempted monopolization has three elements: 1) the defendant's specific intent to achieve monopoly power through predatory or exclusionary conduct, 2) the defendant engages in such conduct, and 3) there exists a dangerous probability that the defendant will succeed. See *U.S. Anchor Mfg., Inc. v. Rural Indus., Inc., 7 F.3d. 986, 994 (11th Cir. 1993)*. "Specific intent does not merely **[**49]** mean intent to prevail over ones rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably." *General Industries Corp. v. Hartz Mountain Corp., 810 F.2d 795, 801 (8th Cir. 1987)*. The Court will not address elements two or three, as it finds the first element dispositive.

HN21[] A finding of legitimate pro-competitive business reasons forecloses a finding of predatory or exclusionary conduct. See *Technical Resource Services, Inc., v. Dornier Medical Systems, Inc., 134 F.3d 1458, 1467 (11th Cir. 1998)*("A defendant can escape *§ 2* liability if the defendant's actions can be explained by legitimate business justifications.") As the Court has already found the PGA Tour's conduct justified by legitimate business reasons, the PGA Tour's Motion for Summary Judgment on Morris's claim of attempted monopolization is **GRANTED**.

B. Florida Deceptive and Unfair Trad Practice Act Claims

Along with the antitrust claims, Morris brings a claim under **HN22**[] the Florida Deceptive and Unfair Trade Practice Act (FDUPTA), *Section 501.201, et. seq.* FDUPTA defines violation of the act in *subsection 501.203(3)*, as "any violation **[**50]** of this act and may be based upon any of the following:(a) Any rules promulgated pursuant to the Federal Trade Commission Act, *15 U.S.C. § 41 et seq.* or this act; (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) Any law, statute, rule, regulation or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." *Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 103-04 (Fla. 1st DCA 1996)*. FDUPTA is to be construed consistently with ***antitrust law***. See *id., at 103*. Morris is correct in its assertion that FDUPTA is not limited **[*1287]** to antitrust violations, but Morris points only to ***antitrust law*** as a foundation for its FDUPTA claim. As this Court has found no violation of ***antitrust law*** and as Morris asserts no other basis for a claim under FDUPTA, the PGA Tour's Motion for Summary Judgment on Morris's FDUPTA claim is **GRANTED**.

C. Claim of Tortious Interference

The PGA Tour raises three reasons for its Summary Judgment Motion, but the Court will only address the last: the PGA Tour's actions **[**51]** were justified and not actionable. **HN23**[] Florida courts recognize that, "If a defendant interferes with a contract in order to safeguard a preexisting economic interest of his own, the defendant's right to protect his own established economic interest outweighs the plaintiff's right to be free of interference, and his actions are usually recognized as privileged and nonactionable". *Heavener, Orgier Servs. Inc., v. R.W. Florida Region Inc., 418 So.2d 1074, 1076 (Fla. 5th DCA 1982)*; see also *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1321 (11th Cir. 1998)*; *Ethyl Corp. v. Balter, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980)*. As the Court has already found the PGA Tour's actions were designed to protect its property interest and not improper, the Court finds that the PGA Tour's actions are privileged. Accordingly, the PGA Tour's Motion for Summary Judgment on Morris's claim of tortious interference is **GRANTED**.

IV. Conclusion

As discussed above, the PGA Tour's Motion for Summary Judgment on all of Morris's claims is **GRANTED**. Because Morris's Motion addresses the same issues which the Court **[**52]** has discussed above, Morris's Motion for Partial Summary Judgment on liability is **DENIED**.

The clerk shall enter judgment accordingly and close the file. Further, the PGA Tour's Motion to Continue Trial (Doc. No. 167, filed December 4, 2002) is **DENIED** as moot.

DONE AND ORDERED at Jacksonville, Florida, this 13th day of December, 2002.

HARVEY E. SCHLESINGER

United States District Judge

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People ex rel. Bill Lockyer v. Fremont Life Ins. Co.

Court of Appeal of California, Second Appellate District, Division Two

December 18, 2002, Decided ; December 18, 2002, Filed

No. B139066.

Reporter

104 Cal. App. 4th 508 *; 128 Cal. Rptr. 2d 463 **; 2002 Cal. App. LEXIS 5176 ***; 2002 Cal. Daily Op. Service 12142; 2002 Daily Journal DAR 14261

THE PEOPLE ex rel. BILL LOCKYER, as Attorney General, etc., Plaintiff and Respondent, v. FREMONT LIFE INSURANCE COMPANY, Defendant and Appellant.

Subsequent History: [*1]** Order Modifying Opinion and Denying Rehearing January 16, 2003. No Change in Judgment.

Rehearing denied by *People ex rel. Lockyer v. Fremont Life Ins. Co., 2003 Cal. App. LEXIS 63 (Cal. App. 2d Dist., Jan. 16, 2003)*

Review denied by *People ex rel. Lockyer v. Fremont Life Ins. Co., 2003 Cal. LEXIS 2113 (Cal., Apr. 9, 2003)*

Prior History: Superior Court of Los Angeles County, No. BC 153983, Ronald M. Sohigian, Judge.

People ex rel. Lockyer v. Fremont General Corp., 89 Cal. App. 4th 1260, 2001 Cal. App. LEXIS 457, 108 Cal. Rptr. 2d 127 (Cal. App. 2d Dist., 2001)

Disposition: The judgment is affirmed. Costs are awarded to respondent.

Core Terms

annuity policy, trial court, annuity, premium charge, civil penalty, violations, restitution, consumers, salespersons, deceptive, surrender, notice, unfair, restitution order, misleading, customers, argues, deceive, sales, surrender charge, unauthorized practice of law, set of circumstances, senior citizen, estate plan, disapproved, marketed, asserts, prong, documents, advisors

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN1[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Cal. Bus. & Prof. Code § 17200*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN2[] Consumer Protection, Deceptive & Unfair Trade Practices

See *Cal. Bus. & Prof. Code § 17500*.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] Private Actions, Remedies

Cal. Bus. & Prof. Code § 17203 provides for injunctive relief to the victim of an unfair trade practice. *Cal. Bus. & Prof. Code § 17206* mandates a maximum civil penalty of $ 2,500 for each violation of the *Cal. Bus. & Prof. Code § 17200* prohibition against unfair competition. *Cal. Bus. & Prof. Code § 17500* mandates a maximum civil penalty of $ 2,500 for each violation of its prohibition against false or misleading statements.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN4[] Procedural Due Process, Scope of Protection

The *Fourteenth Amendment to the federal Constitution* prohibits states from depriving any person, including a corporation, of property without due process of law.

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

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

HN5[] Standards of Review, De Novo Review

The standard of review of constitutional questions is independent judgment, but with deference to underlying factual findings, which the court reviews for substantial evidence, viewing the record in the light most favorable to the ruling. A statute is presumed to be constitutional and it must be upheld unless its unconstitutionality clearly, positively and unmistakably appears.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] Consumer Protection, Deceptive & Unfair Trade Practices

The primary purpose of *Cal. Bus. & Prof. Code § 17200 et seq.*, the "unfair competition law," is the preservation of fair business competition. This purpose includes the right of the public to protection from fraud and deceit.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] Consumer Protection, Deceptive & Unfair Trade Practices

As used in *Cal. Bus. & Prof. Code § 17200 et seq.*, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice. Written in the disjunctive, this language establishes three varieties of unfair competition.

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

Legal Ethics > Unauthorized Practice of Law

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] Private Actions, Remedies

Virtually any state, federal or local law can serve as the predicate for an action under *Cal. Bus. & Prof. Code § 17200*. In essence, an action based on *§ 17200* to redress an unlawful business practice "borrows" violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under of *Cal. Bus. & Prof. Code § 17200 et seq.*, the "unfair competition law," and subject to the distinct remedies provided thereunder. The remedies and penalties are cumulative to those imposed under the other laws. *Cal. Bus. & Prof. Code § 17204*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] Regulated Practices, Trade Practices & Unfair Competition

As to an unfair business practice under *Cal. Bus. & Prof. Code § 17200 et seq.*, the "unfair competition law," the court has not yet developed or approved a definition regarding what is unfair in the context of a suit involving injury to consumers. In deciding what is unfair, courts may not apply purely subjective notions of fairness. This prong is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. The unfairness prong enjoins deceptive or sharp practices. Unfair business practices include unconscionable provisions in standardized agreements.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN10[] Consumer Protection, Deceptive & Unfair Trade Practices

The fraud prong of *Cal. Bus. & Prof. Code § 17200* bears little resemblance to common law fraud or deception. Under *§ 17200*, the test is whether the public is likely to be deceived. This means that a *§ 17200* violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.

Legal Ethics > Unauthorized Practice of Law

HN11[] Legal Ethics, Unauthorized Practice of Law

See *Cal. Bus. & Prof. Code § 6125*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN12[] **Consumer Protection, Deceptive & Unfair Trade Practices**

Knowingly untrue or misleading statements made with the intent to induce the public to enter into obligations come squarely within the prohibitions of *Cal. Bus. & Prof. Code § 17500*.

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

HN13[] **Private Actions, Remedies**

See *Cal. Bus. & Prof. Code § 17206*.

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

Criminal Law & Procedure > Sentencing > Fines

HN14[] **Private Actions, Remedies**

See *Cal. Bus. & Prof. Code § 17500*.

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

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN15[] **Private Actions, Remedies**

The Eighth Amendment contains no proportionality guarantee.

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

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN16[] **Private Actions, Remedies**

Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law," requires that the remedies imposed take into consideration the equities of the case. The court reviews the award of civil penalties to determine whether the trial court abused its discretion.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN17[] Regulated Practices, Trade Practices & Unfair Competition

Cal. Bus. & Prof. Code § 17200 imposes strict liability.

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

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN18[] Private Actions, Remedies

The reprehensible standard is not applicable to an action for damages under Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law."

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

HN19[] Private Actions, Remedies

The number of violations of Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law," is to be determined based upon the number of victims and the number of independent acts. Violations calculated in this manner reasonably relate to the gain or opportunity for gain achieved by the unlawful acts and can fairly be determined through expert testimony, the facts elicited at trial and circumstantial evidence. Regardless of number of misrepresentations made to each customer, the penalty may not exceed $ 2,500 per customer. The focus of the discussion is the calculation of the number of violations. In addition, the phrase "or opportunity for gain" indicates that illegal conduct that did not result in "gain" may yet support imposition of a penalty.

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

HN20[] Private Actions, Remedies

Cal. Bus. & Prof. Code § 17206(b) provides that in assessing the amount of a civil penalty the trial court shall consider, among other factors and if relevant, the defendant's assets, liabilities, and net worth. "Relevance" is given broad application under the Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law." A defendant's financial condition is considered relevant to determine whether such condition precludes the imposition of a penalty considered sufficient to deter such future conduct.

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

HN21[] Private Actions, Remedies

Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law," provides for injunctive relief independent of the mandatory imposition of penalties. Cal. Bus. & Prof. Code §§ 17203, 17206, 17535, 17536. There is no requirement that the fact of an injunction be considered in imposing civil penalties. The law does require that the trial court consider, if relevant, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth. *Cal. Bus. & Prof. Code §§ 17206*, *17536*.

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

***HN22*[]** **Private Actions, Remedies**

See *Cal. Bus. & Prof. Code § 17206.1(a)*.

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

***HN23*[]** **Private Actions, Remedies**

The mandatory language of *Cal. Bus. & Prof. Code §§ 17206(a)*, *17536* provides that any person in violation of *Cal. Bus. & Prof. Code § 17200 et seq.*, the "unfair competition law," shall be liable for a civil penalty.

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

***HN24*[]** **Private Actions, Remedies**

See *Cal. Bus. & Prof. Code § 17203*.

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

***HN25*[]** **Private Actions, Remedies**

See *Cal. Bus. & Prof. Code § 17535*.

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

Banking Law > Federal Acts > Federal Trade Commission Act > General Overview

***HN26*[]** **Private Actions, Remedies**

The general equitable principles underlying *Cal. Bus. & Prof. Code § 17535* as well as its express language arm the trial court with the cleansing power to order restitution to effect complete justice. Accordingly the statute authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.

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

Banking Law > ... > Criminal Offenses > Bank Fraud > Penalties

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN27[] **Private Actions, Remedies**

Restitution may be ordered in the absence of proof of lack of knowledge in order to deter future violations of Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law," and to foreclose retention by the violator of its ill-gotten gains.

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

HN28[] **Private Actions, Remedies**

Restitution under Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law," may be ordered without individualized proof of harm.

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

HN29[] **Private Actions, Remedies**

The trial court may order restitution of money which may have been acquired by means that are violative of the Cal. Bus. & Prof. Code § 17200 et seq., the "unfair competition law." Cal. Bus. & Prof. Code §§ 17203, 17535. Remedies are cumulative. Cal. Bus. & Prof. Code § 17205.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

The attorney General brought an action against an insurer for violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), arising from defendant's practice of marketing inter vivos trusts as a means of inducing the purchase of annuities. The trial court found that defendant and its agents violated the unfair competition law by engaging in the unauthorized practice of law (Bus. & Prof. Code, §§ 6125. 17200), by employing untrue and misleading statements in marketing inter vivos trust products (Pen. Code, § 17500), and by engaging in unfair and fraudulent practices in marketing annuities, specifically, in failing to disclose adequate information concerning a premium charge included in the annuity policy (Bus. & Prof. Code, § 17200). The trial court imposed over $ 2 million in civil penalties, granted injunctive relief, and required the insurer to offer restitution to its victims. (Superior Court of Los Angeles County, No. BC153983, Ronald M. Sohigian, Judge.)

The Court of Appeal affirmed. The court held that the trial court's imposition of civil penalties did not deprive defendant of due process (U.S. Const., 14th Amend.), since the Department of Insurance had expressly disapproved the language describing the premium charge in defendant's policy as misleading and deceptive, which provided defendant with fair notice that the premium charge would result in liability under the unfair competition law. The court further held that the trial court's findings were sufficient to support the civil penalties. Even if there was some value to the annuity policies and the penalties exceeded the financial gain realized by defendant, the penalty determination is based on the defendant's opportunity for gain and the defendant's financial condition as a whole. The court also held that the trial court's restitution notification requirements imposed upon the insurer were readily understandable. (Opinion by Doi Todd, J., with Boren, P.J., and Ashmann-Gerst, J., concurring.)

Headnotes

CA(1a)[] (1a) CA(1b)[] (1b) CA(1c)[] (1c)

Unfair Competition § 10—Actions Under Unfair Competition Law—Damages—Civil Penalties—Due Process Rights of Defendant.

--The trial court's imposition of over $ 2 million in civil penalties against an insurer for violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) did not deprive the insurer of due process (U.S. Const., 14th Amend.). The trial court found that defendant engaged in unfair and fraudulent business practices, specifically, failing to disclose adequate information concerning a premium charge included in the annuity policy (Bus. & Prof. Code, § 17200). The Department of Insurance had expressly disapproved the language describing the premium charge in defendant's policy as misleading and deceptive. Thus, the record sufficiently supported the trial court's finding that the insurer had fair notice that the premium charge would result in liability under the unfair competition law.

CA(2)[] (2)

Constitutional Law § 25—Constitutionality of Legislation—Rules of Interpretation—Presumption of Constitutionality.

--The appellate court reviews constitutional questions independently, but with deference to underlying factual findings, which are reviewed for substantial evidence, viewing the record in the light most favorable to the ruling. A statute is presumed to be constitutional and it must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears.

CA(3a)[] (3a) CA(3b)[] (3b)

Unfair Competition § 4—Acts Constituting—Unfair Competition Law—Three Prongs—Unlawful, Unfair, or Fraudulent Business Act or Practice.

--The primary purpose of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) is the preservation of fair business competition. This purpose includes the public's right to protection from fraud and deceit. Written in the disjunctive, the language of Bus. & Prof. Code, § 17200, established three varieties of unfair competition: any unlawful, unfair, or fraudulent business act or practice. With respect to the unlawful prong, virtually any state, federal, or local law can serve as the predicate for an action. As to the unfairness prong, in deciding what is unfair, courts may not apply purely subjective notions of fairness. The unfairness prong is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. The unfairness prong has been employed to enjoin deceptive or sharp practices and unconscionable provisions in standardized agreements. The fraud prong bears little resemblance to common law fraud or deception; rather, the test is whether the public is likely to be deceived. Thus, a violation of the fraud prong, unlike common law fraud, may be shown even if no even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.

CA(4)[] (4)

Unfair Competition § 10—Actions Under Unfair Competition Law—Damages—Civil Penalties—Trial Court Discretion—Bases for Determination

--The trial court did not abuse its discretion in imposing over $ 2 million in civil penalties against an insurer for violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Bus. & Prof. Code, §§ 17206, and 17500, confer discretion on the trial court in setting the penalty, with consideration of the equities of the individual case. In this case, the trial court found that the insurer and its agents, in marketing inter vivos trusts as a means of inducing the purchase of annuities, violated the unfair competition law by engaging in the unauthorized practice of law (*Bus. & Prof. Code, §§ 6125*, *17200*), by employing untrue and midleading statements in marketing inter vivos trust products (Pen. Code, § 17500), and by engaging in unfair and fraudulent practices in marketing annuities, specifically, in failing to disclose adequate information concerning a premium charge included in the annuity policy (*Bus. & Prof. Code, § 17200*). In addition, the insurer's annuity policies included language that had been specifically disapproved by the Department of Insurance as likely to deceive the public, and these offense were aimed at the elderly. These findings were sufficient to support the penalties. Further, even if there was some value to the annuity policies sold and the penalties exceeded the financial gain realized by the insurer, the penalty determination is based on the defendant's opportunity for gain and the defendant's financial condition as a whole.

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 86 et seq]

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

Unfair Competition § 10—Actions Under Unfair Competition Law—Damages and Injunctive Relief—Restitution.

--The trial court did not abuse its discretion in ordering restitution in addition to imposing over $ 2 million in civil penalties against an insurer for violations of the unfair competition law (*Bus. Prof. Code, § 17200 et seq.*) relating to deceptive practices in marketing inter vivos trusts as a means of inducing the purchase of annuities, specifically, in failing to disclose adequate information concerning a premium charge included in the annuity policy. The trial court ordered the insurer to make a restitution offer to each nonsettling person who purchased an annuity containing the misleading premium charge provision. The trial court could order restitution without proof that all consumers were deprived of money or property as a result of the unfair business practice. Moreover, the restitution order was not reversible on the ground that it would provide an unfair windfall to consumers who were not deceived--restitution under the unfair competition law may be ordered without individualized proof of harm. The trial court's order was reasonably calculated to restore the status quo ante, and the restitution notification requirements imposed upon the insurer were readily understandable.

Counsel: Horvitz & Levy, David M. Axelrad, Lisa Perrochet, Loren Homer Kraus; Woolls & Peer, Paul Woolls and Gregory B. Scher for Defendant and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Assistant Attorney General, Albert Shelden, Michael R. Botwin, Michele R. Van Gelderen, Margaret Reiter and Seth E. Mermin, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: (Opinion by Doi Todd, J., with Boren, P. J., and Ashmann-Gerst, J., concurring.)

Opinion by: DOI TODD

Opinion

[466] [*511] DOI TODD, J.**

INTRODUCTION

In a bench trial the court found Fremont Life Insurance Company (appellant) had violated *Business and Professions Code section 17200 et seq.*, the "unfair competition law," in connection with the sale of certain annuity policies. The trial court imposed approximately $ 2.5 million in civil penalties, granted injunctive relief, and required appellant to offer restitution. Appellant contends that the civil penalties **[***2]** should be reversed as an abuse of discretion **[**467]** and a violation of constitutional due process; that the restitution provisions should be reversed because not all consumers were harmed by appellant's violations and on the ground that the restitution order constitutes an excessive, double punishment; and that the restitution notification requirements should be modified. We affirm the judgment.

[*512] BACKGROUND

Appellant concedes that substantial evidence supports the findings of the trial court. The following factual summary is based on the statement of decision.

Appellant and the Alliance for Mature Americans (AMA) "combined in various ways unlawfully to sell inter vivos trusts and annuities primarily to senior citizens." AMA first solicited potential consumers through mass mailings or telemarketing techniques, offering free consultations about living trusts in their residences. An AMA representative would then visit a prospect and identify himself or herself as a "certified trust advisor" or as an expert in estate planning. The representative would offer to sell the prospect an estate plan, which would include standardized forms, many of which were based on California statutory forms but without **[***3]** cautionary and instructive information. The documents included an inter vivos trust, pour-over will, and various powers of attorney. When the documents were delivered at a later date, the representative presented the documents for signature and notarized some of them. During this encounter, the person delivering the documents, who at that point was a life insurance agent of appellant, would engage in efforts to persuade the consumer to purchase an annuity policy. "From the start of their contact with each prospect, AMA and the representatives had the intention of trying to sell an annuity," which was their major goal and "dwarfed everything else of value, including the consideration paid for the estate plan and the commission arising from the estate plan sale." The representatives did not identify themselves as life insurance agents and did not advise the prospective purchaser that the ultimate goal was to sell the annuity policy and earn a commission from that sale.

The relationship between appellant and AMA and their conduct resulted in the unauthorized practice of law and unfair, fraudulent, and deceptive business practices in the marketing of annuity policies that, in turn, were **[***4]** deceptive.

Respondent filed suit against appellant and other defendants pursuant to *Business and Professions Code section 17200 et seq.*, the "unfair competition law," hereafter, the UCL. [1] The complaint alleged, inter alia, that appellant had violated the UCL based upon its involvement in various acts of **[*513]** unfair competition (*§ 17200*) and the making of untrue or misleading statements (§ 17500). [2]

[*5]** **[**468]** The trial court agreed, finding appellant violated *sections 17200* and *17500* based on "three sets of circumstances, each of which is independently adequate": (1) Appellant was involved in the unauthorized practice of law; (2) Appellant "was involved in an unfair, fraudulent, and deceptive business practice in the marketing of its annuities, i.e., the indication by its sales agents, pursuant to training, that they were advisors on matters of estate planning by the use of inter vivos trusts, rather than salespersons who had the ultimate goal of selling annuity policies to the customers, and the indication that AMA was an organization of senior citizens or an organization which functioned on behalf of senior citizens, rather than [a] sales organization, all of which was likely to deceive"; and (3) Appellant "marketed an annuity policy which was misleading and deceptive in its failure clearly to describe the full economic consequences of early withdrawal of funds and was therefore likely to deceive."

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[1] All statutory references are to the Business and Professions Code unless otherwise stated.

[2] *Section 17200* reads: ***HN1***[] "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Section 17500 reads as here pertinent: ***HN2***[] "It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state . . . any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ."

In addition to ordering injunctive relief, the trial court imposed a civil penalty of $ 210 for each violation of *section 17200* and for each violation of *section 17500*, enhanced by an additional **[***6]** $ 210 per violation because senior citizens were targeted (*§ 17206.1*; fn. 14, *post*), for a total of $ 2,543,000. [3] The trial court stated that the civil penalty imposed closely reflected "the seriousness and harmfulness of the violations" and that the "gross amount . . . is an appropriate remedy based on the various factors material to setting such an amount, which are essentially undisputed between the sides." It also ordered restitution and notice of restitution.

This appeal followed.

[*514] DISCUSSION

Appellant makes the following contentions: I. The civil penalty should be reversed on the grounds that it violates due process requirements, is an abuse of the trial court's discretion, **[***7]** and is not necessary as a deterrent; II. The restitution order should be reversed because not all annuitants were deceived or harmed, and on the additional ground that it is an excessive, double punishment; and III. The notification of restitution should be modified.

I. *The Civil Penalty*

CA(1a)[] **(1a)** Appellant contends the imposition of the civil penalty violates federal due process, constitutes an abuse of discretion, and is not necessary as a deterrent.

A. *Due Process*

HN4[] The *Fourteenth Amendment to the federal Constitution* prohibits states from depriving any person (including a corporation) of property without due process of law. (See generally 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 481-483, pp. 668-670.) Appellant argues the civil penalty imposed in the instant case violates the federal procedural due process requirement on the ground that the broad authority granted courts under the UCL denies defendants fair notice that specific conduct may subject them to imposition of a substantial penalty, and **[**469]** on the additional ground that the civil penalty imposed is grossly excessive.

CA(2)[] **(2)** ***HN5***[] The standard of review of constitutional questions is independent judgment, "but **[***8]** with deference to underlying factual findings, which we review for substantial evidence, viewing the record in the light most favorable to the ruling [citations]." (*City and County of San Francisco v. Sainez (2000) 77 Cal.App.4th 1302, 1313 [92 Cal. Rptr. 2d 418]*.) "[A] statute is presumed to be constitutional and . . . it must be upheld unless its unconstitutionality 'clearly, positively and unmistakably appears.' [Citations.]" (*Hale v. Morgan (1978) 22 Cal.3d 388, 404 [149 Cal. Rptr. 375, 584 P.2d 512]*.)***CA(3a)***[] **(3a)**)

HN6[] The primary purpose of the UCL is " 'the preservation of fair business competition.' [Citations.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180 [83 Cal. Rptr. 2d 548, 973 P.2d 527]*, hereafter *Cel-Tech*).) This purpose includes " 'the right of the *public* to protection from fraud and deceit.' " (*Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 110 [101 Cal. Rptr. 745, 496 P.2d 817]*; **[*515]** see also *Committee on* *Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209-210 [197 Cal. Rptr. 783, 673 P.2d 660]*.)

Sufficiency of Notice

CA(1b)[] **(1b)** Appellant argues that the UCL did **[***9]** not afford appellant sufficient notice that various acts would result in a substantial civil penalty.

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[3] ***HN3***[] *Section 17203* provides for injunctive relief. *Section 17206* mandates a maximum civil penalty of $ 2,500 for each violation of the *section 17200* prohibition against unfair competition. *Section 17500* mandates a maximum civil penalty of $ 2,500 for each violation of its prohibition against false or misleading statements.

CA(3b)[] **(3b)** As quoted in the margin, section 17200 states in part: **HN7**[] "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice . . . ." (§ 17200; fn. 2, *ante*.) Written in the disjunctive, this language "establishes three varieties of unfair competition." (Podolsky v. First Health Care Corp. (1996) 50 Cal.App.4th 632, 647 [58 Cal. Rptr. 2d 89].)

With respect to the *unlawful* prong, **HN8**[] "[v]irtually any state, federal or local law can serve as the predicate for an action" under section 17200. (Podolsky v. First Health Care Corp., supra, 50 Cal.App.4th at p. 647; see, e.g., People v. Landlords Professional Services (1989) 215 Cal. App. 3d 1599 [264 Cal. Rptr. 548] [unauthorized practice of law].) " '[I]n essence, an action based on Business and Professions Code section 17200 to redress an unlawful business practice "borrows" violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable **[***10]** under section 17200 et seq. and subject to the distinct remedies provided thereunder.' " (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 383 [6 Cal. Rptr. 2d 487, 826 P.2d 730], disapproved on another point in Cel-Tech, supra, 20 Cal.4th at p. 185.) The UCL remedies and penalties are cumulative to those imposed under the other laws. (*Ibid.*; § 17204.)

HN9[] As to the second prong, the California Supreme Court has not yet developed or approved a definition regarding what is *unfair* in the context of a UCL suit involving injury to consumers. (Cel-Tech, supra, 20 Cal. 4th at pp. 184-187 & fn. 12.) The court has cautioned that in deciding what is *unfair*, "courts may not apply purely subjective notions of fairness." (Id. at p. 184.) This prong is "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. [Citation.]" (State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1103 [53 Cal. Rptr. 2d 229].) The *unfairness* prong has been employed to enjoin deceptive or **[**470]** sharp practices. (Samura v. Kaiser Foundation Health Plan, Inc. (1993) 17 Cal.App.4th 1284, 1299, fn. 6 [22 Cal. Rptr. 2d 20]; **[***11]** see, e.g., Committee on Children's Television, Inc. v. General Foods Corp., supra, 35 Cal.3d 197 [197 Cal. Rptr. 783, 673 P.2d 660] & **[*516]** People v. Bestline Products, Inc. (1976) 61 Cal. App. 3d 879, 915 [132 Cal. Rptr. 767].) The court also has determined that *unfair* business practices include unconscionable provisions in standardized agreements. (People v. McKale (1979) 25 Cal.3d 626, 634-637 [159 Cal. Rptr. 811, 602 P.2d 731] [tenants of mobilehome park required to sign documents that include illegal provisions].) [4]

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[4] In Cel-Tech, supra, 20 Cal.4th 163, a section 17200 unfair competition case, the court developed a definition but expressly limited it to anticompetitive cases and excluded cases such as the one at bar involving injury to consumers. The court defined "unfair" AS FOLLOWS: "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (Cel-Tech, at p. 187 & fn. 12.)

The *Cel-Tech* court disapproved the definition of "unfair" proposed in People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509 [206 Cal. Rptr. 164] (*Casa Blanca*). Therein, the People charged that it was both unlawful and unfair under section 17200 that there was insufficient staff at the defendant's facilities. Relying upon FTC v. Sperry & Hutchinson Co. (1972) 405 U.S. 233 [31 L. Ed. 2d 170, 92 S. Ct. 898] (*Sperry & Hutchinson*), the *Casa Blanca* court held that an unfair business practice exists "when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (Casa Blanca, at p. 530.) The *Cel-Tech* court criticized this wording, stating in part: "Vague references to 'public policy,' for example, provide little real guidance. ' "[P]ublic policy" as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, "lest they mistake their own predilections for public policy which deserves recognition at law." ' [Citation.]" (Cel-Tech, supra, 20 Cal.4th at p. 185.)

Sperry & Hutchinson, supra, 405 U.S. 233, describes the test for fairness as one developed by the Federal Trade Commission to determine "whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair." The test as stated by the court is as follows: " '(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).' " (Id. at pp. 244-245, fn. 5.) Although the *Cel-Tech* court disapproved of the version of this test found in Casa Blanca, supra, 159 Cal. App. 3d 509, the court expressed "no view on the application of federal cases such as *FTC v. Sperry &*

[*12]** Finally, ***HN10***[] the *fraud* prong of *section 17200* "bears little resemblance to common law fraud or deception." (*State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at p. 1105*.) Under *section 17200*, "[t]he test is **[**471]** whether the public is likely to be deceived. [Citation.] This **[*517]** means that a *section 17200* violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. [Citation.]" (*State Farm Fire & Casualty Co., at p. 1105*.***CA(1c)***[] **(1c)**)

As set out above, the trial court found three separate and independent sets of circumstances wherein appellant had violated the UCL. As will appear, only the third set is relevant to appellant's notice argument.

Unauthorized Practice of Law

First, the trial court found appellant had violated *section 17200* by engaging in the unauthorized practice of law, a violation of *section 6125*. This set of circumstances comes within the *unlawful* prong of *section 17200*. Appellant makes no argument that *section 6125* fails to give adequate notice of its prohibitions. [5]

[*13]** *Deceptive Marketing Techniques*

Second, the trial court found appellant had violated *section 17200* through its agents engaging in particular marketing techniques that involved untrue or misleading statements. The trial court included in this set of circumstances its express findings that sales agents had represented, pursuant to their training, that they were estate planning advisors by virtue of the inter vivos trust product they were offering, "rather than salespersons who had the ultimate goal of selling annuity policies to the customers." They also made representations that AMA was "an organization of senior citizens or an organization which functioned on behalf of senior citizens, rather than [a] sales organization . . . ." Here, ***HN12***[] knowingly untrue or misleading statements made with the intent to induce the public to enter into obligations with respect to appellant's annuity policy product come squarely within the prohibitions of *section 17500*, set forth at footnote 2, *ante*. Appellant makes no argument that *section 17500* fails to give adequate notice of its prohibitions.

Misleading and Deceptive Statements of Costs

With regard to the third set of circumstances, the trial **[***14]** court determined with reference to the "premium charge" that appellant had marketed an annuity policy that was "misleading and deceptive in its failure clearly to **[*518]** describe the full economic consequences of early withdrawal of funds and was therefore likely to deceive." The trial court expressly found the following facts, which are included in the statement of decision: "[Appellant's] annuity policies are misleading in the sense that they do not adequately disclose information [regarding] the premium charge. Such a charge is unusual as [expert] witness Vincent Gallagher testified. Information about the premium charge is not conspicuously set forth in the policy, which was, after all, targeted for sale to senior citizens. The sales brochures did not remedy this deficiency. . . . [Appellant's] application did not do so either. . . . [Appellant] went so far as to remove from its periodic statements information showing the amount of the charges which would be made in the event of early surrender of the policy . . . ."

Both the *unfair* prong and the *fraud* prong of *section 17200* apply to this third set of circumstances. The likely difficulty **[**472]** a consumer would experience **[***15]** in attempting to ascertain the financial impact of the "premium charge" of appellant's annuity policy is *unfair* in the sense of a "deceptive or sharp practice[]" (*Samura v.*

Hutchinson Co. . . . that involve injury to consumers and therefore do not relate to [anticompetitive] actions like this one." (*Cel-Tech, supra, 20 Cal. 4th at p. 187, fn. 12*.)

The *Cel-Tech* court also disapproved the definition of "unfair" as set forth in *State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at page 1104*: "[T]he court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . ." (*Cel-Tech, supra, 20 Cal.4th at p. 184*.)

[5] *Section 6125* reads: ***HN11***[] "No person shall practice law in California unless the person is an active member of the State Bar."

Kaiser Foundation Health Plan, Inc., supra, 17 Cal.App.4th at p. 1299, fn. 6) and also as an unconscionable provision in a standardized agreement (People v. McKale, supra, 25 Cal.3d at pp. 634-637). The fact that the information about the premium charge was "not conspicuously set forth in the policy" and that the policy was "likely to deceive" also brings this set of circumstances within the *fraud* prong of section 17200. (State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at p. 1105.)

With regard to this third set of circumstances, we conclude that the record sufficiently supports the court's finding that appellant had fair notice that the premium charge would result in such liability. Substantial evidence also supports the findings of the trial court that appellant was notified that its annuity policy included language disapproved by the Department of Insurance (DOI), thus providing fair notice that sale of the annuity policy in that **[***16]** form could subject appellant to civil fines pursuant to the UCL.

On or about August 9, 1994, appellant authorized the actuarial firm of Lewis & Ellis, Inc., to file its annuity policy documents, including the application and brochures, with the DOI for approval. Lawrence Scott, assistant vice-president of Lewis & Ellis, Inc., handled the filing project. Appellant's contact person for the filing project was Gene Berry, head of appellant's data processing department. Scott's secretary routinely gave appellant copies of all DOI correspondence sent and received.

In response to an initial filing attempt, John Gilchrist of the DOI communicated to Scott that the premium charge mentioned in appellant's annuity **[*519]** policy should be disclosed more prominently by inclusion on the specification page of the annuity policy, and that it should be evident that the premium charge was distinct from the surrender charge. Scott notified Berry of these requirements and indicated he would resubmit the policy when he received the changes from appellant. Scott later received a modified specification page that included additional information on the premium charge. DOI wrote Scott in response to the resubmission: **[***17]** "Not accepted for filing, renaming a surrender charge a premium charge is misleading and deceptive." Scott contacted appellant, and additional changes were made.

A September 6, 1994 letter from Scott to Gilchrist enclosed a revised policy specifications page. The letter indicated a copy had been sent to Berry. Gilchrist returned the letter to Scott with a handwritten note: "The reference to a premium charge page 7 needs explanation or removal." Scott rewrote one paragraph of page 7 of the policy "to fully explain" the premium charge "so the [DOI] will accept the policy for filing." Scott faxed the suggested paragraph to Berry. Berry put the change "into the contract form."

An October 17, 1994 letter from Scott to Gilchrist, a copy of which was sent to Berry, included the final changes. Gilchrist responded with a request for two complete "John Doe specimens." Scott complied by letter dated October 28, 1994. The specimens enclosed included a hypothetical that Berry had been involved in creating.

With respect to approximately 4,000 annuity policies that appellant sold, all included the following language, which had been *disapproved* by the DOI: "Premium charge--5 percent of the premium applied in the first contract year." Appellant concedes that none of the policies sold included the DOI-approved statement: "SURRENDER **[**473]** CHARGE RELATED TO **[***18]** FIRST YEAR PREMIUM--5 percent of the premium applied in the first contract year (see premium charge on page 7)."

Expert witness Vincent Gallagher, Ph.D., an actuary experienced in analyzing annuity contracts, testified at trial that a "very unusual" feature of appellant's annuity policy was "two separate surrender charges that have different names." The second surrender charge was called a "premium charge," which was "a very unusual term." Dr. Gallagher was accustomed to seeing surrender charges disclosed on the front page of policies. However, the "premium charge" was mentioned on page 4 of the annuity policy, on what sometimes is referred to as a "specification page." DR. GALLAGHER TESTIFIED: "When I first read this policy and saw the premium charge, I, at first, thought that the lines below it [on page 4] referred to it and explained **[*520]** it more fully, but they don't. [P] To find out what the premium charge is, one has to go into the body of the [annuity policy] on page 7. [P] The bottom [of page 4 of the **[***19]** annuity policy] refers to the other surrender charge, which is called a surrender charge and more common[ly] what one would expect to see in the [annuity policy]." After reading page 7 of the annuity policy, Dr. Gallagher understood "[t]o some extent, but not entirely" what the "premium charge" was. Dr.

Gallagher also testified that the annuity policy "has particularly high surrender charges and over a long duration of time." Annuity policies commonly waive surrender charges on death, but appellant's annuity policies did not.

We conclude that substantial evidence supports the findings of the trial court that the annuity policy was "misleading and deceptive" and therefore "likely to deceive." This evidence also demonstrates that appellant was on notice over a period of several months that the DOI had expressly disapproved specific language in its annuity policy.

In light of the foregoing we are satisfied that the UCL as applied to this case did not violate the federal procedural due process notice requirement. Thus, this third set of circumstances, involving misleading and deceptive language in the annuity policy, supports the judgment of the trial court that appellant violated *section **[***20]** 17200*, as well as the first and second sets of circumstances, involving the unauthorized practice of law and the use of untrue or misleading statements in the marketing techniques, respectively.

The Civil Penalty Is Not Grossly Excessive

CA(4)[] **(4)** Appellant argues that the civil penalty violates federal due process on the additional ground that it is grossly excessive in relation to the state's interest in protecting its consumers. The cases upon which appellant relies are distinguishable and do not support appellant's position.

Appellant's reliance on *BMW of North America, Inc. v. Gore (1996) 517 U.S. 559 [134 L. Ed. 2d 809, 116 S. Ct. 1589]* (*BMW v. Gore*) is misplaced because the guidelines there address the propriety of a punitive damage award, not a civil penalty. [6] Although **[**474]** the case refers to civil penalties, the references relate to the plaintiff's argument that a large punitive damage award was necessary to induce change in the defendant's nationwide policy **[*521]** regarding nondisclosure of certain presale vehicle repairs. The court rejected the plaintiff's position because, regardless of whether the award was one of punitive damages or statutory penalties, under "principles **[***21]** of state sovereignty and comity," the plaintiff's approach would allow one state to "impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." (*BMW v. Gore, at p. 572* & fn. 17 [*116 S. Ct. at p. 1597*].) *BMW v. Gore* also refers to civil penalties for purposes of comparison with punitive damage awards to evaluate whether the awards were excessive. But *BMW v. Gore* does not apply the guidelines to civil penalties.

Appellant suggests that certain language in *Hale v. Morgan, supra, 22 Cal.3d 388*, is applicable and supports its position. In that case, Hale moved his trailer **[***22]** into a small trailer park without the knowledge or consent of the owner of the trailer park. The parties later agreed Hale could stay in exchange for $ 65 a month rent, which Hale failed to pay. The owner then acted to deprive Hale of utility services in an effort to evict him. After further disagreement between the parties, the matter went to trial. The trial court found the owner in violation of former *Civil Code section 789.3*, which mandated a $ 100 fine for each day a landlord interrupted utility services with the intent to terminate occupancy, and imposed penalties totaling $ 17,300.

On review, the California Supreme Court expressed concern that the statute did not permit the trier of fact to exercise discretion in fixing the penalty, thereby ignoring the culpability of the landlord and other possibly mitigating factors. (*Hale v. Morgan, supra, 22 Cal.3d at pp. 399-404*.) It reversed the judgment and remanded the matter for retrial of the penalty issue, holding that the total penalty imposed was confiscatory and "wholly disproportionate to any discernible and legitimate legislative goal, and is so clearly unfair that it cannot be sustained." (*Id. at p. 405*.) **[***23]** [7]

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[6] *BMW v. Gore* sets out the following guidelines. "[T]he degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." (*BMW v. Gore, supra, 517 U.S. at pp. 574-575*.)

[7] The year after *Hale v. Morgan* was decided the Legislature amended *Civil Code section 789.3* to provide that the landlord would be liable to the tenant in a civil action for an amount "not to exceed $ 100" for each day the landlord remained in violation

As appellant acknowledges, *Hale v. Morgan, supra*, applies where a statute does not permit any discretion in determining the amount of the penalty. (See, e.g., *People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 313 [58 Cal. Rptr. 2d 855, 926 P.2d 1042]*; *Suman v. BMW of North America, Inc. (1994) 23 Cal.App.4th 1, 11 [28 Cal. Rptr. 2d 133]*.) Appellant concedes that *section 17206* confers discretion on the trial court in **[*522]** setting the civil penalty. [8] **[***24]** We also note the UCL **[**475]** includes *section 17500*, which in itself confers discretion by setting a maximum fine for each violation. [9]

Appellant also cites *Cooper Industries, Inc. v. Leatherman Tool Group (2001) 532 U.S. 424 [149 L. Ed. 2d 674, 121 S. Ct. 1678]*, and cases cited therein in support of its position that the issue whether the civil penalty is excessive must be reviewed de novo. But these cases can be distinguished from the case before us. *Cooper Industries, Inc.*, is a punitive damages case. *Solem v. Helm (1983) 463 U.S. 277 [77 L. Ed. 2d 637, 103 S. Ct. 3001]*, overruled by *Harmelin v. Michigan (1991) 501 U.S. 957, 965 [115 L. Ed. 2d 836, 111 S. Ct. 2680]* [***HN15***[] Eighth Amendment contains no proportionality guarantee]; *Enmund v. Florida (1982) 458 U.S. 782 [73 L. Ed. 2d 1140, 102 S. Ct. 3368]*, **[***25]** and *Coker v. Georgia (1977) 433 U.S. 584 [53 L. Ed. 2d 982, 97 S. Ct. 2861]* are criminal cases in which the sentence was challenged as cruel and unusual under the *Eighth Amendment of the United States Constitution*. *United States v. Bajakajian (1998) 524 U.S. 321 [141 L. Ed. 2d 314, 118 S. Ct. 2028]* involved a forfeiture that the trial court imposed after the defendant attempted to leave the country without reporting that he was transporting more than $ 10,000, in knowing violation of title *18 of the United States Code section 982(a)(1)*. The trial court found that cultural differences were implicated, and, although the entire amount ($ 357,144) was subject to forfeiture under the statute, ordered a lesser amount to avoid violating the excessive fines clause of the Eighth Amendment. The United States appealed, and the United States Supreme Court affirmed the trial court.

In summary, appellant relies primarily on *BMW v. Gore*, and asks this court to "carefully examine[]" the civil penalty "in light of the constitutional **[*523]** considerations articulated" in that case. As reviewed above, *BMW v. Gore* and the other cases discussed do not support appellant's **[***26]** position that the civil penalty violates due process.

B. *Discretion of the Court*

In the statement of decision, the trial court stated that the civil penalty imposed closely reflected "the seriousness and harmfulness of the violations" and that the "gross amount . . . is an appropriate remedy based on the various factors material to setting such an amount, which are essentially undisputed between the sides."

Appellant contends the trial court abused its discretion in imposing the civil penalty, arguing that the $ 2,543,000 amount is excessive given appellant's conduct. In support of this position, appellant asserts the following: (1) Its violations were not knowing or intentional. (2) Its involvement with AMA was not reprehensible conduct that would support the civil penalty. (3) The premium charge violation does not involve reprehensible conduct. (4) Appellant's conduct did not cause widespread or significant harm to consumers. (5) The civil penalty is excessive in light of the

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of the provisions of the statute but required a minimum award of $ 250 for each cause of action. (Stats. 1979, ch. 333, § 1, p. 1191.)

[8] *Section 17206* provides as pertinent: ***HN13***[] "(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($ 2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California . . . . [P] (b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth."

[9] With regard to penalties imposed pursuant to *section 17500*, proscribing false or misleading advertising, that section reads in relevant part: ***HN14***[] "Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($ 2,500), or by both that imprisonment and fine."

profit appellant obtained from its annuity **[**476]** business. (6) Imposition of $ 2.5 million in penalties is not necessary as a deterrent.

We first note ***HN16***[] the UCL requires that the remedies imposed take into **[***27]** consideration the equities of the case. (*People v. Superior Court (Jayhill) (1973) 9 Cal.3d 283, 287, fn. 1 [107 Cal. Rptr. 192, 507 P.2d 1400]*.) We review the award of civil penalties to determine whether the trial court abused its discretion. (*People v. Custom Craft Carpets, Inc. (1984) 159 Cal. App. 3d 676, 686 [206 Cal. Rptr. 12]*.)

1. *Knowledge and Intent*

Appellant suggests that the UCL was unfairly applied based on its assertions that it complied with all DOI directives to clarify that the "premium charge" was a form of surrender charge, that it inadvertently sold the unapproved version due to a change in personnel that impacted its computer files, that there was no evidence appellant "intended or expected that customers would be unfairly induced to purchase its product," and that it did not learn until after litigation commenced that the disapproved language remained.

Setting aside the fact that ***HN17***[] *section 17200* imposes strict liability (*Prata v. Superior Court (2001) 91 Cal.App.4th 1128, 1137 [111 Cal. Rptr. 2d 296]*), **[*524]** appellant's alleged inadvertence due to personnel changes does not negate the fact that it sold a version of its annuity policy that **[***28]** included language specifically disapproved by the DOI as likely to deceive the public. As previously discussed, appellant was clearly on notice regarding the disapproved language, and over 4,000 policies which included the deceptive language were sold. Furthermore, even after litigation commenced and appellant acknowledged that the disapproved language remained in the policy, appellant continued to collect the premium charges "[b]ecause the proper language was in the policy in one place." Appellant never voluntarily notified annuitants that it would not collect premium charges. These latter acts seriously undermine appellant's asserted inadvertence resulting from personnel changes, and support the decision of the trial court.

2. *Reprehensible Conduct Not Required*

Appellant argues that its involvement with AMA was not reprehensible conduct that would support the civil penalty imposed.

The statement of decision includes the following findings.

"9. The customers were likely to be deceived about AMA's purpose in contacting them. The AMA salespeople were trained not only to be ingratiating, but to persuade the customers that the salespeople were acting in a confidential and advisory **[***29]** capacity toward the customers. [P] . . . [P]

"14. . . . As [respondent's] attorneys correctly argued, the sales activities in the present case went well beyond [mere filling out blanks in estate planning forms], and unlawfully invade[d] the territory of practice of law. Those activities included giving of advice and the suggestions that the salespersons were able to give highly qualified expert advice and were giving such expert advice. The salespersons were trained to indicate to the customers that the estate plans would be prepared by attorneys. The salespersons were trained to organize the signing of the will, the inter vivos trust, and such other documents as were pertinent to the particular customer's case. The salespersons were trained to make follow-up calls on the customers, for the ostensible purpose of monitoring the correctness of the steps which had been previously taken and reviewing **[**477]** the current situation of the customers. Actually, although the salespersons gave some advice about the sufficiency of documents and made recommendations for change, the chief purpose of such visits was to find out whether the customers had additional assets which could be used to **[***30]** purchase another annuity. The salespersons were compensated only by the commissions paid if they sold annuities.

"15. Moreover, the reality is that customers of estate planning services really needed attorneys' advice in making the important decisions involved, **[*525]** including the decisions regarding funding a trust, and needed attorneys' skill in drafting the necessary documents--but did not get that kind of advice or that kind of drafting. . . .

"16. . . . The sales method of AMA actually included the element of supposedly determining if the sales prospect qualified for an inter vivos trust, as if the salesperson were going to make a detached and professional disinterested decision on that topic.

"17. A main aspect of AMA's business method, *known to the other defendants*, was that the salespersons would be presented (and/or would present themselves) as experts and advisors (not salesperson[s] trying to make a sale of an estate plan and then of an annuity). The salespersons were instructed not to mention the word 'annuity' in the early phases of their interaction with the sales prospects; such a mention, they were told, would motivate the sales prospect at least to shy away from **[***31]** the interview. The salespersons were given business cards which identified them as 'trust advisors' rather than 'life insurance agents' or some similar designation. The method involved getting into the prospect's home, using the discussions regarding the estate plan and the unauthorized practice of law involved therein as the early steps to seek to gain the trust of the prospect, holding out the sales agents as advisors rather than salespersons, concealing the purpose of selling annuities, [10] using the economic information about the sales prospects obtained during the estate plan sales efforts in connection with efforts to sell [appellant's] annuity, and then selling [appellant's] annuity. This was done under the aegis of a sales organization which carried a name (Alliance for Mature Americans) connoting the idea that it was some sort of association devoted to benevolent advancement of the well-being of senior citizens.

[*32]** "18. . . . [Appellant] knew of AMA's general business methods. [Appellant] is responsible for the acts of AMA under the theory of agency, and under the theory of ratification [*Civ. Code, §§ 2307*, *2311*], since [appellant] accepted the substantial benefits of AMA's conduct, and designated AMA and the salespersons as its agents. The salespersons were agents of [appellant]--indeed, some salespersons sold annuities but were not actually appointed as agents, and [appellant] accepted the business nevertheless. [Citation to trial exhibits.] Persons who sell annuities must be licensed and appointed as agents by the insurer issuing the annuity. Licensing is by the Department of Insurance [*Ins. Code, § 1631*]. Only 'life agents' are authorized to transact life insurance business, including annuity business. [**[*526]** *Ins. Code, §§ 32*, *1622*, *101*.)] It is required that a formal notice be filed showing that the agent has been [ap]pointed to act for an insurer. [*Ins. Code, § 1704, subd. (a)*.)] **[**478]** If an insurer issues a policy on the **[***33]** application taken by a person not appointed as agent, the insurer is still liable for the acts of the person. [*Ins. Code, § 1704.5*.)] [Appellant] knew of the connection between estate plan sales and annuity sales. [Citation to trial exhibit.] [Counsel for appellant] knew of the connection and purported to analyze it with particular respect to whether there was a problem regarding unauthorized practice of the law. [The president of appellant] was present at AMA meetings and went on various trips with AMA personnel. [An AMA representative] explained the connection to [appellant]." (Italics added.)

Appellant concedes it "required that each AMA agent soliciting policies on [appellant's] behalf be appointed a 'life agent' by [appellant], registered with the California Department of Insurance." Appellant also concedes it is not shielded from liability under the UCL even when its conduct was "consistent with industry standards" and it had "no clear notice" that AMA's conduct was unlawful. [11] Despite these concessions of liability, appellant argues that, in determining its culpability for the purpose of imposing the civil penalties, its conduct **[***34]** as it related to AMA was not "*reprehensible* conduct" that would justify the amount imposed, and therefore the trial court abused its discretion.

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[10] "The financial return from selling an estate plan was much less than that potentially involved in the sale of [appellant's] annuity."

[11] However, appellant makes several assertions in support of an argument that AMA's conduct should not be attributed to it, claiming the following occurred: 1. AMA presented its sales methods as "wholly-legitimate and above-board." 2. Appellant did not perceive it had an obligation to investigate or assume responsibility for AMA's sales conduct, based on industry custom and its agreement with AMA. 3. Although appellant "may have understood the general structure of AMA's sales method," it lacked knowledge of how the AMA marketing plan actually affected consumers. 4. Appellant had "no ability to observe AMA's agent training or monitor agent conduct in the field" and therefore was forced to rely on AMA information, which was not always complete or accurate. 5. Appellant's conclusion that AMA was not engaged in the practice of law was due to the complexity of the legal question in combination with AMA's misrepresentations to appellant. Appellant also notes here that the $ 2.5 million penalty is much greater than the $ 100,000 penalty imposed on AMA.

[*35]** Appellant's position is not persuasive. The trial court did not describe appellant's conduct as "reprehensible" in reaching its decision, and none of the cases appellant cites in support of its position on this issue require such a finding. (See *City and County of San Francisco v. Sainez, supra, 77 Cal.App.4th 1302*; *People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal.App.4th 330 [3 Cal. Rptr. 2d 34]*; *People v. Dollar Rent-A-Car Systems, Inc. (1989) 211 Cal. App. 3d 119 [259 Cal. Rptr. 191]*; *People v. Toomey (1985) 157 Cal. App. 3d 1 [203 Cal. Rptr. 642]*; *Casa Blanca, supra, 159 Cal. App. 3d 509*; *People v. Bestline Products, Inc., supra, 61 Cal. App. 3d 879*; **[*527]** *People v. Witzerman*, *supra*, 29 Cal. App. 3d 169 [105 Cal. Rptr. 284].) Appellant draws the "reprehensible" standard from *BMW v. Gore*, which we have previously determined is not applicable here because that case deals with the propriety of a punitive damage award rather than a civil penalty. (See fn. 6, *ante*.) Appellant's reliance on the "reprehensible" standard is misplaced. The findings of the trial court with respect to appellant are **[***36]** sufficient to support the penalties.

3. *Premium Charge Violation*

Appellant references the DOI approval process and the evidence that its noncompliance with disclosure requirements was inadvertent. Appellant again invokes the "reprehensible" standard of *BMW v. Gore* **[**479]** to argue that the penalty sanctions are too severe. As we have discussed, ***HN18***[] the "reprehensible" standard is not applicable.

4. *Harm to Consumers*

As further support for its contention that the trial court abused its discretion, appellant argues that the actual harm suffered by consumers due to its violations does not justify the penalties imposed. Appellant states respondent failed to establish that "*each* consumer" was actually harmed. Appellant asserts that, in fact, there was evidence some consumers ultimately understood that "the annuity was a long-term investment and that withdrawals would be subject to surrender penalties" because these consumers were "financially sophisticated," or had received additional advice from a source other than the agent, or did not trust the agent or believe the misrepresentations, or did not seek or rely upon the agent's legal advice. Appellant also refers to the court's finding **[***37]** that the "annuity and trust provided real value." [12] Based on its position that there was no evidence of "substantial public injury" stemming from its violations, appellant argues that the penalties should be set aside, citing *BMW v. Gore and Lane v. Hughes Aircraft Co. (2000) 22 Cal.4th 405, 424 [93 Cal. Rptr. 2d 60, 993 P.2d 388]* (conc. opn. of Brown, J.). Appellant again relies solely on the "reprehensible" conduct standard of punitive damages cases. Appellant's contention is without merit.

5. *Relationship of Amount of Penalties Imposed to Stated Profit*

Appellant's expert testified that the proper measure of appellant's financial gain from the sale of these annuities is the difference between the **[*528]** interest it received on the monies (or reserves) paid to it and the interest it paid out, less commissions **[***38]** and administrative expenses. Under this formula, appellant's pretax gain resulting from its relationship with AMA from 1994 through 1996, when appellant sold this aspect of its business to another company, totaled $ 627,599. Appellant notes that the $ 2,543,000 total of the penalties imposed is more than four times appellant's gain, and asserts that no case has affirmed such an award. Appellant states that "[c]ourts have recognized the amount of a defendant's financial gain may reflect the seriousness of a defendant's conduct and the appropriate level of punishment," and refers to two cases in support of its proposition, *People v. National Association of Realtors (1984) 155 Cal. App. 3d 578 [202 Cal. Rptr. 243]* and *People ex rel. Van de Kamp v. Cappuccio, Inc. (1988) 204 Cal. App. 3d 750 [251 Cal. Rptr. 657]*. Appellant argues that the only relevant measure is its representation of its "financial gain" from the subject transactions.

We disagree. The court in *People v. National Association of Realtors, supra, 155 Cal. App. 3d 578*, discussed the rule that ***HN19***[] the number of violations is to be determined based upon the number of victims **[***39]** and the

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[12] The statement of decision included the following: "[T]here are both advantages and disadvantages connected with [appellant's] annuities--as compared with other annuities and as compared with other investments."

number of independent acts. (*Id. at p. 586*.) It then states: "[V]iolations calculated in this manner reasonably relate to the gain or opportunity for gain achieved by the unlawful acts and can fairly be determined through expert testimony, the facts elicited at trial and circumstantial evidence." (*Ibid.*, citing *People v. Superior Court (Olson) (1979) 96 Cal. App. 3d 181, 198 [157 Cal. Rptr. 628]*.) *People ex rel Van de Kamp v. Capppuccio, Inc., supra, 204 Cal. App. 3d at page 765*, **[**480]** cites *People v. National Association of Realtors, supra, at page 586*. (See also *People v. Superior Court (Jayhill), supra, 9 Cal.3d at p. 289* [regardless of number of misrepresentations made to each customer, penalty may not exceed $ 2,500 per customer].) Although *People v. National Association of Realtors* employs the term "gain," the focus of the discussion is the calculation of the number of violations. In addition, the phrase "or opportunity for gain" undermines appellant's argument since it indicates that illegal conduct that did not result in "gain" may yet support imposition of a penalty.

Furthermore, **[***40]** ***HN20***[] *section 17206, subdivision (b)*, provides that in assessing the amount of a civil penalty the trial court shall consider, among other factors and if relevant, "the defendant's assets, liabilities, and net worth." (See also *§ 17536, subd. (b)* [identical language]; *People v. Toomey, supra, 157 Cal. App. 3d at p. 25*.) Appellant's "financial gain" figure, based solely on proceeds derived from its relationship with AMA was estimated by appellant's expert at approximately 50 percent of appellant's annuity business. This is a narrowly defined, significantly smaller basis than the factors **[*529]** included in the statute, which require analyses of appellant's business operations as a whole. [13] Appellant's concept of "relevance" in this context is similarly narrow in that appellant limits it to the factual relationship between a measure of financial gain and each profitable transaction. But "relevance" is given broader application under the UCL. A defendant's financial condition is considered relevant to determine whether such condition precludes the imposition of a penalty considered sufficient to deter such future conduct. (*People ex rel. Van de Kamp v. Capuccio, Inc., supra, 204 Cal. App. 3d at p. 765*.) **[***41]**

6. *Deterrence*

Appellant contends that the total amount of the penalties imposed cannot be justified as a deterrent, asserting that its violations were not intentional, it immediately ceased issuance of its annuities and terminated its relationship with AMA after learning of the intent of the Attorney General to file suit, and the injunction serves the purpose of deterrence. It again references the "reprehensible" conduct standard for punitive damages.

We first note that ***HN21***[] the UCL provides for injunctive relief independent of the mandatory imposition of penalties. (*§§ 17203*, *17206*, *17535*, *17536*.) There is no requirement that the fact of an injunction be considered in **[***42]** imposing civil penalties. The UCL does require that the trial court consider, if relevant, "the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." (*§§ 17206*, *17536*.) Substantial evidence supports findings under each of these categories.

The nature of the offenses was that they were aimed at the elderly. The trial court, in fact, imposed additional penalties because senior citizens were involved. (*§ 17206.1*.) [14] The offenses were serious in **[**481]** that they impacted the financial security of these persons.

[*43]** With regard to the number of violations, the statement of decision discloses that the trial court, addressing only the sales in California, found **[*530]** 4,958 violations under *section 17200* and *4*,958 violations under *section 17536*, a total of 9,916 violations. From this amount, it subtracted 653 violations for situations in which no annuity policy was purchased and subtracted 120 violations for the 60 persons with whom appellant had settled, "since the

[13] Appellant's expert, in explaining various calculations employed to reach the financial gain number, stated that appellant's profits for 1996 were $ 17 million. Appellant represents elsewhere in its brief that in 1998 it had approximately $ 24 million in assets and $ 6 million in liabilities, resulting in a net worth of less than $ 19 million.

[14] *Section 17206.1, subdivision (a)* reads as pertinent: ***HN22***[] "In addition to any liability for a civil penalty pursuant to *Section 17206*, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($ 2,500) for each violation . . . ."

court considers that the interests of those persons have been adequately dealt with by other provisions of the monetary relief . . . ." Thus, the total number of violations upon which it imposed penalties was 9,143. ***HN23***[] The mandatory language of *subdivision (a) of sections 17206* and *17536*, provides that "[a]ny person" in violation of the relevant provisions "shall be liable for a civil penalty." The court imposed penalties of $ 210 out of a maximum of $ 2,500 permitted under each of the applicable statutes for each violation. (*§§ 17206*, *17536*, *17206.1*.) We find no abuse here.

The misconduct was persistent and stretched over more than two years. The trial court found appellant knew of the connection between the estate plan sales and annuity sales **[***44]** and that its agents were engaging in the unauthorized practice of law. Appellant's willfulness is evidenced by the fact that the disapproved language remained in the annuity policy after litigation commenced and appellant continued to collect the premium charges.

The trial court acted well within its discretion in imposing the penalties.

II. *Restitution Issues*

CA(5)[] **(5)** In addition to imposing the civil penalties, the trial court ordered relief pursuant to *sections 17203* and *17535*. [15] It enjoined numerous acts, ranging from the conduct of insurance agents in the residence of a prospective customer and disclosures in policies and brochures, to the size of the margin on the annuity policy.

[*45]** In light of the decision of the trial court that the annuity policy was misleading, based in part on its findings that the "premium charge" was **[*531]** "unusual" and "not conspicuously set forth" in the policy or in the sales brochures, it also made a restitution order. Appellant was ordered to make an offer of restitution to each nonsettling California consumer (or beneficiary under the terms of the policy), who had purchased an annuity policy from appellant that contained a premium charge provision, regardless of whether the annuity policy has **[**482]** been fully surrendered. The court set the amount of restitution on an annuity policy that had not been fully surrendered as "the current account value of the annuity less only the surrender charge, but not less the premium charge and, if applicable, any premium charges that previously were incurred on such annuity" or on a fully surrendered annuity, plus legal interest on those premium charges from the date of imposition.

Appellant contends that the restitution order should be reversed on two grounds: A. Not all consumers were deceived or harmed by appellant's violations. B. The restitution order constitutes an excessive double punishment that duplicates **[***46]** the civil penalties. The contentions are without merit.

A. *Deception and Harm to Consumers*

Appellant first argues that across-the-board restitution may not be ordered without proof that all consumers were deprived of money or property as a result of an unfair business practice. This position directly contradicts the holding of *Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442 [153 Cal. Rptr. 28, 591 P.2d 51]*: ***HN26***[] "The general equitable principles underlying *section 17535* as well as its express language arm the trial court with the cleansing power to order restitution to effect complete justice. Accordingly the statute clearly authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the

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[15] *Section 17203* reads as relevant: ***HN24***[] "*Any person who* engages, *has engaged*, or proposes to engage *in unfair competition may be enjoined* in any court of competent jurisdiction. *The court may make such orders* or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or *as may be necessary to restore to any person in interest any money* or property, real or personal, *which may have been acquired by means of such unfair competition*." (Italics added.)

Section 17535 is similar and reads as pertinent: ***HN25***[] "Any person . . . [who] violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person . . . of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money . . . which may have been acquired by means of any practice in this chapter declared to be unlawful."

unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." (*Id. at p. 449*.) Appellant argues that a later case has cast doubt on *Fletcher*, citing *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 149-151 [96 Cal. Rptr. 2d 485, 999 P.2d 718]* (conc. & dis. opn. of Werdegar, J.). The court in *Kraus* addressed issues related to whether restitution **[***47]** could be ordered to a fluid recovery fund when victims of an unfair business practice cannot be identified. (*Id. at pp. 129-132*.) *Kraus* does not impact the *Fletcher* holding or the instant case with respect to an offer of restitution.

Appellant next argues that the trial court abused its discretion in ordering across-the-board restitution, asserting that the evidence does not support a reasonable inference of class-wide deception or harm. But the record is to the contrary. Expert witness Vincent Gallagher, Ph.D., an actuary experienced in analyzing annuity contracts, testified he was not able fully to **[*532]** understand the premium charge based on the information in the annuity policy. This evidence alone supports the findings of the trial court that the annuity policy was "misleading and deceptive" and therefore "likely to deceive." Furthermore, as earlier discussed, *Fletcher* supports the order of restitution imposed here.

Appellant next asserts the restitution award was "unfair, inappropriate, and unnecessary to accomplish the goals of the UCL." Appellant first argues the restitution order must be reversed on the ground it will provide an unfair windfall to **[***48]** consumers who were not deceived. This is not a valid reason to reverse the order given the holding of *Fletcher v. Security Pacific National Bank, supra, 23 Cal. 3d at page 449* (***HN27***[]] restitution may be ordered "in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains"). We note that the rule that ***HN28***[]] restitution under the UCL may be ordered without individualized proof of harm is well settled. (See *Massachusetts Mutual Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 1288 [119 Cal. Rptr. 2d 190]*; **[**483]** *Prata v. Superior Court, supra, 91 Cal.App.4th at p. 1144*.)

Appellant next asserts that the order does not restore the status quo but alters the "lawful terms of the annuity contract." Appellant cites *People v. Superior Court (Jayhill), supra, 9 Cal.3d at page 286*, which states that "a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved. [Citations.]" This argument is not persuasive. While the premium charge **[***49]** may be considered *lawful* in itself, substantial evidence supports the finding that the annuity policy was misleading as a whole because of the premium charge term. The premium charge therefore cannot be considered *lawful* in the context of the annuity policy because the sale of the policy is in violation of the UCL. The trial court's order is reasonably calculated to restore the status quo ante by requiring appellant to offer to restore, inter alia, any premium charges imposed, and legal interest thereon from the date of imposition.

Finally, appellant argues restitution is not necessary to punish or deter appellant in light of the civil penalties imposed. We find no abuse of discretion. Imposition of civil penalties for appellant's transgressions is mandatory. (*§§ 17206*, *17536*.) ***HN29***[]] The trial court may order restitution of money "which may have been acquired by means" that are violative of the UCL. (*§§ 17203*, *17535*.) These remedies are cumulative. (*§ 17205*.) The trial court carefully tailored the restitution order to the harm perpetrated.

[*533] B. *The Restitution Order Does Not Constitute an Excessive Double Punishment*

Appellant argues that because it must make an across-the-board **[***50]** offer of restitution, the order of restitution constitutes a double punishment that is excessive. Appellant again invokes the *BMW v. Gore* reprehensible conduct standard. As previously noted, substantial evidence supports the findings of the trial court, the remedies are cumulative, the restitution order is tailored to the harm perpetrated, and we have rejected the *BMW v. Gore* standard.

III. *Restitution Notification Requirements*

The judgment requires appellant to send a letter to each person who purchased an annuity policy that contained a premium charge provision, the body of which reads:

"The California Attorney General, 21 district attorneys, 2 city attorneys and the Department of Insurance brought a civil action against [appellant] pertaining to the sale of its annuities by [AMA]. On [specify date] the Los Angeles Superior Court entered a judgment against [appellant]. The Court found that [appellant] was involved in the unauthorized practice of law, that it fraudulently marketed its annuities through agents who posed as estate planning advisors rather than insurance sales agents and that [appellant's] annuity policies and annuity applications were misleading **[***51]** because they did not adequately disclose information about the 'premium charge.' [P] . . . [P]

"The Court ordered [appellant] to allow you to withdraw all of your money, including interest, from the annuity without having to pay the 'premium charge,' one of the two penalties for early withdrawal under your annuity. The 'surrender' charge would still have to be paid.

"Your annuity has two kinds of surrender penalties that may be imposed when **[**484]** you surrender your annuity. They are a 'surrender charge' and a 'premium charge.' The 'surrender charge' can be as high as 10 for each of the first three years and is reduced 1 each year thereafter until it is eliminated the 12th year.

"The 'premium charge' lasts for 14 years and can be as high as 5 of the premiums paid during the first year. It is 5 for the first 10 years and is reduced 1 each year thereafter until it is eliminated in the 15th year. Both types of penalties apply either if all the money is withdrawn from the annuity or if the annuitant dies and the beneficiaries cash in the annuity before the end of the surrender period.

[*534] "Pursuant to Court order, you may cancel your annuity at any time without having to pay **[***52]** a premium charge. If you do cancel, you will be refunded the account value (premium amount plus interest) less surrender penalties. Enclosed is an Endorsement which reflects that order. You should attach the Endorsement to your policy. However, if you ever decide to cancel your annuity, you may still be subject to the surrender penalties.

"If you cancel and have funds paid directly to you, there may be tax consequences. If your annuity is an IRA annuity, you can ask us to transfer the refund directly to another annuity elsewhere. If your annuity was not an IRA, you can ask us to transfer the refund to another annuity elsewhere. You may wish to consult with your tax advisor.

"Sincerely,

"[Signature and title of a representative of appellant]."

Appellant objects to the form of notice and argues that language such as "fraudulently marketed" is inflammatory and seeks removal of that language. It also objects that the notice did not include finding of the trial court that the annuity policy did have "genuine value." Appellant is concerned that mass cancellations from fears about the safety of the investment will result, and cautions that such cancellations will lead consumers to **[***53]** incur substantial surrender penalties unnecessarily. Appellant asserts that such a result would undermine the goals of the restitution order. Appellant asks that the matter be remanded with instructions that its proposed notification letter be used or, alternatively, that language be added to reflect the additional findings of the trial court regarding the value of the annuity policy. [16]

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[16] Appellant proposed the following language for the body of the notification letter: "The lawsuit filed by the Attorney General and State Bar of California against [AMA] and [appellant] has now been resolved. The court entered an Order which gives you an opportunity to cancel your Fremont Life annuity contract(s) without having to pay the Premium Charge referenced on pages 4 and 7 of your annuity contract. You will still have to pay the surrender charge illustrated in the table at the bottom of page 4 of your annuity contract. [P] YOUR CURRENT ACCOUNT VALUE IS: $ [insert account value] [P] If you elect to cancel your annuity contract pursuant to the terms of this offer, you will receive the following amount: [P] Account Value $ [current account value] - [P] Surrender Charge $ [surrender charge] [P] Paid To You $ [amount of payment] [P] **You have 90 days from the date of this letter to decide whether to cancel your annuity contract without paying the premium charge.** If you do not accept this offer to cancel without paying the premium charge all of your rights and options under the policy will remain the same. If you cancel, there may be tax consequences. If your annuity is an IRA annuity or you purchased the annuity as a tax free exchange

[*54]** The letter the trial court ordered is accurate and fully describes the premium **[**485]** charge in a readily understandable manner. It also explains the **[*535]** consequences of surrendering a policy. In this context, accurate statements cannot be considered inflammatory statements. Appellant failed to ensure that the version of the annuity policy it placed before the public was equally clear. We find no basis for remand.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

Boren, P. J., and Ashmann-Gerst, J., concurred.

A petition for rehearing was denied January 16, 2003, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied April 9, 2003.

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under *Internal Revenue Code section 1035*, you can ask us to transfer your funds to another annuity elsewhere. You should consult your tax advisor if you have questions. [P] Sincerely, [P] [Fremont Life Representative]."

[Ciamaichelo v. Independence Blue Cross]

Commonwealth Court of Pennsylvania

November 6, 2002, Argued ; December 20, 2002, Decided ; December 20, 2002, Filed

No. 1969 C.D. 2002

Reporter
814 A.2d 800 *; 2002 Pa. Commw. LEXIS 1004 **

Jules Ciamaichelo and Rob Stevens, Inc. v. Independence Blue Cross, Appellant

Subsequent History: Appeal granted by *Ciamaichelo v. Independence Blue Cross, 574 Pa. 749, 829 A.2d 1158, 2003 Pa. LEXIS 1531 (2003)*

Related proceeding at *Petty v. Ins. Dep't, 878 A.2d 942, 2005 Pa. Commw. LEXIS 338 (Pa. Commw. Ct., 2005)*
Reversed by, Remanded by Ciamaichelo v. Independence Blue Cross, 2006 Pa. LEXIS 2248 (Pa., Nov. 21, 2006)

Prior History: [1]** Appealed From No. 2001-04985. Common Pleas Court of the County of Bucks. Judge RUBENSTEIN.

Disposition: Reversed; complaint dismissed.

Core Terms

reserves, rates, surplus, filed rate doctrine, accumulated, common pleas, nonprofit corporation law, breach of contract, regulating, funds

LexisNexis® Headnotes

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Energy & Utilities Law > Utility Companies > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > General Overview

HN1[] Separation of Powers, Primary Jurisdiction

The courts of common pleas have subject matter jurisdiction over all actions and proceedings except where exclusive jurisdiction is vested by statute or general rule in another court. *42 Pa. Cons. Stat. § 931*. The courts of common pleas have original jurisdiction over suits for damages even against public utilities or insurers, which are subject to the exclusive regulation by an administrative agency. In cases where the administrative agency is charged with regulating the subject matter of a controversy, but cannot provide complete redress, the doctrine of primary jurisdiction requires judicial abstention until the administrative agency has adjudicated the issues within its jurisdiction and expertise. Where the matter is not one requiring the special competence of the administrative agency, but rather is one that the court is equally well suited to determine, the court must not defer to the agency.

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > General Overview

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN2[] Corporate Finance, Initial Capitalization & Stock Subscriptions

See *40 Pa. Cons. Stat. § 6124(a)*.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN3[] Industry Practices, Rate Regulation

See *40 Pa. Cons. Stat. § 6123*.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN4[] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine prevents courts from questioning or changing approved rates to prevent rate discrimination among members of a class of rate payers and to preserve the role of the regulatory agency as rate setter, i.e., the reasonableness of an agency-approved rate is nonjusticiable.

Counsel: Richard A. Sprague, Philadelphia, for appellant.

William R. Caroselli, Pittsburgh, for appellees.

Judges: BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE DORIS A. SMITH-RIBNER, Judge, HONORABLE BONNIE BRIGANCE LEADBETTER, Judge, HONORABLE RENEE L. COHN, Judge. OPINION BY PRESIDENT JUDGE COLINS.

Opinion by: JAMES GARDNER COLINS

Opinion

[*801] OPINION BY PRESIDENT JUDGE COLINS

Independence Blue Cross appeals the order of the Court of Common Pleas of Bucks County that overruled its preliminary objections to the declaratory judgment action filed by Jules Ciamaichelo and Rob Stevens, Inc. We granted Independence Blue Cross's (Blue Cross) petition for permission to appeal an interlocutory order pursuant to *Pa. R.A.P. 1311*.

[*802] In their complaint Ciamaichelo and Stevens, filed on behalf of themselves and other subscribers, policyholders, and members of Independence Blue Cross, alleged misconduct in Blue Cross's accumulation **[**2]** of excessive surplus or reserves. The complainants aver that the surplus is larger than the number reported to the Insurance Department and far exceeds the industry standard, and that Blue Cross acquired the excessive surplus for non-charitable purposes and has improperly used surplus funds in for-profit enterprises. They allege violations of the Nonprofit Corporation Law of 1988, [1] breach of contract, and breach of fiduciary duty and seek declaratory relief as well as an accounting, imposition of a constructive trust, inspection of Blue Cross's books, and other relief with regard to disposition of amounts held in excess of that which is necessary for its financial solvency.

Blue Cross filed preliminary objections raising the trial court's lack of subject matter jurisdiction, a demurrer based on the filed-rate doctrine as a bar to collateral attacks on agency-approved rates, failure to join the Insurance Department as an indispensable **[**3]** party, lack of standing to pursue a claim under the nonprofit corporation law, and the legal insufficiency of the complaint with respect to the breach of contract and breach of fiduciary claims. The trial judge overruled the objections. In an opinion filed pursuant to *Pa. R.A.P. 1925(b)*, the trial court states that the issues were not clear and free from doubt; the opinion does not specifically discuss any one of the objections as the basis for its order.

In its petition for permission to appeal the interlocutory order, Blue Cross avers that jurisdiction over the complainants' rate-related claims based on an alleged excessive surplus is exclusively with the Insurance Department, that their complaint is barred by operation of the filed-rate doctrine, and that the complainants have no standing under the nonprofit corporation law to pursue their claims and the relief sought is prohibited thereunder.

Jurisdiction

HN1[] The courts of common pleas have subject matter jurisdiction over all actions and proceedings except where exclusive jurisdiction is vested by statute or general rule in another court. *42 Pa. C.S. § 931*. The courts of common pleas have original **[**4]** jurisdiction over suits for damages even against public utilities or insurers, which are subject to the exclusive regulation by an administrative agency. *DeFrancesco v. Western Pa. Water Company, 499 Pa. 374, 453 A.2d 595 (1982)*; *Feingold v. Bell of Pa., 477 Pa. 1, 383 A.2d 791 (1978)*; *Poorbaugh v. Pa. Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995)*, *petition for allowance of appeal denied*, *544 Pa. 678, 678 A.2d 367 (1996)*; *Mattes v. Commonwealth, 94 Pa. Commw. 1, 503 A.2d 78 (Pa. Cmwlth. 1985)*. In cases where the administrative agency is charged with regulating the subject matter of a controversy, but cannot provide complete redress, the doctrine of primary jurisdiction requires judicial abstention until the administrative agency has adjudicated the issues within its jurisdiction and expertise. *Poorbaugh*. Where the matter is not one requiring the special competence of the administrative agency, but rather is one that the court is equally well suited to determine, the court must not defer to the agency. *Id*.

As a special class of insurer, Blue Cross is subject to regulation **[**5]** by the Insurance Department, which must approve its rates, reserves, and surplus, as well as the investment of its reserves and surplus. The **[*803]** Insurance Department has exclusive jurisdiction over the setting of rates, approving reserves and surpluses, and

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[1] *15 Pa. C.S. §§ 5101*- 5997.

the hospital plan corporation's investment of its reserves and surplus. As stated in the law regulating hospital plan corporations, [2]

HN2[] The rates charged to subscribers by hospital plan corporations, all rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this chapter, all acquisition costs in connection with the solicitation of subscribers to such hospital plans, the reserves to be maintained by such corporations, the certificates issued by **[**6]** such corporations representing their agreements with subscribers, and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the department.

40 Pa. C.S. § 6124(a).

HN3[] Any statute to the contrary notwithstanding, funds of any hospital plan corporation, equal to its reserves, shall be invested in compliance with the requirements of law for the investment of the capital and reserves of life insurance companies. The funds of any such corporation, equal to its surplus, shall be invested in compliance with the requirements of law for the investment of the surplus of life insurance companies.

40 Pa. C.S. § 6123. Every hospital plan corporation must file an annual report, and its books, records, business affairs, and transactions are subject to examination by the Insurance Department at a minimum of every three years. *40 Pa. C.S. § 6125*.

The complainants' claims, while characterized as violation of the nonprofit corporation law, breach of contract, and breach of fiduciary duty, are all based first on their allegation that **[**7]** Blue Cross has accumulated excessive reserves (i.e., reserves higher than the industry standard, higher than in past years, higher than necessary to cover its claims and expenses and maintain solvency), and second, on their allegation that Blue Cross has accumulated the excessive reserves for impermissible purposes and has misused the reserve funds by transferring assets to subsidiaries. Approval of rates and reserves are matters within the exclusive jurisdiction of the Insurance Department and are based on statutory formula, actuarial information, and discretionary determinations. [3] The plaintiffs do not request damages or any other form of relief that could be ordered only by the court of common pleas. For these reasons, primary jurisdiction over the question of whether Blue Cross has accumulated excessive reserves is with the Insurance Department as is the question of whether Blue Cross's disposition of reserve funds was in compliance with the applicable law. Blue Cross's objection to the trial court's jurisdiction should have been sustained.

[**8] Filed Rate Doctrine

Blue Cross argues that the trial court erred in overruling its demurrer under the filed rate doctrine, which it contends, prohibits a collateral attack on rates, and thereby reserves, approved by the Insurance Department.

[*804] The filed rate doctrine has its origins in *Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, wherein the plaintiff alleged that the railway company fixed rates in violation of federal ***antitrust law***. The Supreme Court held that the trial court should have dismissed the complaint for failure to state a claim because the rates the railroad charged were approved by the Interstate Commerce Commission; i.e., by approving and fixing the rate, the agency's determination that the rate was reasonable and nondiscriminatory was dispositive of the issues raised in the complaint. *HN4*[] This doctrine prevents courts from questioning or

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[2] A hospital plan corporation is a nonprofit corporation engaged in the business of maintaining and operating a nonprofit hospital plan, which is a plan whereby paid subscribers receive hospitalization or related health benefits. *40 Pa. C.S. § 6101*.

[3] *Cf.* Section 301 of The Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, *as amended*, *40 P.S. § 71*, pertaining to computation of reserves for life insurance companies, and *31 Pa. Code §§ 84a.1- 84a.8*, which set forth minimum reserve standards for health and accident insurance contracts.

changing approved rates to prevent rate discrimination among members of a class of rate payers and to preserve the role of the regulatory agency as rate setter, i.e., the reasonableness of an agency-approved rate is nonjusticiable. *Id*.; *American Telephone & Telegraph Company v. Central Office Telephone Inc., 524 U.S. 214, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998)*; **[**9]** *Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981)*; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 95 L. Ed. 912, 71 S. Ct. 692 (1951)*.

Pennsylvania appellate courts have applied the filed rate doctrine in *Pa. Power Company v. Pa. Public Utility Commission, 127 Pa. Commw. 97, 561 A.2d 43 (Pa. Cmwlth. 1989)*, *affirmed*, *526 Pa. 453, 587 A.2d 312 (1991)*, to hold that rates approved by the Federal Energy Commission must be given binding effect by the state utility regulator, and in *Philadelphia Suburban Water Authority v. Pa. Public Utility Commission, 808 A.2d 1044 (2002)*., to hold that the agency-approved rate is the only lawful charge and that a utility may not deviate from the filed rate. The Pennsylvania appellate courts have never addressed the doctrine in the present context to bar a civil action against a utility. Judge Albert W. Sheppard Jr. of the Philadelphia Court of Common Pleas applied the filed rate doctrine in *Knipmeyer v. Bell Atlantic Corporation, 51 Pa.* ***[**10]*** *D&C4th 225 (2001)*, to dismiss a class action filed against Bell Atlantic for violations of Pennsylvania unfair trade practices and consumer protection law and conspiracy. He relied primarily on the U.S. Supreme Court's decision in *Central Office Telephone* for the proposition that the filed rate doctrine bars claims including breach of contract, breach of warranty, fraud, unjust enrichment, and false advertising where the plaintiffs essentially are attacking the approved rate and seeking different rate. As Judge Sheppard Jr. stated in *Knipmeyer*, based on the Public Utility Code's establishment of a statutory filed rate doctrine and on persuasive authority from other jurisdictions, [4] we must conclude that by logical extension, the filed rate doctrine bars claims where the complaint collaterally attacks the filed rate.

[11]** The complaint in the present case presents claims that are all based on the plaintiffs' contention that Blue Cross has accumulated excessive reserves. "Reserves" has been defined as a sum of money variously computed or estimated, which, with accretions from interest, is set aside, "reserved," as a fund, with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued and contingent claims, and claims accrued **[*805]** but contingent and indefinite as to amount or time of payment.

Couch on Insurance 3d, § 2:29 n.40. Rates and reserves are related concepts. The Insurance Department considers the amount of an insurer's reserves when approving rates, and the collection of premiums based on the rates must inevitably be a factor in the accumulation of excessive reserves. Any determination that Blue Cross has accumulated excessive reserves would necessarily require the recalculation of the approved rates. [5] Because we conclude that the plaintiffs' cause of action is not independent of the rates approved by the Insurance Department, or of its approval of Blue Cross's reserves and investments, the filed rate doctrine **[**12]** bars the plaintiffs' breach of contract, breach of fiduciary duty, and nonprofit corporation law claims, and Blue Cross's demurrer should have been sustained.

Accordingly, the order of the trial court overruling Blue Cross's preliminary objections is reversed, and the complaint it dismissed.

JAMES GARDNER COLINS, President Judge

Judge Leavitt did not participate in this decision.

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[4] *E.g.*, *Qwest Corporation v. Kelly, 204 Ariz. 25, 59 P.3d 789, 2002 Ariz. App. LEXIS 165, 385 Ariz. Adv. Rep. 26 (Ariz. Ct. App. 2002)*; *Lupton v. Blue Cross and Blue Shield of North Carolina, 139 N.C. App. 421, 533 S.E.2d 270* (N.C. Ct. App.), *review denied*, ***353 N.C. 266, 546 S.E.2d 105 (N.C. 2000)***.

[5] *See* *Lupton, 533 S.E.2d at 273*.

ORDER

AND NOW, this 20th day of December 2002, the order of the Court of Common Pleas of Bucks County in the above-captioned matter is reversed, and the complaint is dismissed.

JAMES GARDNER COLINS, President Judge

Covad Communs. Co. v. Bellsouth Corp.

United States Court of Appeals for the Eleventh Circuit

December 20, 2002, Decided ; December 20, 2002, Filed

No. 01-16064

Reporter

314 F.3d 1282 *; 2002 U.S. App. LEXIS 26429 **; 2002-2 Trade Cas. (CCH) P73,906; 15 Fla. L. Weekly Fed. C 131

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company, Plaintiffs-Appellants, versus BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 00-03414-CV-BBM-1. Beverly B. Martin, Judge.

Covad Communs. Co. v. BellSouth Corp., 299 F.3d 1272, 2002 U.S. App. LEXIS 15486 (11th Cir. Ga., 2002)

Disposition: Rehearing, en banc, denied.

Core Terms

anti trust law, antitrust, competitor, essential facilities doctrine, interconnection, obligations, telecommunications, prices, regulation, monopolist, wholesale, district court, facilities, network, squeeze, federal court, regulatory scheme, en banc, forced-access, customers, incumbent, retail, long-distance, horizontal, undermines, consumers, monopoly, vertical, rivals, cases

Counsel: For Covad Communications, Company, Dieca Communications, Inc., Appellants: Guzman, Michael J., Washington, DC. Powers, Tony G., Rogers & Hardin, Atlanta, GA. Myers, Kimberly L, Atlanta, GA. Pfeiffer, Alfred C. Jr., Bingham McCutchen, LLP, San Francisco, CA. Hinman, Frank M. Bingham McCutchen, LLP, San Francisco, CA. Yurasek, Jason A., Bingham McCutchen, LLP, San Francisco, CA.

For Bellsouth Corporation, Appellee: Clay, A. Stephens, Kilpatrick & Cody, Atlanta, GA.

For Bellsouth Telecommunications, Appellee: Sarles, Jeffrey W., Mayer, Btown, Rowe & Maw, Chicago, IL. Walker, J. Henry, Atlanta, GA. Kellogg, Michael K., Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, DC. Panner, Aaron M., Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, DC. Hansen, Mark C., Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Wasington, DC. Watson, Ashley B., Atlanta, GA. Bogan, James F. III, Kilpatrick Stockton, Atlanta, GA. Galonsky, Marc William Franklin, Atlanta, GA. Gary Marc, Atlanta, GA. Shapiro, Stephen Michael, Mayer, Brown, Rowe & Maw, Chicago, IL.

For Verizon Communications, Inc., Amicus: Taranto, Richard G., Washington, DC.

Judges: Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, BLACK, CARNES, BARKETT, MARCUS and WILSON, Circuit Judges. [*] TJOFLAT, Circuit Judge, dissenting from the denial of Rehearing En Banc, in which ANDERSON and BIRCH, Circuit Judges, join.

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[*] Judge Dubina and Judge Hull having recused themselves did not participate.

Opinion by: EDMONDSON

Opinion

[*1283] ON PETITION FOR REHEARING

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (*Rule 35, Federal Rules of Appellate Procedure*; *Eleventh Circuit Rule 35-5*), the Petition for Rehearing En Banc is DENIED.

/s/ J L EDMONDSON

CHIEF JUDGE

Dissent by: TJOFLAT

Dissent

TJOFLAT, Circuit Judge, dissenting from the denial of Rehearing En Banc, in which ANDERSON and BIRCH, Circuit Judges, join:

I. Background

A. Telephone Regulation

Not long after Alexander Graham Bell invented the telephone, government regulators sought to deal with the public policy issues inherent in **[**2]** a service that was both considered to be a natural monopoly (due to the economies of scale and network effects of local telephony) and essential for the day-to-day functioning of the American public. Prior to 1996, government regulators operated under the assumption that local exchange carriers (LECs) should not only be rate-regulated, but also quarantined to the business of local telephony. The latter premise was embodied by the consent decree that broke up AT&T. In the government's 1974 antitrust suit against AT&T, the government argued that AT&T (1) discriminated against rivals who needed access to the local loop (such as long distance companies or providers of information services) and (2) engaged in predatory pricing against rivals - a scheme of cross-subsidization that was made more likely by the fact that AT&T simultaneously operated in both regulated/monopolistic and unregulated/competitive markets. See Roger Noll & Bruce Owen, The Anticompetitive Uses of Regulation: United States v. AT&T, in The Antitrust Revolution 290, 295-96 (J. Kwoka & L. White, eds., 1989). District Judge Harold Greene approved a consent decree between the government and AT&T in the form of **[**3]** the Modified Final Judgment (MFJ) entered in 1982. See *United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982)*, aff'd, *460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240*. [1], *75 L. Ed. 2d 472, 103 S. Ct. 1240* Judge Greene retained jurisdiction over the case, and the Department of Justice promised to report to court every three years regarding the continuing need for the "line of business" restrictions. With the case on his docket for eighteen years, Judge Greene in effect became the telecommunications czar of the nation.

[*1284] 1996 marked a paradigm change in telephone regulation; competition, not quarantine, would best advance the public interest. In that year, **[**4]** Congress passed monumental legislation, the Telecommunications

[1] The MFJ split AT&T's local service into seven Regional Holding Companies (RHCs): U.S. West, Pacific Telesis, Southwestern Bell, Ameritech, Nynex, Bell Atlantic, and BellSouth. The MFJ also employed various line-of-business restrictions which, for example, precluded the RHCs from providing long distance service or information services.

Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 57 U.S.C. § 151 et seq.). The legislation aimed to spark competition in the provision of local telephony. Congress also hoped to foster additional competition in telecommunications markets which had, due the MFJ's line-of-business restrictions, been insulated from competition by very important competitors - namely, the RHCs. See Glen Robinson, The Titanic Remembered: AT&T and the Changing World of Telecommunications, *5 Yale J. On Reg. 517, 534-44 (1988)*. The 1996 Act has three components which are especially noteworthy. First, the Act made an important change in who regulates the telecommunications industry. The Act abolished the MFJ, see Pub. L. 104-104, Title VI, § 601, 110 Stat. 142 (codified at *47 U.S.C. § 152* note), [2] and it delegated to the FCC authority to implement regulations that advance the pro-competition objectives of the Act, see, e.g., *47 U.S.C. § 251(d)(1)*. [3] Judge Greene was, in short, replaced by the FCC. [4] **[**7]** Second, the Act substantively changed the way the **[**5]** telecommunications industry is regulated by imposing various obligations on incumbent local exchange carriers (ILECs). These obligations are defined by *section 251*, [5] whereas *section 252* governs the implementation of the obligations. Specifically, *section 252(a)* provides that ILECs and competitive local exchange carriers (CLECs) can voluntarily enter into interconnection agreements, and *section 252(b)* provides that state public service commissions (PSCs) can fashion an agreement through arbitration in the event that negotiations stall. The Act thus contemplates top-down regulation by the FCC, voluntary or arbitrated agreements, [6] and resolution of post-agreement disputes in the form of contract adjudication. **[*1285]** *Section 252* also covers additional matters, such as the grounds PSCs must give in order to reject an agreement, [7] what happens if a PSC chooses not to make an approve-or-reject determination at all, [8] **[**8]** and how PSC or FCC decisions can be appealed to a federal court. [9] The final component of the Act is the removal of the line-of-business restrictions. Some restrictions, for example, sunset automatically. See, e.g., *47*

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[2] The provision states:

> Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act . . . and shall not be subject to the restrictions and obligations imposed by such Consent Decree.

[3] The statute provides that "within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."

[4] As the Seventh Circuit explained:

> Long before the 1996 Act was passed . . . it had become clear that comprehensive regulation of the rapidly advancing telecommunications markets was not a task well suited to the federal courts. Thus, one of the first things Congress did in the 1996 Act was to shift the remaining authority the district court was exercising under the MFJ over to the FCC.

Goldwasser v. Ameritech Corp., 222 F.3d 390, 393 (7th Cir. 2000).

[5] These include: the duty to negotiate interconnection agreements in good faith; the obligation to interconnect with competitors; the obligation to provide competitors with unbundled access to its network elements ("UNEs") at reasonable rates; the duty to offer for resell at wholesale rates any telecommunications service that the ILEC provides at retail; and the duty to allow collocation of the CLECs' equipment on the ILEC's premises. See *47 U.S.C. § 251(c)*. The 1996 Act thus envisions "three entry options: entry through resale, entry through pure facilities-based competition, and entry via the purchase of unbundled network elements." Stuart Benjamin, Douglas Lichtman, & Howard Shelanski, Telecommunications Law and Policy 718 (2001).

[6] There are thousands of existing agreements throughout the United States, and over 400 in BellSouth's territory.

[7] *Section 252(e)(2)* allows state commissions to reject an interconnection agreement only if the agreement discriminates against a third-party CLEC or is inconsistent with "the public interest, convenience, and necessity."

[8] *Section 252(e)(5)* instructs the FCC to act in the event of a PSC default.

[9] *Section 252(e)(6)*, governing federal review of PSCs, provides that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of *section 251* of this title and this section." There is no special review statute for the FCC, which is therefore reviewed by the courts of appeals pursuant to *28 U.S.C. § 2344*.

U.S.C. § 275 (precluding RBOC **[**6]** [10] entry into the alarm monitoring business until 2001). Others are removed only after ILECs prove that they have fulfilled their obligations under the 1996 Act. See *47 U.S.C. § 271(c)(2)(B)* (establishing a fourteen-point "competitive checklist" that RBOCs must meet before they may offer in-region long distance service.).

B. This Dispute

Covad is the CLEC in this case; BellSouth is the ILEC. Covad is in the business of providing DSL service [11] **[**10]** - primarily through the use of BellSouth's physical plant. BellSouth and Covad entered into an interconnection agreement - ultimately approved by the Georgia PSC - pursuant to *47 U.S.C. § 252*. Covad claims that BellSouth has not fulfilled its obligations under the 1996 Act and the BellSouth/Covad **[**9]** interconnection agreement. Specifically, Covad argues the following: BellSouth should have provided UNEs more promptly; BellSouth did not sufficiently provide space so that Covad could "collocate" its equipment on BellSouth's premises; BellSouth engaged in a "price squeeze" by pricing its UNEs too high while selling its DSL services to consumers at retail prices that are too low; [12] and BellSouth understaffed its wholesale division. The basic theory, then, is that Covad needs BellSouth's local loop to compete, and BellSouth has done a poor job of turning it over. Covad wants access, and it wants access more promptly and on less costly terms than BellSouth presently provides. [13]

[11]** **[*1286]** The district court granted a dismissal, pursuant to *Fed. R. Civ. P. 12(b)(6)*, based upon the reasoning of the Seventh Circuit in *Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)*. A three-judge panel of this Court reversed, concluding that the obligations of ILECs under the 1996 Act and the Sherman Act are essentially coterminous, and therefore Covad's complaint alleges harms that, if proved, are cognizable under the antitrust laws. See *Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002)*. Specifically, the panel found that BellSouth's alleged failure to promptly turn over its network would, if proved, give rise to liability under the essential facilities doctrine and the refusal-to-deal doctrine. The panel also held that BellSouth's allegedly high wholesale prices for its DSL UNEs, in conjunction with low retail prices on DSL service, states a "price squeeze" claim under Section 2 of the Sherman Act. This court declined to reconsider the panel's decision en banc. I dissent because the panel's holding has troubling implications for telecommunications law and, indeed, ***antitrust law*** as a whole. The panel decision took **[**12]** a turn that is bad policy, undermines Congress's regulatory scheme, and usurps regulatory power that belongs to the FCC under the 1996 Act by placing it in the hands of federal courts.

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[10] "RBOC" is an acronym for "Regional Bell Operating Company." RBOCs were the subdivisions of AT&T that provided local service throughout the nation prior to the MFJ. Under the MFJ, each RHC consisted of several RBOCs.

[11] "DSL" stands for "digital subscriber line." DSL is "a high-speed data service provided over conventional telephone networks. DSL refers to the technology that allows telephone carriers to attach certain electronics to the telephone line that can transform the copper loop that already provides voice service into a conduit for high-speed data traffic." See Stuart Benjamin, Douglas Lichtman, & Howard Shelanksi, Telecommunications Law and Policy 1048 (2001).

[12] A "price squeeze" claim is premised upon an illegal wholesale/retail differential. For example, Covad states in its complaint that BellSouth's retail prices "are set so low related to its unbundled wholesale loop prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on investment."

[13] Covad's complaint contains twenty-three causes of action. Count one seeks relief under section 2 of the Sherman Act pursuant to the "essential facilities doctrine." Count two seeks the same relief under section 2 of the Sherman Act based upon BellSouth's alleged "monopolization." Count three seeks the same relief under section 2 of the Sherman Act based upon BellSouth's alleged "attempted monopolization." All of the section 2 allegations are thus folded into count 3. Counts six, seven nine, ten, thirteen, fourteen, sixteen, seventeen, nineteen, twenty, twenty-two, and twenty-three replicate counts two and three under the laws of the following states: Alabama, Florida, Kentucky, Louisiana, North Carolina, and Tennessee. Counts eight, eleven, twelve, fifteen, eighteen, and twenty-one allege that BellSouth interfered with business relations in violation of the laws of the same six states. Count four is a claim for breach of contract. Finally, count five asserts a cause of action directly under the Telecommunications Act of 1996. In the "prayer for relief" at the end of its complaint, Covad asks for treble damages on its antitrust claims, punitive damages on its state law tort claims, compensatory damages on the remaining claims, and "such other and further relief as the Court deems just and proper." One must assume that the latter relief would include injunctive orders necessary to ensure BellSouth's compliance with the antitrust laws, the 1996 Act, and the parties' interconnection agreement.

C. Overview

In part II of this opinion, I explain why the duty Covad seeks to impose - namely, the duty to help one's competitor - is required by the 1996 Act but not the antitrust laws. This proposition is supported by traditional antitrust doctrine and the fact that antitrust suits premised upon forced-access obligations would flout the intent of Congress. On the latter point, I explain how an overlap between the antitrust laws and the 1996 Act would make the 1996 Act's scheme of post-agreement dispute resolution a nullity and would put federal judges back into the regulatory mix, micromanaging telecommunications firms far beyond what Judge Greene could have imagined. Part III examines the panel's holding regarding Covad's "price squeeze" claim, concluding that Covad's allegations fail to state a claim under the antitrust laws. This part also explains how the panel's "price squeeze" holding will harm consumers and impede the rollout of broadband Internet access, resulting in considerable tension **[**13]** with FCC policy. Part IV concludes.

[*1287] II. The Duty of a Monopolist to Help its Competitors is an Extraordiary Obligation Imposed by the Telecommunications Act of 1996, but not the Antitrust Laws

The panel apparently believes that the 1996 Act's unbundling and interconnection obligations are coterminous with the duties of a monopolist under the antitrust laws. I disagree. Rather, as the Seventh Circuit held in *Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)*, the 1996 Act imposes additional obligations above and beyond what is required under the antitrust laws. [14] I reach this conclusion for two reasons: (1) antitrust doctrine has not (at least until now) ever required the sort of forced-access requirements sought by the plaintiff and (2) suits premised upon a forced-access regime under the antitrust laws would flout the intent of Congress.

[14]** A. Traditional Antitrust Doctrine Regarding Forced Access

1. The Essential Facilities Doctrine

Antitrust doctrine has never required the extensive, court-administered forced-access regime that the panel opinion contemplates in its holding regarding the so-called "essential facilities" doctrine. [15] ***Antitrust law*** generally poses no obligation upon firms to deal with competitors or share their capital investments with rivals. See, e.g., *Aspen*

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[14] The Seventh Circuit clearly articulated what the world would have looked like if, counterfactually, Congress had opted to choose a "simple antitrust solution" rather than the extraordinary obligations placed upon ILECs:

> It would have been possible for Congress to have passed a statute that simply lifted the regulatory prohibitions found in sources such as the Telecommunications Act of 1934, the MFJ, and other sources, that barred companies in different parts of the telecommunications market (i.e. long distance and local markets, generally speaking) from entering one another's domains. Anyone who wanted to compete with an ILEC would have had the burden of duplicating its physical infrastructure or of persuading the ILEC to contract with it on mutually satisfactory terms, but this is the normal way in which competitive markets work . . . .
>
> In other words, Congress could have chosen a simple antitrust solution to the problem of restricted competition in local telephone markets. It did not. Instead, in an effort to jump-start the development of competitive local markets, it imposed a host of special duties on the ILECs; it entrusted supervision of those duties to the FCC and the state public utility commissions; and it created a system of negotiated agreements through which this would be accomplished. These are precisely the kinds of affirmative duties to help one's competitors that we have already noted do not exist under the unadorned antitrust laws.

Goldwasser, 222 F.3d at 399-400 (citations omitted).

[15] The panel, citing *MCI Communications v. Am. Tel. & Tel., 708 F.2d 1081, 1132-33 (7th Cir. 1983)*, held that there are four elements to a claim under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Covad, 299 F.3d at 1286*. The panel never mentioned the horizontal/vertical distinction that I discuss, infra.

Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-01, 105 S. Ct. 2847, 2856, 86 L. Ed. 2d 467 (1985) ("Even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. . . . The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates."); see generally 3A Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 771b (1996) **[*1288]** ("Forcing a firm to share its monopoly is inconsistent with antitrust's basic goals . . . ."). This is so for several reasons. The first reason is the fear that new entrants will not build their own physical **[**15]** plant if they can simply piggyback on the facilities of an incumbent; there is hardly meaningful competition without facilities-based competition. A second problem with a broad expansion of the essential facilities doctrine is that it would place trial courts in the role of quasi-regulatory agencies because they would have to oversee sharing between rivals. Third, the doctrine creates a disincentive to develop new technologies. If a competitor can simply utilize a court order to get access to an incumbent's physical plant, there is less incentive to create new technologies (such as wireless telephony) to bypass the perceived "essential facility." Finally, the doctrine creates little incentive for incumbents to roll out additional plant or upgrade existing facilities. Why bare all of the risk, only to have competitors reap the benefits? In sum, there are convincing reasons why the leading antitrust scholars condemn the essential facilities doctrine, and why they are steadfast in their argument that the Supreme Court has never explicitly endorsed the doctrine. See id. at PP 771b-c ("The Supreme Court has never articulated or approved the modern version of the essential facilities **[**16]** doctrine.").

The panel relied on two cases to support its expansive view of the essential facilities doctrine. The first is *Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla., 880 F.2d 297, 301 (11th Cir. 1989)*, on reh'g en banc, *912 F.2d 1262 (11th Cir. 1990)*, vacated and remanded, *499 U.S. 915 (1991)*, on remand, *931 F.2d 710 (11th Cir. 1991)*. That case **[**17]** was wrong because it failed to grasp a fundamental point: to the extent that the essential facilities doctrine is viable at all, it is a doctrine concerned with vertical foreclosure. The leading antitrust scholars confirm this view: "It should be clear from the outset that the essential facility doctrine concerns vertical integration - in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market, which we call market # 1, with someone operating in an upstream or downstream market, which we call market # 2." See 3A Areeda & Hovenkamp, ***Antitrust Law*** P 771a; see also Consolidated Gas, 912 F.2d at 1291-92 (Tjoflat, C.J., dissenting) (arguing that the defendant's refusal to deal was justified on the basis that it was not a wholesaler, but rather a retailer similar to the plaintiff/competitor). Indeed, Covad concedes that my dissenting opinion was correct. See Covad Br. at 27 n.14. In this case, BellSouth was in the business of providing DSL services via its local loop. Covad is similarly in the business of DSL provision (via BellSouth's local loop). The two entities are thus horizontal competitors. Moreover, **[**18]** Covad does not want merely to interconnect its own facilities with BellSouth's network; it wants the facilities of BellSouth so that it can sell DSL services. The 1996 Act imposes this novel obligation; the antitrust laws do not. A reading of the essential facilities doctrine that stands for the proposed proposition - namely, that horizontal competitors that find it financially inconvenient to build their own physical plant may simply tap the resources of the incumbent/monopolist or else sue for treble damages - is a dangerous expansion of the antitrust laws indeed. [16]

[19]** **[*1289]** The Seventh Circuit decision in *MCI Communications v. AT&T Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir. 1983)*, makes this point clear (although the Covad panel somehow uses that case to support its position). In that case, the court held that there was no liability for AT&T's failure to provide access to its long-distance network. It was only in the vertical context that the essential facilities doctrine was implicated: MCI was

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[16] We rejected a similar claim in another case:

> This argument reveals the heart of the plaintiffs' claim: they want the right to benefit from [the defendant's] economies of scale. The plaintiffs are seeking a "free ride" - since they do not have a large enough operation to produce significant economies of scale and are unable, or unwilling, to finance the growth necessary to achieve these economies, they want to use, to their benefit, [the defendant's] size and the capital outlays used to achieve it . . . .
>
> The plaintiffs then are asking us to equip them with [the defendant's] competitive advantage. This is not a function of the antitrust laws. The antitrust laws are not intended to support artificially firms that cannot effectively compete on their own.

Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1572-73 (11th Cir. 1991).

entitled to interconnect its *long distance* network with AT&T's *local* exchanges. The court held that because MCI was seeking to compete with AT&T in the long-distance market, it was not entitled to rely on AT&T's existing long-distance facilities to enhance its ability to compete. As the Seventh Circuit later stated: "AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network,' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means." *State of Ill., ex. rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1484 (7th Cir. 1991)* (quoting *MCI, 708 F.2d at 1149*). **[**20]** The MCI court held that "as pure matter of ***antitrust law*** . . . we decline to hold AT&T liable for a refusal to make available its full nationwide network to a competitor." *MCI, 708 F.2d at 1149*. The analogy between MCI and AT&T's long-distance division is similar to the analogy between BellSouth and Covad: each is a horizontal competitor of the other. Accordingly, the same result should obtain: the essential facilities doctrine should not be used to give the horizontal competitor access.

The essential facilities doctrine should not be applied in Covad for another reason. Covad seeks to force BellSouth to make extensive modifications to its network to accommodate Covad. See Plaintiff's Complaint, R1-1, PP66, 70, 88 (complaining that BellSouth failed to provide a transport line, to "develop[] automated electronic interfaces," and "to develop any mechanism by which Covad can offer an existing BellSouth ADSL customer a seamless transfer to Covad."). The antitrust laws do not require this. See 3A Areeda & Hovenkamp, ***Antitrust Law*** P773e, at 214 ("No case has suggested that the monopolist must build new capacity to satisfy a would-be sharer."). The **[**21]** 1996 Act may require such alterations, but that is another matter. The antitrust laws do not require BellSouth to promptly develop software and modify its facilities in order to meet Covad's business needs. Nor do the antitrust laws require, as Covad complains, that BellSouth add personnel to its wholesale division in order to meet BellSouth's regulatory obligations.

2. The Refusal-to-deal Doctrine

The refusal-to-deal doctrine is unavailing for the same reasons that its cousin, the essential facilities doctrine, is unavailing. Because this doctrine of forced-access is used for the same purpose as the essential facilities doctrine, all of the problems discussed above apply. If one persists on using a different analytical hat for essentially the same conduct, however, none of the refusal-to-deal cases countenance the bold extension proffered by the panel. The touchstone refusal-to-deal case is the much-criticized *Aspen Skiing, supra.* Liability was imposed in that case because the defendant terminated a mutually beneficial, pre-existing business arrangement. **[*1290]** The case hinged on the fact that Aspen did not engage in "competition in the merits"; rather, it chose to forego **[**22]** "short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing, 472 U.S. at 610-11, 105 S. Ct. at 2861*. In this case, there was no preexisting business arrangement that BellSouth once thought to be mutually beneficial. Moreover, Covad cannot possibly claim that the obligation it seeks to impose with the antitrust laws - forced sharing - serves BellSouth's interests. Its decision not to share is perfectly legitimate competition on the merits.

B. The Undermining of the 1996 Act

The position taken by the panel - namely, that the 1996 Act does not require obligations above and beyond those required by the antitrust laws but rather overlaps with the antitrust laws - results in a regulatory scheme that is in considerable tension with the regulatory scheme envisioned by Congress. First, the panel's holding makes the 1996 Act's post-agreement enforcement scheme a nullity. This is because breach-of-contract claims would become secondary to antitrust claims, and the contract claims would be adjudicated under the supplemental jurisdiction of federal district courts (rather than by state courts or PSCs). Why would **[**23]** a CLEC ever sue only in contract when it can jettison the regulatory scheme and sue for treble damages in federal court? After all, ILECS are all monopolists, and virtually anything they do that breaches an interconnection agreement can be the subject of an antitrust suit under the theory that the breach is done to protect the ILEC's market position. [17] On this point, I agree

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[17] The panel maintained that before a complaint can pass *Rule 12(b)(6)* muster, it must allege more than monopoly power and breach of contract; it must also allege that the defendant engaged in conduct "with an intent to monopolize." I cannot think of a

with the Seventh Circuit that "the elaborate system of negotiated agreements and enforcement established by the 1996 Act would be brushed aside by any unsatisfied party with the simple filing of an antitrust action." See *Goldwasser, 222 F.3d 390, 400-01 (7th Cir. 2000)*.

[24]** Second, the panel's holding undermines Congress's efforts to place regulatory authority in the hands of the FCC - an expert agency - rather than the courts. Prior to the panel's decision, the FCC (and, to some extent, PSCs) had exclusive authority to implement the 1996 Act's interconnection and unbundling requirements. If the panel is correct in its conclusion that Covad has made out an antitrust claim under the essential facilities doctrine, will federal district courts issue injunctions [18] requiring ILECs to undertake obligations above and beyond those required by the 1996 Act? Even if district courts refrain from issuing forced-access injunctions (with their concomitant price terms) under the theory that regulatory bodies have already been established to set interconnection terms and UNE rates, courts will no doubt enjoin ILECs from engaging in future anticompetitive behavior. And since the claims of anticompetitive conduct made by CLECs will essentially track the many contractual obligations that ILECs must undertake pursuant to their interconnection agreements, [19] the district courts will **[*1291]** essentially oversee ILEC compliance under their contempt power. For every alleged violation **[**25]** of an interconnection agreement, the ILEC will have to show cause why it should not be held in contempt and sanctioned. Thus, the federal courts will be charged with closely monitoring ILEC compliance with the many requirements of the ILEC/CLEC interconnection agreements. This was not what Congress envisioned when it replaced Judge Greene with the FCC.

III. Price Squeeze

The panel's holding that Covad's "price squeeze" claim is cognizable under the antitrust laws is suspect because, as the district court noted, there is no allegation that BellSouth set below-cost retail prices for its DSL services. The wholesale prices that BellSouth charges are set by state commissions or by voluntary agreement; **[**26]** that is, a CLEC either agrees to the wholesale price and cannot be heard to complain, or else the wholesale rate is nondiscretionary. Covad has a remedy for its claim that the state commission set a wholesale rate that was too high: judicial review under *47 U.S.C. § 252(e)(6)*. [20] It cannot acquiesce in the state commission's wholesale rate and turn around and sue BellSouth because BellSouth is not charging consumers enough at retail. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 2588, 125 L. Ed. 2d 168 (1993)* (rejecting "the notion that above-cost prices that are below . . . the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws."). If the district court grants injunctive relief, will it order BellSouth to charge Covad a wholesale price that is lower than that set by the state commission? Will it order BellSouth to charge DSL customers a price that is higher than the present price (even though the present price is presumably above cost)? Assuming Covad's allegations are true, what should BellSouth have charged DSL customers in hindsight? I can think **[**27]** of nothing more antithetical to the consumer welfare aims of ***antitrust law***, and to FCC efforts to hasten the rollout of broadband services, than to send the message that ILECs should charge DSL customers prices that are not only above cost, but *substantially* above cost so that CLECs can have large profit margins. There is nothing "factual" about this claim that must await summary judgment. The law simply does not recognize the alleged facts as an actionable price squeeze.

IV. Conclusion

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situation, however, in which an ILEC would be liable in breach and yet a creative plaintiff's lawyer could not also allege that the breach was made with an eye toward benefitting the ILEC and thus preserving the ILEC's position in the relevant market.

[18] Covad did not specifically ask for injunctive relief in is complaint, although it requested "such other relief as the Court deems just and proper."

[19] In this case, for example, the alleged anticompetitive acts of BellSouth could easily be mistaken for breaches of the Covad/BellSouth interconnection agreement.

[20] This is true if the BellSouth/Covad agreement was the product of arbitration before the PSC. It is unclear from the complaint whether the agreement was voluntary or arbitrated.

Much more could be said about the panel opinion, such as (1) when it was issued, two of the key decisions it relied on (BellSouth [21] and Consolidated Gas) had been vacated; (2) the panel set up a straw man with its belabored argument in support of the unexceptional proposition that "in enacting the 1996 Act, Congress did not explicitly **[**28]** supersede the salience of the antitrust laws in the telecommunications industry," [22] **[**30]** *Covad, 299 F.3d at 1280*; **[*1292]** and (3) the decision will trigger an avalanche of complex litigation in the district courts. [23] **[**31]** I stop with the antitrust issues, however, because that is where the panel opinion wreaks the most havoc on the law. First, the decision thwarts Congress's chosen regulatory scheme. In the states of Florida, Georgia, and Alabama, CLECs will have no incentive to use the post-agreement enforcement process envisioned by the 1996 Act. From now on they will simply run to federal court, seeking treble damages and injunctions that are potentially inconsistent with the 1996 Act's requirements. [24] Along the way, regulation of the telecommunications industry will shift from the FCC back to the federal courts. Although Judge Greene may not have had the expertise of the FCC, at least the public law litigation he presided over involved a single monopolist (AT&T) and the government rather than what will ensue in the wake of the panel's ruling: multiple private disputes. And at least at the time of the AT&T litigation, Congress had not explicitly chosen to vest the FCC with **[**29]** the regulatory authority assumed by Judge Greene. The panel thus undermines the wishes of Congress - first by getting the federal courts into the business of micromanaging ILEC compliance with interconnection agreements, and second by enabling CLECs to sidestep the 1996 Act's regulatory scheme with the filing of antitrust suits.

The panel also embarked upon a new journey in ***antitrust law***, the likes of which have not been seen since the inconsistent and discredited antitrust jurisprudence of the Warren Court era embodied by cases such as *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)* ("It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned **[*1293]** businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). See generally Robert Bork, The Antitrust Paradox: A Policy at War With Itself (rev. ed. 1993). The panel's novel extension of **[**32]** the essential facilities doctrine, for example,

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[21] See *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., 278 F.3d 1223 (11th Cir. 2002)*.

[22] The panel made this argument in the context of its discussion of the 1996 Act's antitrust savings clause. See Telecommunications Act of 1996 § 601(b)(1), codified at *47 U.S.C. § 152* note ("Nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws."). No one has ever contended that "in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry." Judge Wood of the Seventh Circuit, who is a former antitrust professor and high-ranking attorney with the U.S. Department of Justice Antitrust Division, never made that argument. Neither do I. Rather, we contend that the 1996 Act established a regulatory scheme that went beyond anything required by the antitrust laws. It is likely that Congress perceived the 1996 Act as imposing *additional* obligations, and that Congress therefore wanted to bring home the point that pre-1996 obligations under the antitrust laws continue to have vitality in the post-1996 world. The panel, on the other hand, evidently believes that the 1996 Act is merely a more specific application of the forced-accessed requirements that ordinarily would be required by the antitrust laws.

[23] This proposition stems from several observations. First, there are thousands of interconnection agreements and thus potentially thousands of Covad-like antitrust cases lurking across the Circuit (and, indeed, the United States). Second, many parties will be involved in the litigation. In Goldwasser, for example, consumers (not CLECs) were the plaintiffs. There might well be multiple consumer class actions in future cases. Moreover, the panel's "price squeeze" holding, which will compel BellSouth to raise the retail price of its DSL service, will affect existing contracts. DSL customers must therefore be joined as indispensable parties - possibly in the form of another class action. If one adds to this picture the problem of apportioning damages, see, e.g., *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1451-52 (11th Cir. 1991)*, and the issue of state court proceedings (which obviously cannot be consolidated), then the drain on scarce judicial resources becomes apparent. I do not suggest that otherwise meritorious lawsuits should be dismissed merely because their complexity will drain judicial resources; rather, I contend that the drain ought to at least provoke a second look as to whether these suits are really meritorious in the first place.

[24] CLECs also have an incentive to delay the negotiation of interconnection agreements, for any damages CLECs sustain because of an ILEC's failure to yield access to its network will potentially be subject to trebling by a district judge.

will enable any new entrant to tap the assets of its (monopolistic) horizontal competitor if the assets are "essential" for the new entrant to compete. This broad principle has never been the law. In the same vein, the panel decision will force ILECs to raise the retail prices of DSL services or else face "price squeeze" claims - even if the ILEC already prices its DSL services above cost and even though the FCC has been eager to hasten deployment of broadband technology rather than decrease it.

The aftershocks of the panel opinion well be felt far beyond the telecommunications industry. Are all firms that traditionally have been thought to be natural monopolies, such as pipeline companies and energy producers, now supposed to let competitors resell their assets, with the incumbent monopolists having the additional duty to charge their customers a price that is high enough so that new entrants can have hefty profit margins? After all, the panel purported to apply general principles of ***antitrust law*** to the facts of the case; there is nothing that is telecom-specific in its holding.

Rule 35(b) of the Federal Rules of Appellate Procedure **[**33]** instructs that cases to be heard en banc are those which "present a question of exceptional importance." The panel decision - traveling on an Eleventh Circuit essential facilities case that has been vacated by the Supreme Court - departs from settled antitrust doctrine, undermines the operation of 1996 Act, and invites the filing of hundreds of complex cases in the district courts throughout the circuit. [25] This case is extremely important. Accordingly, I am compelled to dissent from the court's failure to reconsider the case en banc.

[34]**

End of Document

[25] I suggest that CLECs filing suit against BellSouth in the district courts of the Fourth, Fifth, and Sixth Circuits may invoke the doctrine of collateral estoppel in response to BellSouth's argument that federal antitrust claims such as those Covad presents in this case are not cognizable under section 2 of the Sherman Act. In short, the panel's decision is not only of "exceptional importance" in the Eleventh Circuit, it will be of importance to the courts and litigants in these other circuits as well.

Friedman v. Salomon/Smith Barney

United States Court of Appeals for the Second Circuit

December 11, 2001, Argued ; December 20, 2002, Decided

Docket No. 01-7207

Reporter

313 F.3d 796 *; 2002 U.S. App. LEXIS 26355 **; 2002-2 Trade Cas. (CCH) P73,908; Fed. Sec. L. Rep. (CCH) P92,242

ALAN FRIEDMAN, SYBIL MEISEL, STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL and SYBIL MEISEL, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. SALOMON/SMITH BARNEY, INC., GOLDMAN SACHS, MERRILL LYNCH & CO., INC., CREDIT SUISSE FIRST BOSTON, CORP., MORGAN STANLEY DEAN WITTER, PAINEWEBBER INC., NATWEST SECURITIES, DEUTSCHE BANK ALEX BROWN, INC., COBURN & MEREDITH, INC., SHAMROCK PARTNERS LTD., PRUDENTIAL SECURITIES INC., RAYMOND JAMES & ASSOCIATES, INC., DONALDSON LUFKIN & JENRETTE, LEGG MASON WOOD WALKER, INC., NATIONS BANC MONTGOMERY SECURITIES, LLC, LAZARD FRERES & CO., LLC, and MORGAN KEEGAN & CO., Defendants-Appellees.

Subsequent History: As Corrected January 13, 2003.

US Supreme Court certiorari denied by *Friedman v. Salomon/Smith Barney, 2003 U.S. LEXIS 6055 (U.S., Oct. 6, 2003)*

Prior History: **[**1]** Appeal from December 11, 2000, judgment of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, Judge) dismissing plaintiffs' class action complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*.

Friedman v. Salomon/Smith Barney, Inc., 2000 U.S. Dist. LEXIS 17785 (S.D.N.Y., Dec. 7, 2000)

Disposition: Affirmed.

Core Terms

stabilization, aftermarket, immunity, regulation, anti trust law, stock, antitrust, practices, flipping, Exchange Act, district court, public offering, defendants', investors, restrictions, retail, manipulation, plaintiffs', shares, anti-competitive, customers, sales

LexisNexis® Headnotes

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN1[] **Procedural Matters, Jurisdiction**

See 15 U.S.C.S. § 78i(a)(6).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

The doctrine of implied immunity rests on three United States Supreme Court cases: Silver, Gordon, and National Ass'n of Sec. Dealers. Generally, courts should not abrogate antitrust laws through implied immunity, also known as implied repeal or revocation, casually because repeal by implication is not favored. Implied immunity will exist only where there is a plain repugnancy between the antitrust and regulatory provisions. Repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap. Importantly, the plain repugnancy, or conflict, between antitrust and securities laws extends to potential as well as actual conflicts. Implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with ***antitrust law***.

Business & Corporate Compliance > ... > Labor & Employment Law > Affirmative Action > Program Compliance

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Securities Law > Postoffering & Secondary Distributions > Exchanges & Other Markets > General Overview

HN3[] **Affirmative Action, Program Compliance**

Implied immunity exists where allowing an antitrust lawsuit to proceed would conflict with Congress's implicit determination that the Securities Exchange Commission (SEC) should regulate the alleged anti-competitive conduct. In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates. The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Express Liabilities > Price Manipulation

Securities Law > Postoffering & Secondary Distributions > Exchanges & Other Markets > General Overview

HN4[] **Express Liabilities, Price Manipulation**

The Securities Exchange Commission does not regulate price stabilization in the aftermarket. 17 C.F.R. § 242.104 (Regulation M).

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Necessity for Regulation

HN5[] **US Securities & Exchange Commission, Necessity for Regulation**

Section 9(a)(6) of the Securities Exchange Act of 1934, *15 U.S.C.S. § 78i(a)(6)*, requires the Securities Exchange Commission to consider other factors such as the public interest and protection of investors in addition to market competition in assessing the competitive effects of its regulations.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Express Liabilities > Price Manipulation

HN6[] **Express Liabilities, Price Manipulation**

Price stabilization in contravention of Securities Exchange Commission (SEC) regulations is unlawful. *15 U.S.C.S. § 78i(a)(6)*. The statute allows price stabilization practices that the SEC does not prohibit.

Counsel: ROGER KIRBY, Kirby McInerney & Squire LLP (Alice McInerney, Randall K. Berger, W. Mark Booker, on the brief) New York, NY, for Plaintiffs-Appellants.

ROBERT F. WISE, JR., Davis Polk & Wardwell (John J. Clarke, Jr., Kevin Wallace, on the brief) New York, NY, for Defendants-Appellees.

Jay N. Fastow, Weil, Gotshal & Manges LLP (Adam P. Strochak, on the brief), New York, NY, for amicus curiae New York Stock Exchange, Inc.

David M. Becker, General Counsel, Securities and Exchange Commission (Meyer Eisenberg, Deputy General Counsel, Mark Pennington, Assistant General Counsel, on the brief) Washington, DC, for amicus curiae Securities and Exchange Commission.

Judges: Before: OAKES and POOLER, Circuit Judges. [*] **[**2]**

Opinion by: POOLER

Opinion

[*797] POOLER, *Circuit Judge*:.

Plaintiffs Alan Friedman, et al., appeal from the December 11, 2000, judgment of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Judge*) dismissing their class action complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*. Plaintiffs alleged that defendants participated in a price-fixing scheme concerning the sale of securities in violation of federal antitrust laws. The district court correctly held, however, that defendants' action enjoys implied immunity from antitrust laws because the antitrust laws conflict with securities regulatory provisions.

BACKGROUND

Plaintiffs are a class of retail investors who bought stock in public offerings. Plaintiffs are buyers. Defendants are underwriters and brokerage firms that manage public offerings through which they distribute shares of stock. Defendants are sellers. According to plaintiffs, defendants do not permit plaintiffs to re-sell their public offering stock during a prescribed "retail restricted period" of between 30 and 90 days after the initial offering distribution. First Am. Compl. at PP 2.b, 3. This retail restricted period occurs **[**3]** in the "aftermarket," which concerns any sales after the initial distribution. The re-sale of stock shortly after purchasing it in a public offering is known as "flipping."

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[*] Judge Wilfred Feinberg recused himself from consideration of this matter after oral argument took place and did not participate in this decision. Because the remaining two panel members agree on the disposition of this appeal, they act in accordance with 2d Cir. R. 0.14.

Generally, flipping causes stock prices to fluctuate - usually downward - and aftermarket sales restrictions are a form of price stabilization. According to plaintiffs, stock that institutional investors purchased from the same public offerings is not subject to aftermarket sales restrictions. *Id*. at P 4. Plaintiffs also claim that defendants do not disclose the restrictions in an offering's registration statement or prospectus. *Id*. at P 2.b.

Plaintiffs allege a conspiracy beginning in approximately 1990 among defendants to impose the restrictions on retail investors. According to plaintiffs, defendants **[*798]** discourage flipping but do not strictly forbid the practice. Instead, defendants enforce the retail restricted period by denying stock allocations in future public offerings to retail investors who previously flipped stock. Defendants also enforce the retail restricted period by denying or restricting stock allocations or commissions to brokers whose retail customers engage in flipping. First Am. Compl. **[**4]** at PP 60, 63. Defendants monitor stock sales and flipping on a customer-by-customer basis through the Depository Trust Co., "a clearing house for the settlement of securities traded on all major exchanges and the NASDAQ system." *Id*. at P 8.

Plaintiffs contend that defendants' practice artificially drives up the price of stock in the aftermarket by restricting the supply of shares. Plaintiffs also contend that the practice causes them to pay inflated prices for shares during the initial distribution of public offering stock. According to plaintiffs, institutional investors benefit from defendants' practice because they can re-sell their shares at a higher price in the aftermarket. First Am. Compl. at P 4. Defendants also benefit from the scheme by, among other things, receiving more business and even kickbacks from institutional investors. Plaintiffs also note that defendants benefit from the artificially high prices because they do not have to spend as much of their own capital to support the price of public offering shares, and defendants attract future business based on the stock price performance of current public offerings. *Id*. at P 11.e.

Plaintiffs filed a class action **[**5]** lawsuit in federal court on August 21, 1998, alleging a violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. Plaintiffs also alleged a cause of action under New York law for breach of fiduciary duty. Plaintiffs filed an amended complaint on March 10, 1999, and defendants moved to dismiss it pursuant to *Rule 12(b)(6)*. After hearing oral argument, the district court granted defendants' motion in a Memorandum and Order in December 2000. *Friedman v. Salomon/Smith Barney, Inc., 2000 U.S. Dist. LEXIS 17785, 2000 WL 1804719* (S.D.N.Y. Dec. 8, 2000) ("*Friedman I*"). In addition to dismissing plaintiffs' federal claim on the merits, the district court dismissed their state law claim by declining to exercise supplemental jurisdiction over it. *2000 U.S. Dist. LEXIS 17785*, [WL] at *12. Plaintiffs moved for reconsideration, and the district court denied the motion in a January 2001 Memorandum and Order. *Friedman v. Salomon/Smith Barney, Inc., 2001 U.S. Dist. LEXIS 884, 2001 WL 64774* (S.D.N.Y. Jan. 23, 2001) ("*Friedman II*"). Plaintiffs now appeal. Our review is *de novo*. *Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994)*.

DISCUSSION

Both parties agree that the only issue on appeal **[**6]** is whether defendants' conduct is immune from antitrust enforcement based on the regulatory authority and actions of the Securities and Exchange Commission ("SEC"), principally under Section 9(a)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), *15 U.S.C. § 78i(a)(6)*. [1] The relevant legal doctrine is known as implied immunity. The parties also agree **[*799]** that the SEC has not regulated price stabilization in the aftermarket, but they draw opposite inferences from this circumstance.

[7]** According to plaintiffs, defendants' conduct does not benefit from the shield of implied immunity because the SEC's failure to regulate the manipulation of stock prices in the aftermarket is not the product of its consideration of

[1] The statute states: ***HN1***[] "It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange . . . to effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." *15 U.S.C. § 78i(a)(6)*.

antitrust or competitive concerns, and the SEC never has implied or held that defendants' conduct was permissible. Plaintiffs also argue that because defendants' conduct is anti-competitive, applying antitrust laws would reinforce the purpose of the Exchange Act rather than subject defendants to conflicting directives of securities and antitrust laws. Defendants and *amici* contend that the SEC has exercised its statutory authority in permitting - through the deliberate absence of regulation - defendants' conduct, so punishing that same conduct under antitrust principles would create an impermissible conflict.

I. Implied immunity

HN2[] The doctrine of implied immunity rests on three Supreme Court cases: *Silver v. New York Stock Exch., 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*, *Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)*, and *United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)* **[**8]** ("*NASD*"). Generally, courts should not abrogate antitrust laws through implied immunity, also known as implied repeal or revocation, "casually" because "repeal by implication is not favored." *Finnegan v. Campeau Corp., 915 F.2d 824, 828 (2d Cir. 1990)* (quotation marks and citation omitted). Implied immunity will exist "only where there is a plain repugnancy between the antitrust and regulatory provisions." *Id*. (quotation marks and citation omitted). "Repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap." *Strobl v. New York Mercantile Exch., 768 F.2d 22, 27 (2d Cir. 1985)*. Importantly, the "plain repugnancy," or conflict, between antitrust and securities laws extends to potential as well as actual conflicts. *Id*.

As the district court below recognized, implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with ***antitrust law***. *See* *Friedman I, 2000 U.S. Dist. LEXIS 17785, 2000 WL 1804719*, at *4-5 (listing relevant factors to implied immunity analysis). In their arguments on appeal, the parties largely compare **[**9]** the case at bar to the facts of prior cases, making a brief review of those cases helpful here.

In *Finnegan*, we found implied immunity where a direct conflict existed between ***antitrust law***, which would prohibit joint takeover bidders, and the Williams Act, *15 U.S.C. §§ 78m(d)-(e)* & *78n(d)-(f)*, which allowed competing bidders to make joint bids as long as they complied with SEC disclosure regulations. *Finnegan, 915 F.2d at 829-31*. In light of the direct conflict, implied immunity was necessary for the "proper functioning of the securities laws." *Id. at 831*. In *Finnegan*, we held that "we cannot presume that Congress has allowed competing bidders to make a joint bid under the Williams Act and the SEC's regulations and taken that right away by authorizing suit against such joint bidders under the antitrust laws." *Id. at 830*.

In *Strobl*, we found that no implied immunity existed where both the Sherman Act and Commodity Exchange Act forbid price manipulation, although the Sherman Act called for greater damages. *Strobl, 768 F.2d at 27-28*. Key to that decision **[*800]** was the absence of conflict **[**10]** or repugnancy between the legal schemes and the fact that "there is no built-in balance in the regulatory scheme of the [Commodity Exchange] Act that permits a little price manipulation in order to further some other statutory goal." *Id. at 28*. Thus, both sets of laws had the same goal and considered the same factors to reach that goal. Note that the Exchange Act, which governs our decision here, differs from the Commodity Exchange Act because the former allows "a little price manipulation" to further goals such as efficiently raising capital through new issues. *See* *15 U.S.C. § 78i(a)(6)*; *see also* S. Rep. No. 34-792, at 8-9, 17 (1934), SEC Release No. 34-2446, at 10-11 (March 18, 1940).

In *NASD*, the Supreme Court found implied immunity where the Investment Company Act of 1940, *15 U.S.C. § 80a-22(f)*, gave the SEC power to authorize sales and distribution restrictions on the transfer of mutual fund shares in secondary markets even though the same restrictions were anti-competitive under the antitrust laws. *NASD*, 422 U.S. at 729-30. The facts in *NASD* are analogous to the case at bar because **[**11]** the statute in *NASD* "authorizes funds to impose transferability or negotiability restrictions, subject to [SEC] disapproval." *Id. at 726*. Here, Section 9(a)(6) of the Exchange Act authorizes price stabilization mechanisms subject to SEC disapproval. *15 U.S.C. § 78i(a)(6)*. The Supreme Court found that "there can be no reconciliation of [the SEC's] authority under

Section 22(f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal per se," even though the SEC had not specifically approved the restrictive agreements. *Id. at 729-30*.

In *Gordon*, the Supreme Court found implied immunity where the SEC under Section 19(b) of the Exchange Act, *15 U.S.C. § 78s(b)*, had jurisdiction to establish a system of fixed commission rates on the New York Stock Exchange. *Gordon, 422 U.S. at 691*. The Court did not concern itself with the "wisdom of fixed rates" but considered only Congress' intent that the SEC and not antitrust laws address the issue. *Id. at 688*. Again, the Court focused on conflict, holding that "different standards **[**12]** are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Id. at 689*.

In contrast to *Gordon* and *NASD*, in the earlier case *Silver* the Supreme Court found no implied immunity because applying antitrust principles to New York Stock Exchange rules that lay outside the SEC's jurisdiction created no conflict. *Silver, 373 U.S. at 358*. Because the Exchange Act at that time did not give the SEC power to "review particular instances of enforcement of exchange rules," *id. at 357*, applying the antitrust laws to effect that review did not affect the function of the Exchange Act, particularly because nothing in the SEC regulatory scheme at the time performed the "antitrust function" of considering injuries to competition. *Id. at 358-59*. The Court noted that if the SEC had jurisdiction over review of exchange rules "a different case as to antitrust exemption would be presented." *Id. at 360*. After *Silver* was decided, Congress amended the **[**13]** Exchange Act to require the SEC to take competition, among other things, into account in rulemaking and when reviewing rules of exchanges. *See 15 U.S.C. §§ 78c(f)*, *78w(a)(2)*.

Thus, ***HN3***[] implied immunity exists where allowing an antitrust lawsuit to proceed **[*801]** would conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct. In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates. The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it. *Strobl, 768 F.2d at 27*.

II. Application of legal standard

In a thorough and comprehensive opinion, the district court found that implied immunity existed here because (1) the SEC has exclusive jurisdiction over price stabilization pursuant to Section 9(a)(6), which allows stabilization practices not specifically prohibited by the SEC; (2) Congress was aware of stabilization practices when it passed the Exchange **[**14]** Act and created the SEC in 1934; (3) the SEC actively studied and regulated stabilization practices over the last 60 years and consistently made a "studied assessment that the benefits of price stabilization to the capital markets outweigh the admitted anti-competitive aspects of stabilizing manipulation;" and (4) there is a clear conflict between plaintiff's reading of antitrust laws and SEC regulation under Section 9(a)(6). *Friedman I, 2000 U.S. Dist. LEXIS 17785, 2000 WL 1804719*, at *11-12; *Friedman II, 2001 U.S. Dist. LEXIS 884, 2001 WL 64774*, at *1. These holdings rest on proper interpretation of Section 9(a)(6) and analysis of the history of SEC regulation of price stabilization practices.

We examine briefly the SEC's regulation of price stabilization in both the distribution and aftermarket phases of public offerings. As noted previously, at the time Congress passed the Exchange Act, it declined to prohibit pegging, fixing or stabilizing practices outright and instead gave the SEC authority to regulate them. In 1940, the SEC issued its first policy statement about the practices, did not prohibit stabilization during distribution, and adopted regulations in an attempt to balance the interests of **[**15]** individual investors and "protection of the nation's credit and banking structure and the health of its capital markets." SEC Release No. 34-2446, at 10, 14. The SEC acknowledged that stabilization, "broadly defined as the buying of a security for the limited purpose of preventing or retarding a decline in its open market price in order to facilitate its distribution to the public," was a long-standing market practice with some "vicious and unsocial aspects" requiring additional monitoring in light of the new regulations. *Id*. at 3, 14. The SEC also pointed out that stabilization tended to combat the serious problem of flipping. *Id*. at 5.

In 1955 and 1963, the SEC revisited the stabilization issue and modified existing regulations but did not prohibit the practice. *See* SEC Release No. 34-5194 (July 5, 1955); H.R. Doc. No. 95, Pt. 1 (1963). In its 1963 report to Congress, the SEC pointed out that various firms combated flipping by depriving salespeople of their commissions "if resales by customers occur within 30 days of the effective date," by identifying "customers who sold stock in the immediate after-market" and declining to give these customers "allotments of subsequent **[**16]** oversubscribed issues," and telling customers "not to sell for varying periods, usually 30 or 60 days." H.R. Doc. No. 95, Pt. 1, at 525-26. The SEC nonetheless declined to regulate or prohibit the practices.

More recently, the SEC in 1994 undertook a comprehensive review of its trading practice rules and posed several questions dealing specifically with flipping in the aftermarket **[*802]** and whether a need existed to regulate the practice. SEC Release Nos. 33-7057, 34-33924, at 1316-17 (April 19, 1994). ***HN4***[] The SEC rule that resulted from this inquiry did *not* regulate price stabilization in the aftermarket. *See* *17 C.F.R. § 242.104* ("Regulation M"). In its release describing its new regulation, the SEC noted that stabilization in the aftermarket to combat flipping was "not uncommon and may act to support the price of the offered security in the aftermarket." SEC Release Nos. 33-7282, 34-37094, at 1740 (April 11, 1996). The commenters were "divided" over whether to regulate stabilization in the aftermarket, and the SEC chose instead to gather information, monitor aftermarket practices and "assess[] whether further regulation is warranted." *Id*.

Defendants **[**17]** argue that this history demonstrates that the SEC studied price stabilization and flipping repeatedly yet made the administrative judgment not to regulate the practices of which plaintiffs complain. Plaintiffs dispute the import of this history. First, plaintiffs argue that price stabilization in the aftermarket is a recent phenomenon beginning in the 1990s, so there is no way that Congress in 1934 or the SEC until just recently could have studied the issue. Thus, plaintiffs contend, the history we recounted above is essentially meaningless. We disagree. Plaintiffs rely on an artificial distinction between price stabilization in the aftermarket and price stabilization during distributions. There is no question that underwriters and brokers consistently employed some form of price stabilization to deter flipping. The practice pre-dated the Exchange Act and the SEC. As technology has evolved and distributions have taken shorter and shorter periods of time, the problem of flipping - and its "solution" of price stabilization - simply has spilled into the aftermarket as well as the distribution period. The SEC explicitly recognized this trend in its 1994 release, when it stated that "'stabilization' **[**18]** of the market in connection with offerings may have shifted from the sales period to the aftermarket period." SEC Release Nos. 33-7057, 34-33924, at 1316. The SEC still declined to regulate price stabilization in the aftermarket when it adopted Regulation M, and we find this decision to be both deliberate and significant. Plaintiffs cannot contend that this latest action concerned only distributions and not the aftermarket.

Second, plaintiffs claim that no conflict exists here because application of antitrust laws would reinforce the Exchange Act's hostility to price manipulation. Plaintiffs argue that the SEC has not considered the antitrust implications of price stabilization. However, the agency must consider the competitive effects of its regulations. *See* *15 U.S.C. §§ 78c(f)*, *78w(a)(2)*. Contrary to plaintiffs' contention, this case is unlike *Strobl*, where both the securities and antitrust laws imposed a categorical prohibition on price manipulation, *Strobl, 768 F.2d at 28*, because here ***HN5***[] Section 9(a)(6) requires the SEC to consider other factors such as the public interest and protection of investors in addition to market competition. **[**19]** The SEC has considered these factors in deciding not to regulate price stabilization in the aftermarket. Moreover, because Section 9(a)(6) permits some forms of price stabilization, it conflicts with the antitrust laws' blanket prohibition of the practices. The SEC also indicated in its 1940 release that its power to regulate stabilizing under the Exchange Act was broad and exclusive and that anti-competitive practices were lawful in the absence of SEC regulation. SEC Release No. 34-2446, at 12-14. The agency was aware of the antitrust implications of stabilization practices and the potential for direct conflict.

[*803] Third, plaintiffs argue repeatedly that the SEC has specifically declined to regulate the aftermarket and the absence of this regulation means that courts can enforce the antitrust laws against defendants without the danger of a conflict. Plaintiffs also contend that the possibility of future SEC aftermarket regulation is insufficient to sustain a finding of implied immunity. Plaintiffs' argument rests on a misinterpretation of Section 9(a)(6), which the district court addressed in its order denying plaintiffs' motion for reconsideration. On that motion and on appeal, plaintiffs **[**20]** argue that the district court misread the "plain words" of Section 9(a)(6) and "turned [the section] on its head by an interpretation directly opposite its plain meaning." It is plaintiffs that have given an opposite meaning to Section 9(a)(6).

The statute clearly provides that ***HN6***[] price stabilization in contravention of SEC regulations is unlawful. *15 U.S.C. § 78i(a)(6)*. As the district court correctly found, the statute allows price stabilization practices that the SEC does not prohibit. *Friedman II, 2001 U.S. Dist. LEXIS 884, 2001 WL 64774*, at *1. Plaintiffs reach the opposite conclusion - that the statute prohibits all price stabilization practices that the SEC does not specifically allow - because only this interpretation permits plaintiffs to construe the SEC's failure to regulate the aftermarket as leaving a space for antitrust laws to fill. Plaintiffs' misinterpretation of Section 9(a)(6) is the core of their position on appeal because all of their arguments against implied immunity flow from this view of the statute. But once the correct interpretation of Section 9(a)(6) is in place - the interpretation that the district court and defendants espouse - a finding **[**21]** of implied immunity is the direct consequence. We therefore affirm the district court's ruling that implied immunity bars plaintiffs' challenge to price stabilization practices in the aftermarket.

CONCLUSION

For the forgoing reasons, we affirm the judgment below in its entirety. Because we hold that implied immunity bars plaintiffs' claim, we do not reach defendants' alternative argument that the complaint alleges no antitrust injury because plaintiffs bought their shares at the same price as institutional investors and are free to sell them in the aftermarket.

End of Document

Gregory v. Albertson's, Inc.

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

December 20, 2002, Decided ; December 20, 2002, Filed

Nos. A097031, A097620.

Reporter

104 Cal. App. 4th 845 *; 128 Cal. Rptr. 2d 389 **; 2002 Cal. App. LEXIS 5211 ***; 2002 Cal. Daily Op. Service 12287; 2002 Daily Journal DAR 14393

MARGARET ROSE GREGORY, Plaintiff and Appellant, v. ALBERTSON'S, INC., et al., Defendants and Respondents.

Subsequent History: Review denied by Gregory v. Albertson's Inc., 2003 Cal. LEXIS 1633 (Cal., Mar. 19, 2003)

Prior History: Superior Court of Alameda County, No. 840200-8, James A. Richman, Judge.

Disposition: The judgment is affirmed. Costs on appeal are awarded to respondents.

Core Terms

unfair competition, competitors, unfair, public policy, alleges, blight, shopping center, leasehold, first amended complaint, redevelopment, consumers, demurrer, unfair business practice, cause of action, anti trust law, decisions, practices, courts, retail, sustain a demurrer, business practice, unfair act, fraudulent, violations, pleadings, policies, weighing, lease, space

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Defenses, Demurrers & Objections, Defects of Form**

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN2[] **Antitrust & Trade Law, Federal Trade Commission Act**

The Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, was one of the so-called little Federal Trade Commission Acts of the 1930's, enacted by many states in the wake of amendments to the Federal Trade Commission Act enlarging the commission's regulatory jurisdiction to include unfair business practices that harmed, not merely the interests of business competitors, but of the general public as well. The definition of unfair competition in *§ 17200* demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting inter alia, any member of the public to sue on his own behalf or on behalf of the public generally.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN3[] **Antitrust & Trade Law, Federal Trade Commission Act**

Cal. Bus. & Prof. Code § 17203 authorizes injunctive relief to prevent "unfair competition." This term is broadly defined by Cal. Bus. & Prof. Code *§ 17200 of the Business and Professions Code* to include any unlawful, unfair or fraudulent business act or practice.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN4[] **Antitrust & Trade Law, Federal Trade Commission Act**

The coverage of the *Cal. Bus. & Prof. Code § 17203* statute is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. It governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. It borrows violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under *Cal. Bus. & Prof. Code § 17200 et seq.* and subject to the distinct remedies provided thereunder. *Section 17200* does not require that a plaintiff prove that he or she was directly injured by the unfair practice or that the predicate law provides for a private right of action.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Governments > Courts > Judicial Precedent

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > General Overview

HN5[] **Antitrust & Trade Law, Federal Trade Commission Act**

In construing the unfair competition law, the courts have drawn upon common law precedents in the fields of business torts. Because *Cal. Bus. & Prof. Code § 17200* is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. There are separate lines of authority construing each of these three terms. The first amended complaint does not contain any factual allegations of unlawful or fraudulent activity. Consequently our inquiry is confined to an analysis of whether the allegations of the operative pleading are sufficient to support a cause of action based upon an unfair business act or practice.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Real Property Law > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Real Property Law > ... > Remedies > Injunctions > General Overview

Real Property Law > ... > Injunctions > Grounds for Injunctions > General Overview

Real Property Law > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN6[] **Antitrust & Trade Law, Federal Trade Commission Act**

The term unfair is not precisely defined in *Cal. Bus. & Prof. Code § 17200*, and the courts have struggled to come up with a workable definition. Two appellate court decisions have attempted to formulate a more precise approach to adjudicating the existence of an unfair act or practice within the meaning of the unfair competition law. After reviewing the open-ended definitions of unfairness in earlier decisions, added this obvious thought: that the determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim--a weighing process quite similar to the one enjoined on us by the law of nuisance.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

The United States Supreme Court has sanctioned guidelines for construing parallel language in the Federal Trade Commission Act that stress the potential relevance of public policy. Among other things, these guidelines call for an inquiry into whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN8[] **Antitrust & Trade Law, Federal Trade Commission Act**

An unfair business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

When a plaintiff who claims to have suffered injury from a direct competitor's unfair act or practice invokes *Cal. Bus. & Prof. Code § 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10[] **Regulated Practices, Trade Practices & Unfair Competition**

A business practice constitutes unfair competition if it is forbidden by any law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court- made or if it is unfair, that is, if it offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Governments > Public Improvements > Community Redevelopment

Real Property Law > Eminent Domain Proceedings > Procedures

HN11[] **Public Improvements, Community Redevelopment**

Cal. Health & Safety Code § 33035 is found in the Community Redevelopment Law, *Cal. Health & Saf. Code § 33000 et seq.*, which establishes procedures for the acquisition of property by the power of eminent domain and the expenditure of public funds for redevelopment projects. The Community Redevelopment Law contemplates that a redevelopment project will involve the assembly of small property and public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor. *Cal. Health & Saf. Code § 33037*. It delegates to responsible agencies of local government the authority to make the legislative decisions required to formulate and carry out such a project. *Cal. Health & Saf. Code §§ 33036*, *33100 et seq.*, and *Cal. Health & Safety Code § 33200 et seq.*

Governments > Public Improvements > Community Redevelopment

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > ... > Lease Agreements > Commercial Leases > General Overview

Real Property Law > ... > Lease Agreements > Commercial Leases > Shopping Center Leases

HN12[] **Public Improvements, Community Redevelopment**

The Community Redevelopment Law may be viewed as harmonizing the policy condemning blight with distinct policies favoring the free use of property. The balancing of conflicting policies is a common legislative function. The statutory scheme of the Community Redevelopment Law, however, provides only one remedy for the phenomenon of blight condemned by *Cal. Health & Safety § 33035*--public participation in a redevelopment project. An appellate court does not think it provides any authority for the courts to balance these policies outside this statutory context by fashioning a private remedy through the use of the unfair competition law to affect a single leasehold in a shopping center.

Business & Corporate Law > ... > Remedies > Equitable Relief > Injunctions

Real Property Law > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Real Property Law > ... > Remedies > Injunctions > General Overview

Real Property Law > ... > Injunctions > Grounds for Injunctions > General Overview

Real Property Law > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN13[] **Equitable Relief, Injunctions**

An appellate court does not disagree with the general proposition that claims of unfair competition commonly present fact-intensive issues. What constitutes unfair competition under any given set of circumstances is a question of fact. The determination of unfair competition often involves a weighing process that requires a full examination of the relevant facts. The court must weigh the utility of defendant's conduct against the gravity of the harm to the alleged victim--a weighing process quite similar to the one enjoined on us by the law of nuisance.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

In an unfair competition action (*Bus. & Prof. Code, § 17200 et seq.*) filed by a citizen against a supermarket for closing one supermarket in a mall when it opened another one nearby, with the intention of keeping the closed one unoccupied to preclude competition from that location, the trial court entered judgment on the pleadings for defendant. (Superior Court of Alameda County, No. 840200-8, James A. Richman, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly entered judgment on the pleadings for defendant, as there were no allegations that defendant's business decision was unlawful, fraudulent, or deceptive. The complaint alleged only one coherent theory of an unfair practice: by keeping the chief retail store in the shopping center off the market, defendant put in motion a process of deterioration affecting the entire shopping center that would inevitably produce the kind of blight that *Health & Saf. Code, § 33035*, condemns. The statutory scheme of the community redevelopment law provides only one remedy for the phenomenon of blight condemned by § 33035-public participation in a redevelopment project. It does not provide any authority for the courts to balance these policies outside this statutory context by fashioning a private remedy through the use of the unfair competition law to affect a single leasehold in a shopping center. Also, the allegations did not state a conflict with antitrust laws or policies. (Opinion by Swager, J., with Stein, Acting P.J., and Margulies, J., concurring.)

Headnotes

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

Appellate Review § 128—Scope of Review—Rulings on Demurrers.

--On appeal from a judgment dismissing an action after the sustaining of a demurrer without leave to amend, the reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions, or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.

And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility that any defect identified by the defendant can be cured by amendment. The same principles apply to an appeal from a judgment on the pleadings.

CA(2)[] (2)

Unfair Competition § 2—Definitions and Distinctions—Unfair Competition Law.

--The unfair competition law (Bus. & Prof. Code, § 17200 et seq.) was one of the so-called "little FTC Acts" of the 1930's, enacted by many states in the wake of amendments to the Federal Trade Commission Act enlarging the commission's regulatory jurisdiction to include unfair business practices that harmed not merely the interests of business competitors but also those of the general public. The definition of unfair competition in § 17200 demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting, inter alia, any member of the public to sue on his or her own behalf or on behalf of the public generally.

CA(3)[] (3)

Unfair Competition § 2—Definitions and Distinctions—Unfair Competition Law—Scope.

--Under Bus. & Prof. Code, § 17203, which authorizes injunctive relief to prevent unfair competition, the term "unfair competition" is broadly defined by Bus. & Prof. Code, § 17200, to include any unlawful, unfair, or fraudulent business act or practice. It was intentionally framed in its broad, sweeping language, precisely to deal with the innumerable new schemes which the fertility of man's invention could contrive. The statute embraces anything that can properly be called a business practice and that at the same time is forbidden by law. It governs anticompetitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. It borrows violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices that are independently actionable under Bus. & Prof. Code, § 17200 et seq., and subject to the distinct remedies provided thereunder. It does not require that a plaintiff prove that he or she was directly injured by the unfair practice or that the predicate law provides for a private right of action. In construing the unfair competition law, the courts have drawn upon common law precedents in the fields of business torts as well as judicial interpretation of the closely parallel provisions of the Federal Trade Commission Act. Because Bus. & Prof. Code, § 17200, is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices that are unlawful, or unfair, or fraudulent.

CA(4a)[] (4a) CA(4b)[] (4b) CA(4c)[] (4c)

Unfair Competition § 4—Acts Constituting Unfair Competition—Keeping Closed Supermarket Vacant to Preclude Competition for New One.

--In an unfair competition action (Bus. & Prof. Code, § 17200 et seq.) filed by a citizen against a supermarket for closing one supermarket in a mall when it opened another one nearby, with the intention of keeping the closed one unoccupied to preclude competition from that location, the trial court properly entered judgment on the pleadings for defendant. There were no allegations that defendant's business decision was unlawful, fraudulent, or deceptive. The complaint alleged only one coherent theory of an unfair practice: by keeping the chief retail store in the shopping center off the market, defendant put in motion a process of deterioration affecting the entire shopping center that would inevitably produce the kind of blight that Health & Saf. Code, § 33035, condemns. The statutory scheme of the Community Redevelopment Law provides only one remedy for the phenomenon of blight condemned by Health & Saf. Code, § 33035--public participation in a redevelopment project. It does not provide any authority for the courts to balance these policies outside this statutory context by fashioning a private remedy through the use of the unfair competition law to affect a single leasehold in a shopping center. Also, the allegations did not state a conflict with antitrust laws or policies.

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 99.]

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

Unfair Competition § 4—Acts Constituting Unfair Competition—Business Practices.

--A business practice constitutes unfair competition if it is forbidden by any law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made, or if it is unfair, that is, if it offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. However, this test may be too amorphous for all cases, and a claim of an unfair act or practice predicated on public policy requires that the public policy that is a predicate to the action must be tethered to specific constitutional, statutory, or regulatory provisions.

CA(6)[] **(6)**

Unfair Competition § 9—Actions—Evidence—Acts Constituting Unfair Competition—Question of Fact.

--What constitutes unfair competition (*Bus. & Prof. Code, § 17200*) under any given set of circumstances is a question of fact. The determination of unfair competition often involves a weighing process that requires a full examination of the relevant facts. The court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim--a weighing process similar to the one enjoined by the law of nuisance.

Counsel: Cary L. Dictor for Plaintiff and Appellant.

Coblentz, Patch, Duffy & Bass and William H. Orrick III for Defendant and Respondent Albertson's Inc.

Stein, Smith, Rudser & Cohen, David A. Stein, Harold P. (Peter) Smith, and Jessica R. Stavnezer for Defendant and Respondent Ires (California), Inc.

Judges: (Opinion by Swager, J., with Stein, Acting P. J., and Margulies, J., concurring.)

Opinion by: Swager

Opinion

SWAGER, [*848] J.

[390]** Margaret Rose Gregory appeals an order and a judgment on the pleadings dismissing her first amended complaint against Albertson's Inc., and Ires (California), Inc. (hereafter Albertson's and Ires), to enjoin an unfair business practice. We affirm.

FACTUAL BACKGROUND

Appellant filed her first amended complaint after the trial court sustained a demurrer filed by Albertson's to the original complaint. As amended, the complaint alleges appellant is "an individual citizen and resident **[***2]** of the city of Alameda, County of Alameda, State of California." Ires is the owner of the Bridgeside Shopping Center in Alameda, California. In 1972, Ires leased to Albertson's predecessor "the larger one of the two major anchor stores" in the shopping center, which was "specially fitted for the sale of grocery and sundry items by a larger retailer of such items." Albertson's now holds the leasehold interest under a lease that "currently runs through the year 2042, including extension options."

In February 1997, Albertson's opened a large retail facility at Fruitvale Station Shopping Center in Oakland. The first amended complaint alleges that Albertson's "determined" that this facility "should service an area **[*89]** including the same area formerly serviced by [its store] at Bridgeside Shopping Center" and therefore "determined to indefinitely 'warehouse,' i.e., hold but make no beneficial use of, the leasehold space it formerly used for its facility at the Bridgeside Shopping Center in Alameda, in order to continue to hold the legal right of possession for such leasehold for the purpose of preventing any competitor from using such space to compete in the retail sale of groceries." Ires **[***3]** has permitted Albertson's to pursue this business strategy of maintaining the leasehold premises "in a permanent state of closure and darkness, vacant and empty, devoid of commercial activity, usefulness, use or purpose, and decaying, deteriorated and blighted, which condition has existed . . . from February, 1997 . . . [and] threatens to continue unchanged for over 40 years into the future."

The first amended complaint alleges that "[t]he maintenance of said leasehold in a permanent state of closure" is an unfair business practice by which Albertson's and Ires "thwart any effort by competitors . . . **[**391]** [of Albertson's] to make any beneficial use of the leasehold premises." The withdrawal of "the largest anchor building in a multiple user small commercial center serving a small community" creates "commercial and residential deterioration and blight, eliminating the economic viability of most of the shopping center space for most users, depressing land values in the vicinity, creating an attractive nuisance, creating visual and unaesthetic decay, reducing and eliminating consumer shopping choices, depriving the local municipality of sales tax revenues, strangling other small retail **[***4]** businesses in the same shopping center and unfairly restraining market competitors and economic competition based on price, service and quality."

Appellant seeks an injunction restraining Albertson's and Ires "from continuing to withhold the said leasehold space from normal and beneficial economic activity . . . and enjoining and directing defendants . . . actively to market such leasehold for assignment or subletting to business competitors or others, without regard for market competition to defendants Albertson's Inc."

Albertson's filed a demurrer to the first amended complaint on the ground that it failed to allege facts sufficient to state a cause of action under the unfair competition law. The trial court sustained the demurrer by an order filed September 7, 2001, and entered an order dismissing the first amended complaint against Albertson's on November 6, 2001. Ires subsequently filed a motion for judgment on the pleadings that was granted by an order filed December 17, 2001, and a judgment was entered in its favor on January 2, 2002. Appellant filed timely notices of appeal from the order entered November 6, 2001, and the judgment entered January 2, 2002.

[*850] DISCUSSION

A. **[***5]** *Standard of Review*

CA(1)[] **(1)** ***HN1***[] "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967 [9 Cal.Rptr.2d 92, 831 P.2d 317]*; *Palm Springs Tennis Club v. Rangel (1999) 73 Cal.App.4th 1, 4-5 [86 Cal.Rptr.2d 73]*.) The same principles apply to an appeal from a judgment on the pleadings. **[***6]** (*Buck v. Standard Oil Co. (1958) 157 Cal. App. 2d 230, 235 [321 P.2d 67]*.)

B. *Unfair Competition Law*

CA(2)[] **(2)** HN2[] The unfair competition law (Bus. & Prof. Code, § 17200 et seq.) was "one of the so-called 'little FTC Acts' of the 1930's, enacted by many states in the wake of amendments to the Federal Trade Commission Act enlarging the commission's regulatory jurisdiction to include unfair business practices that harmed, not merely the interests of business competitors, but of the general public as well." (**[**392]** Rubin v. Green (1993) 4 Cal.4th 1187, 1200 [17 Cal. Rptr.2d 828, 847 P.2d 1044]; Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1263-1264 [10 Cal.Rptr.2d 538, 833 P.2d 545].) The definition of unfair competition in section 17200 "demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting inter alia, any member of the public to sue on his own behalf or on behalf of the public generally." (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 110 [101 Cal.Rptr. 745, 496 P.2d 817].)

CA(3)[] **(3)** The present action seeks relief under Business and Professions Code section 17203 **[***7]** , which HN3[] authorizes injunctive relief to prevent "unfair competition." This term is broadly defined by section 17200 of the Business and Professions Code to include "any unlawful, unfair or fraudulent business act or practice." In **[*851]** Barquis v. Merchants Collection Assn., supra, 7 Cal.3d 94, 112, the court observed that the predecessor to section 17200 "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ' "new schemes which the fertility of man's invention would contrive." ' [Citation.]" "[G]iven the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." (Barquis v. Merchants Collection Assn., supra, at p. 112.) HN4[] The coverage of the statute is " 'sweeping, embracing " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " ' [Citations.] It governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair business competition.' [Citations.]" (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180 [83 Cal.Rptr.2d 548, 973 P.2d 527] **[***8]** (*Cel-Tech*).) It " ' "borrows" violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. and subject to the distinct remedies provided thereunder.' " (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 383 [6 Cal.Rptr.2d 487, 826 P.2d 730].) Section 17200 does not require that a plaintiff prove that he or she was directly injured by the unfair practice or that the predicate law provides for a private right of action. (Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 839 [33 Cal.Rptr.2d 438].)

HN5[] In construing the unfair competition law, the courts have drawn upon common law precedents in the fields of business torts (e.g., American Philatelic Soc. v. Claibourne (1935) 3 Cal.2d 689, 698 [46 P.2d 135]) as well as judicial interpretation of the closely parallel provisions of the Federal Trade Commission Act. (See People ex rel. Mosk v. National Research Co. of Cal. (1962) 201 Cal. App. 2d 765, 770-774 [20 Cal.Rptr. 516].) Because Business and Professions Code section 17200 "is written in the disjunctive, it **[***9]** establishes three varieties of unfair competition--acts or practices [which] are unlawful, or unfair, or fraudulent." (AICCO, Inc. v. Insurance Co. of North America (2001) 90 Cal.App.4th 579, 587 [109 Cal.Rptr.2d 359]; State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1102 [53 Cal.Rptr.2d 229]; Roskind v. Morgan Stanley Dean Witter & Co. (2000) 80 Cal.App.4th 345, 351 [95 Cal.Rptr.2d 258].) There are separate lines of authority construing each of these three terms. (Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1158, 1169-1170 [121 Cal.Rptr.2d 79].) The first amended complaint does not contain any factual allegations of unlawful or fraudulent activity.CA(4a)[] **(4a)** Consequently our inquiry is confined to an analysis of whether the allegations of the operative pleading are sufficient to support **[**393]** a cause of action based upon an "unfair business act or practice."

HN6[] The term unfair is not precisely defined in the statute, and the courts have struggled to come up with a workable definition. Two appellate court **[*852]** decisions have attempted to formulate a more precise approach to adjudicating **[***10]** the existence of an "unfair" act or practice within the meaning of the unfair competition law. After reviewing the "open-ended definitions of unfairness" in earlier decisions, the court in Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735, 740 [162 Cal.Rptr. 543] "add[ed] this obvious thought: that the determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim--a weighing process quite similar to the one enjoined on us by the law of nuisance." (See also State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th 1093, 1103.)

In *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 530 [206 Cal.Rptr. 164]*, the court noted that ***HN7***[] the United States Supreme Court decision in *F.T.C. v. Sperry & Hutchinson Co. (1972) 405 U.S. 233, 244 [92 S. Ct. 898, 31 L. Ed. 2d 170, 179]*, sanctioned **[***11]** guidelines for construing parallel language in the Federal Trade Commission Act that stress the potential relevance of public policy. Among other things, these guidelines call for an inquiry into " ' "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; . . ." ' [Citation.]" (*People v. Casa Blanca Convalescent Homes, Inc., supra, at p. 530*.) The *Casa Blanca* court concluded: ***HN8***[] "an 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*Ibid.*)

Cel-Tech, supra, 20 Cal.4th 163 can be read as a departure from these earlier precedents. The plaintiffs were sellers of cellular telephones who filed suit against a company that possessed a government-protected duopoly in the Los Angeles area in selling cellular services. They claimed that the defendant sold cellular **[***12]** telephones below cost so as to gain subscribers for its profitable cellular service. Reversing a judgment for the defendant, the court remanded the case for retrial on the cause of action for unfair competition.

In reviewing precedents under the unfair competition law, the *Cel-Tech* court found that the "definitions" of unfair acts or practices offered by **[*853]** *People v. Casa Blanca Convalescent Homes, Inc., supra, 159 Cal. App. 3d 509, 530*, and *Motors, Inc. v. Times Mirror Co., supra, 102 Cal. App. 3d 735, 740*, [1] were "too amorphous and provide too little guidance to courts and businesses. Vague references to 'public policy,' for example, provide little real guidance. . . . These concerns led us to hold that to establish the tort of wrongful discharge in violation of public policy, the public policy triggering the violation must **[**394]** be tethered to a constitutional or statutory provision [citation] or a regulation carrying out statutory policy [citation]." (*Cel-Tech, supra, 20 Cal.4th 163, 185*.)

[*13]** Turning for guidance to the jurisprudence under section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45(a)*), the court noted that the " ' "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " ' [Citation.]" (*Cel-Tech, supra, 20 Cal.4th 163, 186*.) These principles, the court concluded, "require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: ***HN9***[] When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at pp. 186-187*, fn. omitted.)

The court in a footnote specifically limited the scope of its ruling. (*Cel-Tech, supra, 20 Cal.4th 163, 187, fn. 12*.) **[***14]** Despite the court's earlier concerns that it found the definitions in *Casa Blanca* and *State Farm Fire & Casualty Co.* to be "too amorphous" for practical application, it limited application of its newly announced test to an action by a competitor alleging anticompetitive practices. "This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.' " (*Cel-Tech, supra, at p. 187, fn. 12*.) The present case therefore does not fall within the procedural context to which the new test applies.

CA(5)[] **(5)** Since the test adopted by the court in *Cel-Tech* is expressly limited to the context of that case, our inquiry continues to be guided by prior Court of Appeal decisions, which have attempted to formulate a test for an "unfair act **[*854]** or business practice." In *People v. Duz-Mor Diagnostic Laboratory, Inc. (1998) 68 Cal.App.4th 654, 658*[2] [*80 Cal. Rptr. 2d 419*], **[***15]** the court set forth what appears to be an all inclusive definition of unfair

[1] The opinion cited *State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th 1093, 1103-1104*, which followed the *Motors, Inc.*, decision.

competition: ***HN10***[] "A business practice constitutes unfair competition if it is forbidden by any law, 'be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made' (*Saunders v. Superior Court*[*, supra*,] *27 Cal.App.4th 832, 838-839* . . .) or if it is unfair, that is, if it ' " 'offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' . . ." ' (*Podolsky v. First Healthcare Corp. (1996) 50 Cal.App.4th 632, 647 [58 Cal.Rptr.2d 89]*, citations omitted.)"

Cel-Tech, however, may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad **[***16]** language in **[**395]** earlier decisions that the court found to be "too amorphous." [3] Moreover, where a claim of an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.

C. *Adequacy of Pleadings*

CA(4b)[] **(4b)** There are no allegations that the business decision of the respondents is unlawful, fraudulent or deceptive. We find that the first amended complaint alleges only one coherent theory of an unfair practice: by **[***17]** keeping off the market the chief retail store in the shopping center, the respondents have put in motion a process of deterioration affecting the entire shopping center that will inevitably produce the kind of blight that *Health and Safety Code section 33035* condemns "as injurious and inimical to the public health, safety, and welfare of the people of the communities in which they exist . . . ." The public policy expressed in the redevelopment law thus forms the predicate to her cause of action.

HN11[] *Health and Safety Code section 33035* is found in the Community Redevelopment Law (*Health & Saf. Code, § 33000 et seq.*), which establishes procedures for the acquisition of property by the power of eminent domain and the expenditure of public funds for redevelopment projects. The Community Redevelopment Law contemplates that a redevelopment project will **[*855]** involve the assembly of small property and "public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor . . . ." **[***18]** (*Health & Saf. Code, § 33037*.) It delegates to responsible agencies of local government the authority to make the legislative decisions required to formulate and carry out such a project. (*Health & Saf. Code, §§ 33036*, *33100 et seq.*, and *33200 et seq.*)

While the policy of *Health and Safety Code section 33035* supports the statutory scheme for carrying out a redevelopment project, it does not necessarily follow that it calls for a private remedy affecting a single parcel of property under the unfair competition law. Appellant seeks an extension of the policy that departs from the primary focus of the statute.

Moreover, as respondents point out, appellant asks us to apply the policy against urban blight to circumstances where it would impinge on a separate state policy favoring "freedom of contract by the parties to commercial real property leases." (*Civ. Code, § 1995.270, subd. (a)(1)*; cf. *Pay 'N Pak Stores, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1404, 1409-1410 [258 Cal.Rptr. 816]*.) **[***19]** ***HN12***[] The Community Redevelopment Law may be viewed as harmonizing the policy condemning blight with distinct policies favoring the free use of property. The balancing of conflicting policies is a common legislative function. The statutory scheme of the Community Redevelopment Law, however, provides only one remedy for the phenomenon of blight condemned by *Health and Safety Code section 33035*--public participation in a redevelopment project. We do not think it provides any authority for the courts to balance these policies outside this statutory context by fashioning a private remedy through the **[**396]** use of the unfair competition law to affect a single leasehold in a shopping center.

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[2] The Supreme Court denied a petition for review on February 24, 1999, less than two months before its decision in *Cel-Tech*.

[3] In our reading of *Cel-Tech,* we differ somewhat from the interpretation in *Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 720, footnote 23 [113 Cal. Rptr. 2d 399]*,, which expressed the view that *Cel-Tech "*did not signal a retreat (at least in noncompetitor cases), from [the Supreme Court's] earlier statements in *Barquis v. Merchants Collection Assn. . . .*"

Although our focus is on whether or not appellant has adequately stated a cause of action for unfair competition, we note that the remedy she seeks would impose a difficult burden on the court. The remedy that appellant seeks goes well beyond the remedy of divestment, authorized in antitrust actions, because it demands discretion in choosing between the option of sale or lease and the negotiation with a suitable tenant of commercial real estate terms calculated to remedy the alleged evil of blight. It is true that the courts possess **[***20]** power to appoint receivers to enforce equitable decrees, but appellant seeks a remedy that would put the court in the complex role of supervising and directing efforts to market commercial property in a manner to remedy the multitude of grievances alleged in the complaint. It would not only cause the court "to assume the roles of real estate broker or property manager" as respondents argue, but also would require the court to make **[*856]** competitive business judgments. Furthermore, by tying her claim to the public policy against blight expressed in *Health and Safety Code section 33035*, plaintiff in essence is seeking to convert the unfair competition law into a private remedy to remediate blight that may not require the findings of blight as required by the Health and Safety Code. (*Health & Saf. Code §§ 33030, subd. (b)*, *33031*.)

Appellant argues that the unfair competition law contains "broad remedial provisions which authorize the courts to correct violations" (*Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy (1992) 4 Cal.App.4th 963, 972 [6 Cal.Rptr.2d 193]*) and the demurrer cannot be sustained if she is " 'entitled to **[***21]** some relief, notwithstanding that . . . [she] may demand relief to which [s]he is not entitled under the facts alleged. . . .' [Citation.]" (*White v. State of California (1987) 195 Cal. App. 3d 452, 471 [240 Cal.Rptr. 732]*.) But we think a judicially supervised marketing of the property would, at best, put the court in the untenable position of making or approving commercial decisions without clear guidelines and, at worst, would involve a level of dominion over the property raising constitutional issues. [4]

The first amended complaint does not state a theory of unfair practice based on violation of specific antitrust statutes or policies of antitrust legislation. It is true that the complaint alleges that Albertson's acted with a motive to secure an advantage over competitors. For example it alleges that **[***22]** Albertson's retained possession under the lease "for the purpose of preventing any competitor from using such space to compete in the retail sale of groceries" and "to thwart any effort by competitors . . . to make any beneficial use of the leasehold premises." But these allegations do not state a conflict with antitrust laws or policies. As noted in *Cel-Tech, supra, 20 Cal.4th 163, 186*, the focus of the antitrust laws is on injury to competition. To come within the letter or policy of these laws, it must be alleged that respondent's conduct had an adverse effect on competition.

We find only one allegation in the complaint charging injury to competition. The respondents' acts, it is alleged, constitute an unfair business practice by "unfairly restraining market competitors and economic competition based on price, service and quality." However, "[s]uch allegations are too vague and conclusionary to support a claim for restraint of trade." (**[**397]** *Saunders v. Superior Court, supra, 27 Cal. App. 4th 832, 842* .) Similarly, the allegation that defendants' actions "reduce market choices otherwise available to consumers" does not imply a diminution of competition. The **[***23]** same can be said of every occasion that an enterprise ceases to offer its goods or services by going out of business.

[*857] Appellant vigorously argues that unfair business practices present issues of fact that cannot be resolved by demurrer. ***HN13***[] We do not disagree with the general proposition that claims of unfair competition commonly present fact-intensive issues.***CA(6)***[] **(6)** In *People v. McKale (1979) 25 Cal.3d 626, 635 [159 Cal.Rptr. 811, 602 P.2d 731]*, the court observed, " 'What constitutes "unfair competition" . . . under any given set of circumstances is a question of fact . . . .' [Citation.]" The determination of unfair competition often involves a weighing process that requires a full examination of the relevant facts. As stated in *Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1167 [93 Cal.Rptr.2d 439]*, " 'the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim--a weighing process quite similar to the one enjoined on us by the law of nuisance. . . .' [Citations.]"

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[4] See United States *Constitution, article I, section 10* (impairment of contracts clause), Fifth Amendment (takings clause), and Fourteenth Amendment (due process clause).

CA(4c)[] **(4c)** We have relied, however, on an analysis of the legislative policy of *Health and Safety Code section 33035* **[***24]** in rejecting the theory of unfair competition based on remediation of blighted areas. Our conclusion that this theory does not state a claim under the unfair competition law represents a conclusion of law rather than the sort of factual finding that cannot be resolved by demurrer. Appellant was given an opportunity to state an alternative theory under the antitrust laws, which might indeed present a fact-intensive issue, but made no legally cognizable effort to do so. As in *Khoury v. Maly's of California (1993) 14 Cal.App.4th 612, 619 [17 Cal.Rptr.2d 708]*, the demurrer was properly sustained because the complaint "identifies no particular section of the statutory scheme [of antitrust laws] which was violated and fails to describe with any reasonable particularity the facts supporting violation."

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

Stein, Acting P. J., and Margulies, J., concurred.

Appellant's petition for review by the Supreme Court was denied March 19, 2003.

End of Document

Sunny Isle Shopping Ctr., Inc. v. Xtra Super Food Ctrs., Inc.

United States District Court for the District of the Virgin Islands, Division of St. Croix

December 20, 2002, Decided

Civ. No. 1998-154

Reporter

237 F. Supp. 2d 606 *; 2002 U.S. Dist. LEXIS 24478 **; 2003-1 Trade Cas. (CCH) P73,987

Sunny Isle Shopping Center, Inc., a Virgin Islands Corporation, Plaintiff, v. Xtra Super Food Centers, Inc., d/ b/ a Pueblo, a Delaware Corporation, and Kmart Corporation, Defendants.

Prior History: *Sunny Isle Shopping Ctr., Inc. v. Xtra Super Food Ctrs., Inc., 2002 U.S. Dist. LEXIS 27069 (D.V.I., July 24, 2002)*

Disposition: [1]** Defendant's motion to dismiss claim granted. Defendant's motion for partial summary judgment denied.

Core Terms

restrictive covenant, lease, shopping center, food, Landlord, courts, anti trust law, grocery, tenant, antitrust claim, consumption, antitrust violation, standing to bring, premises, rent, summary judgment, Islands, relevant market, competitor, antitrust, damages, space, terms, unenforceable, off-premises, restraining, genuine, retail

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In considering a defendant's motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court may dismiss the complaint if it appears certain the plaintiff cannot prove any set of facts in support of its claims which would entitle it to relief. The court accepts as true all well-pled factual allegations, drawing all reasonable inferences in the plaintiff's favor.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

See *11 V.I. Code Ann. § 1503(1)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN3[] **Standing, Requirements**

With regard to standing, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

See *11 V.I. Code Ann. § 1503(2)*.

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

HN5[] **Private Actions, Standing**

See *11 V.I. Code Ann. § 1507(2)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Legislation > Interpretation

HN6[] **Public Enforcement, State Civil Actions**

11 V.I. Code Ann. § 1518 states that when the language of this chapter is the same or similar to the language of a federal ***antitrust law***, the district court in constructing this chapter shall follow the construction given to the federal law by the federal courts. The Virgin Islands Antimonopoly Law, *11 V.I. Code Ann. § 1501 et seq.*, evidences the intention that it be applied in a manner consistent with the Sherman Act and other federal antitrust claims.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN7[] **Clayton Act, Claims**

Similar to *11 V.I. Code Ann. § 1507(2)*, § 4 of the Clayton Act provides authority for a private antitrust cause of action in an antitrust suit. *15 U.S.C.S. § 15* states that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. Despite this broad language, the courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Antitrust standing is narrower than the statute's wording indicates. Realizing that a liberal interpretation of § 4 of the Clayton Act could afford relief to all persons whose injuries are causally related to an antitrust violation, courts have impressed a standing doctrine so as to confine the availability of § 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN8[] **Private Actions, Standing**

The United States Court of Appeals for the Third Circuit holds that in determining a party's standing to bring antitrust suits a court must look to: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause the harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages. Courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Restrictive covenants are not per se unlawful, provided they are reasonable in scope and economically justified. Courts will uphold restrictive covenants so long as they are reasonable in scope and do not unduly burden trade. The complete bar on competition needs to be reasonably related to the promisee's interest in protecting his own business. Restrictive covenants are not per se invalid.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Market Definition, Relevant Market**

Many courts have refused to grant standing to commercial landlords who bring antitrust claims against their tenants. Courts generally look to the competitors and consumers in the relevant market when determining the proper parties to an antitrust action. Congress enacted the Sherman Act to protect the economic freedom of participants in the relevant market.

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

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

Torts > ... > General Premises Liability > Types of Premises > Stores

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

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN11[] **Private Actions, Remedies**

With regard to standing, a party may demonstrate that its injury falls within the protective realm of antitrust laws if it can show that its injury is inextricably intertwined with the injury the defendant sought to inflict on the relevant market.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN12[] **Private Actions, Standing**

With regard to standing, Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages from the injury to his business or property.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN13[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. Only evidence admissible at trial shall be considered and the court must draw all reasonable inferences therefrom in favor of the nonmovant.

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN14[] **Types of Damages, Liquidated Damages**

Liquidated damages are typically used when the amount fixed by contract approximates actual loss and proof of loss is difficult to determine.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Lease Provisions

Contracts Law > Remedies > Reformation

HN15[] **Types of Contracts, Covenants**

Although the Restatement (Second) of Property, Landlord & Tenant recognizes the validity of non-competition agreements and provides a tenant remedies for a landlord's breach of its promise not to lease space to a competitor of the tenant, it acknowledges instances where all or part of the restrictive covenant may be invalid. In those situations, however, the Restatement permits, where possible, the reformation of the agreement to carry out the intent of the parties and to protect the tenant's interests against competition.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > ... > Lease Agreements > Damages > General Overview

Real Property Law > Landlord & Tenant > Landlord's Remedies & Rights > Power to Reenter & Terminate

Real Property Law > ... > Lease Agreements > Commercial Leases > General Overview

HN16[] **Types of Contracts, Lease Agreements**

A tenant may terminate the lease upon the landlord's breach and recover damages or continue the lease and obtain equitable and legal relief.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Conditions & Provisions > General Overview

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Contracts Law > Remedies > Election of Remedies

HN17[] **Types of Contracts, Covenants**

The United States Court of Appeals for the First Circuit has detailed three approaches a court has at its disposal when dealing with potentially unreasonable restrictive covenants. One method, the "all or nothing" approach, is to void the restrictive covenant in its entirety if any provision of the agreement is unenforceable. Another method, known as the "blue pencil" approach, permits a court to excise the unreasonable provision from an agreement and enforce the restrictive covenant so long as the covenant remains grammatically coherent. The final approach, known as "partial enforcement," enables the court to modify the terms of the restrictive covenant to make the agreement reasonable unless the circumstances indicate bad faith or deliberate overreaching on the part of the parties to the contract.

Counsel: A. Jeffrey Weiss, Esq., St. Thomas, U.S.V.I., for plaintiff.

John K. Dema, Esq., St. Croix, U.S.V.I., for Pueblo, defendant.

Andrew C. Simpson, Esq., St. Croix, U.S.V.I., for Kmart, defendant.

Judges: Thomas K. Moore, District Judge.

Opinion by: Thomas K. Moore

Opinion

[*607] MEMORANDUM

Defendant Xtra Super Food Centers, Inc. ["defendant" or "Pueblo"] moves to dismiss parts of the complaint of plaintiff Sunny Isle Shopping Center, Inc. ["plaintiff" or "Sunny Isle"] and for summary judgment. Sunny Isle opposes defendant's motion. For the reasons set forth below, I will grant Pueblo's motion to dismiss Count I of Sunny Isle's complaint, but I will deny defendant's motion for summary judgment in regard to Counts II and V. [1] In addition, I will exercise my discretion to modify the scope of the area covered by the restrictive covenant.

[2] I. FACTUAL BACKGROUND**

Plaintiff owns and operates the Sunny Isle Shopping Center as well as other commercial properties on St. Croix. Defendant is a successor tenant at the shopping center, where it operates a supermarket. Originally, Sunny Isle entered into a lease with the Grand Union Company ["Grand Union"] on or about October 17, 1969 to operate a supermarket at the shopping center. [2] The lease negotiated with Grand Union contained a restrictive covenant at paragraph 10, which provided that

> during the term of this lease and any extension thereof the Landlord shall not use nor permit to be used any other part **[*608]** of the shopping center or any other property directly or indirectly owned or controlled by the Landlord within a radius of five miles of the shopping center for the sale of food for consumption off premises, except (1) bakery, kiosks, hamburger stands, and snack bars located within the shopping center .... If this covenant be violated, the Tenant, without liability of forfeiture of its terms, may withhold payment of any or all

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[1] Pueblo made no motion to dismiss Sunny Isle's remaining claims, namely Count III (waiver) and Count IV (estoppel).

[2] The initial term of the lease was 21 years, but permitted Grand Union to extend the lease term four times, with each extension having a term of five years.

> installments of rent accruing during such violation. The total amount of such rents thus withheld shall be deemed to be liquidated **[**3]** damages ....

On November 30, 1995, Grand Union assigned its lease to Pueblo with the consent of Sunny Isle. That same day the terms of the lease, including paragraph 10, were extended until January 31, 2012.

Some time in 1997, Pueblo learned that Sunny Isle intended to lease space at the shopping center to the Kmart Corporation ["Kmart"]. [3] **[**4]** Knowing that Kmart traditionally sells groceries and believing that such conduct would violate the terms of its agreement with Sunny Isle, Pueblo notified Sunny Isle of its intent to enforce the restrictive covenant. Notwithstanding this announcement, Sunny Isle proceeded to negotiate a lease of the space to Kmart on December 4, 1997, which permitted Kmart to sell food for consumption off-premises despite Pueblo's exclusive arrangement. [4]

On June 17, 1998, Sunny Isle filed suit in this Court for a declaration that the restrictive covenant violates the subsequently enacted Virgin Islands Antimonopoly Act (Count I), that the restrictive covenant is unenforceable (Count II), that Pueblo has waived any defenses by failing to enforce paragraph 10 before 1998 (Count III), that Pueblo is estopped from enforcing the restrictive covenant because of its failure to object to prior violations of paragraph 10 (Count IV), and that the lease's provision enabling Pueblo to withhold rent is a penalty (Count V). After Kmart began operations in September 1998, Pueblo discovered that Kmart was in fact using its store to sell groceries and began to withhold rent as provided by paragraph **[**5]** 10. Sunny Isle responded on September 10th by filing a notice to evict Pueblo for failure to pay rent. Pueblo immediately sought a temporary restraining order to prevent its eviction, which this Court granted on October 8, 1999. Sunny Isle and Pueblo later stipulated to several extensions of the temporary restraining order through November 15, 2000.

During the pendency of this suit, Kmart voluntarily agreed to cease selling most of its food products. Upon learning that Kmart had ceased selling a number of the prohibited items, Pueblo began to pay rent again from November of 2000 until August of 2002, at which time it now argues that Kmart has continued to violate the terms of the restrictive covenant by selling snack items and beverages. Sunny Isle disputes Pueblo's interpretation of paragraph 10 of the lease on whether these items violated the prohibition on the sale of foods for **[*609]** consumption off-premises and responded on August 7, 2002, by giving Pueblo another notice to quit the leased premises for failure to pay rent. Pueblo thereafter moved to enforce the October 9, 1999 temporary restraining order halting any eviction. While that motion was pending, Sunny Isle filed an action **[**6]** for forcible entry and detainer in the Territorial Court to evict Pueblo, which Pueblo has removed to this Court. As further proceedings are pending in that separate action, Pueblo's motion to enforce the October 9, 1999 temporary restraining order is not ripe for decision. This Court has diversity jurisdiction under section 22(a) of the Revised Organic Act of 1954 [5] and *28 U.S.C. § 1332*.

II. DISCUSSION

A. Sunny Isle Has No Standing to Bring Claims Under the Virgin Islands Antimonopoly Act

Pueblo moves to dismiss Count I of plaintiff's complaint pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* on the ground that Sunny Isle lacks standing to sue **[**7]** under the Virgin Islands Antimonopoly Act, 11

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[3] The space Sunny Isle intended to lease to Kmart was originally used by F.W. Woolworth Company ["Woolworth"]. Woolworth had entered into a lease with Sunny Isle on September 15, 1969 to operate a "department store business." According to Sunny Isle, Woolworth, in addition to operating its premises as a department store, marketed and sold "an extension line of food products for consumption off premises." Woolworth terminated its lease with Sunny Isle in 1997.

[4] Paragraph 29 of the Sunny Isle-Kmart lease provides in part: "Landlord acknowledges that [Kmart] intends to sell food for consumption off premises, and hereby agrees notwithstanding the Pueblo Exclusive, [Kmart] shall have the right to sell food for consumption off premises." Sunny Isle also agreed to defend at its own cost Kmart's right to sell such foods.

[5] *48 U.S.C. § 1612(a)*. The complete Revised Organic Act of 1954 is found at *48 U.S.C. §§ 1541-1645 (1995 & Supp.2001)*, *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2001) (preceding V.I. CODE ANN. tit. 1).

V.I.C. §§ 1501-1518. ***HN1***[] In considering defendant's motion to dismiss under *Rule 12(b)(6)*, the Court "may dismiss [the] complaint if it appears certain the plaintiff cannot prove any set of facts in support of its claims which would entitle it to relief." *See* *Bostic v. AT&T of the Virgin Islands, 166 F. Supp. 2d 350, 354 (D.V.I. 2001)* (internal quotations omitted); *see also* *Julien v. Committee of Bar Examiners, 34 V.I. 281, 286, 923 F. Supp. 707, 713 (D.V.I. 1996)*; *FED. R. CIV. P. 12(b)(6)*. The Court accepts as true all well-pled factual allegations, drawing all reasonable inferences in the plaintiff's favor. *See* *Bostic, 166 F. Supp. 2d at 354*; *Julien, 34 V.I. at 286-87, 923 F. Supp. at 713*.

The viability of Count I centers on whether Sunny Isle has standing to bring an antitrust claim against Pueblo. Pueblo argues that Sunny Isle has no standing because it is not a competitor of Pueblo and, thus, its injury is not the type of injury antitrust laws were designed to prevent. *See* ***HN2***[] *11 V.I.C. § 1503(1)* ("Every person shall be deemed to have committed a violation of this **[**8]** chapter who shall: Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person."); *see also* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1996)* (***HN3***[] "[A] private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'"). Sunny Isle counters that this competitor requirement is only limited to *section 1503(1)* and that its injury is covered by *section 1503(2)*, which gives it standing to pursue this antitrust claim. *See* ***HN4***[] *11 V.I.C. § 1503(2)* ("Every person shall be deemed to have committed a violation of this chapter who shall: By Contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce."). The language of *section 1503(2)* on its face appears to give Sunny Isle standing to bring this action under *section 1507* of the Virgin Islands Antimonopoly Act. *See* ***HN5***[] *11 V.I.C. § 1507(2)* ("Any person who has been injured in his business or property, or is threatened with **[**9]** such injury, by a violation of *section 1503* ... may maintain an action in the District Court for **[*610]** damages, or for an injunction, or both, against any person who has committed such violation."). My inquiry does not end here, however, as I must look to the interpretation of federal ***antitrust law*** to see whether federal courts would find that Sunny Isle has standing to sue. *See id.* ***HN6***[] *§ 1518* ("When the language of this chapter is the same or similar to the language of a Federal ***Antitrust Law***, the District Court in constructing this chapter shall follow the construction given to the Federal Law by the Federal Courts."); *see also* *Sea Air Shuttle Corp. v. Virgin Islands Port Auth., 782 F. Supp. 1070, 1077 (D.V.I. 1991)* (noting the Virgin Islands Antimonopoly Law "evidences the intention that [it] be applied in a manner consistent with the Sherman Act and other federal antitrust claims."). Therefore, to decide whether Sunny Isle has standing to pursue its territorial antitrust claim, I must determine whether it would have standing to pursue its claim under federal law.

HN7[] Similar to our *section 1507(2)*, *section 4* of the Clayton Act provides authority for a private antitrust **[**10]** cause of action in an antitrust suit. *See* *15 U.S.C. § 15* ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ...."). Despite this broad language, the "courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)* (collecting cases); *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 274 (3d Cir. 1999)* ("Antitrust standing, however, is narrower than the statute's wording indicates."). Realizing that a liberal interpretation of *section 4* of the Clayton Act

> could afford relief to all persons whose injuries are causally related to an antitrust violation ...[,] courts have impressed a standing doctrine so as to confine the availability of *section 4* relief only to those individuals whose protection is the fundamental purpose of the antitrust laws.

Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 505 (3d Cir. 1976) **[**11]** (quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir. 1973)*.

HN8[] The Third Circuit Court of Appeals has adopted the following approach in determining a party's standing to bring antitrust suits. Accordingly, a court must look to:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause the harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993); *see also* Cromar, 543 F.2d at 506 (noting that "courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the **[**12]** relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff."). A review of these factors confirms that Sunny Isle does not have standing to bring its antitrust claims.

[*611] First, plaintiff's claimed injuries were not caused solely by any anti-competitive actions of Pueblo. Even though Pueblo is seeking to enforce the restrictive covenant, Sunny Isle's actions are just as significant a cause of the injuries about which it complains. Plaintiff obviously knew of the terms of the restrictive covenant before it leased space to K-Mart, yet Sunny Isle rented the space to K-Mart anyway. Moreover, Sunny Isle had freely agreed to this restrictive covenant when it first negotiated the lease with Grand Union. Thus, even if Pueblo's conduct in trying to enforce this restrictive covenant has been a cause in fact of Sunny Isle's injury, I cannot find that Pueblo's actions are the legal or proximate cause of plaintiff's claimed injury. *See* Acme Mkts., Inc. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230, 1237 (D.N.J. 1995) (finding that defendant grocery store's enforcement of restrictive covenant was not the proximate **[**13]** cause of harm to commercial landlord, but that the likely proximate cause of the injury stemmed from prior anchor tenant's decision to quit the premises).

Second, there is no evidence that Pueblo intended to harm Sunny Isle. I can find no evidence of "retaliatory and bad faith" conduct by Pueblo in its letter of April 27, 1998 to Sunny Isle notifying Sunny Isle of Pueblo's intent to enforce the restrictive covenant in the event that Kmart opened a store in the defendant's shopping center and sold groceries. As numerous courts before me have opined, ***HN9***[] restrictive covenants are not per se unlawful, provided they are reasonable in scope and economically justified. *See* id. at 1242 (noting that courts will uphold restrictive covenants so long as they are reasonable in scope and do not unduly burden trade); *see also* Liautaud v. Liautaud, 221 F.3d 981, 987 (7th Cir. 2000) ("The complete bar on competition needs to be reasonably related to the promisee's interest in protecting his own business."); Static Control Components, Inc. v. Darkprint Imaging, Inc., 135 F. Supp. 2d 722, 729 (M.D.N.C. 2001) (noting that restrictive covenants are not per **[**14]** se invalid). It is evident, given its size and location, that St. Croix may have problems attracting businesses to the island. One way Crucian entrepreneurs can attract desirable businesses to the island is through restrictive covenants as economic inducements. *See* Acme Mkts., 890 F. Supp. at 1242. Accordingly, Pueblo's act of seeking to enforce its restrictive covenant-a covenant freely agreed to by Sunny Isle-was a reasonable course of action designed to protect its business interests rather than an intent to harm plaintiff. Moreover, I note that the April 27th letter evidences that Pueblo did not object to Kmart opening a store on plaintiff's premises, but merely reiterated its intent to enforce the restrictive covenant if Kmart attempted to sell food at this location. Again, this fact demonstrates Pueblo's desire to protect its own business interests and not some evil plan to harm Sunny Isle.

Third, Sunny Isle is not the most direct victim. ***HN10***[] Many courts have refused to grant standing to commercial landlords who bring antitrust claims against their tenants. *See* id. at 1230 (refusing to grant landlord standing in suit to declare restrictive covenant **[**15]** unenforceable); *see also* Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995) (shopping mall owners did not have standing to bring antitrust claim against grocery store tenant); Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1087 (6th Cir. 1983) (lessor of commercial premises did not have antitrust standing to challenge alleged violation of section 2 of the Sherman Act in the retail grocery industry); Rosenberg v. Cleary, Gottlieb, Steen & Hamilton, 598 F. Supp. 642, 645-46 (S.D.N.Y. 1984) (holding that the owner of a supermarket development did not have standing under section **[*612]** 4 of the Clayton Act to challenge restraint of trade in retail grocery business). Courts generally look to the competitors and consumers in the relevant market when determining the proper parties to an antitrust action. *See* Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 539, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). The relevant market here is the grocery retail market. As Sunny Isle is not involved in this market in any capacity, it is not a proper party. *See* id. at 538 **[**16]** (noting that Congress enacted the Sherman Act to protect "the economic freedom of participants in the relevant market"). [6]

Fourth and finally, the injury suffered by Sunny Isle is not the type Congress intended "to redress in providing a private remedy for violations of the antitrust laws." *Blue Shield of Va. v. McCready, 457 U.S. 465, 483, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. ***HN11***[] A party may demonstrate that its injury falls within the protective realm of antitrust laws if it can show that its injury is "inextricably intertwined with the injury the [defendant] sought to inflict on … the … [relevant] market." *Id. at 484*. As noted above, the relevant market here is **[**17]** the retail grocery market, in which Sunny Isle has suffered no injury. Sunny Isle creatively argues that it has been injured in the retail shopping center market. Basically, Sunny Isle argues that the restrictive covenant covering a five mile radius unnecessarily restricts its ability to lease commercial space. Assuming without deciding that this restrictive covenant may have affected Sunny Isle's ability to lease commercial real estate and thus caused it harm, such injury would be "no more than a 'tangential by-product' of an antitrust violation in the grocery market," assuming such a violation exists here. *See* Rosenberg, 598 F. Supp. at 645 (rejecting plaintiff's attempt to create a second market); *see also McCready, 457 U.S. at 477* (***HN12***[] "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages from the injury to his business or property."). Therefore, I find that Sunny Isle does not have standing to bring its antitrust claims and I must dismiss Count I of its complaint.

B. Genuine Issues of Material Fact Preclude Summary Judgment in Pueblo's Favor

Pueblo **[**18]** has also moved for summary judgment on Counts II (unenforceable restrictive covenant) and V (unenforceability of penalty provision) of plaintiff's complaint. ***HN13***[] Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*; *see also Sharpe v. West Indian Co., 118 F. Supp. 2d 646, 648 (D.V.I. 2000)*. The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp., 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I. 1999)*, *aff'd in part and rev'd in part,* 260 F.3d 228, 43 V.I. 361 (3d Cir. 2001). Only evidence admissible at trial shall be considered and the Court must draw all reasonable inferences therefrom in favor of the nonmovant. **[*613]** *See id.* A review of this matter reveals that genuine issues of material fact still remain, thus precluding **[**19]** a grant of summary judgment in Pueblo's favor.

First, the language of the lease pertaining to the prohibition of the sale of "food for consumption off-premises" is ambiguous. Despite defendant's claim that this is a standard industry term, I have no evidence before me at this time to support such a claim. As there is still a question of fact regarding what exactly the lease prohibits, Count II is not ripe for decision.

Likewise, there is a material question of fact whether Pueblo has actually suffered any loss from Kmart's activities. ***HN14***[] Liquidated damages are typically used when the amount fixed by contract approximates actual loss and proof of loss is difficult to determine. *See RESTATEMENT (SECOND) OF CONTRACTS § 356*. [7] As the evidence before me is unclear whether Pueblo has suffered any financial losses since Kmart's arrival or whether any such losses can be attributed to Kmart's sales of food products, I am unable to determine at this time whether the rent-withholding provision challenged in Count V is enforceable.

[6] Sunny Isle argues that it alone has the ability and desire to bring this antitrust action. In particular, it notes that K-Mart has been unwilling to enter into the fray and consumers cannot realistically be expected to bring an action. Whether or not either of these are true, they are beside the point.

[7] Absent local law to the contrary, the restatements provide the substantive law of the Virgin Islands. *See* 1 V.I.C. § 4.

[20] C. Modifying Scope of Restrictive Covenant**

Throughout its pleadings, Pueblo has requested that I limit my review of the geographic area covered by the restrictive covenant to the plaintiff's shopping center. Sunny Isle, at oral argument, countered that the law in this jurisdiction prohibits the re-writing of contracts, citing the Territorial Court's opinion in *Virgin Islands Diving Schools/ Supplies, Inc. v. Dixon, 20 V.I. 54 (Terr. Ct. 1983)*. Despite plaintiff's claims to the contrary, the law in this jurisdiction does not bar the modification of restrictive covenants and I will therefore amend the lease provision to make it reasonably apply to the facts of this case.

HN15[] Although *section 7.2 of the Restatement (Second) of Property, Landlord & Tenant* ["Restatement"] recognizes the validity of non-competition agreements and provides a tenant remedies for a landlord's breach of its promise not to lease space to a competitor of the tenant, [8] it acknowledges instances where all or part of the restrictive covenant may be invalid. In those situations, however, the Restatement permits, where possible, the reformation of the agreement to carry out the intent of **[**21]** the parties and to protect the tenant's interests against competition. *See* *RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT, § 7.2 cmt. b*. For example, *comment b of section 7.2* provides that

> the promise of the landlord may be invalid because the restriction on competition is to go on for too long a period of time, or because it relates to too broad an area, or because it restricts the landlord from entering businesses that do not compete with the tenant. In those cases, if the promise is severable and hence valid for a shorter period of time, or in relation to a less broad area, or in regard to competition with certain businesses, and such validity gives reasonable protection to the tenant against competition, the severed invalid portion is disregarded in applying the rule of this section. In this situation, no one is engaging in a competing business as long as there is performance within the revised limits of the promise.

[*614] *See id.* (emphasis added). Thus, the Restatement clearly acknowledges a court's ability to amend the terms of a restrictive covenant. Whether or not the Territorial Court chose to reform the contract in *Dixon* is neither binding **[**22]** on this Court nor dispositive of the issue.

Moreover, I note that the Restatement's approach is in line with what other courts have done when faced with restrictive covenants. *See* *Unihealth v. U.S. Healthcare, 14 F. Supp. 2d 623, 639 (D.N.J. 1998)* (noting the right of court's to "fashion an equitable remedy by modifying" a restrictive covenant"); *Hillard v. Medtronic, Inc., 910 F. Supp. 173, 177 (M.D. Pa. 1995)* (noting that Pennsylvania law allows its courts to reform and enforce restrictive covenants). In particular, ***HN17***[] the First Circuit Court of Appeals has detailed three approaches a court has at its disposal when dealing with potentially unreasonable restrictive covenants. One method, the "all or nothing" approach, is to void the restrictive covenant in its entirety **[**23]** if any provision of the agreement is unenforceable. *See* *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992)* Another method, known as the "blue pencil" approach, permits a court to excise the unreasonable provision from an agreement and enforce the restrictive covenant so long as the covenant remains grammatically coherent. *See id.* The final approach, known as "partial enforcement," enables the court to modify the terms of the restrictive covenant to make the agreement reasonable unless "the circumstances indicate bad faith or deliberate overreaching on the part of the [parties to the contract]." *See id.* [9]

I reject the "all or nothing" approach and find that I can "blue pencil" paragraph 10 to render it reasonable in scope and yet still grammatically coherent. As noted above, paragraph 10 of the lease provides in part:

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[8] *RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT, § 7.2* (noting that ***HN16***[] a tenant may terminate the lease upon the landlord's breach and recover damages or continue the lease and obtain equitable and legal relief).

[9] The Restatement has acknowledged these three approaches in the Reporter's Note to *Section 7.2*. *See* *id. at 256-58*.

> During **[**24]** the term of this lease and any extension thereof the Landlord shall not use nor permit to be used any other part of the shopping center **or** any other property directly or indirectly owned or controlled by the Landlord within a radius of five miles of the shopping center for the sale of food for consumption off premises[.]

The agreement thus first prohibits Sunny Isle from permitting any of its tenants to sell food for off-premises consumption within the shopping center. It then goes on to prohibit such sales on any of Sunny Isle's properties within five miles of the shopping center. These two clauses are separate and severable. I find that the prohibition on allowing other tenants to sell food for off-premises consumption within the Sunny Isle Shopping Center itself does not unreasonably restrict competition. *See* *J.C. Penney Co. v. Giant Eagle, Inc., 813 F. Supp. 360 (W.D. Pa. 1992)*, *aff'd, 995 F.2d 217 (3d Cir. 1993)*, *permanent inj. aff'd,* *85 F.3d 120 (3d Cir. 1996)* Since this is the only area covered by paragraph 10 that is factually before me, I need not reach the reasonableness of the restriction as extended **[**25]** to the five-mile area outside the shopping center. Applying my blue pencil to accommodate the facts of this case, paragraph 10 reads as follows:

> During the term of this lease and any extension thereof the Landlord shall not use nor permit to be used any other part of the shopping center for the sale of food for consumption off premises.

As this amended language is grammatically coherent and gives reasonable protection **[*615]** to Pueblo against competition as contemplated by the parties at the time the lease was executed, I will uphold the validity of the restrictive covenant as confined to the Sunny Isle Shopping Center.

III. CONCLUSION

Sunny Isle has no standing to bring its antitrust claim because it is neither a competitor nor consumer in the relevant market. Therefore, I will dismiss Count I of plaintiff's complaint. Counts II and V, however, will remain as genuine issues of material fact exist. Finally, I will limit the scope of paragraph 10 of the lease to the Sunny Isle Shopping Center itself.

ENTERED this 20th day of December, 2002.

For the Court

/s/

Thomas K. Moore

District Judge

ORDER

For the reasons set forth in the foregoing Memorandum of **[**26]** even date, it is hereby

ORDERED that defendant Pueblo's motion to dismiss Count I of the complaint (Docket No. 130) is **GRANTED;** it is further

ORDERED that defendant Pueblo's motion for summary judgment on Counts II and V (Docket No. 130) is **DENIED;** and it is further

ORDERED that paragraph 10 validly restricts defendant Sunny Isle Shopping Center, Inc. as follows:

> During the term of this lease and any extension thereof the Landlord shall not use nor permit to be used any other part of the shopping center for the sale of food for consumption off premises.

ENTERED this 20th day of December, 2002.

For the Court

/s/

Thomas K. Moore

District Judge

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Wallis v. Giromex, Inc.

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

December 23, 2002, Filed

D039168

Reporter
2002 Cal. App. Unpub. LEXIS 11954 *

RICHARD WALLIS, Plaintiff and Appellant, v. GIROMEX, INC. et al., Defendants and Respondents.

Notice: **[*1]** NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977. COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

Prior History: APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. GIC754831. William C. Pate, Judge.

Disposition: Affirmed.

Core Terms

subsidiary, overtime, disclosures, employees, entities, summary judgment, cause of action, antitrust, anti trust law, exchange rate, customers, trial court, purposes, grant summary adjudication, price fixing, labor law, defendants', electronic, separate entity, transmittal, violations, nonsuit, controlling interest, grant a nonsuit, allegations, contends

Judges: HALLER, J. WE CONCUR: BENKE, J., Acting P.J., McDONALD, J.

Opinion by: HALLER

Opinion

Richard Wallis brought a *Business and Professions Code section 17200* action against two corporations and several individuals, alleging defendants committed labor law and antitrust violations. After granting summary adjudication on the antitrust claims and a nonsuit on the labor law claims, the court entered judgment in defendants' favor. Wallis contends the court erred in granting the summary adjudication and in granting the nonsuit. We reject these contentions, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Richard Wallis filed a complaint against two California **[*2]** businesses: (1) Giromex, Inc., a company that provides electronic transfer of funds between the United States and Mexico; and (2) Casas De Cambio El Gallo (Casas), a company that provides check cashing and other financial services and serves as Giromex's agent for purposes of the electronic fund transfers. Wallis also named as defendants three of Giromex's officers and directors. Wallis alleged two causes of action: (1) Giromex violated labor laws in failing to pay overtime pay and in hiring undocumented workers; and (2) Giromex and Casas engaged in unlawful price fixing and failed to provide proper disclosure of prices and exchange rates. Wallis brought the action exclusively under *Business and Professions Code section 17200* (*section 17200*) because his standing to assert the violations was based solely on his status as a representative of the general public.

Defendants moved for summary judgment on both causes of action.

The court denied the motion with respect to the alleged labor law violations, but granted summary adjudication on the allegations regarding price fixing and proper rate disclosures. With respect to the price fixing/disclosure issues, the court based its ruling **[*3]** on three alternative grounds: (1) the evidence established that Giromex owns a controlling interest in Casas, and therefore the entities are not sufficiently separate to come within the proscription of the antitrust price fixing laws; (2) the undisputed evidence established that defendants complied with applicable laws and disclosure requirements; and (3) Wallis failed to provide evidence to show the parties engaged in price fixing.

The court then conducted a trial on Wallis's cause of action claiming Giromex violated labor laws relating to overtime wages and undocumented workers. After Wallis's counsel presented Wallis's entire case which consisted of the brief testimony of two witnesses, the court granted defendants' motion for nonsuit. In a written order, the court stated that: "1. The plaintiff has not presented any evidence to establish that there were any employees of [defendants] with improper immigrant status. [P] 2. The plaintiff has not presented any evidence to establish that [defendants] have not paid overtime wages to any of [defendants'] employees."

Based on its summary adjudication and nonsuit rulings, the court entered final judgment in defendants' favor. **[*4]** Wallis appeals.

DISCUSSION

I. *Summary Adjudication*

A. *Price Fixing Cause of Action*

In his complaint, Wallis alleged that Giromex and Casas entered into an agreement to fix prices charged for the electronic transfer of money from the United States to Mexico and the applicable exchange rate. Wallis claimed this conduct constituted an unlawful restraint of trade in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) and therefore violated California's unfair competition law (*§ 17200*).

In moving for summary judgment, defendants argued Wallis could not prevail on this claim because Giromex is not subject to antitrust laws for entering into price agreements with its subsidiary. In support, defendants presented the declaration of Giromex's president, stating that Casas is a subsidiary of Giromex and Giromex owns a "controlling interest" in Casas. Based on this evidence, defendants argued that the two entities are not independent economic actors and therefore they did not engage in improper or illegal price fixing as a matter of law. In response, Wallis did not proffer any evidence to show Giromex and Casas are independent actors, but instead argued **[*5]** that defendants did not meet their summary judgment burden on this issue. Wallis reasserts this argument on appeal.

Applicable Law

An indispensable element of any action for a Cartwright Act violation is proof of a "combination of resources of two or more *independent interests* for the purpose of restraining competition and preventing market competition." (*GHII v. MTS (1983) 147 Cal. App. 3d 256, 266, 195 Cal. Rptr. 211*, italics added; see *Bus. & Prof. Code, § 16720*.) Thus, a plaintiff must plead and prove an illegal combination between two *separate* entities. (*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 189* (*Freeman*).)

In interpreting analogous federal ***antitrust law***, the courts focus on the substance, rather than the form, of the relationship in determining whether two entities are separate and therefore prohibited from engaging in anticompetitive behavior. (*Copperweld Corp. v. Independence Tube Corp. (1984) 467 U.S. 752, 772-773, 81 L. Ed. 2d 628, 104 S. Ct. 2731* (*Copperweld*).) Under this functional approach, "whether separate entities are present requires analysis not of the corporate **[*6]** formalities but of the economic realities under which the entities operate . . . . The mere existence of separate incorporated entities does not automatically suffice to show that these entities are capable of combining; instead the entities must have separate and independent interests that are combined by the unlawful conspiracy." (*Freeman, supra, 77 Cal.App.4th at p. 189*; see *Copperweld, supra, 467 U.S. at pp. 770-771*; *City of Mt. Pleasant, Iowa v. Assoc. Elect. Co-op. (8th Cir. 1988) 838 F.2d 268, 275*.) In *Freeman*, this court applied Copperweld's "economic realities" test to analyze the separate entity issue under a state Cartwright Act claim. (*Freeman, supra, 77 Cal.App.4th at pp. 189-194*; accord, *Lake Communications, Inc. v. ICC Corp. (9th Cir. 1984) 738 F.2d 1473, 1480*, overruled on other grounds by *Nghiem v. NEC Electronic, Inc. (9th Cir. 1994) 25 F.3d 1437, 1442*.) [1]

[*7] Wallis contends that even assuming *Copperweld*'s analysis should be applied to a state antitrust claim, defendants failed to meet their summary judgment burden to show that Giromex and Casas are not separate entities because defendants' supporting declaration merely states that Giromex owns a "controlling interest" in Casas.

In *Copperweld*, the United States Supreme Court held that a parent and *wholly owned* subsidiary could not conspire with one another for purposes of the antitrust laws because the two entities have "a complete unity of interest" and "common" objectives. (*Copperweld, supra, 467 U.S. at p. 771*.) The court reasoned that the antitrust laws are intended to prevent "two or more entities that previously pursued their own interests separately [from] combining to act as one for their common benefit," but coordinated action between a parent and wholly owned subsidiary does not pose this same risk because "there is no sudden joining of economic resources that had previously served different interests . . . ." (*Id. at pp. 769-771*.)

Although no California court has yet addressed the issue, several federal courts have since applied **[*8]** *Copperweld*'s reasoning to conclude that the antitrust laws are inapplicable to a parent and subsidiary even if the subsidiary is not wholly owned. (See, e.g., *Coast Cities Truck Sales, Inc. v. Navistar Internat. Transportation Co. (D. N.J. 1995) 912 F. Supp. 747, 764-766* (*Coast Cities*); *Siegel Transfer, Inc. v. Carrier Express, Inc. (3rd Cir. 1995) 54 F.3d 1125, 1131-1135* (*Siegel Transfer*); *Williams v. I.B. Fischer Nevada (9th Cir. 1993) 999 F.2d 445, 447*; *Bell Atlantic Business Systems v. Hitachi Data Systems Corp. (N.D. Cal. 1994) 849 F. Supp. 702, 707* (*Bell Atlantic*); but see *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc. (D. Or. 1987) 677 F. Supp. 1477*; see generally Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability* (2001) *68 U.Chi.L.Rev. 1401*.) Although these courts have not always expressed consistent reasoning, the essential logic underlying their holdings is the idea that even where a parent does not wholly own a subsidiary, the parent's legal control over the subsidiary means that the parent can assert full control over the **[*9]** subsidiary if the subsidiary ceases to act in the parent's best interest and, therefore, the essential factors of "unity of interest" and "common corporate consciousness" will necessarily be present despite the lack of a 100 percent ownership. (See *Bell Atlantic, supra, 849 F. Supp. at pp. 705-706*.)

Analysis

Under these principles, defendants argue that they met their summary judgment burden because a "controlling interest" in a corporation is equivalent to legal control over the entity. Wallis counters that because it is the substance, and not the form, of the relationship that determines the question whether corporate entities are sufficiently independent for antitrust purposes, the inquiry is necessarily a factual one that cannot be decided on a

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[1] Though recognizing that the federal ***antitrust law*** (the Sherman Act) is not always directly probative of the legislative intent underlying the Cartwright Act, California courts frequently look to judicial interpretations of the Sherman Act as helpful authority because of the similarity in language and purpose in the federal and state statutes. (*Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 541, fn. 2*.)

summary judgment, particularly in this case where defendants made only a minimal and conclusory factual showing.

We agree the separate entity issue may be affected by numerous factors in addition to a corporation's legal control of its subsidiary, such as the actual relationship between the parent and subsidiary, the makeup of the parent's and subsidiary's boards of directors, and the contractual obligations **[*10]** and economic incentives between the two entities. (See *Coast Cities*, *supra*, 912 F. Supp. 2d at p. 765 [applying a factual analysis]; but see *Bell* *Atlantic, supra, 849 F. Supp. at p. 706* [holding it unnecessary to conduct a factual inquiry if the facts show parent has legal control of its subsidiary].) However, after consideration of the entire record in this case, we conclude defendants met their initial summary judgment burden to show Giromex and Casas were not separate entities for purposes of antitrust liability. Based on persuasive federal authority, the fact that Giromex owns a controlling interest in Casas shows that Giromex can legally control its subsidiary, and therefore that the interests of the two companies are sufficiently aligned to be exempt from antitrust liability. (*Bell Atlantic, supra, 849 F. Supp. at p. 706*.) Once defendants proffered the evidence showing that Giromex had legal--and therefore actual--control of its subsidiary, it was Wallis's burden to come forward with facts showing that the two entities should be treated as separate for purposes of the antitrust laws. Although Wallis had full opportunity to **[*11]** conduct discovery and come forward with evidence creating a triable issue of fact showing the two corporations are separate, he failed completely to do so. On this record, the court properly granted summary adjudication on the price-fixing claim.

This conclusion is bolstered when we examine Wallis's pleading, which is the necessary framework for analyzing a summary judgment motion. (See *Brantley v. Pisaro (1996) 42 Cal.App.4th 1591, 1602*.) In *Freeman*, this court applied well-settled pleading rules to hold that a complaint asserting a Cartwright Act violation must allege specific facts supporting the claim that the two allegedly offending entities are functionally separate. (*Freeman, supra, 77 Cal.App.4th at pp. 192, fn. 21* & 196.) However, not only did Wallis fail to assert these allegations, he affirmatively alleged that Casas was Giromex's agent for purposes of the activity claimed to be wrongful--fixing prices for electronic transfers.

This agency allegation is fatal to Wallis's antitrust claim. It is well settled that a conspiracy for purposes of the antitrust laws does not occur if the two alleged coconspirators stand in a principal-agent relationship **[*12]** for purposes of the alleged illegal acts. (See *Siegel Transfer, supra, 54 F.3d at p. 1135*; *Palmer v. Gotta Have It Golf Collectibles, Inc. (S.D.Fla. 2000) 106 F. Supp. 2d 1289, 1299-1301*; see also *Black v. Bank of America (1994) 30 Cal.App.4th 1, 4-6*.) Although an exception to this rule may exist where the agent is acting "'for personal reasons'" (*Siegel Transfer, supra, 54 F.3d at p. 1135*), this exception does not apply here because Wallis never alleged that Casas was acting to further its own economic interests to benefit from the alleged restraint. To the extent Wallis now attempts to argue that Giromex and Casas were not in fact engaged in an agency relationship with respect to the alleged wrongful conduct, a party may not successfully oppose a summary judgment by contradicting the allegations of his pleadings, particularly where the party has not moved to amend its complaint and has not come forward with any facts to support those new and inconsistent theories. (See *Brown v. City of Fremont (1977) 75 Cal. App. 3d 141, 146, 142 Cal. Rptr. 46*.)

A "party moving for summary judgment bears the **[*13]** burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850* (*Aguilar*).) A defendant satisfies this burden by showing "'one or more elements of' the 'cause of action' . . . 'cannot be established,' or that 'there is a complete defense'" to that cause of action. (*Ibid*.) Further, in meeting this burden, the defendant may rely on admissions of material fact made in the opposing party's pleadings. (*24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199, 1211*.) "'Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.'" (*Aguilar, supra, 25 Cal.4th at p. 849*.)

Applying these principles on a de novo review of the record, we conclude defendants satisfied their burden of persuasion to show the Cartwright Act's price-fixing prohibitions do not apply to Giromex and its subsidiary, and

Wallis failed to meet his burden to show a triable issue of fact on this issue. **[*14]** Thus, the trial court properly granted summary adjudication on this claim. [2]

B. *Alleged Disclosure Violations*

Wallis next argues the trial court erred in granting summary adjudication on his claim that defendants violated antitrust laws and applicable statutes when defendants failed to fully disclose rate information to electronic fund transfer **[*15]** customers.

In his complaint, Wallis alleged defendants improperly inflated the amounts charged for electronic transfer of money because they failed to disclose the "actual rate" at which the dollars and pesos were exchanged.

In moving for summary judgment on this claim, defendants presented the declaration of Giromex's president, Juan Lebrija, who stated:

"[Giromex] engages in the business of receiving money for the purpose [of] its transmittal to foreign countries. [Giromex] is licensed by the California Superintendent of Banks and subject to the regulations of *California Financial Code § 1815*.

"When [Giromex] receives monies from customers in the United States for the purpose of transmittal to Mexico, [Giromex] provides the customer a receipt which describes the rate of exchange for the transaction, the amount of the commission charged for the transmittal, and the net exchange after all fees and commissions have been deducted. The receipt provided to customers reflects the actual exchange rate at which customer's dollars are exchanged for foreign currency. This receipt form has been approved by the California Department of Financial Institutions in accordance with **[*16]** *California Financial Code § 1809*. . . .

"[Giromex] charges a flat fee for the transmission of monies abroad. The flat fee is increased when monies transmitted are in excess of specific amounts. The fees charged by [Giromex] are contained in a published schedule prominently displayed at each branch location.

"[Giromex] daily calculates exchange rates for the transmittal of funds abroad. The calculation of exchange rates is based on the daily market rate, competitors' rates, and other factors. The exchange rate is prominently displayed at each branch location."

This evidence satisfied Giromex's summary judgment burden to show the disclosures and prices charged for electronic transmittal of funds were proper. Lebrija stated that Giromex provides each customer a receipt which describes the rate of exchange for the transaction, the amount of the commission charged for the transmittal, and the net exchange after all fees and commissions have been deducted. Lebrija further stated that the receipt provided to the customers reflects the actual exchange rate at which customers' dollars are exchanged for foreign currency. This evidence was sufficient to show that Wallis could not prove **[*17]** the claim alleged in his complaint that the actual rates were not disclosed to customers. (See *Fin. Code, § 1815*.)

In response to this evidence, Wallis did not come forward with any affirmative facts that showed a failure to disclose. By failing to present any evidence to support his allegations, Wallis failed to meet his summary judgment burden of persuasion. To show the trial court nonetheless erred in granting summary adjudication on this claim, Wallis relies exclusively on *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1243-1244* for the proposition that regulatory approval of rates does not immunize companies from price-fixing antitrust liability.

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[2] We recognize that *section 17200* may apply even when the conduct does not violate a specific statute if the conduct is nonetheless "unfair" or "fraudulent." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180- 187, 973 P.2d 527*.) However, Wallis has based his *section 17200* claim solely on a Cartwright Act violation, and has never argued defendants' conduct was otherwise unfair or fraudulent. In any event, there is nothing in Wallis's complaint that would support a theory that defendants may be liable for unfair or fraudulent conduct if the alleged price-fixing conduct did not violate antitrust laws.

Although we agree with this principle, it is not helpful to Wallis's position in this case. In moving for summary judgment, defendants did not rely solely on the fact that the applicable regulatory agency had approved their rate disclosures, instead they presented affirmative evidence that they in fact made the proper disclosures. Moreover, unlike *Cellular Plus*, this particular cause of action does not involve price-fixing, rather it concerns the claim that proper disclosures were not made. **[*18]** In such instance, complying with the disclosure requirements of a regulatory agency may at least provide prima facie evidence that disclosures were proper. The burden then shifts to the plaintiff to present some evidence showing that the disclosures made were not proper under the law or were otherwise unfair. Wallis's failure to do so precludes his entitlement to a trial on this issue and therefore supports a summary adjudication on the disclosure claim.

The court properly granted summary adjudication on Wallis's claim asserting violations of antitrust laws and disclosure rules.

II. *Nonsuit*

Wallis next contends the trial court erred in granting a nonsuit on his causes of action relating to Giromex's alleged labor law violations.

Wallis did not attend trial. His counsel called two witnesses: Gloria Peralta and defendant Juan Carlos Lebrija. Peralta, trial counsel's wife, had previously brought an unsuccessful action asserting the same allegations contained in Wallis's complaint.

Peralta testified to the following: She worked for Giromex from October 1998 to April 1999 as a payroll clerk in the accounting department. Peralta entered the payroll information for three employees, **[*19]** Christina Martinez (an accounts receivable clerk), Manuel Aguilera (an accountant), and Nancy Hogg (a cash reconciliation clerk). These employees earned approximately eight to nine dollars an hour and each employee worked "on average" about one to two hours overtime. [3] While Peralta was working for Giromex, the management changed the pay structure from hourly wages to salary for many employees. After she protested this change, Peralta was maintained as an hourly employee and was paid for all of her own overtime work. Peralta testified that when she entered the payroll for the three employees after December 1998, they were not paid time and a half for any overtime hours worked.

The second witness called by Wallis's counsel, defendant Lebrija, testified that Giromex never refused to pay Hogg or Martinez overtime pay for overtime hours worked.

After the two witnesses testified, defendants moved for a nonsuit. The court granted the motion, **[*20]** finding that Peralta's testimony did not establish a basis for relief under *section 17200* because there was no evidence Giromex failed to pay overtime wages to any of its employees or that Giromex had hired any employees with improper immigrant status.

Wallis contends the trial court erred in granting a nonsuit on the overtime pay issue because Peralta testified that the accounting department employees were not paid for overtime work after the company changed the pay structure from hourly wage to an annual salary. However, in support, Wallis cites only to page 12 of the Reporter's Transcript, where Peralta testified that the three identified employees were not paid time and a half for overtime after December 1998 and before March 1999. This evidence is not sufficient to support a finding that those employees in fact worked overtime from December 1998 through March 1999, or that they were not adequately compensated for their time worked. The fact that Peralta testified that "on average" these employees worked one to two hours overtime is not sufficient to show that the employees did so during the three months. The trial court correctly found there was a failure of proof on the overtime **[*21]** pay claim.

With respect to the immigration law issue, Wallis does not dispute that there was insufficient evidence to support this claim, but instead argues that he was improperly precluded from proving this claim because the trial court erred in excluding Peralta's hearsay testimony. During direct examination, Peralta was asked whether she knew how

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[3] Peralta did not say whether these hours were per week or per month.

employee Miriam Villegas was paid for her work. Peralta answered "by Mexican check." The court granted defendants' motion to strike that answer based on a lack of foundation. Wallis's counsel then asked Peralta whether Villegas ever told Peralta how she was paid for her work. The court sustained a hearsay objection to that question. Peralta apparently would have testified that Villegas said that she was paid by a "Mexican check."

Wallis contends the court erred by excluding the evidence on hearsay grounds because the "testimony was intended to show the operative facts of the offense alleged . . . ." However, the fact that Villegas was paid by a "Mexican check" is not an operative fact of the *section 17200* cause of action. At most it was an evidentiary fact that is potentially relevant to the issue of Villegas's citizenship status. The **[*22]** court did not err in refusing to permit Peralta to testify about something Villegas had told her because there was no applicable hearsay exception. In any event, the alleged error is not prejudicial because, as Wallis admits in his appellate brief, later in her testimony Peralta was permitted to testify that five or six other employees were paid by a check from a Mexican bank. Further, even assuming the fact that Villegas was paid by a "Mexican check," this fact, in and of itself, is insufficient to support a *section 17200* claim.

"'A motion for nonsuit . . . concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is no substantial evidence to support a judgment in the plaintiff's favor. [Citations.]' [Citation.]" (*Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal.App.4th 672, 677*, italics omitted.)

Applying these standards on an independent review **[*23]** of the record, we concur in the trial court's conclusion that even assuming the truth of Wallis's evidence, the proffered facts did not support a *section 17200* claim based on the alleged labor law violations. Thus, the court properly granted the nonsuit on this claim.

DISPOSITION

Judgment affirmed. Wallis to bear defendants' costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, J., Acting P.J.

McDONALD, J.

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Pepsico, Inc. v. Coca-Cola Co.

United States Court of Appeals for the Second Circuit

October 11, 2001, Argued ; December 24, 2002, Decided

Docket No. 00-9342

Reporter

315 F.3d 101 *; 2002 U.S. App. LEXIS 27238 **; 2003-1 Trade Cas. (CCH) P73,914

PEPSICO, INC., Plaintiff-Appellant, v. THE COCA-COLA COMPANY, Defendant-Appellee.

Subsequent History: **[**1]** As Amended January 21, 2003.

Prior History: Appeal from the September 25, 2000, judgment in the United States District Court for the Southern District of New York (Loretta A. Preska, District Judge), granting appellee's motion for summary judgment.

PepsiCo, Inc. v. Coca-Cola Co., 114 F. Supp. 2d 243, 2000 U.S. Dist. LEXIS 13361 (S.D.N.Y. 2000).

Disposition: The judgment of the district court is affirmed.

Core Terms

district court, fountain, syrup, customers, relevant market, distributors, prices, monopolization, horizontal, bottler, loyalty, monopoly power, summary judgment, Toys, market power, Sherman Act, delivery, cases, submarket, products, market share, competitors, delivering, nonmoving, cheaper, indicia, chain

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN1[ ] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate only where, examining the evidence in the light most favorable to the nonmoving party, the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In the context of antitrust cases, however, summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces. Although all reasonable inferences will be drawn in favor of the non-movant, those inferences must be reasonable in light of competing inferences of acceptable conduct.

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

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] Burdens of Proof, Movant Persuasion & Proof

In a motion for summary judgment, the burden on the moving party may be discharged by "showing" -- that is pointing out to a district court -- that there is an absence of evidence to support the nonmoving party's case. When the moving party meets this burden, the burden shifts to the nonmoving party to come forward with specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] Sherman Act, Claims

In order to state a claim for monopolization under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, a plaintiff must establish: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN5[] Attempts to Monopolize, Elements

To state an attempted monopolization claim under [§ 2](15 U.S.C.S. § 2) of the Sherman Act, a plaintiff must establish: (1) that a defendant has engaged in predatory or anti-competitive conduct; with (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Monopolies & Monopolization, Attempts to Monopolize**

In a claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, as an initial matter, it is necessary to define the relevant product and geographic market a defendant is alleged to be monopolizing.

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

HN7[] **Regulated Practices, Market Definition**

For purposes of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, a relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered. Products will be considered to be reasonably interchangeable if consumers treat them as "acceptable substitutes."

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

HN8[] **Regulated Practices, Market Definition**

For purposes of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, the "practical indicia" enunciated in Brown Shoe for determining the existence of a separate submarket are: (1) unique production facilities; (2) specialized vendors; (3) distinct customers; (4) sensitivity to price changes; (5) industry or public recognition of the proposed submarket as a separate economic entity; and (6) peculiar characteristics and uses of the product.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Sherman Act, Claims

For purposes of § 2 (15 U.S.C.S. § 2) of the Sherman Act, a relevant market definition is not a necessary component of a monopolization claim. Monopoly power may be proven by: (1) direct proof of anticompetitive effect; and (2) defining a relevant market and showing excess market share there. A relevant market definition simply serves as a surrogate for market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN10[] Monopolies & Monopolization, Actual Monopolization

The core element of a monopolization claim is market power, which is defined as the ability to raise price by restricting output. The more competition a company faces, the less it can control prices because competitors will undercut its prices to secure market share. Conversely, a company that can exclude competition can sustain its ability to control prices and thereby maintain its market power. The pertinent inquiry in a monopolization claim, then, is whether a defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power. In the absence of direct measurements of a defendant's ability to control prices or exclude competition, however, market power necessarily must be determined by reference to the "area of effective competition" - which, in turn, is determined by reference to a specific, defined "product market."

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

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

HN11[] Market Definition, Relevant Market

Defining a relevant market is generally a necessary component of analyzing a monopolization claim. Once a relevant market is determined, a defendant's share in that market can be used as a proxy for market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] Monopolies & Monopolization, Actual Monopolization

For purposes of § 2 (15 U.S.C.S. § 2) of the Sherman Act, a market share between 50 percent and 70 percent can occasionally show monopoly power, but only if other factors support the inference.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Sherman Act, Claims**

To prove a violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, a plaintiff must show a combination or some form of concerted action between at least two legally distinct economic entities that constituted an unreasonable restraint of trade either per se or under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

HN14[] **Horizontal Refusals to Deal, Sherman Act**

For purposes of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors. The United States Supreme Court decision in NYNEX requires an agreement between or among direct competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN15[] **Antitrust & Trade Law, Sherman Act**

For purposes of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, a horizontal agreement is a prerequisite in a group boycott case.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN16[] **Antitrust & Trade Law, Sherman Act**

A claim under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, under the rule of reason requires a showing of injury to competition in the relevant market. Where appellate court has failed properly to define the relevant market, there can be no violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, under a rule of reason analysis.

Counsel: Thomas F. Cullen, Jr., Washington, D.C. (Robert H. Rawson, Jr., Jones, Day, Reavis & Pogue, Washington, D.C.; Richard C. Weisberg, Merion, Pa.; Randolph S. Sherman, Richard M. Steuer, Kaye Scholer LLP, New York, N.Y.; Gerard W. Casey, PepsiCo, Inc., Purchase, N.Y., on the brief), for Plaintiff-Appellant.

Jonathan M. Jacobson, New York, N.Y. (Daniel F. McInnis, Akin, Gump, Strauss, Hauer & Feld, L.L.P., New York, N.Y.; James M. Koelemay, Jr., Joel M. Neuman, Kenneth L. Glazer, The Coca-Cola Company, Atlanta, Ga.; Michael C. Russ, Jeffrey S. Cashdan, King & Spalding, Atlanta, Ga., on the brief), for Defendant-Appellee.

Judges: Before: NEWMAN and KEARSE, Circuit Judges. [*]

Opinion

[*103] PER CURIAM:

Plaintiff-appellant PepsiCo, Inc. ("PepsiCo") appeals from the judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, District Judge), entered September 25, 2000, granting summary judgment in favor of defendant-appellee The Coca-Cola Company ("Coca-Cola") on PepsiCo's claims that (1) Coca-Cola's enforcement of loyalty provisions in its distributorship agreements with independent food service distributors ("IFDs") that prohibit the IFDs from delivering PepsiCo products to any of their customers constitutes monopolization and attempted monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*; and *(2)* the inclusion and enforcement of the loyalty provisions in Coca-Cola's agreements **[*104]** amount to concerted action by Coca-Cola and the IFDs in restraint of trade, in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. Having thoroughly reviewed the record and the parties' arguments, we affirm the district court's grant of summary judgment in favor of Coca-Cola and, except where noted, adopt the district court's reasoning set forth in its thorough and persuasive opinion. **[**3]** See *PepsiCo, Inc. v. Coca-Cola Co., 114 F. Supp. 2d 243 (S.D.N.Y. 2000)*.

Background

Coca-Cola and PepsiCo, in addition to selling their famous beverages in bottles and cans, sell fountain syrup to numerous customers, including large restaurant chains, movie theater chains, and other "on-premise" accounts. PepsiCo and Coca-Cola bid for agreements to supply fountain syrup and negotiate a price directly with the customer, and then pay a fee to a distributor to deliver the product. Historically, PepsiCo delivered fountain syrup primarily through bottler distributors; Coca-Cola delivered fountain syrup through bottler distributors as well as IFDs, who can offer customers one-stop shopping for all of their restaurant supplies. In the late 1990s, PepsiCo decided it

[*] Honorable John M. Walker, Jr., Chief Judge of the United States Court of Appeals for the Second Circuit, originally a member of the panel, recused himself after oral argument, and the appeal is being disposed of by the remaining members of the panel, who are in agreement. See Second Circuit Local Rule § 0.14(b); Murray v. Nat'l Broad. Co., 35 F.3d 45, 47, 48 (2d Cir.1994).

wanted to start delivering fountain syrup via IFDs, but when it sought to do so, Coca-Cola began to enforce the so-called "loyalty" or "conflict of interest" policy contained in its agreements with IFDs, which provides that distributors who supply customers with Coca-Cola may not "handle[] the soft drink products of [PepsiCo]." *PepsiCo, 114 F. Supp. 2d at 245*. IFDs who breach the loyalty **[**4]** policy risk termination by Coca-Cola. As the district court observed, "a distributor subject to the loyalty policy can supply all its customers with either Pepsi or Coke, not both. Because distributors are given an all or nothing choice, a customer of a distributor subject to Coca-Cola's loyalty policy who wants Pepsi will have to go elsewhere to get it." *Id. at 245-46*.

PepsiCo filed this antitrust complaint alleging that the loyalty provisions constituted an illegal monopolization and attempted monopolization under *Section 2* of the Sherman Act. Pepsico later amended its complaint to add a claim that Coca-Cola and the IFDs had entered into an illegal horizontal conspiracy to restrain trade, in violation of *Section 1* of the Sherman Act.

The district court denied Coca-Cola's motion to dismiss, finding that PepsiCo's allegations, if supported by evidence, could make out a monopolization claim. Following eighteen months of aggressive discovery, however, the district court granted Coca-Cola's motion for summary judgment, largely on the basis that PepsiCo had failed to introduce sufficient evidence on any of its claims to raise a triable issue. *Id. at 245, 258 n.7*. **[**5]** This appeal followed.

Discussion

I. Legal Standard

HN1[] We review the district court's grant of summary judgment de novo. *Beckford v. Portuondo, 234 F.3d 128, 130 (2d Cir. 2000)* (per curiam). ***HN2***[] Summary judgment is appropriate only where, "examining the evidence in the light most favorable to the nonmoving party," *Adjustrite Sys., Inc. v. Gab Bus. Servs., Inc., 145 F.3d 543, 547 (2d Cir. 1998)*, the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," *Fed. R. Civ. P. 56(c)*. In the context of antitrust cases, however, summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces. See *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 **[*105]** (2d Cir. 1998)*. Although all reasonable inferences will be drawn in favor of the non-movant, those inferences "must be reasonable in light of competing inferences of acceptable conduct." Id.

Moreover, as noted by the district court, ***HN3***[] "'the burden on the moving party may be discharged by "showing" -- that is pointing out to the district **[**6]** court -- that there is an absence of evidence to support the nonmoving party's case.'" *PepsiCo, 114 F. Supp. 2d at 247* (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; see also *Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)* ("In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim."). When the moving party meets this burden, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*.

II. *Section 2* of the Sherman Act

As noted by the district court, ***HN4***[] in order to state a claim for monopolization under *Section 2* of the Sherman Act, a plaintiff must establish "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic **[**7]** accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; see *Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997)*. ***HN5***[] To state an attempted monopolization claim, a plaintiff must establish "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; *Tops Mkts., 142 F.3d at 99-100*.

A. The Relevant Market

HN6[] As an initial matter, it is necessary to define the relevant product and geographic market Coca-Cola is alleged to be monopolizing. See *AD/SAT v. Associated Press, 181 F.3d 216, 226 (2d Cir. 1999)*; cf. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. The parties do not dispute that the relevant geographic market is the United States. *HN7*[] A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced **[**8]** -- price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)* ("du Pont"). Products will be considered to be reasonably interchangeable if consumers treat them as "acceptable substitutes." *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 46 (D.D.C. 1998)* ("The relevant market consists of all of the products that the Defendants' customers view as substitutes to those supplied by the Defendants.").

In its complaint, PepsiCo defined the relevant market as the "market for fountain-dispensed soft drinks distributed through [IFDs] throughout the United States." Pepsico sought to narrow this market definition on summary judgment by confining it to customers with certain characteristics, specifically "large restaurant chain accounts that are not 'heavily franchised' with low fountain 'volume per outlet.'" *PepsiCo, 114 F. Supp. 2d at 246*. The district court rejected this definition on the grounds that 1) it was not substantiated **[*106]** by the evidence; and 2) it was not supported by the practical indicia enunciated in Brown Shoe.

Reviewing the evidence submitted **[**9]** on summary judgment, the district court held that fountain syrup delivered by bottler distributors was an "acceptable substitute" for fountain syrup delivered by IFDs - and thus had to be included in the relevant product market - because none of the numerous customers who were deposed or submitted affidavits for the summary judgment motion said that the availability of delivery via IFDs was determinative of its choice of fountain syrup. See *id. at 250*. Tellingly, in PepsiCo's own survey of 99 major customers, the availability of one-stop-shopping IFDs was ranked 35 out of 38 in importance among various factors they considered in choosing a fountain syrup. See *id. at 252*. PepsiCo's internal strategy documents, moreover, repeatedly explain that Coca-Cola has several advantages over PepsiCo in the fountain syrup business, only some of which relate to flexible delivery methods.

The district court also rejected PepsiCo's argument that the relevant market should be confined to certain customers, an argument the district court characterized as "PepsiCo['s attempt] to define the elements of the relevant market to suit its desire for high Coca-Cola market **[**10]** share, rather than letting the market define itself." *Id. at 249*. The district court found that, although the affidavits and exhibits submitted on the summary judgment motion showed that many customers have a preference for receiving fountain syrup through IFDs because of the advantages provided by one-stop-shopping, these customers did not constitute a discrete group, but rather were included in various groups of fountain syrup customers. *Id. at 250*. Indeed, franchisees, a group PepsiCo sought to exclude from the market definition, purchased 63 percent of the Coca-Cola fountain syrup delivered by IFDs. See *id. at 257*. Identical types of customers expressed preferences for either IFDs or bottler distributors, and most customers stated that method of delivery was simply one of several non-determinative factors they considered in deciding which fountain syrup to stock. [1] See *id. at 250*. We agree with the district court that PepsiCo failed to provide evidentiary support for its market definition restricted by distributor and customer.

[11]** The district court's second basis for rejecting PepsiCo's argument that bottler distributors should not be included in the relevant market was that none of *HN8*[] the "practical indicia" enunciated in *Brown Shoe, 370 U.S.*

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[1] PepsiCo, citing *AD/SAT, 181 F.3d at 228*, maintains that fountain syrup delivered by IFDs is the relevant market if enough customers have sufficient preference for that product to raise prices "significantly above the competitive level," despite the fact that others might shift to substitutes at supracompetitive prices. PepsiCo also contends that none of the many customers who continue to use or have recently converted to bottler distributors for delivery of fountain syrup, such as Au Bon Pain, Arthur Treacher's, Sbarros, Hard Rock Cafe, Planet Hollywood, and major franchise groups of Wendy's, Arby's, and Subways, are "similarly situated" to the type of customer that prefers systems distribution. Although this argument, in theory, may have merit, we agree with the district court that PepsiCo failed to adduce evidence to support its application in this case.

at 325, for determining the existence of a separate submarket would support a finding that fountain syrup delivered by IFDs constitutes a separate submarket. Those indicia are: (1) unique production facilities; (2) specialized vendors; (3) distinct customers; (4) sensitivity to price changes; (5) industry or public recognition of the proposed submarket as a separate economic entity; and (6) peculiar characteristics and uses of **[*107]** the product. Id.; see also PepsiCo, 114 F. Supp. 2d at 252-53. With respect to indicia (1) and (2), PepsiCo has not contested the district court's conclusion that fountain syrup delivered by IFDs uses the same production facilities as fountain syrup delivered by other methods and does not require specialized vendors. With respect to indicia (3) through (6), we agree with the district court that they weigh against a finding of a submarket, although we are not as persuaded as was the District Court as to indicium **[**12]** (6). Specifically, the evidence established that there is no discrete class of customers that has such a strong preference for IFDs that it would not consider substitutes if other factors (especially price) changed; the competition between PepsiCo and Coca-Cola demonstrates that there is a high sensitivity to price change between IFD-delivered and bottler-distributor-delivered fountain syrup; and there is no industry recognition of fountain syrup delivered by IFDs as a separate market. See PepsiCo, 114 F. Supp. 2d at 253-54, 257-58. As PepsiCo's former CEO conceded: "Never ever would I think of or refer to a delivery method as a market." See id. at 253. PepsiCo itself stated in its brief that "competition for chain [fountain syrup] business is fought by Coca-Cola and PepsiCo in head-to-head bidding at the retailer level. Once a chain account selects its fountain supplier, the systems distributor acts solely as a conduit, delivering syrup along with the other items the account uses." In short, as the district court observed, "the evidence shows that Coca-Cola viewed PepsiCo as a competitor, and vice versa, and that both they and fountain syrup **[**13]** purchasers viewed systems distribution as a competitive advantage, not a separate market." PepsiCo, 114 F. Supp. 2d at 254. Compare Cardinal Health, 12 F. Supp. 2d at 49 & n.10 (finding submarket of drug wholesalers where defendants' documents showed that they "clearly viewed their economic competition to be from their fellow drug wholesalers, and not from the other sources as suggested by the defendants at trial").

B. Monopoly Power

No doubt disappointed by the district court's rejection of its market definition, PepsiCo argues on appeal that the district court erred in insisting that the relevant market had to be defined before it could determine whether Coca-Cola had monopoly power. PepsiCo points to du Pont, 351 U.S. at 393, and argues that in that case the court rejected the government's definition of the relevant market and, instead, focused on direct evidence of monopoly power, viz. "the power to control prices or exclude competition." Id. at 391; see also id. at 393, 403-04. We agree with PepsiCo that there is authority to support its claim that ***HN9***[↑] a relevant market definition is not a necessary **[**14]** component of a monopolization claim. See, e.g., id. at 391; Tops Mkts., 142 F.3d at 98 (noting that monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market"); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) (noting two ways to prove market power: (1) direct proof of anticompetitive effect and (2) defining a relevant market and showing excess market share there); 2A Phillip E. Areeda, et al., Areeda & Hovenkamp's ***Antitrust Law***, P 531a, at 156 (2002) ("Areeda & Hovenkamp") (stating that a relevant market definition simply serves as a surrogate for market power).

HN10[↑] The core element of a monopolization claim is market power, which is defined as "the ability to raise price by restricting output." Areeda & Hovenkamp, supra, P 501, at 85. The more competition **[*108]** a company faces, the less it can control prices because competitors will undercut its prices to secure market share. See generally id. Conversely, a company that can exclude competition can sustain its ability to control prices **[**15]** and thereby maintain its market power. See id. at 85-86. The pertinent inquiry in a monopolization claim, then, is whether the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power. [2] In the absence of direct measurements of a defendant's ability to control prices or exclude competition, however, market power necessarily must be determined by reference to the "area of effective competition" - which, in turn, is determined by reference to a specific, defined "product market." Brown Shoe, 370 U.S. at 324; see Areeda & Hovenkamp, supra, P 531a, at 156. Thus, as Coca-Cola points out, numerous cases state that ***HN11***[↑] defining a relevant market is generally a necessary

[2] For a more extensive discussion of these principles, see generally Areeda & Hovenkamp, supra, P 530.

component of analyzing a monopolization claim. Once a relevant market is determined, the defendant's share in that market can be used as a proxy for market power.

[16]** More to the point, however, PepsiCo has failed to adduce direct evidence that Coca-Cola has market power (i.e., that it can control prices or exclude competition). To the contrary, the result of PepsiCo's stepped-up attack on the fountain syrup market resulted in numerous bidding wars between PepsiCo and Coca-Cola. PepsiCo was successful in obtaining several accounts, and in those cases where it lost out to Coca-Cola, it nevertheless forced Coca-Cola to drastically reduce its price and profitability to keep the account. As the district court stated, moreover, it is "most compelling, [that] no customer testified that Coca-Cola's loyalty policy prevented the customer from obtaining Pepsi." *PepsiCo, 114 F. Supp. 2d at 251*.

PepsiCo, relying on *United States v. ALCOA, 148 F.2d 416, 426-27 (2d Cir. 1945)* (L. Hand, J.), asserts that because the cost of IFDs is allegedly lower than bottlers, Coca-Cola - by controlling this distribution channel - has the opportunity to charge supracompetitive prices. We agree with the district court that this argument fails because no evidence was proffered to establish that it is cheaper for Coca-Cola to deliver **[**17]** fountain syrup through IFDs than through other delivery methods. Indeed, the only evidence we have found concerning Coca-Cola's distribution costs indicates that the costs vary depending on geography and volume, and that bottler distribution is actually a cheaper delivery method at higher volumes and/or remote locations. PepsiCo's "proof" that IFDs are cheaper for Coca-Cola is its assertion that IFDs are cheaper for PepsiCo, and that if PepsiCo had access to IFDs, it could lower its prices to its customers. Coca-Cola counters that the lower cost of IFDs for PepsiCo is the result of PepsiCo's recent renegotiation of its bottler distributor contracts, and that before 1997 -- when PepsiCo used bottlers almost exclusively -- bottler distribution was a cheaper delivery method for PepsiCo. PepsiCo has not disputed this allegation.

That PepsiCo could lower prices if it used IFDs does not create a triable issue with respect to whether Coca-Cola charges supracompetitive prices. As the bidding wars show, moreover, Coca-Cola's alleged control of the distribution process **[*109]** has not immunized its prices from PepsiCo's aggressive challenges. We have previously rejected as speculative similar attempts **[**18]** to argue that monopoly power is established by showing that "competitive advantages . . . could have resulted in potentially higher prices," in the absence of proof "that prices were actually higher." *Tops Mkts., 142 F.3d at 96*. Thus, the district court could not have ignored the definition of the relevant market in deciding this case because PepsiCo failed to proffer direct evidence that Coca-Cola has monopoly power or a dangerous probability of achieving it.

In sum, we conclude, as did the district court, that PepsiCo's *Section 2* antitrust claim fails because fountain syrup distributed by IFDs is not a separate submarket. Moreover, PepsiCo has not sought to argue that Coca-Cola has monopoly power in the broader fountain syrup market. Nor could it; according to PepsiCo's own figures, in 1998, the year it filed this lawsuit, IFDs accounted for only 50.2 percent [3] of all fountain syrup deliveries by the three largest suppliers (Coca-Cola, PepsiCo, and Dr. Pepper/Seven-Up), and Coca-Cola had only a 64 percent share of the total fountain syrup sales by these three suppliers. [4] Absent additional evidence, such as an ability to control prices or exclude competition, **[**19]** a 64 percent market share is insufficient to infer monopoly power. See *Tops Mkts., 142 F.3d at 99* (holding that ***HN12***[] "a share between 50% and 70% can occasionally show monopoly power," but only if other factors support the inference); *ALCOA, 148 F.2d at 424* (L. Hand, J.) (expressing doubt that 64 percent market share is enough to constitute a monopoly).

[3] We note that Coca-Cola's figures exclude service distributors that serve only one company's stores (so-called "captive" or "dedicated" distributors) from the IFD category on the ground that, according to Coca-Cola, its loyalty provisions are inapplicable to captive distributors (i.e., because they only carry the fountain syrup their one client purchases). By Coca-Cola's calculations, IFDs accounted for only 32.3 percent of all fountain syrup deliveries in 1998. Because we are reviewing the district court's grant of summary judgment, we use the figures most favorable to PepsiCo. See *Adjustrite Sys., 145 F.3d at 547*.

[4] PepsiCo repeatedly asserts that Coca-Cola has an 80 percent or 84 percent market share, but fails to explain precisely what market it is referring to or how the 80 percent or 84 percent figures were derived.

[20]** Accordingly, we hold that the district court properly granted summary judgment in favor of Coca-Cola on PepsiCo's *Section 2* monopolization and attempted monopolization claims.

III. *Section 1* of the Sherman Act

As the district court noted, ***HN13***[] to prove a *Section 1* violation of the Sherman Act, a plaintiff must show "'a combination or some form of concerted action between at least two legally distinct economic entities' that 'constituted an unreasonable restraint of trade either per se or under the rule of reason.'" *Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 103 (2d Cir. 2000)* (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 542 (2d Cir. 1993))*.

The gist of PepsiCo's *Section 1* claim is that because Coca-Cola assured each of the IFDs that it would uniformly enforce similar loyalty agreements with other IFDs, Coca-Cola's loyalty policy is, in reality, a per se illegal horizontal conspiracy among the IFDs and Coca-Cola to boycott PepsiCo. On appeal, PepsiCo argues that the district court erred by requiring that the *Section 1* violation be "attributable solely" to concerted actions of the IFDs. This **[**21]** argument is based on a misreading of the district court's opinion. In fact, the district court's decision relied on the Supreme **[*110]** Court's admonition that ***HN14***[] "'precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.'" *PepsiCo, 114 F. Supp. 2d at 259* (quoting *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 134, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998))*. The district court properly interpreted NYNEX as requiring "an agreement between or among direct competitors," and found that PepsiCo had failed to adduce any evidence of a horizontal agreement among the IFDs. Id.

The district court correctly rejected PepsiCo's *Section 1* claim on the ground that it failed to proffer sufficient evidence of a horizontal agreement among the IFDs. PepsiCo offered no evidence of direct communications among the IFDs; its "offer of proof" of an agreement was simply that Coca-Cola assured the IFDs that the loyalty policy would be uniformly enforced and encouraged them to report violations. We agree with the district court that this was insufficient evidence of a horizontal agreement to withstand summary judgment.

[22]** In addition, all of the cases relied on by PepsiCo to argue that it established a "hub and spokes" conspiracy are inapposite or distinguishable. Most of these cases concerned price-fixing, see, e.g., *United States v. Parke, Davis & Co., 362 U.S. 29, 32, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)* (price fixing among drug wholesalers); *Interstate Cir. v. United States, 306 U.S. 208, 214, 83 L. Ed. 610, 59 S. Ct. 467 (1939)* (price-fixing agreement among movie distributors and exhibitors), which is a per se violation regardless of whether the restraint is vertical or horizontal. See *Bus Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 735-36, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* ("Economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels."); *Capital Imaging, 996 F.2d at 543* (noting that "most cases fall outside the[] narrow, carefully demarcated categories held to be illegal per se," such as horizontal and vertical price-fixing, division of a market into territories, certain tying arrangements, **[**23]** and some group boycotts) (citing cases). Contrary to PepsiCo's reading, NYNEX, as discussed above, squarely held that ***HN15***[] a horizontal agreement is a prerequisite in a group boycott case.

The most factually similar case, Toys "R" *Us, Inc. v. FTC, 221 F.3d 928*, is distinguishable for several reasons. First, whereas here we are dealing with exclusive distributorships - which are presumptively legal - Toys "R" Us involved a demand by Toys "R" Us of the top ten toy manufacturers that they refuse to sell certain toys to warehouse clubs. *Id. at 931-32*. Thus, unlike here, the established effects of the Toys "R" Us agreement was to limit output (because the warehouse clubs could not obtain the same products from other sources) and to protect Toys "R" Us from competitive prices, both clearly proscribed anticompetitive effects. *Id. at 936, 937*; see generally Areeda & Hovenkamp, supra, P 530. In addition, the court's bases for holding that a horizontal agreement had been established were that: the manufacturers abruptly shifted their practice of selling to the warehouse clubs; there was direct evidence of communication among the manufacturers; **[**24]** and there was evidence that they only agreed to the demand on the condition that their competitors also agree to go along with it. *Id. at 932-33, 935-36*. Such strong evidence of a horizontal agreement is lacking here. Finally, but we believe significantly, although there was more evidence of a horizontal agreement in Toys "R" Us than here, the court in that case repeatedly pointed out that the evidence could be viewed either way, **[*111]** but that the court was obliged to affirm because the applicable standard of review was the highly deferential "substantial evidence" of agency review. *Id. at 930, 934-35*. Viewing Toys "R" Us as representing a minimum evidentiary threshold, we conclude that the district court correctly determined that PepsiCo failed to create a jury issue as to a per se *Section 1* violation.

Nor is there any basis to conclude that PepsiCo has adequately supported ***HN16***[] a *Section 1* claim under the rule of reason. Such a claim requires a showing of injury to competition in the relevant market. See *Capital Imaging Assocs., 996 F.2d at 543*. The district court concluded that "because PepsiCo has failed properly to define the **[**25]** relevant market here, there can be no *Section 1* violation under a rule of reason analysis." *PepsiCo, 114 F. Supp. 2d at 259*. PepsiCo half heartedly argues that it has established a *Section 1* violation under the rule of reason because a jury could find that the only purpose and effect of the loyalty provisions was to restrict price and output. This argument fails under the reasoning ofCDC Technologies, discussed above, because PepsiCo clearly has access to alternative distribution channels. Indeed, PepsiCo has not disputed Coca-Cola's assertions that (1) Coca-Cola has agreements with only 377 out of more than 2000 IFDs; (2) PepsiCo previously owned one of the largest IFDs, but sold it in 1997, the very year it chose to switch to IFDs; (3) PepsiCo has not attempted to use any of the remaining IFDs; and (4) PepsiCo's difficulty in using IFDs and its expense in using bottler distributors is due at least in part to its unique relationship with its bottler distributors and to certain restrictions imposed by them when PepsiCo renegotiated their contracts in 1997. Moreover, Coca-Cola's exclusive distributorships are short in duration and terminable at will, and PepsiCo **[**26]** has failed to demonstrate any significant anticompetitive effect on the price or output of fountain syrup. See *CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 79-81*.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

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Wal-Mart Stores v. Rodriguez

United States District Court for the District of Puerto Rico

December 26, 2002, Decided ; December 26, 2002, Filed

Civil No. 02-2778(PG)

Reporter

238 F. Supp. 2d 395 *; 2002 U.S. Dist. LEXIS 25228 **; 2003-1 Trade Cas. (CCH) P73,976

WAL-MART STORES, INC., WAL-MART PUERTO RICO, INC., SUPERMERCADOS AMIGO, INC., Plaintiffs, v. ANABELLE RODRIGUEZ, in her Personal and Official capacity as SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO, Defendant.

Subsequent History: Motion denied by *Wal-Mart Stores, Inc. v. Rodriguez, 238 F. Supp. 2d 423, 2003 U.S. Dist. LEXIS 437 (D.P.R., 2003)*

Prior History: *Wal-Mart Stores, Inc. v. Rodriguez, 236 F. Supp. 2d 200, 2002 U.S. Dist. LEXIS 24611 (D.P.R., 2002)*

Disposition: [1]** Plaintiffs' request for preliminary injunction granted. Defendant Anabelle Rodriguez, Secretary of Justice of the Commonwealth of Puerto Rico, her lawyers, agents, employees, or any other person acting in concert with her enjoined.

Core Terms

divestiture, negotiations, merger, conditions, Plaintiffs', demands, opinion letter, purchases, public policy, suppliers, buyer, employees, parties, constitutional right, state court, take place, labor force, acquisition, antitrust, rights, preliminary injunction, distributors, violates, lawsuit, assurances, requests, geographic area, deprivation, interstate commerce, reach an agreement

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

There are four elements necessary to grant injunctive relief: (1) there must be a substantial likelihood of success on the merits; (2) the preliminary injunction must be necessary to prevent irreparable injury; (3) the threatened harm must outweigh the harm a preliminary injunction would inflict on the nonmovant; and (4) the preliminary injunction would serve the public interest. *Fed. R. Civ. P. 65*. The sine qua non of that formulation is whether the plaintiff is likely to succeed on the merits.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN2[] **Interstate Commerce, State Powers**

Aside from its role as a power-allocating provision giving Congress pre-emptive authority over the regulation of interstate commerce, the *Commerce Clause* also serves as a substantive restriction on permissible state regulation of interstate commerce. Under this negative command, known as the dormant *Commerce Clause*, states are prohibited from acting in a manner that burdens the flow of interstate commerce. Thus, when a state statute discriminates against interstate commerce, courts scrutinize such actions under a virtually per se invalid rule. These statutes are routinely struck down, unless the state can show a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

Business & Corporate Law > Foreign Corporations > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Per Se Invalidity

HN3[] **Business & Corporate Law, Foreign Corporations**

Statutes pursuing "simple protectionism" are subject to this per se rule of invalidity. Economic protectionism can be proved by showing that either in its effects or purpose, a statute implements differential treatment between in-state and out-of-state commercial entities. Thus, the *Commerce Clause* forbids states from benefitting in-state economic interests by burdening out-of-state competitors or from building up their domestic commerce by means of unequal and oppressive burdens upon the industry and the business of other states. When facing such economic protectionism, the standards for proving a legitimate local purpose are onerous. The *Commerce Clause*, however, is not merely a grant of authority to Congress. The United States Supreme Court has declared that the *Commerce Clause* is intended to benefit those who are engaged in interstate commerce. The Court believes that every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any. Thus, the Court has recognized that plaintiffs as market participants indeed have a cause of action under *42 U.S.C.S. § 1983* for violations under the *Commerce Clause*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN4[] **Commerce Clause, Dormant Commerce Clause**

Puerto Rico is subject to the constraints of the dormant *Commerce Clause* doctrine in the same fashion as the states.

Antitrust & Trade Law > Consumer Protection > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN5[] **Antitrust & Trade Law, Consumer Protection**

The antitrust laws are intended to protect competition and not competitors, or suppliers, distributors and manufacturers for that matter.

Business & Corporate Law > Foreign Corporations > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Per Se Invalidity

HN6[] **Business & Corporate Law, Foreign Corporations**

With regard to the *Commerce Clause*, protectionism itself, or promoting in-state business by discriminating against out-of-state participants, is not a legitimate state interest.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > General Overview

HN7[] **Equal Protection, Nature & Scope of Protection**

The *Equal Protection Clause* commands that no state shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. U.S. Const. amend. XIV, § 1. This protection is afforded to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Real Property Law > ... > Limited Use Rights > Easements > Public Easements

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN8[] **Equal Protection, Nature & Scope of Protection**

The United States Supreme Court has recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

Civil Rights Law > Protection of Rights > Procedural Matters > Criminal Penalties

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN9[] **Procedural Matters, Criminal Penalties**

Circuits courts expanded and developed the "selective enforcement" cause of action. Selective prosecution or enforcement is actionable under the federal Constitution where the decision to prosecute is made either in retaliation for the exercise of a constitutional right or because of membership in a vulnerable group. Liability has been imposed in these cases upon plaintiffs' proof that (1) compared with others similarly situated, they were selectively treated; and (2) that the selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or bad faith intent to injure a person. Absent an allegation of racial religious or speech discrimination, there must be evidence from which a jury reasonably could find that the defendant acted with malicious or bad faith intent to injure the plaintiff. This cause of action has been specifically applied in *42 U.S.C.S. § 1983* claims. Because the plaintiff must prove illegitimate animus and malicious intent, courts have recognized the onerous nature of this claim. Court have also stated, however, that the temporary nature of the oppression is unimportant in the analysis.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN10[] **Equal Protection, Nature & Scope of Protection**

Vindictive enforcement is the other equal protection claim available against invidious discrimination through the enforcement of valid statutes. This cause of action has been recognized when administrative agencies enforce their rules as a punishment for, or a deterrent to, the exercise of constitutional rights. As such, it is similar to the due process cause of action of vindictive prosecution in criminal cases. The general inquiry in a vindictive prosecution claim analysis must be whether as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for the hostility or punitive animus towards defendants due to their exercise of constitutional rights. The analysis is directed to determine how the decision to prosecute was actually made in the case under consideration.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Legal Ethics > Prosecutorial Conduct

HN11[] **Equal Protection, Nature & Scope of Protection**

To succeed in a vindictive enforcement claim a plaintiff must prove that (1) he or she exercised a protected right; (2) the prosecutor or state official had a stake in the exercise of that right; (3) the prosecutor's or state official's conduct was unreasonable; and (4) the prosecution or state enforcement was initiated with the intent to punish the plaintiff for the exercise of the protected right.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Constitutional Law > Equal Protection > Nature & Scope of Protection

Transportation Law > Interstate Commerce > Federal Powers

HN12[] **Protection of Rights, Section 1983 Actions**

The purpose of *42 U.S.C.S. § 1983* as well as the other civil rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN13[] **Injunctions, Grounds for Injunctions**

A presumption of irreparable harm flows from and is triggered by an alleged deprivation of constitutional rights.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN14[] **Congressional Duties & Powers, Commerce Clause**

While the promotion of vigorous competition in the Puerto Rican economy is a legitimate public policy, it cannot belittle another unceasing public interest: guaranteeing the rule of law and preventing deprivations of constitutional and civil rights under color of law. To preserve the rule of law the government must act not only as an enforcer, but as a guiding light. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN15[] **Fundamental Rights, Procedural Due Process**

When the prosecutorial arm of the state uses its power to coerce private parties into abdicating their constitutional right, not only is due process and equal protection of law denied, but the trust in the United States' processes and system of laws diminishes.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN16[] **Congressional Duties & Powers, Commerce Clause**

It is in the best interest of the people of Puerto Rico that under circumstances such as this one, where a federal and a state agency are conducting parallel investigations and one has more resources available to it than the other, their government recognizes with full faith and credit the decisions of a federal agency such as the Federal Trade Commission when there is no indication that such decision was incorrect or unjust. Moreover, it is also in the best interests of the people of Puerto Rico that their government refrain from engaging in arbitrary and irrational enforcement of the laws, specially when these are used contrary to their own purposes.

Counsel: For WAL-MART STORES, INC, WAL-MART PUERTO RICO, INC., SUPERMERCADOS AMIGO, INC., plaintiffs: Ruben T. Nigaglioni, Raul M. Arias-Marxuach, Veronica Ferraiuoli-Hornedo, McConnell Valdes, San Juan, PR.

For ANABELLE RODRIGUEZ, defendant: Carlos Del-Valle-Cruz, Department of Justice, San Juan, PR.

Judges: JUAN M. PEREZ-GIMENEZ, U.S. District Judge.

Opinion by: JUAN M. PEREZ-GIMENEZ

Opinion

[*397] OPINION AND ORDER-PRELIMINARY INJUNCTION

The parties, Wal-Mart Stores, Inc., Wal-Mart Puerto Rico, Inc., Supermercados Amigo, Inc. (collectively "Plaintiffs"), and Anabelle Rodriguez, Secretary of Justice of the Commonwealth of Puerto Rico ("Defendant" or "the Secretary"), having appeared at a hearing held before this Court on December 12, 16 and 17, 2002, and the Court having heard testimony and having received evidence presented by the Plaintiffs on the issues before it, and having heard arguments from both Plaintiffs and Defendants **[**2]** on the related legal issues, does hereby issue and order the following Findings of Fact, Conclusions of Law and Preliminary Injunction.

FINDINGS OF FACT

During the Fall of the year 2001, Wal-Mart Stores, Inc. and Wal-Mart Puerto Rico, Inc. (collectively "Wal-Mart") conducted due diligence examinations to assess the possibility of acquiring Supermercados Amigo, Inc. ("Amigo"), a supermarket chain in the Commonwealth of Puerto Rico. Both Wal-Mart Puerto Rico, Inc. and Supermercados Amigo, Inc. are companies incorporated and having their principal place of business in the Commonwealth of Puerto Rico, while Wal-Mart Stores, Inc. is incorporated in the State of Delaware and has its principal place of business in the State of Arkansas.

INVESTIGATIONS AND NEGOTIATIONS

February 2002-The Merger Executed

On February 5, 2002 the merger agreement between Wal-Mart and Amigo was signed and this originated a number of procedures that needed to take place before the closing of the transaction as part of the companies' integration process. This pre-closing process included negotiations with federal and state agencies that typically oversee this type of transaction in **[**3]** an effort to anticipate and remedy potential antitrust concerns. Plaintiffs' lawyers negotiated at length several aspects of the transaction with the Federal Trade Commission and the Puerto Rico Department of Justice ("PRDOJ"), and its Office of Monopolistic Affairs ("OMA").

[*398] Luis D. Martinez Rivera ("Martinez"), a Special Prosecutor who has worked at the OMA since 1997, was the main PRDOJ representative working on this case and was assisted for the most part by two economists from his office. Martinez, in charge of conducting the investigation pertinent to compliance with local anti-monopolistic laws, began to get involved in the Wal-Mart/ Amigo merger transaction on February 11, 2002. Deputy Attorney General ("DAG") of the OMA, Irma Rodriguez-Justiniano ("Rodriguez-Justiniano"), supervised Martinez during the first months of the investigation and then, during the month of October 2002, Jose Diaz Tejeda ("Diaz-Tejeda"), who substituted Rodriguez as DAG of the OMA, began taking a much more active role in the investigation and negotiations with Wal-Mart.

Soon after the agreement to merge was announced, the OMA served Plaintiffs with a Civil Investigative Demand ("CID") which served **[**4]** as the basis for the OMA's request of all information that was being provided to the FTC. Since both agencies were conducting parallel investigations, Plaintiffs provided information simultaneously to the FTC and the OMA. These materials were sent to both agencies under a waiver of confidentiality so that the agencies could also share information between themselves. Pursuant to this waiver, formalized in a letter sent by Plaintiffs' lawyers to the FTC, the federal agency could provide the PRDOJ any materials they requested. (See Docket No. 21 at 178-179 & Pl.'s Ex. 8).

The FTC is the federal antitrust enforcement agency instituted pursuant to the Federal Trade Commission Act of 1914. *15 U.S.C. §§ 41-51*. While the FTC conducts its investigations with careful regard of the federal antitrust laws, the Sherman Act, *15 U.S.C. § 1 et seq.*, and the Clayton Act, *15 U.S.C. § 1 et seq.*, the PRDOJ conducts its investigations pursuant to Article 16 of the Puerto Rico Anti-Monopoly Act, Law 77 of June 25, 1964, codified at *10 P.R. LAWS ANN. § 257 et seq.* [1] (See *10 P.R. LAWS ANN. § 272*). Unlike the FTC, however, the **[**5]** PRDOJ and OMA do not have regulations that govern or provide guidance in the conduct of divestiture investigations within a mergers and acquisitions context. Even Martinez, the main OMA investigator in this case, was not familiar with the FTC guidelines for divestiture and had not participated in the investigation of a divestiture in the past.

On February 6, 2002 Wal-Mart filed a Hart-Scott-Rodino Application with the FTC. The application is a notice to the FTC explaining that a company intends to merge with another company. The FTC **[**6]** then initiated a review process and investigation of the transaction and during the next few months, Wal-Mart prepared many documents requested by the federal agency. Once the FTC initiates an investigation, it typically culminates in an agreement between the agency and the acquiring party that consists of several consent decrees and orders. A consent package prepared by the FTC addresses every competitive problem present in the transaction and every geographical market with potential problems, as well as the **[*399]** required divestitures, if any, that remedy these problems.

April 2002-Initial Contacts

On April 17, 2002, Rodriguez-Justiniano sent a letter to Anthony George ("George"), in-house counsel at Wal-Mart, requesting that they prepare a white paper addressing a number of issues the OMA was interested in exploring. (Pl.'s Ex. # 11). Mark Schmidt ("Schmidt"), Vice President of Development in Wal-Mart, prepared much of the response to this letter. A white paper together with a summary spreadsheet reporting on local purchases and local suppliers with whom Wal-Mart had dealt since it arrived in Puerto Rico was sent to the PRDOJ on May 3, 2002. Schmidt, who has worked with **[**7]** Wal-Mart since 1987 and is responsible for mergers and acquisitions, was the principal negotiator on behalf of Wal-Mart with the PRDOJ.

Also in April 2002, a meeting was held attended by William Berkowitz ("Berkowitz"), attorney for Amigo, Steve Lausell ("Lausell"), Martinez, and an economist from the PRDOJ. Lausell was Chairman of the Board of Directors and a stockholder at Amigo and is now President of the Board of Directors and a stockholder of Supermercados

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[1] Nevertheless, in an article published a few years after the Puerto Rico Anti-Monopoly Act was signed into law and came into effect, Arturo Estrella wrote "there is no doubt that the Puerto Rican statute of 1964 was basically inspired by the Federal legislation, from which it draws heavily, ..." and the state act establishes the same objectives as those of the federal antitrust statutes. Arturo Estrella, ***Antitrust Law*** in Puerto Rico, 28 Rev. Colegio de Abogados, 582-89 (1968).

Maximo ("Maximo"), the company that bought the four Amigo stores divested. During this meeting the representatives of Amigo offered to provide the OMA with whatever information they needed and they left the meeting with the impression that to this point, things were running smoothly in the Department with regards to their investigation of the transaction.

Finally, on April 22, 2002, Berkowitz wrote a letter addressed to Defendant, Rodriguez-Justiniano, and Martinez-Rivera detailing the legal and constitutional problems with their request for maintenance of local purchases from distributors, manufacturers, and suppliers. He explained that there was no relationship between the antitrust laws and the purchase of goods from local **[**8]** or foreign-based distributors. He explained how the PRDOJ's demands suggested facial discrimination against out-of-state distributors and, moreover, were not within the scope of the antitrust laws. Defendant claimed to have no recollection of seeing this letter and Plaintiffs never heard from the PRDOJ in regards to the matters raised in it.

May 2002-FTC's Expectations Revealed

During the month of May, Wal-Mart came to an understanding of what the FTC's expectations were before they would free the transaction of antitrust concerns. By then, the federal agency had identified the three geographical areas that raised monopolistic concerns: Cayey-Cidra, Ponce-Juana Diaz and Vega Baja-Manati. The proposed plan, then, was to divest four stores in these areas, one in Cidra, one in Ponce, one in Manati, and one in Vega Baja.

Even though the FTC gathers information on possible divestiture buyers, the onus is on the company requesting approval of a merger to find a potential buyer for the stores or locales that need to be divested. In order to comply with FTC expectations, Wal-Mart itself began looking for buyers for the four stores. During the summer months, the idea of a group **[**9]** of Amigo stockholders, among others, getting together to incorporate a company that would become the divestiture buyer began to emerge. Wal-Mart then submitted this group to the FTC as its selected buyer and once it received the FTC's approval, the selling process began.

Other potential buyers were not further investigated or considered because their initial interest never materialized into anything **[*400]** concrete. Also, some of the other candidates had a strong presence in the geographical areas where the four stores were located and thus posed a threat of competition in those areas. Finally, there was no evidence introduced in the record about any bids higher than that of the group of Amigo stockholders, who later incorporated as Maximo. Martinez testified that he never heard of any bids higher than that by Supermercados Maximo.

The obstacles that led to a delay in implementing the FTC agreements were partly due to Plaintiffs' interest in reaching a "global settlement," that is, a settlement with all the parties involved. (Docket No. 21 at 183, ln. 12). Plaintiffs had the impression that although the PRDOJ was satisfied with the divestitures imposed by the FTC, it still had additional **[**10]** concerns, which included reporting requirements during a period of several years after the merger was implemented, and the level of Wal-Mart's purchases of goods from local versus foreign distributors and suppliers. (Docket No. 21 at 184, lns. 10-15). But the PRDOJ had also communicated to the FTC that they believed the proposed divestiture of four stores was not enough for antitrust concerns. Nevertheless, the FTC ultimately approved the merger with the divestiture of only those four stores. (Pl's Ex. # 6).

A meeting to address all these issues was held in July between representatives from the PRDOJ and Wal-Mart, and by the beginning of August it was Plaintiffs' understanding that an agreement had been reached with the PRDOJ. These issues were the subject of a Voluntary Assurance Letter ("VAL") that the PRDOJ had demanded from Plaintiffs.

Summer 2002-Voluntary Assurance Letter

The issue of the Voluntary Assurance Letter came up in early May 9, 2002, after receipt of the white paper, when the PRDOJ asked Plaintiffs to provide a letter addressing Wal-Mart's intentions as to certain aspects of its business in Puerto Rico. The request for Plaintiffs' intentions quickly **[**11]** shifted to the imposition of certain conditions on them that had been conceived by the PRDOJ pursuant exclusively to the public policy of the current administration of the Commonwealth of Puerto Rico.

On June 4, 2002 a proposed text of the VAL was sent by Plaintiffs' counsel to the PRDOJ. At that point, the subject of this letter contemplated the issue of the amount of purchases from Puerto Rico domiciled suppliers. Months later, this became one of the three conditions for approval of the merger to which Plaintiffs resisted, and the controversy ultimately led to the filing of the complaint in state court. In the early conversations on this topic between Plaintiffs and the PRDOJ, the PRDOJ requested a commitment from Plaintiffs to maintain a percentage of purchases from local suppliers as opposed to foreign based suppliers. In response to the June 4, 2002 letter from Wal-Mart, the PRDOJ sent Plaintiffs a letter on June 20, 2002 asking that it address and/ or clarify certain issues in that letter. Specifically, the PRDOJ asked for more precise assurances with regards to the local purchases. (Pl.'s Ex. # 15). In good faith, Wal-Mart informed the PRDOJ that since 1999 it had substantially **[**12]** increased its local purchases in the Island and it intended to sustain that tendency. Soon thereafter, this issue was put aside and it was Wal-Mart's understanding that it had reached a general agreement with the PRDOJ. In addition, Plaintiffs were required to assure the PRDOJ that they would submit certain sales reports, as well as copies of Wal-Mart's contracts with local and foreign distributors, and any termination contracts **[*401]** with distributors for a five year period following the transaction. Whatever the parties agreed in this regard would be set out in the VAL.

On July 1, 2002, attorney for Plaintiffs, Armando Llorens ("Llorens"), and Schmidt met with Martinez with the intent of reaching a final agreement for the VAL. After the meeting, four issues remained pending between the parties: first, the length of the reporting period; second, the format of the reporting; third, the PRDOJ's request for copies of Wal-Mart's past contracts with local suppliers; and finally, Wal-Mart wanted to ensure that these requests for assurances were not interpreted as its own failure to comply with similar information requests in the past.

A follow-up letter was then sent by Martinez to Plaintiffs **[**13]** on August 5, 2002. Martinez states in it that Defendant has given her approval, or given her "good to go" approval, to the VAL, which at that point was entitled "Proposed text of letter to P.R. Department of Justice-on Wal-Mart letter head" (Pl.'s Ex. # 16). In the second paragraph of the letter, Martinez asks for a trivial change in the language of the document: the word *"expects"* was to be substituted for the word "*intends* to continue these local purchasing policies and practices …" The message conveyed in this letter was that but for the change of the word *expects* to the word *intends,* the rest of the proposed VAL would remain unaltered and once this change was implemented, a final agreement between the parties would be reached. The first paragraph of that VAL states: "Wal-Mart Stores, Inc, is pleased that the *Puerto Rico Department of Justice and the Federal Trade Commission are in agreement regarding the appropriate relief for resolving the competition issues* relating to Wal-Mart's proposed acquisition of the Supermercados Amigos supermarket chain." (Pl.'s Ex. # 14)(emphasis ours). Moreover, the first sentence of the last paragraph states: "We trust that Wal-Mart's **[**14]** voluntary assurance regarding the above matters demonstrates and confirms Wal-Mart's commitment to be an integral part of the Puerto Rican economy and should *resolve any remaining issues not addressed in the FTC/DoJ proposed settlement."* Id. Wal-Mart's understanding upon receipt of this August 5, 2002 letter was that the merger transaction had the "green light" from the PRDOJ and that it signified the culmination of the issues that had originally emanated from, or after, the May 3rd white paper and had been negotiated throughout the summer.

The August 5, 2002 letter, read in the context of what had transpired up to that point between the parties, can only be understood to mean that the outstanding issues between the PRDOJ and Plaintiffs had been taken care of. Martinez himself testified that all the issues raised in the July 1, 2002 meeting were taken care of by August 5, 2002. Nevertheless, he added that what the letter meant was that there were no objections to the proposed text of the VAL at the time, and not that the language of the agreement had been approved with finality. No such clarification is found in the letter, however, or in any subsequent clarifying correspondence **[**15]** sent to Plaintiffs.

Meanwhile, on or around July 3, 2002, another meeting took place between Amigo representatives and the PRDOJ. This time Lausell and Jose Revuelta ("Revuelta"), President of Supermercados Amigo, Inc., informed Martinez about the group emerging to buy the divestiture supermarkets in Cidra, Ponce, Manati, and Vega Baja pursuant to the FTC's expectations. In light of this new development, Lausell once again offered to provide the OMA **[*402]** with any information that was needed for the investigation of the transactions and for the agreements.

August 2002-September 2002-The Divestiture

After talks between all parties about the buyer that had shown the most interest in the four divestiture stores, on August 20, 2002 a letter of intent on behalf of NewCo Food Retailing, Inc. was sent by Lausell to Revuelta expressing their interest in buying certain assets and retaining certain liabilities pertaining to the four Amigo stores. (Pl.'s Ex. # 3). The future buyers of these stores prepared a business plan and a capitalization plan under the name of NewCo Food Retailing, Inc.-NewCo for "new company"-but it was known to all that if they were approved, they would be incorporated **[**16]** under the name Supermercados Maximo.

As the "front buyers," a term used by the FTC to describe an identified and accepted buyer, as a condition to the FTC's approval Maximo had to produce other documents for the FTC, including its agreements with the landlords of the locales where the stores to be bought were located and information about its proposed management. After both the FTC and the PRDOJ had been provided with all available information regarding Maximo, conversations regarding the sale picked up steam towards the last week of August 2002.

On August 22, 2002 attorney for Plaintiffs, Fionna Schaeffer ("Schaeffer"), wrote to the FTC on behalf of her clients informing them, among other things, of the purchase price negotiated with the "Amigo shareholders" that were incorporating Maximo for the purchase of the four stores to be divested. [2] (Pl.'s Ex. # 4). Another letter, dated August 26, 2002, was also sent to both the FTC and the PRDOJ in response to a request for information made by the FTC. (Pl.'s Ex. # 5). Martinez testified that he had learned the "Amigo shareholders" would definitely be the divestiture buyers early in September 2002 and that even before that date, he had **[**17]** received information from Maximo, such as the capitalization, management, and business plans presented to the FTC. Even before August 2002 the PRDOJ had gained knowledge that the proposed divestiture buyers were associated with Amigo.

Supmermercados Maximo was incorporated on September 17, 2002. (Pl.'s Id. # 31). On or around September 18, 2002 Schaeffer contacted Martinez to let him know that Wal-Mart was expecting to reach a final and formal settlement with the FTC within days. She wanted to know if he had any questions regarding the information sent about Maximo and was told by Martinez that the PRDOJ had no problem with Maximo. (Docket No. 21 at 201, Ins. 20-22). Indeed, Martinez also told Schaeffer that on that same day, he had communicated to Defendant **[**18]** his recommendation of Maximo as the divestiture buyer. On that day, Martinez expressed his interest in expeditiously finalizing all the agreements with Plaintiffs since his wife was about to give birth. The agreements would in essence "mirror" those that were being entered into with the FTC. Schaeffer memorialized her conversation with Martinez in an electronic mail she sent George, as well as two of Plaintiffs' other attorneys, Llorens and Jay Tabor. (Pls.' Ex. # 34) She communicated to them that from her conversation with Martinez she had learned that he had sent a favorable **[*403]** recommendation to Defendant on Maximo, that he was creating an OMA consent decree that essentially mirrored the FTC's with minor modifications, and that OMA was clearly aware of the November 5, 2002 deadline to close on the merger agreement. The modifications Schaeffer and Martinez had talked about were in relation to the public comment period provided for in the FTC papers and the confidentiality of the consent documents with the PRDOJ.

Since Maximo was less creditworthy than Amigo, Wal-Mart had to pay the landlords of the locales of the four stores a sum of $ 5.4 million dollars to compensate for the loss **[**19]** of a more creditworthy tenant. Amigo shouldered $ 500,000.00 of that figure. The execution of the agreements with the landlords to this effect took place at some point before November 21, 2002 since it was a requirement for the FTC's approval of the merger.

October 2002-The Legislative Hearings

The month of October was a turning point in many aspects of the investigations and negotiations that were taking place in reference to the Wal-Mart/ Amigo merger. During the final days of that month, the Legislature of the Commonwealth of Puerto Rico held hearings regarding the merger in which representative of both Wal-Mart and

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[2] The record reflects that at least two stockholders of Amigo, Steven Lausell ("Lausell") and William Gonzalez ("Gonzalez"), became stockholders of the company that the FTC approved to be the buyer of the four stores that were the issue of the divestiture.

Amigo testified. [3] The pressure began to build up on Defendant. By this time, Defendant had received many letters, white papers, and personal visits of concerned parties expressing their support or opposition to the transaction. This public pressure that kept building up towards the end of the month, close to what initially had been the closing date of the transaction--November 5, 2002--was essentially what led to the new demands Defendant imposed on Wal-Mart. Moreover, the review of the transaction by the PRDOJ became a public policy decision subject **[**20]** to the input from various functionaries in the administration. Among these other functionaries were Ramon Cantero Frau, Secretary of Economic Development and Commerce, Cesar Miranda, Chief of Staff, and the Governor of Puerto Rico herself, Sila Maria Calderon. Defendant testified that like other decisions that were made at the PRDOJ, this one had created much tension on her as head of that Department.

From October on, this tension affected the negotiations between the PRDOJ and the Plaintiffs, and these began to intensify. (Docket No. 25 at 375, ln. 24). It was around this time that the maintenance of the labor force and purchase levels issues were raised. Lausell testified that in his third and last meeting with the PRDOJ, which took place on October 2002, the impression he got from the PRDOJ was "totally different [from the other meetings] **[**21]** in the sense that there was a lot of pressures being put in [sic] the transaction and that they were worried about … how to find ways to satisfy all the parties …" (Docket No. 25 at 391, lns. 19-23). Also in that meeting the PRDOJ asked Lausell for his advice with regards to the issue of local purchases and Lausell explained that one potential problem he saw revolving around that issue was the impact on distributors and suppliers of knowing that Wal-Mart <u>had</u> to buy from them.

Towards the end of October, Martinez also participated in a conference call with Schmidt. They discussed the VAL that had been negotiated during the summer, and Martinez made mention of several things in that letter that would have to be renegotiated and changed. At that point Schmidt responded by stating that contrary **[*404]** to what Martinez apparently was suggesting, he did not see any legal issues involved in the proposed changes to the VAL. To that, Martinez responded that the issues were no longer "legal," but instead a shift in their agenda had turned them into "political" issues. (Docket No. 21 at 111, ln.7). Wal-Mart associated this sudden swerve and the Defendant's new demands to the legislative hearings **[**22]** that took place in late October and the pressure that these exerted on the PRDOJ.

By this time in the negotiations, Defendant and the staff working for her on this matter began to solidify their ideas with regards to what they would bring to the bargaining table as an ultimatum for Plaintiffs. Before November 21, 2002, however, they had not raise any of these issues with the heightened concern they reflected after that date. On November 21, 2002 the FTC documents and agreements with Plaintiffs were signed suggesting that the merger transaction between Wal-Mart and Amigo and the mandated divestitures were in compliance with applicable federal laws. [4] From thereon, Defendant personally took a much more active role in the negotiations as she attempted to please all those who were pressuring her against approving the transaction.

November 2002-Fairness Opinion & Labor Issues

One of the three major issues that Defendant identified as the basis to her filing of the state court **[**23]** complaint was her request for a "fairness opinion letter" from Plaintiffs. (<u>See</u> Pl.'s Exs. 19-20). The parties explored the possibility of obtaining such opinion letter from Santander Securities Corporation for a fee of $ 150,000.00. The PRDOJ was allegedly requesting a fairness opinion letter to evaluate the divestiture of the four Amigo stores precisely because that divestiture had validated the merger for antitrust purposes. Defendant testified that she saw it as her duty to make sure the divestiture was done correctly, that it was not a sham, and that Maximo had the capacity to be a long term market competitor. (Docket No. 25 at 303, ln. 2). Moreover, she wanted proof that the merger was an arm's length transaction. It was Martinez' understanding that the fairness opinion letter would reveal the value of the transaction and whether it was real under its particular parameters. The OMA thought that in

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[3] Press Releases, House of Representatives of the Commonwealth of Puerto Rico, October 29-31, 2002, <u>available at</u> *http://www.camaradepuertorico.org/octubre2002.html*.

[4] <u>See supra</u> note 1.

addition to all the information they had received regarding the divestiture to Maximo, the business, capitalization and management plans as well as the price paid and other documentation, they also needed a fairness opinion letter that would reveal the financial analysis sustaining **[**24]** the legality and legitimacy of the transaction.

Clearly, all these concerns had been resolved by the FTC under the appropriate and applicable divestiture guidelines which were lacking in the PRDOJ. Martinez had no evidence that the divestiture transaction was a sham. (Docket No. 25 at 315, lns. 4-7). He and the PRDOJ were concerned, however, because some investors of Supermercados Maximo were shareholders at Amigo. Yet, between August and September, Martinez had approved the transaction and communicated his approval to both Plaintiffs' counsel, Schaeffer, and also to Defendant.

The PRDOJ knew about the divestiture requirements since approximately May 2002. It knew the possible genesis of Maximo since July 3, 2002 and that it had been chosen as the divestiture buyer for the four stores since mid-August 2002. The PRDOJ became aware that the chosen divestiture buyer was Supermercados **[*405]** Maximo in August 2002. (Docket No. 25 at 283, lns. 6-7). Nevertheless, the request for a fairness opinion letter was first informally talked about, and not necessarily brought to Plaintiffs' attention, in late October or beginning of November. It was brought by Defendant to the attention of one Plaintiffs' **[**25]** attorney, Samuel Cespedes, on November 24 or 25, around the time when they also brought up the issue with the definition of an arm's length transaction in the OMA proposed agreement. It became a heated point of interest around the same time that the labor force issue was brought up.

The PRDOJ requested that the divestitures be an arm's length transaction and unilaterally added a definition of that term to the agreements. Plaintiffs immediately objected to the late request and questioned the real reasons behind it, given that the PRDOJ had known since August 2002 that the proposed buyers were associated with Amigo. Moreover, a sale of this nature taking place under divestiture circumstances could not reflect fair market value because it is typically done within a short period of time and the value will be whatever best value is procurable within that short period of time. The PRDOJ recognized this particularity of the transaction. Nevertheless, Defendant claimed to have her doubts about the divestiture transaction and, specifically, how it affected the merger's adherence to Articles 2 (Transactions in restraint of trade), 4 (Monopolies), and 5 (Mergers and acquisition) of the **[**26]** Puerto Rico Anti-Monopoly Act.

Expert Testimony Re: Fairness Opinion

Plaintiffs presented two expert witnesses in the hearings. The first was Rafael F. Martinez Margarida, Managing Partner of the San Juan Office of PricewaterhouseCoopers, LLP. Mr. Martinez holds a Master in Business Administration from Columbia University Graduate Business School. He is a Certified Public Accountant, a Certified Management Consultant, and a Certified Valuation Analyst, among other professional certifications. The other expert witness was Gregory Scott Vistnes. Mr. Vistnes holds a doctoral degree in economics from Stanford University. He specializes in the field of industrial organization, which is the study of how firms compete and interact with each other. As part of his professional experience, he served for several years in the Department of Justice, where he ultimately served as the assistant chief in the economic regulatory section. He also worked in the FTC, where he occupied the position of deputy director for the FTC's Bureau of Economics for three years. The findings of fact in this section derive from the expert testimony of these two witnesses.

Once there was evidence on record that **[**27]** the PRDOJ recognized that due to the nature of the transaction, a divestiture purchase frequently resulted in a sale for a price that did not reflect fair market value, its request for a fairness opinion became highly suspicious. A fairness opinion letter is a professional opinion rendered usually by an investment banker or a certified valuation professional regarding the reasonableness of the price of a sale in the context of a particular financial transaction. The opinion is usually provided to assure either the seller or the buyer that a transaction is fair. In cases of mergers and acquisitions, the opinion is typically prepared to provide the shareholders of a company reasonable assurances that management and/ or their representatives have appropriately discharged their fiduciary duties to them. A fairness opinion letter does not reveal whether a transaction is fictitious or not; that could possibly be achieved through due diligence. Moreover, a fairness opinion letter does not **[*406]** address market issues or market protection. A business valuation of a comparable transaction in the market would best serve to determine whether a sale price is within the parameters of the real value in **[**28]** the market. A fairness opinion would not reveal either whether after a divestiture sale, the sold stores would represent competition to the acquiring company. (Docket No. 25 at 455-465). Finally, given the nature of this transaction and the structure of the deal, neither a fairness opinion letter nor any other type of financial evaluation would have been able to categorize it and evaluate it as an arm's length transaction. For purposes of a divestiture investigation, the FTC would find it useless and inappropriate to entertain a fairness opinion letter since a divestiture frequently involves assets forced to be sold in a short period of time under duress. Hence, they usually will be sold at a very low price and requesting adherence to fair market prices would be senseless.

The Agreements

Final preparations of the FTC agreements were done during the Fall 2002 and a final version was ready by November 14, 2002. The agreements and orders were signed on November 21, 2002, and published in the Federal Register on November 27, 2002. (Pl.'s Ex. # 6). The FTC's approval of the merger was a requirement to close the transaction and its effect was to remove the Hard-Scott-Rodino waiting **[**29]** period. Against this background that included the FTC's approval of the merger, previous agreements reached and previous assurances exchanged between the PRDOJ and Plaintiffs, and recent and unexpected references to the issues of maintaining the current labor force and producing a fairness opinion letter, on November 22, 2002 the PRDOJ sent to the Plaintiffs the first of four sets of proposed agreements exchanged between the parties from that date until December 5, 2002. (Pl.'s Exs. 27 *(November 22, 2002-PRDOJ to Plaintiffs);* 23 *(November 25, 2002-PRDOJ to Plaintiffs);* 17 *(December 4, 2002-PRDOJ to Plaintiffs);* and 18 *(December 5, 2002-Plaintiffs to PRDOJ)).* Some of the documents included in these exchanges were very similar to the FTC documents. (Pl.'s Ex. 6).

On November 27, 2002, Defendant issued a press release containing statements that had been made by her on the preceding Sunday, November 24, 2002. She reiterated a list of the most important requirements the PRDOJ was using to evaluate the transaction. These were: 1) that Wal-Mart does not increase its concentration in local markets to an extent that reaches monopolistic levels; 2) that the divestiture of Amigo **[**30]** supermarkets is real and non-fictitious,; 3) that part-time jobs are as protected as full-time jobs are; 4) that sales of local agricultural products are not adversely affected; and 5) that the price paid for the four stores is within the parameters of the real market value for a transaction of this nature.

During the two weeks following the Secretary's press statements, the parties negotiated regarding the issue of the fairness opinion letter, the changes the PRDOJ had made to the VAL, and other language problems in the agreements regarding the affected geographical areas, the definition of arm's length transaction, and the demand that Plaintiffs maintain the current labor force and the current level of purchases from local suppliers.

Maintenance of Levels of Local Purchases

The final versions of the proposed agreement that Plaintiffs received from the PRDOJ had the following provision: "... the respondents will not reduce or **[*407]** suspend its current volume purchases of local agricultural and/ or food products." (See Pl.'s Exs. 17, 23 & 27, cf. Pl.'s Ex. 18). With regards to this language the parties were not able to reach an agreement before the deadline for the closing. **[**31]** Wal-Mart was willing to make a commitment to buy as much locally as they could and they provided the PRDOJ with evidence that their purchases had in fact increased in recent years. But there was additional language in the agreement suggesting that these intentions were not enough and that Plaintiffs would subject themselves to legal enforcement if they were ever to reduce their volume of local purchases regardless of the reasons for such decision. This was unacceptable to Plaintiffs because it put them at a disadvantage with competitors who freely conducted their business while knowing Wal-Mart had these restrictions.

Maintenance of Current Work Force vs. Maintenance of Current Work Force Levels

The issue of guaranteeing the maintenance of the current work force versus the current levels of work force was brought up in late November as an amendment to the VAL in an attempt by the PRDOJ to protect the public policy of Puerto Rico. Indeed, the protection and preservation of existing jobs, as well as the creation of new ones, is the highest priority of the current administration. (Pl.'s Ex. 19 at 2). Within the framework of this policy, Defendant brought up the need to either **[**32]** require or negotiate with Wal-Mart the issue of maintaining the labor force at the time of the acquisition. With regards to labor issues, the new VAL included a provision that read: "Wal-Mart will continue to comply with all applicable labor laws and regulations and will not undergo a reduction of the current labor force of Supermercados Amigo nor will substitute its full time employees for part timers as a result of the transaction." (Pl.'s Ex. 17). [5]

The controversy in the language of the agreements with regards to labor issue can be best summarized as follows: while the PRDOJ wanted to get Wal-Mart to agree not to alter the current labor force, that is, the employees that are currently working at the Amigo stores, Wal-Mart was willing to agree to maintain the current number of employees, leaving open the possibility that current employees could be terminated as long as their positions were not eliminated. (Docket No. 25 at 362, lns. 6-14). But despite their lack of intention to **[**33]** downsize their current work force, Plaintiffs could not agree to maintain the current employees and forego the possibility of ever letting go of anyone who currently works at Amigo. Wal-Mart anticipated that just like in any other acquisition, there was a possibility that the integration process would reveal deficiencies in the labor force that would need to be remedied. Moreover, no layoffs in the stores were anticipated, but Wal-Mart could not make the same commitment with regards to positions in their administrative and home offices. The phenomenon of attrition, over which they have no control, was also raised as a concern for Wal-Mart. Finally, as with the levels of purchase condition, Wal-Mart would be at a disadvantaged with competitors if forced to maintain the current labor work force.

December 2002-Closing, Press Release, and State Lawsuit

Plaintiffs negotiated in good faith the conditions which Defendant was attempting to impose on them and even on December 5, 2002, Plaintiffs were hoping to reach an agreement with the Secretary of Justice **[*408]** with regards to the terms of the VAL. The merger agreement originally had a deadline for closing the transaction on November 5, 2002, which **[**34]** was then extended to December 5, 2002, pending the Agreement and Order from the FTC. The Department of Justice was well aware of the closing date. Mr. Schmidt had personally assured Diaz-Tejeda, Director of the Office of Monopolistic Affairs, that the closing would take place on December 5, 2002.

A telephone conversation was held between Lausell and the Defendant on December 3, 2002. On the basis of all the pressure she had and her sense that it was "very very very" likely that they would reach an agreement with Wal-Mart, she asked Lausell if they could postpone the closing until Friday, December 6, 2002. Lausell communicated to her that he was of the impression that Wal-Mart did not feel the same way about the likelihood of reaching an agreement, since there were still important issues to be resolved. At this point, it seemed that the most important and controversial pending issue was the fairness opinion letter. Still, Lausell offered to assist in mediating with Wal-Mart to reach an agreement regarding the language of that letter so Defendant could take it to Cantero Frau for his approval, even though Lausell understood that Cantero Frau inevitably would remain firmly opposed to **[**35]** the transaction. Defendant's reaction to this last remark suggested that Lausell's suspicions about Cantero Frau were correct. (Docket No. 25 at 402 lns. 19-20).

While Defendant asked Lausell for two more days to "negotiate," at some point before December 5, 2002, she had ordered that a draft of a complaint be prepared. The idea of a potential lawsuit, or "going to court," had been brought up once or twice during the final days of negotiations. Plaintiffs, however, were quite certain that they would be able to reach an agreement with Defendant with regards to the VAL. The public announcement made by the Defendant on Thursday, December 5, 2002, at 3:00 P.M., with regards to the filing of a lawsuit in state court came as an enormous surprise to Plaintiffs.

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[5] See infra at 34-36.

The closing took place on the morning hours of Thursday, December 5, 2002. On that day, Diaz-Tejeda asked Plaintiffs' attorneys to postpone the announcement of the closing until 3:00 p.m. that afternoon so that Defendant could make an announcement first. [6] Plaintiffs acceded.

[36]** In the press release issued by Defendant on December 5, 2002, and attached as Exhibit A to Plaintiffs' complaint, Defendant expressed her intent to file a lawsuit against Plaintiffs. She explained that the transaction that took place on that same date between Wal-Mart and Amigo violated the Puerto Rico Anti-Monopoly Act and was contrary to the best interests of consumers, merchants and distributors in Puerto Rico. (Docket No. 1, Ex. A). Immediately thereafter, Defendant explained in the press release that Plaintiffs failed to consent to three issues that were essential for her to accept the transaction. The three conditions that Plaintiffs refused to agree to and Defendant had announced were the basis for her intent to ask a Court to enjoin the merger were: first, that the number of employees currently working at Amigo must remain at the current level; second, that at a minimum the purchase of local agricultural products must remain at current levels; and finally, that the transaction must be made in good **[*409]** faith in order to protect the local market. Martinez testified that his understanding of the press release was that because Wal-Mart had not complied with the PRDOJ's labor force **[**37]** requirements, she would sue the parties to the merger. (Docket No. 25 at 329, ln. 25).

The state court complaint was filed by Defendant on December 6, 2002 at 2:36 p.m. and it only alleges violations of the Puerto Rico Anti-Monopoly Act. Together with the Complaint, Defendant filed a request for a preliminary injunction pursuant to Article 13 of Law 77. The injunction was granted that afternoon by the state judge. In the state court complaint, Defendant alleges for the first time that since May 2002 there existed antitrust concerns in another geographical area of the Island, the Municipality of Bayamon. However, two weeks earlier, on November 22, 2002, the PRDOJ had sent Plaintiffs a proposed draft of the agreements which included a provision that read: "all other relevant geographical markets of Puerto Rico [, besides Cayey-Cidra, Ponce-Juana Diaz, Barceloneta-Manati-Vega Baja] do not evidence any overlaps among the parties, higher concentration indexes, conditions that would result in unacceptable concentrations of market power as a result of the acquisition or the evidence is that existing competition or the lack thereof will remain essentially unaltered." (Pl.'s Ex. 27 at 4, **[**38]** P m). Three days later-and then again twelve days later-when the same documents were sent by the PRDOJ to Plaintiffs, that language had been taken out of Paragraph (m). Nevertheless, throughout the negotiating and in the agreements, reference to the problematic areas was always limited to the three geographical areas identified by the FTC in May 2002.

Even though the PRDOJ and Plaintiffs thought that they would be able to reach an agreement before closing the transaction, the turn the negotiations took in the last month made it impossible to reach an agreement in principle. Wal-Mart could not agree to maintain the current labor force, they could not agree to a definite percentage of purchases from local versus foreign-based suppliers, and neither would they produce what was an unnecessary opinion letter that would not help the PRDOJ in executing its duties pursuant to Puerto Rico's ***antitrust law***.

DISCUSSION

Before examining the probability of success on the merits of Plaintiffs' claims, we begin our discussion by setting forth what we glean from the findings of fact. In sum, we have identified a sequence of events from which we can discern that Defendant's December 6, 2002 complaint **[**39]** presents pretextual and bogus claims against the Plaintiffs. These claims disguise conduct and motivation of an inherently spurious nature lacking any kind of authoritative or legal support. Moreover, the Secretary's undertakings as the highest law enforcement agent of the Commonwealth elucidate a pattern of bad faith conduct in the negotiations, specially during the months of November and December, which violates Plaintiffs' civil rights under the United States Constitution. A brief review of the events that took place within the ten month period from February 5 to December 6, 2002 shows that after October, and even more strikingly after November 21, Defendant engaged in a desperate attempt to extract Plaintiffs' submissions to her imposed conditions as a result of public and political pressures put on her. These

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[6] That announcement turned out to be the press release in which she stated that she would file a lawsuit against Plaintiffs in a few hours because they refused to submit to her demands.

events culminated in the vindictive filing of a state antitrust lawsuit in an effort to coerce Plaintiffs to yield to the Secretary's demands.

[*410] We first look at the state court complaint and proceed backwards to February, 2002. The complaint alleges violations of the anti-monopolistic laws of Puerto Rico in two specific matters: that the geographical area of Bayamon created **[**40]** competition problems; and the allegedly fictitious divestiture of the four Amigo stores. Prior to the state court complaint, no mention was ever made of geographical areas that might raise antitrust concerns, other than the three areas identified by the FTC and remedied by the divestitures. Moreover, there is no evidence of any other independent investigation, or evidence gathered by Defendant in this regard, that would lead her to conclusions divergent from those reached by the FTC. Since May 2002, the FTC had approved the transaction pending the divestiture of the four stores. Plaintiffs successfully complied with this condition, thus gaining full FTC approval by November 21, 2002. Indeed, there was language in pre-November 25, 2002 drafts of the PRDOJ/Wal-Mart agreements that stated that no geographical areas--other than those where the four divestiture supermarkets were located--presented antitrust concerns. This language was taken out from the drafts on or around November 25, 2002. (<u>See</u> Pl.'s Exs. 23 and 27 at 4 P m, <u>cf.</u> Pl.'s Ex. 17 at 4 P m). In addition, all the drafts of agreements exchanged between November 22 and December 5, 2002 limited their discussion of the problematic **[**41]** geographical areas to Cayey-Cidra, Ponce-Juana Diaz, and Barceloneta-Manati, Vega Baja--the three areas covered by the FTC's divestiture findings.

Aside from what the PRDOJ thought the fairness opinion would reveal, which the evidence suggested was an inaccurate and potentially feigned belief, absolutely no mention of other antitrust concerns was made prior to the December 5, 2002 press release. In her November 24, 2002 statements to the press, Defendant makes no reference to monopolistic or competition concerns raised by the transaction. Instead, the Secretary alleges that on the basis of the public policy of Puerto Rico, the scope of the OMA's investigation is broader than that of the federal agency. Therefore, she was examining other issues related to Amigo's labor force and Wal-Mart's purchases from local suppliers. This shows that prior to the fabricated monopolistic concerns that allegedly form the basis of Defendant's state court complaint, she had no legal substance on which to base that state lawsuit. Thus the real reason behind her bringing that action is unveiled: she is retaliating against Plaintiffs for not submitting to her public policy concerns, which were actually **[**42]** the concerns of those exerting pressure on her, and in doing so she abused her powers as a state actor to infringe upon the rights of the Plaintiffs guaranteed by the United States Constitution.

Defendant uses her counterfeit alibi, the fairness opinion letter, to justify the PRDOJ's inability to reach an agreement with Plaintiffs. Key to understanding the pretextual nature of this issue is that even though it was of utmost importance, to the point that there was a breakdown in the negotiations as a result of Plaintiffs failure to produce that letter, the PRDOJ did not raise the issue until after nine (9) months of negotiations, after six (6) months of knowledge of the divestiture, after four (4) months of knowledge of the identified buyers, <u>and</u> after the October legislative hearings which brought heavy political pressures on Defendant. The evidence showed that the PRDOJ had approved Maximo as the divestiture front buyer since September 2002 and was aware that this group of Amigo stockholders was interested in the four stores since early July 2002. No evidence was introduced to show why Defendant suspected the unfairness of the **[*411]** divestiture sale nor was there any evidence of an **[**43]** investigation taking place to this effect. No evidence was introduced either of any genuine and true purpose that a fairness opinion would serve within the context of a divestiture. Indeed, the evidence revealed that there is no relation between the issues and concerns typically addressed in a fairness opinion and those addressed by the anti-monopolistic laws of Puerto Rico. But once again, the best revelation of the bogus nature of the request for this letter is the fact that it was not solicited from Plaintiffs until late November 2002, even though the identity and relationship of the Maximo group had been known more than four (4) months earlier.

Next, we consider the other two conditions, aside from the fairness opinion letter, that Defendant imposed on Plaintiffs during the last weeks of negotiations: 1) maintenance of current levels of local purchases, and 2) maintenance of the current labor force at Amigo stores. These were raised by Defendant as crucial matters that provoked her scrutiny of Plaintiffs' transaction for several weeks prior to its closing. Yet, Defendant attempts to suggest now that these two conditions in no way instigated her state court lawsuit or were related **[**44]** to it. She alleges that other monopolistic concerns, of which no evidence was introduced at the hearing, form the basis of her complaint, including those she sought to uncover in requesting a fairness opinion letter. This seems unreasonable and unconvincing given the pattern of events that has transpired in this case and the fact that up until the last day of negotiations and hours before filing the state court compliant, Defendant persevered in her demands for these two conditions. The Secretary's November 27 and December 5 press releases attest to this conclusion. (Pls.' Exs. 19 & 20)

Defendant admits that the labor and purchase requirements are unrelated to monopolistic and competition issues and, for this reason, they are not mentioned nor are they part of the state court lawsuit. If this is so, we wonder where she found the authority in the first place to demand these conditions. The Puerto Rico Anti-Monopoly Act does not provide the source for Defendant's imposition of conditions unrelated to antitrust concerns, even if they were-as they are not in this case-legal and constitutional. Additionally, the evidence showed that in no other merger monitored by the OMA had there been **[**45]** demands for maintenance of the current workforce and current local purchases, nor had there ever been requests for fairness opinion letters.

The Defendant testified that the imposition of the two conditions of local purchases and labor work force was done in the spirit of a negotiation and pursuant to the public policy of the Commonwealth of Puerto Rico. Given that this Court understands these conditions to be unconstitutional in that they violate Plaintiffs equal protection and commerce clause rights, [7] we pause to address the implications of Defendant's proposition. The Secretary claimed that just like any negotiator, she sat at the bargaining table in an attempt to leave that table with the best deal for those whose interests she was representing. It is absurd, however, to make such comparison when it is the State Attorney General demanding that a party not only relinquishes its constitutional rights but in addition, violates the law. If a private party made such demands at a negotiating table, the party receiving the demands would obviously feel less bulldozed than when they are made by a state official, **[*412]** who moreover has to pass muster over the transaction.

[46]** Those who negotiated on behalf of the PRDOJ, namely Martinez, Diaz Tejeda and the Secretary herself, believed that once they invoked the public policy of the administration, and because they were assuming the roles of negotiators in their dealings with Plaintiffs, they were at liberty to engage in an unobstructed pursuit of potentially illegal concessions for the good of the people of the Commonwealth of Puerto Rico. Thus, they could get away with imposing those demands first because they were "simply negotiators" and second, because ultimately they found their support in the public policy of the Commonwealth of Puerto Rico. This, they thought, would get them around the unconstitutionality of the conditions.

The public policy of Puerto Rico does not equate a *carte blanche* to government officials to impose illegal or unconstitutional conditions on parties entering a private transaction, nor to demand their acquiescence to those conditions. Much less can a state's protection of its public policy go so far as to violate the federal constitution and other state laws, nor can it be used to amend by fiat existing laws. Moreover, it seems very convenient to focus on those public policy **[**47]** concerns that are apparent and not go beyond the face of those imposed conditions to unveil adverse public policy effects that result from their imposition. Defendant suggested in her various press releases that the people of Puerto Rico would be negatively affected by the merger of Wal-Mart and Amigo since there was no guarantee that they would buy the same level of merchandise and agricultural goods from local suppliers and distributors as Amigo had in the past. But Wal-Mart understood that these requests were not only unfair but contrary to the interest of the people of Puerto Rico. Knowledge of imposed quotas on Wal-Mart would limit its bargaining power with suppliers, who would end up selling goods at higher prices in light of the quotas, and that increment would have to be passed on to consumers, of course, the people of Puerto Rico.

Moving on to the other condition, Defendant alleges that in a negotiating spirit and in an effort to uphold her administration's primary public policy goal, the protection and creation of jobs, she conditioned her approval of the transaction on Plaintiffs's assurances that they would retain Amigo's current workforce. The Secretary's genuine interest **[**48]** in protecting employment, however, becomes suspect when we consider that she did not raise this

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[7] See infra at 37, 41-44.

issue until the last month of negotiations, and after the legislative hearings took place, when things became "political." (See Docket No. 26). The possibility of job reductions and changes in the work force existed since day one of the negotiations. Ever since Martinez became involved in the negotiations back in February 2002, the PRDOJ and OMA had every reason to know that the work force in the company that was being acquired could be affected. Yet, being as important as it is for the current administration, neither Defendant nor those working under her command, thought about it or brought it up until less than a month before the closing of the transaction. To be more precise, it was not until the third week of November that this requirement was presented to Plaintiffs. This absolutely shows the pretextual nature of the claims raised in the state court complaint. Once Defendant could not find any other way to delay and halt the merger pursuant to the anti-monopolistic concerns that she is entitled to protect, she tried to use as last resort the public policy of Puerto Rico.

[*413] Pursuant **[**49]** to the language she was attempting to get Plaintiffs to agree to, they would not be able to discharge any employees who currently make up Amigo's work force. Besides the bogus nature of this condition, we find that it moreover violates Plaintiffs' rights to equal protection of the law. Plaintiffs are entitled to be free from state prosecution if they adhere to the established labor laws. But through these labor conditions Defendant is effectively imposing additional restrictions on Plaintiffs as to when they can or cannot discharge an employee. If they are unwilling to accede to these restrictions, then their merger transaction will not be approved and cannot take place.

Under the labor laws of Puerto Rico, there are enumerated reasons that will constitute good cause for an employer to terminate an employee. Puerto Rico Law on Unjustified Dismissals, Law 80 of May 30, 1976, 29 *P.R. Laws Ann. tit. 29, §§ 185a-185k* ("Law 80"). Specifically, Law 80 sets out six (6) situations where good cause can be found for discharge of employees. 29 P.R. Laws. Ann. § 185 (b). Nowhere in these provisions is it suggested that in cases of mergers and acquisition when the acquiring company is a foreign **[**50]** company, it will be forbidden from discharging employees or will ever be required to maintain its number of employees at the pre-merger level. Defendant attempts to amend the law to this effect as it applies to Plaintiffs.

One of the good cause reasons for discharge is the "*technological or reorganization changes* as well as changes of style, design or the nature of the product made or handled by the establishment, and changes in the services rendered to the public." 29 P.R. Laws Ann. § 185(e). Clearly, a merger entails changes of this type. The integration process of two companies requires that they reorganize management and administration and with this, it is very possible that employees at both lower and higher levels of management and service, have to be either transferred to different positions or discharged.

Law 80 contains a specific provision related to merger and acquisitions:

> "in the case of transfer of a going business, ***if*** *the new acquirer continues to use the services of the employees who were working with the former owner,* such employees shall be credited with the time they have worked in the basis under former owners. In the event that the new **[**51]** acquirer *chooses not to continue with the services of all or any of the employees* and hence does not become their employer, the former employer shall be liable for the compensation provided herein, and the purchaser shall retain the corresponding amount from the selling price stipulated with respect to the business. *In case he discharges them without good cause after the transfer,* the new owner shall be liable for any benefit which may accrue under sections 185a-185l of this title to the employee laid off, there being established also a lien on the business sold, to answer for the amount of the claim."

29 P.R. Laws. Ann. § 185f (emphasis ours).

Clearly, this section of the law does not say that employees of a company being acquired cannot be discharged nor does it say that the new acquirer should bring in all new employees to substitute the old ones. Indeed, it does allow the possibility that none of the employees at the company being acquired are retained by the new acquirer. As the evidence showed, this was never Plaintiffs' intent. In imposing on Plaintiffs the condition of retaining the current labor work force, and thus, effectively amending Law 80 by executive fiat, **[**52]** Defendant not only violates constitutional **[*414]** rights to equal protection of the laws but, moreover, reveals her desperate attempt to indulge all those who were exerting political and public pressures on her. Since no evidence was introduced to the effect that similar requirements are ever imposed on other companies, whether under the circumstances of a merger or not, Plaintiffs' equal protection rights are implicated. Defendant is imposing requirements on Plaintiffs that go beyond what the law requires, while not imposing them on others similarly situated.

With this factual and analytical background in mind, we proceed to examine Plaintiffs' claims within the framework of a preliminary injunction standard.

Preliminary Injunction Standard

HN1[] There are four elements necessary to grant injunctive relief: 1) there must be a substantial likelihood of success on the merits; 2) the preliminary injunction must be necessary to prevent irreparable injury; 3) the threatened harm must outweigh the harm a preliminary injunction would inflict on the nonmovant; and 4) the preliminary injunction would serve the public interest. *New Comm Wireless Services., Inc. v. SprintCom, Inc., 287 F.3d 1, 8-9 (1st Cir. 2002)*; **[**53]** *Narragansett v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991)* see also *FED.R.CIV.P. 65*. "The *sine qua non* of that formulation is whether the plaintiffs are likely to succeed on the merits." *Weaver v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993)*.

Likelihood of Success on the Merits

In this *Section 1983* action, Plaintiffs allege that Defendant's imposition of certain conditions on them before approving their transaction violates their civil rights to equal protection of the laws and due process as protected by the Fifth and Fourteenth Amendment to the Constitution of the United States of America, and also rights deriving from the Commerce Clause of the U.S. Constitution.

A review of the applicable constitutional analysis suggests that Plaintiffs would likely succeed on the merits of their constitutional claims.

Conclusions of Law

Commerce Clause Claim

HN2[] Aside from its role as a "power-allocating provision giving Congress pre-emptive authority over the regulation of interstate commerce," the commerce clause also serves as a "substantive 'restriction on permissible state regulation' of interstate commerce." *Dennis v. Higgins, 498 U.S. 439, 447, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991)*. **[**54]** Under this "negative command, known as the dormant Commerce Clause," states are prohibited "from acting in a manner that burdens the flow of interstate commerce." *Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 79 (1st Cir. 2001)*. Thus, when a state statute "discriminates against interstate commerce," courts scrutinize such actions under a "virtually per se invalid rule." Id. These statutes are "routinely struck down," unless the state can show a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988)*; accord *Concannon, 249 F.3d at 79*.

HN3[] Statutes pursuing "simple protectionism" are subject to this per se rule of invalidity, see *City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978)*. Economic protectionism can be proved by showing that either in its effects or purpose, a statute implements differential treatment between in-state and out-of-state commercial entities. Thus, the Commerce Clause forbids states from benefitting **[**55]** "in-state economic interests **[*415]** by burdening out-of-state competitors," *Limbach, 486 U.S. at 273-74*, or from building up their "'domestic commerce by means of unequal and oppressive burdens upon the industry and the business of other States,'" *Bacchus Imports v. Dias, 468 U.S. 263, 273, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984)* (citing Guy v. Baltimore, 100 U.S. 434, 443, 25 L. Ed. 743, 1 Ky. L. Rptr. 205 (1880)). When facing such economic protectionism, the standards for proving a legitimate local purpose are onerous. See Limbach, 486 U.S. at 273-74.

The Commerce Clause, however, is not merely a grant of authority to Congress. The Supreme Court has declared that the Commerce Clause "was intended to benefit those who ... are engaged in interstate commerce." Dennis, 498 U.S. at 449 (citing Morgan v. Virginia, 328 U.S. 373, 376-77, 90 L. Ed. 1317, 66 S. Ct. 1050 (1990)). The Court believes that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." Id. 498 U.S. at 450 (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949)). **[**56]** Thus, the Supreme Court has recognized that plaintiffs as market participants indeed have a cause of action under 42 U.S.C. § 1983 for violations under the Commerce Clause. Dennis, 498 U.S. at 446.

The requirement that Wal-Mart maintain a high level of purchases from local suppliers, distributors and manufacturers, present throughout the negotiations between Wal-Mart and the PRDOJ since May 2002 until the day before the state complaint was filed, falls within the type of protectionist state policies subject to the "virtually invalid per se rule" and thus it is "likely to be struck down." [8] In both its effect and purpose, the requirement differentiates between local Puerto Rico growers and out-of-state producers by mandating a quota of local products to be purchased annually. This differential treatment favors the interests of Puerto Rico growers, who are given a guaranteed market for the products sheltered from the usual perils of the market, while shutting out out-of-state growers from the potentially lucrative business relationship with Wal-Mart. Regardless of the quality of their products, the consistency of their supply, or the prices **[**57]** they offer, local growers would have a guaranteed and insurmountable advantage over out-of-state growers. This, in part, violates Wal-Mart's right to engage in interstate commerce, which is now reduced to "exclusivity contracts" with local growers, despite the myriad alternatives in interstate commerce.

In the face of this direct and discriminatory interference with interstate commerce, the Secretary of Justice offers no legitimate purpose. As has been suggested throughout this opinion, she invokes the public policy of the administration she currently works with as her source of authority that allows her to make these demands from Plaintiffs during their negotiations. She stated in a press release that "the public policy **[**58]** is directed at protecting the necessary balance that should exist between Puerto Rican and foreign capital and the benefits that it entails for the consumers." (PL.'s Ex. # 19). Whether or not Wal-Mart should attempt to strike that balance is not for this Court nor any other to determine for as long as it engages **[*416]** as a free market participant within the boundaries of the law, it is to make its own business decisions without governmental interference. But confronted with facially discriminatory remarks such as this one, we can and do determine that the Secretary is engaging in state protectionism prohibited by the federal constitution.

Defendant herself admits that failing to submit to her conditions with regards to the maintenance of a high level of local purchases is not contrary to either local or federal laws. Therefore, there can only be one conclusion as to the motivation of Defendant in making such requests from Plaintiffs: she was engaging in the type of protectionism of local suppliers that is forbidden under the Commerce Clause. Moreover, the state interests Defendant claimed to be upholding in imposing the preferential conditions on Plaintiffs do not result as beneficial **[**59]** to the people of Puerto Rico as she suggests and in fact, could result in quasi-monopolies in sectors where there is only one local supplier, distributor or manufacturer of any given good. Knowing that Wal-Mart had to purchase all its goods from them, suppliers would increase prices and in effect cause Wal-Mart to be at a great disadvantage when doing business and bargaining with these suppliers. This would ultimately result in a guaranteed loss for consumers, whose interests should no doubt also be taken into account by the public policy of the Commonwealth of Puerto Rico. In addition, **HN5**[] the antitrust laws which Defendant invokes as her source of authority to interfere in Plaintiffs' transaction are intended to protect competition and not competitors, or suppliers, distributors and

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[8] **HN4**[] Puerto Rico is subject "to the constraints of the dormant commerce clause doctrine in the same fashion as the states." Trailer Marine Transp. Corp. v. Rivera Vazquez, 977 F.2d 1 (1st Cir. 1992); Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 142 (1st Cir. 2001).

manufacturers for that matter. *Brooke Group, Ltd. v. Brown & Williamson, 509 U.S. 209, 224, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1999)*.

HN6[] Protectionism itself, or promoting in-state business by discriminating against out-of-state participants, is not a legitimate state interest. *Starlight Sugar, Inc. v. Soto, 909 F. Supp. 853, 858 (D.P.R. 1995)*. Because the Department of **[**60]** Justice's requirement, as a direct and discriminatory interference with interstate commerce, is subject to the "virtually invalid per se rule" and since the Secretary of Justice could offer no legitimate local purpose to justify such a protectionist measure, the Plaintiffs are likely to succeed in the merits of this claim.

Selective Enforcement Claim

HN7[] The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*; see also U.S. Const. amend. XIV, § 1. This protection is afforded "to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or *by its improper execution through duly constituted agents." Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923)* (citing *Sunday Lake Iron Co. v. Wakefield Tp., 247 U.S. 350, 62 L. Ed. 1154, 38 S. Ct. 495 (1918))* **[**61]** (emphasis ours).

HN8[] The Supreme Court has recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000)*. In that case, the Village of Willowbrook "intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal **[*417]** water supply," although Village regulations required the grant of only a 15-foot easement. *Id. at 565*. The Court concluded that the allegations of arbitrariness and irrationality were sufficient to "state a claim under traditional equal protection analysis," even though after opposition from the Plaintiff, the Village retracted its requirement of a 33-foot easement. *Id. at 564*.

HN9[] Circuits courts expanded and developed this "selective enforcement" cause of action. Selective prosecution or enforcement is actionable under the federal Constitution "where the decision to prosecute is made either in retaliation for **[**62]** the exercise of a constitutional right ... or because of membership in a vulnerable group." *Torres v. Frias, 68 F. Supp. 2d 935, 942 (N.D. Ill. 1999)*(quoting *Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995)*. Liability has been imposed in these cases upon plaintiffs' proof that (1) "compared with others similarly situated," they were "selectively treated"; and (2) that the selective treatment "was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or bad faith intent to injure a person." *Yerardi's Moody St. Rest. & Lounge, Inc. v. Bd. of Selectmen, 932 F.2d 89, 92 (1st Cir. 1991)*; accord *Harlen Assocs. v. Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001)*; *Hilton v. Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000)*. Absent an allegation of racial religious or speech discrimination, "there must be evidence from which a jury reasonably could find that the [defendant] acted with malicious or bad faith intent to injure [the plaintiff]." *Yerardi's, 932 F.2d at 92*. This cause of action has been specifically **[**63]** applied in *Section 1983* claims. See *Harlen Assocs., 273 F.3d at 499*; *Yerardi's, 932 F.2d at 92*. Because the plaintiff must prove illegitimate animus and malicious intent, courts have recognized the onerous nature of this claim. *Olech v. Village of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998)*; *Rubinovitz v. Rogato, 60 F.3d 906, 911 (1st Cir. 1995)*. Court have also stated, however, that the temporary nature of the oppression is unimportant in the analysis. *Olech, 160 F.3d at 388*.

The Supreme Court's analysis of the facts in Willowbrook sheds light on the effect of Defendant having technically "dropped" from her state court complaint the labor and purchase related conditions imposed on Plaintiffs while she was negotiating with them. The answer is that it does not matter. The Court in Willowbrook found plaintiff had a viable equal protection claim regardless of the fact that defendant there had "redeemed" itself when it retracted the particular and unusual demand from plaintiff of a 15-foot easement. *528 U.S. at 565*. Therefore, Defendant errs in suggesting that as long as she **[**64]** did not make the conditions part of her complaint she would be within the boundaries of the law in negotiating with Plaintiffs and demanding their submission to special conditions before she would approve their merger. Such belief in fact results in liability for equal protection violations.

The facts of this case reveal that Defendant has clearly engaged in treatment of Plaintiffs that intends to inhibit them from exercising and punishes their exercise of equal protection and due process rights as well as their rights under the Commerce Clause. Plaintiffs have a right to be free market participants without the arbitrary and oppressive imposition of obstacles that are unwarranted not only in fact but also under the law. Clearly the Secretary's intent in denying the OMA's approval of the merger on the basis of their failure to submit to her requests was to punish Plaintiffs for their defiance to her demands. **[*418]** As has been well put by the Seventh Circuit, Defendant's action were motivated by a "'spiteful effort to "get" [Plaintiffs] [] for reasons wholly unrelated to any legitimate state objective.'" *Olech v. Village of Willowbrook, 160 F.3d 386, 386 (7th Cir. 1998)* **[**65]** (quoting *Esmail, 53 F.3d at 180*).

The evidence in this case also showed that Defendant had never before imposed conditions such as the ones demanded from Plaintiffs in this case. Moreover, never before had Defendant questioned a divestiture and demanded a $ 150,000 fairness opinion letter in order to convince herself of the legitimacy of any aspect of a merger and acquisition transaction. [9]

[66] Vindictive Enforcement Claim**

HN10[] Vindictive enforcement is the other equal protection claim available against invidious discrimination through the enforcement of valid statutes. [10] See *Futernick v. Sumpter Township, 78 F.3d 1051, 1056 n.7 (6th Cir. 1996)* (explaining that they distinguish two different types of selective prosecution claims under the Equal Protection Clause: "true selective prosecution" and "vindictive enforcement"). This cause of action has been recognized when administrative agencies enforce their rules as a punishment for, or a deterrent to, the exercise of constitutional rights. See id.; see also *Heaton v. City of Princeton, 47 F. Supp. 2d 841 (W.D. Ky. 1997)*. As such, it is similar to the due process cause of action of vindictive prosecution in criminal cases. See, e.g., *United States v. Lanoue, 137 F.3d 656, 664 (1st Cir. 1998)* ("Successful assertions of vindictive prosecution are most common where a defendant advances some procedural or constitutional right and is then punished for doing so."). The general inquiry in a vindictive prosecution claim analysis must be whether "as a practical matter, there is **[**67]** a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for the hostility or punitive animus" towards defendants due to their exercise of constitutional rights. *United States v. P.H.E., Inc., 965 F.2d 848, 858 (10th Cir. 1992)*(quoting *United States v. Raymer, 941 F.2d 1031, 1042 (10th Cir. 1991)*. "The analysis is directed to determine *how the decision to prosecute was actually made in the case under consideration." P.H.E., 965 F.2d at 858* (emphasis ours).

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[9] Pursuant to *FED. R. EVID. 201(b)(2)*, the Court hereby takes judicial notice of the fact that during Martinez and Defendant's tenure at the PRDOJ, at least three other mergers have taken place. First, the sale of Puerto Rico Cement Co. this past year to Cemex, S.A., a Mexican company. Also, V. Suarez & Co. acquired Cadierno Corp. in 2001. Finally, Grupo Gloria, a Peru-based company has recently signed an agreement with Dean Foods Co., parent company to Suiza Foods, to acquire all the operations of Suiza. This foreign capital acquisition of a local company that covers two-thirds of the local fresh-milk market, has not been under the scrutiny of the PRDOJ even though their agreement was signed in early November 2002, after the PRDOJ and the government became aware of potential public policy and political concerns that can ensue as a result of this type of transaction. No evidence was introduced with regards to the PRDOJ's oversight of any of these recent transactions. See Jose L. Carmona, Ferre-Rangel: Decision to Sell Puerto Rican Cement Difficult, Caribbean Business, Construction, June 20, 2002, available at *http://prwow.com/html/cbarchive.asp;* CB & WOW News, V. Suarez Acquires Cadierno Corp., Caribbean Business, Retail, May 10, 2001, available at *http://prwow.com/html/cbarchive.asp.;* CB & WOW News, Dean Foods signs agreement to sell Suiza to Grupo Gloria, Caribbean Business, Retail, November 14, 2002, available at *http://prwow.com/html/cbarchive.asp*.

[10] As has been evident throughout this discussion section, the claims raised in this case challenge the Secretary's pretextual enforcement of the Puerto Rico Anti-Monopoly Act, not validity of the statute itself.

[*419] ***HN11***[] To succeed in a vindictive enforcement claim a plaintiff must prove that (1) he or she exercised a protected right; (2) the prosecutor or state official had a stake in the exercise of that right; (3) the prosecutor's or state official's conduct was unreasonable; **[**68]** and (4) the prosecution or state enforcement "was initiated with the intent to punish the plaintiff for the exercise of the protected right." *Futernick, 78 F.3d at 1056 n.7*.

Plaintiffs in this case are exercising their rights under the Commerce Clause to be market participants free from impositions of state protectionism. In refusing to abdicate them, Plaintiffs exercised their constitutional rights under the Commerce Clause. They did not yield to the Secretary's attempt to impose unconstitutional conditions on their transaction. The Secretary also violates Plaintiffs' right to equal protection under the law when she attempts to extract from them a consent decree that in effect amends the labor laws applicable to them as employers.

The Secretary had a stake in the Plaintiff's exercise of these rights because it meant that she would not be able to satisfy those who were exerting pressures on her to enjoin the merger transaction. She and her administration had a political stake in the transaction because while trying to give the impression that they were protecting the public policy and people of Puerto Rico they were gaining political support.

The Secretary's conduct **[**69]** towards Plaintiffs was, to say the least, unreasonable and also retaliatory and spiteful. The PRDOJ began demanding concessions from Plaintiffs in April 2002. Once Wal-Mart agreed to yield to one request, they would make another one and consequently come up with more and more requirements. In August 2002, Plaintiffs thought they had concluded their negotiations with the PRDOJ. Yet, after October the Secretary began making certain demands under the guise of continuing negotiations. Suddenly, the agreed terms of the VAL were no longer acceptable to the PRDOJ. She once again wanted to make changes to the agreements that entailed onerous submissions on behalf of Plaintiffs and that evinced her retraction from previously agreed matters.

The evidence suggests that it was around the time when she began to get the most resistance from Plaintiffs, that the Secretary directed her staff to prepare the state court complaint. The PRDOJ received much resistance from Plaintiffs with regards to the demand for a fairness opinion letter and the requirement that Plaintiffs maintain Amigo's current labor force. As has been discussed at length above the request for a fairness opinion letter was absolutely **[**70]** unreasonable. See *supra at 27-30*. Moreover, the other two conditions which remained unresolved at the closing of the transaction were not only unreasonable but also unconstitutional. Defendant's irrationality in making such demands and attempting to justify them pursuant to the public policy of Puerto Rico is one of the many indications found in the facts of this case that leaves this Court no option but to conclude that these were synchronized actions taken as a result of Plaintiffs resistance to Defendant's extortion efforts. Since Plaintiffs were not acquiescing to Defendant's demands, she retracted her earlier approval of the VAL and of the divestiture areas so she could have pretextual justifications to file her complaint pursuant to the local anti-monopolistic laws.

There was a certain suspicious aspect present during the final stages of the negotiations when many obstacles were put on Plaintiffs' transaction. These were, amongst others, the late request for a **[*420]** fairness opinion, the last minute amendments to an already agreed upon Voluntary Assurance Letter, the failure to mention at any point before filing the state court complaint any antitrust issues in geographical areas **[**71]** other than those that formed the basis for the FTC mandated divestitures, and the switch from legal to political concerns. Construed together, these series of developments reveal why those obstacles were imposed on Plaintiffs and suggests that Defendant's state lawsuit is a sham which seeks to further harass Plaintiffs and finds no support in any of the provisions of the local anti-monopolistic laws.

Soon after the PRDOJ's agenda shifted in the Fall of 2002 from a focus on legal issues to one on political issues, Defendant engaged in a desperate attempt to not only please everyone who was pressing her one way or the other, but to intimidate and coerce Plaintiffs into submissions that fall well beyond the scope of the anti-monopolistic laws of Puerto Rico. This represents a clear abuse of the judicial process and of state endowed powers that violate fundamental rights of Plaintiffs, who became targets simply because they would not yield to unconstitutional demands. The lawsuit filed in state court further burdens Plaintiffs with legal defense costs and threat of liability, and it also intimidates in trying to convince them to agree to the unconstitutional conditions to which, in Defendant's **[**72]** own words, they have not "submitted."

Ultimately, the case before this Court is not strictly about antitrust issues, or the commerce clause, or due process or equal protection. Instead, it is about a state official who has attempted to misuse and abuse state power to violate Plaintiffs' constitutional rights. ***HN12***[] "The purpose of *§ 1983* as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action." *Jobson v. Henne, 355 F.2d 129, 133 (2nd Cir. 1966)*.

Irreparable Harm

The Court finds that without a preliminary injunction Wal-Mart would suffer irreparable harm in both economic and non-economic form. The injunctive relief sought by Defendant in the Puerto Rico courts does not seek to prevent a business transaction from taking place; rather, the Secretary seeks to reverse a transaction that has already taken place. Wal-mart would thus be forced to halt and/ or reverse any cooperation or integration activity with Amigo it has begun so far. This potential course of action affects Wal-Mart in diverse ways. First, **[**73]** the delays and uncertainties affect employee morale and customer trust. Employee uneasiness after ten months of rumors about a impending merger would be heightened by a further, and potentially prolonged, delay. This uneasiness will likely permeate the delivery of the services to Amigo customers. In addition to the effect on employee morale and the delivery of services to customers, the Defendant's attempt to impede the transaction will surely damage Wal-Mart's reputation arising from the unlawful and bogus enforcement of the Puerto Rico antitrust laws. Wal-Mart has carefully built its reputation in the ten years it has conducted business in Puerto Rico, and that reputation-easier to lose than to rebuild-would erode slowly. Third, Amigo faces the potential loss of their current distribution center, the lease of which expires on March 2004. The merger between Amigo and Wal-Mart envisioned the use of a joint distribution center. With a prolonged halt in the integration of Wal-Mart and Amigo, however, the difficulties in establishing an independent distribution **[*421]** center before the current lease expires jeopardizes Amigo's sustained operation.

The deprivation of Wal-Mart constitutional **[**74]** rights, however, is the utmost irreparable harm in this case. ***HN13***[] A presumption of irreparable harm flows from and is triggered by an alleged deprivation of constitutional rights. See *Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996)*; *Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984)*. If the Secretary's actions indeed violate Wal-Mart's constitutional rights, this deprivation must be stopped promptly. The unacceptable alternative is to subject Wal-Mart to an unlawful enforcement action, and once the deprivation of their constitutional rights has taken place, have this Court intervene. Having proper jurisdiction over this case, it is necessary to prevent the deprivation now, instead of trying to offer redress after the deprivation has taken its toll.

The Public Interest

We live in a system of laws, not men. Thus, ***HN14***[] while the promotion of vigorous competition in the Puerto Rican economy is a legitimate public policy, it cannot belittle another unceasing public interest: guaranteeing the rule of law and preventing deprivations of constitutional and civil rights under color of law. To preserve the rule of law the government must act not only **[**75]** as an enforcer, but as a guiding light. For as Justice Brandeis once declared: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." See *Olmstead v. United States, 277 U.S. 438, 485, 72 L. Ed. 944, 48 S. Ct. 564 (1928)* (Brandeis, J., dissenting).

The actions by the Department of Justice against Wal-Mart not only fall short of being a guiding light, they poison the trust that the people must have in its legal and political system. The government cannot hide under the guise of its legitimate enforcement authority to deprive the citizens of this Nation of their constitutional rights. Contrary to the Secretary's assertions, she is not just a negotiator seeking the best deal; she is a state actor and, more specifically, she represents the prosecutorial arm of the state with all its power and authority which in this case has been severely misused. ***HN15***[] When the prosecutorial arm of the state uses its power to coerce private parties into abdicating their constitutional right, not only is due process **[**76]** and equal protection of law denied, but the trust in our processes and system of laws diminishes. It is this public interest in guaranteeing due process and preserving the trust in the rule of law that the Court furthers with this preliminary injunction.

The parties that entered into this transaction recognized that the process would entail scrutiny by a federal and a state agency. The federal agency, fully capable as it is to review this type of transaction and having been instituted for that purpose, made a careful examination of the Wal-Mart/ Amigo merger proposal and determined that it complied with federal antitrust laws from which the local laws minimally deviate. ***HN16***[] It is in the best interest of the people of Puerto Rico that under circumstances such as this one, where a federal and a state agency are conducting parallel investigations and one has more resources available to it than the other, their government recognizes with full faith and credit the decisions of a federal agency such as the FTC when there is no indication that such decision was incorrect or unjust. Moreover, it is also in the best interests of the people of Puerto Rico that their government refrain from engaging **[**77]** in arbitrary and irrational enforcement of the **[*422]** laws, specially when these are used contrary to their own purposes.

The Balance of Equities

Considering the Plaintiff's irreparable harm and the strong public interests in favor of supporting the status quo, the harm caused to the Defendant by the issuance of a preliminary injunction is less considerable than the harm to the Plaintiffs. First, the preliminary injunction does not prevent the Secretary of Justice from ultimately enforcing Puerto Rico's antitrust laws. It merely preserves the status quo to ensure that no deprivation of constitutional rights takes place. If the Secretary's actions are found lawful, she will be free to enforce the applicable laws and seek the remedies she deems appropriate. Second, there is no evidence that a mere delay in legal action in state court will cause disproportionate harm to the Secretary of Justice. As this Court suggested in an earlier opinion in this case, Defendant waited quite a long time, seven (7) months to be exact, before raising many of her "primary" and "fundamental" concerns with the Wal-Mart/ Amigo transaction. If this Court were ultimately to decide in her favor, she **[**78]** will be able to accomplish the same results than she could in the very near future. The possibility of further divesting other stores if she was in fact correct about the remaining competition issues in other geographical areas, or of reselling those that were already divested will be as present then as it is now. The opportunity for Plaintiffs to vindicate their rights before going through a process that itself violates those rights will be long gone if not addressed in this lawsuit with the provision of preliminary injunctive relief.

CONCLUSION

The above discussion demonstrates that Plaintiffs would likely prevail on their contention that unconstitutional conditions were demanded and requested by the Secretary of Justice in order to approve the acquisition of Supermercados Amigo, Inc. by Wal-Mart Puerto Rico, Inc and the divestiture of the four Amigo stores to Supermercados Maximo, Inc. Furthermore, the evidence before the Court leads the Court to conclude that the events that transpired from February 5 to December 5, 2002 show that Plaintiffs will suffer irreparable injury if the Secretary is not enjoined from continuing to prosecute the lawsuit filed in the Court of **[**79]** First Instance, Superior Division of San Juan against the Plaintiffs herein. Finally, consideration of the comparative equities in this case, including the public interest, weigh in favor of Plaintiffs.

Therefore, based on the findings entered herein and the special emphasis placed on the "likelihood of success" prong, as required by First Circuit case law, the Court rules in favor of Plaintiffs in their request for a preliminary injunction and the same is **GRANTED.**

Defendant Anabelle Rodriguez, Secretary of Justice of the Commonwealth of Puerto Rico, her lawyers, agents, employees, or any other person acting in concert with her is hereby enjoined, prohibited and/ or forbidden to thwart, impede, or interfere with the acquisition of Supermercados Amigo, Inc. by Wal-Mart Puerto Rico, Inc. and the divestiture by Wal-Mart Puerto Rico, Inc. of four Amigo stores to Supermercados Maximo, Inc.; or to seek a stay in any court of the Commonwealth of Puerto Rico directed to the Plaintiffs to impede, interfere, or forbid them from operating the Supermercados Amigo stores as a wholly owned subsidiary of Wal-Mart Puerto Rico, Inc.

IT SO ORDERED.

SO ORDERED.

San Juan, Puerto Rico, **[**80]** December 26, 2002.

JUAN M. PEREZ-GIMENEZ

U.S. District Judge

End of Document

Whitehall Co. v. Merrimack Valley Distrib. Co.

Appeals Court of Massachusetts

November 6, 2001, Argued ; December 30, 2002, Decided

No. 99-P-1743

Reporter

56 Mass. App. Ct. 853 *; 780 N.E.2d 479 **; 2002 Mass. App. LEXIS 1642 ***; 2003-1 Trade Cas. (CCH) P73,928

WHITEHALL COMPANY LIMITED vs. MERRIMACK VALLEY DISTRIBUTING COMPANY, INC., & another. [1]

Prior History: **[***1]** Norfolk. Civil action commenced in the Superior Court Department on November 20, 1996. Motions to dismiss and for reconsideration were heard by Charles M. Grabau, J.

Disposition: Trial court's judgment was affirmed.

Core Terms

price discrimination, unfair, prices, violations, provisions, unfair methods of competition, damages, FTC Act, competitors, wholesaler, predation

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Price Discrimination, Promotional Allowances & Services**

Mass. Gen. Laws ch. 138, § 25A(a) (as amended through 1971 Mass. Acts 494) prohibits brand owners and wholesalers of alcoholic beverages from discriminating in price or in discounts for their customers' volume purchases or prompt payments. The statute provides that violations of ch. 138, *§ 25A* can lead to suspension of the violator's license, *Mass. Gen. Laws ch. 138, § 23*, or to imposition of criminal penalties, *Mass. Gen. Laws ch. 138, §§ 2*, *62*.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Price Discrimination, Promotional Allowances & Services**

[1] Atlas Liquors, Inc.

See *Mass. Gen. Laws ch. 138, § 25A(a)* (as amended through 1971 Mass. Acts 494).

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

HN3[] **Motions to Dismiss, Failure to State Claim**

In considering a motion filed under *Mass. R. Civ. P. 12(b)(6)*, a court is limited to the contents of the complaint itself.

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

HN4[] **Motions to Dismiss, Failure to State Claim**

A complaint cannot be dismissed pursuant to *Mass. R. Civ. P. 12(b)(6)* unless it appears certain that the complaining party is not entitled to relief under any state of facts which could be proved in support of the claim. The standard is applied in an exceedingly liberal manner. Nevertheless, the complaint must put the adversary on notice of the essential elements of the claim the pleader intends to assert. It is not enough that a viable claim lurks somewhere in conclusory descriptions of a general scenario, which could be dominated by unpleaded facts.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

Violation of a specific statute that does not itself permit private recovery may give rise to a private claim under *Mass. Gen. Laws ch. 93A* if the violation amounts to an unfair method of competition or an unfair or deceptive practice independently prohibited by *Mass. Gen. Laws ch. 93A, § 2* and if recovery under ch. 93A is compatible with the objectives and enforcement mechanisms the underlying statute contains. Not every statutory violation amounts either to unfair competition or to an unfair practice. Therefore, before undertaking the often complex task of deciding whether maintenance of a private action under ch. 93A is congruent with an underlying statute or statutes, one must determine whether the statutory violation also violates ch. 93A, *§ 2*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Mass. Gen. Laws ch. 93A, § 2(b)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

See *15 U.S.C.S. § 45(a)(1)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Mass. Gen. Laws ch. 93A, § 11*.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN9[] **Public Enforcement, US Federal Trade Commission Actions**

15 U.S.C.S. § 13(a) prohibits certain price discrimination by competing sellers, so-called discrimination at the primary line.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Price Discrimination, Competitive Injuries**

At the primary line, price discrimination is an unfair trade practice only if the discrimination has an adverse impact on competition itself, not simply an adverse impact on competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN11[] **Attempts to Monopolize, Elements**

At the primary line, the essence of a viable claim for price discrimination under *§ 2(a)* of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, and, thus, under § 5(a)(1) of the Federal Trade Commission Act, *15 U.S.C.S. § 45(a)(1)*, is that a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market. The injury thereby created is similar to the injury produced by violating *§ 2* of the Sherman Act, *15 U.S.C. § 2*, which prohibits monopolizing a market or attempting to do so. Accordingly, proof of prohibited discrimination at the primary line requires proof of two elements, i.e., that the rival's prices are below an appropriate measure of the rival's cost and the rival has a reasonable prospect that its scheme will ultimately allow it to charge noncompetitively high, or supercompetitive, prices sufficient to recoup the amounts expended on the predation, including the time value of the money invested in it. Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] **Price Discrimination, Competitive Injuries**

The risk of supercompetitive prices spawned by predation is the social harm that justifies prohibiting primary line discrimination. Without that harm, or its realistic prospect, even predatory pricing is an insufficient trigger for regulatory intervention because such pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] **Price Discrimination, Competitive Injuries**

Price discrimination without an adverse impact on competition, and not simply on competitors, is not an unfair method of competition or an unfair trade practice within the meaning of *Mass. Gen. Laws ch. 93A, § 2*, at least when the discrimination occurs at the primary line.

Headnotes/Summary

Headnotes

Alcoholic Liquors, Price, Wholesaler. *Statute*, Construction. *Consumer Protection*, Availability of remedy, Unfair act or practice.

Counsel: Robert S. Frank, Jr., for the plaintiff.

Bruce W. Edmands for Merrimack Valley Distributing Company, Inc.

William D. O'Brien for Atlas Liquors, Inc.

Judges: Present: Brown, Greenberg, & McHugh, JJ.

Opinion by: McHUGH

Opinion

[*853] [480]** McHUGH, J. Reduced to essentials, the question in this case is whether *G. L. c. 93A, § 11*, allows the plaintiff, a liquor wholesaler, to recover damages from a competing wholesaler who allegedly violated the price discrimination provisions of *G. L. c. 138, § 25A*, and from a retailer who allegedly sought and benefitted from the discrimination. A judge in the Superior Court said "no," and allowed the defendants' motion to dismiss. We agree that, in this case, the answer is "no," although we do **[*854]** so for reasons different from those upon which the motion judge relied. Consequently, we affirm the judgment dismissing the plaintiff's complaint.

[481]** Extracted from inconsequential diversions, the background is as follows. The plaintiff, Whitehall **[***2]** Company Limited, Inc., is a wholesaler of alcoholic beverages licensed under the provisions of *G. L. c. 138, § 18*. Merrimack Valley Distributing Company, Inc. (Merrimack), one of the two defendants, is a competing wholesaler, also licensed under *G. L. c. 138, § 18*. Atlas Liquors, Inc. (Atlas), the other defendant, is a licensed liquor retailer. See *G. L. c. 138, § 15*.

General Laws c. 138, § 25A, the statutory provision at the center of the present controversy, [2] **[***3]** is part of an extensive scheme under c. 138 for regulating distribution of alcoholic beverages. See generally *Miller Brewing Co. v. Alcoholic Bevs. Control Commn., 56 Mass. App. Ct. 801, 780 N.E.2d 80 (2002)*. As part of that scheme, ***HN1***[] *§ 25A*(*a*) prohibits brand owners and wholesalers from discriminating in price or in discounts for their customers'

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[2] The section provides as follows:

> ***HN2***[] "No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall --
>
> "(a) Discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality;
>
> "(b) [Deleted by St. 1970, c. 140, *§ 1*.]
>
> "All price lists or price quotations made to a licensee by a wholesaler shall remain in effect for at least thirty days after the establishment of such price list or quotation. Any sale by a wholesaler of any alcoholic beverages at prices lower than the price reflected in such price list or quotation within such thirty day period shall constitute price discrimination under this section."

G. L. c. 138, § 25A, as amended through St. 1971, c. 494.

volume purchases or prompt payments. [3] The statute provides that violations of *§ 25A* can lead to suspension of the violator's license, *G. L. c. 138, § 23*, **[*855]** or to imposition of criminal penalties, *G. L. c. 138, §§ 2*, *62*.

[*4] [**482]** In November, 1996, the plaintiff commenced the present action in Superior Court alleging that Merrimack had engaged in unfair competition and had committed an unfair or deceptive practice, all in violation of *G. L. c. 93A, § 2*, by failing to adhere to the *§ 25A* antidiscrimination provisions. [4] **[***5]** The complaint also alleged that Atlas had committed similar violations by soliciting and receiving discriminatory discounts. See **[*856]** *G. L. c. 93A, § 11*. [5] The plaintiff's complaint sought declaratory and injunctive relief as well as damages, compensatory and punitive.

Merrimack and Atlas moved to dismiss the complaint under *Mass.R.Civ.P. 12(b)(6)*, 365 Mass. 754 (1974). [6] **[***6]** After initially denying the motion pending the outcome of related Federal litigation, see note 3, *supra*, the judge allowed it and judgment of dismissal entered. [7]

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[3] The final paragraph of *§ 25A* is a so-called "post and hold" provision that requires those who sell alcoholic beverages to wholesalers or retailers to submit to the Alcoholic Beverages Control Commission (ABCC) periodic schedules of prices at which they are prepared to sell such beverages and then to maintain those prices for a period of thirty days after the schedule becomes effective. In *Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41 (D. Mass. 1998)*, the United States District Court for the District of Massachusetts held that the post and hold provision was a per se violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*, because that provision allowed sellers to set prices without effective State oversight and consequently did not qualify for a "State action" immunity from the antitrust laws under the principles articulated by the Supreme Court of the United States in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. See *Canterbury Liquors & Pantry v. Sullivan, 999 F. Supp. 144 (D. Mass. 1998)*. See generally *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. In *Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d at 44*, the Federal District Court reached that conclusion on the basis of a Ninth Circuit decision, *Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987)*, cert. denied, *484 U.S. 1061, 98 L. Ed. 2d 983, 108 S. Ct. 1018 (1988)*, and a dissent in a Second Circuit decision, *Battipaglia v. New York State Liquor Authy., 745 F.2d 166, 179 (2d Cir. 1984)* (Winter, J., dissenting), cert. denied, *470 U.S. 1027, 84 L. Ed. 2d 782, 105 S. Ct. 1393 (1985)*, but without citing *M. H. Gordon & Son, Inc. v. Alcoholic Bevs. Control Commn., 386 Mass. 64, 70-73, 434 N.E.2d 986 (1982)*, which held that the ABCC did exercise sufficient supervision over execution of the post and hold provisions of *G. L. c. 138, §§ 25B*, *25D*, to immunize them from the antitrust laws. In any event, the Federal District Court entered judgment declaring that the *§ 25A* post and hold provision and the implementing regulations found in *204 Code Mass. Regs. §§ 6.00-6.07*, were invalid and unenforceable. The ABCC did not appeal and, after dismissal of an appeal brought by another party, see *Sea Shore Corp. v. Sullivan, 158 F.3d 51, 59 (1st Cir. 1998)*, the judgment became final.

[4] When filed, the complaint also alleged that the defendants had violated the *§ 25A* "post and hold" provision. See note 3, *supra*. The Federal litigation over that provision was pending at the time and the plaintiff had intervened in that litigation as a plaintiff to urge that the provision violated the Sherman Act. When the plaintiff and others prevailed in the Federal litigation, the plaintiff was given leave to amend the Superior Court complaint to eliminate the "post and hold" claim. The amended complaint is the subject of the present appeal and contains no reference to alleged "post and hold" violations.

In view of the result we reach on the merits, we need not explore the defendants' contention that the plaintiff's representations to the Superior Court about its intentions after resolution of the Federal action estopped it from pursuing the present claims.

[5] The plaintiff named nine additional wholesalers as defendants in the action, making similar allegations against each and claiming that Merrimack and the other nine were involved in a conspiracy to violate *§ 25A* and "the laws which govern the sale of alcoholic beverages in Massachusetts." The plaintiff likewise named three other retailers, making allegations similar to those it made regarding Atlas. Read as a whole, the complaint alleged that the wholesalers were giving the retailers, and the retailers were seeking and receiving from the wholesalers, forbidden discounts or that, put somewhat differently, competition between wholesalers was impermissibly flourishing. The other wholesalers and retailers settled and consequently play no role in this appeal.

[6] At some point before the motion to dismiss was allowed, the plaintiff filed affidavits dealing with discovery issues and with certain aspects of the plaintiff's damages claim. ***HN3***[] In considering a motion filed under *Mass.R.Civ.P. 12(b)(6)*, however, the court is limited to the contents of the complaint itself. See *Epstein v. Seigel, 396 Mass. 278, 278-279, 485 N.E.2d 947*

Our analysis begins with the familiar. **HN4**[] A complaint cannot be dismissed pursuant to Mass.R.Civ.P. 12(b)(6) "unless it appears certain that the complaining party is not entitled to relief under any state of facts which could be proved in support of the claim." Harvard Law Sch. Coalition for Civil Rights v. President & Fellows of Harvard College, 413 Mass. 66, 68, 595 N.E.2d 316 (1992), quoting from Rae v. Air-Speed, Inc., 386 Mass. 187, 191, 435 N.E.2d 628 (1982). We apply that standard in an "exceedingly liberal manner." Brum v. Dartmouth, 44 Mass. App. Ct. 318, 321, 690 N.E.2d 844 (1998). Accord Coolidge Bank & Trust Co. v. First Ipswich Co., 9 Mass. App. Ct. 369, 370-371, 401 N.E.2d 165 (1980). **[***7]** Nevertheless, the **[**483]** complaint must put the **[*857]** adversary on notice of the essential elements of the claim the pleader intends to assert. It is not enough that a viable claim lurks somewhere in "conclusory descriptions of a 'general scenario which could be dominated by unpleaded facts.'" Schaer v. Brandeis Univ., 432 Mass. 474, 478, 735 N.E.2d 373 (2000), quoting from Judge v. Lowell, 160 F.3d 67, 77 (1st Cir. 1998).

Here, the plaintiff alleges that it has been damaged by price discrimination, pure and simple. Although it claims that the damaging price discrimination is forbidden by G. L. c. 138,

§ 25A, it does not maintain that it has a right of action under that statute. [8] **[***9]** Instead, it asserts that to engage in discrimination banned by § 25A is to engage in an unfair method of competition and commit an unfair trade practice in violation of G. L. c. 93A, § 2, and that G. L. c. 93A, § 11, provides a right of action to recover resulting damages and more. Accordingly, the question for us is whether, **[***8]** without more, an allegation that a competing defendant has engaged in price discrimination forbidden by G. L. c. 138, § 25A, and that the plaintiff lost sales as a consequence, is enough to state a viable claim for relief under G. L. c. 93A, § 11. [9]

[*858] **HN5**[] Violation of a specific statute that does not itself permit private recovery may give rise to a private claim under c. 93A if the violation amounts to an unfair method of competition or an unfair or deceptive practice independently prohibited by G. L. c. 93A, § 2, and if recovery under c. 93A is compatible with the objectives and enforcement mechanisms the underlying statute contains. See Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 76-78, 365 N.E.2d 802 (1977); Ciardi v. Hoffmann-La Roche, Ltd., 436 Mass. 53, 62-64, 762 N.E.2d 303 (2002).

(1985). Nothing in the record suggests that the motion judge considered the contents of those affidavits in ruling on the motion to dismiss, and their content likewise plays no role in our review.

[7] Because of the result we reach regarding the plaintiff's claim against Merrimack, we need not separately assess Atlas's claim that it cannot be liable in any circumstances for receiving the benefits of any price discrimination because G. L. c. 138,

§ 25A, is aimed solely at brand owners and wholesalers. But, c. 93A § 11, not c. 138, § 25A, per se, is the focus of the plaintiff's complaint. As to that, see note 11, *infra*.

[8] Accordingly, we are not required to decide whether such an action exists. We note, however, that c. 138 contains no express provision for a private right of action and that § 25A was added to the General Laws by St. 1946, c. 304, the emergency preamble to which noted that the acts the statute prohibited "contributed to a disorderly distribution of alcoholic beverages" and that deferred operation of the statute would "be contrary to the interests of temperance." See Supreme Malt Prod. Co. v. Alcoholic Bevs. Control Commn., 334 Mass. 59, 62, 133 N.E.2d 775 (1956); Miller Brewing Co. v. Alcoholic Bevs. Control Commn., 56 Mass. App. Ct. at 807. But cf. Capital Distrib. Co. v. Heublein, Inc., 50 Mass. App. Ct. 339, 342, 737 N.E.2d 498 (2000). We also note that G. L. c. 138, § 23, provides that the licensing scheme at the heart of the chapter's regulatory mechanism is not intended to create rights for individuals engaged in the liquor distribution business but is instead designed to serve the public need and common good. Finally, we note that each reported case dealing with the subject has rejected private efforts to coax a right of action out of some alleged violation of c. 138. Cimino v. Milford Keg, Inc., 385 Mass. 323, 327, 431 N.E.2d 920 (1982) (§ 69); Gottlin v. Herzig, 40 Mass. App. Ct. 163, 166-167, 662 N.E.2d 706 (1996) (§ 26); Wine & Spirits Wholesalers of Massachusetts, Inc. v. Net Contents, Inc., 10 F. Supp. 2d 84, 86-87 (D. Mass. 1998) (general violations of c. 138). See generally *All* Brands Container Recovery, Inc. v. Merrimack Valley Distrib. Co., 54 Mass. App. Ct. 297, 300-303, 764 N.E.2d 931 (2002).

[9] The plaintiff could have, but did not, move to amend the complaint after the motion to dismiss was allowed. See Mass.R.Civ.P. 15(a), 365 Mass. 761 (1974); Smith & Zobel, Rules Practice § 15.4 (1974). It chose not to seek an amendment and elected to stand on the theory expressed in the amended complaint as initially pleaded.

Compare *Reiter Oldsmobile, Inc. v. General Motors Corp., 378 Mass. 707, 393 N.E.2d 376 (1979)*; *Cabot Corp. v. Baddour, 394 Mass. 720, 477 N.E.2d 399 (1985)*; **[***10]** *DePasquale v. Ogden Suffolk Downs, Inc., 29 Mass. App. Ct. 658, 662, 564 N.E.2d 584 (1990)*. Obviously, however, not every statutory violation amounts either to unfair competition or to an unfair practice. Therefore, before **[**484]** undertaking the often complex task of deciding whether maintenance of a private action under c. 93A is congruent with an underlying statute or statutes, one must determine whether the statutory violation also violates c. 93A, *§ 2*. See *Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 754, 610 N.E.2d 912 (1993)*.

In determining whether price discrimination of the type the plaintiff alleges here violates *§ 2*, we are guided by two express directions contained in c. 93A itself. First,, c. 93A *§ 2*(*b*), states that, in any action brought, inter alia, under *§ 11*, we are to ***HN6***[] "be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (*15 U.S.C. 45(a)(1)*), as from time to time amended." The Federal Trade Commission (FTC) Act broadly prohibits ***HN7***[] "unfair methods of competition . . . and unfair or deceptive acts or practices. **[***11]** "[10] *15 U.S.C. § 45(a)(1)*. Second, c. 93A, *§ 11*, provides that, in determining whether challenged conduct amounts to an ***HN8***[] "unfair method[] of competition," **[*859]** we are to consider the provisions of G. L. c. 93, the Commonwealth's antitrust statute, in addition to FTC and judicial interpretations of the FTC Act.[11]

[*12]** At the Federal level, the FTC has interpreted and applied § 5(a)(1) of the FTC Act to prohibit price discrimination if that discrimination is outlawed by *§ 2(a)* of the Robinson-Patman Act, *15 U.S.C. § 13(a)*.[12] **[***13]** In turn, *§ 2(a)* ***HN9***[] prohibits certain price discrimination by competing sellers, so-called discrimination at the primary line.[13] See **[**485]** *Federal Trade Commn. v. Anheuser-Busch, Inc., **[*860]** 363 U.S. 536, 542-543, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*. That is the type of discrimination the plaintiff alleges here.

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[10] Although the FTC Act "has heavy historical roots in ***antitrust law***," *Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 773 n.15, 407 N.E.2d 297 (1980)*, the FTC's powers are not constrained by the antitrust laws' precise contours. See *PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 595-596, 321 N.E.2d 915 (1975)*; *Ciardi v. Hoffmann-La Roche, Ltd., 436 Mass. at 68-70* (Sosman, J., dissenting). See also note 11, *infra*.

[11] The cited portion of *§ 11* is one of the exceptions countenanced by the broad provision of *G. L. c. 93, § 14A*, that "the Massachusetts Antitrust Act shall have no effect upon the provisions of [c. 93A], except as explicitly provided in said [c. 93A]."

[12] When it adopted the broad language of § 5(a)(1) of the FTC Act, Congress "considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply." *Federal Trade Commn. v. Sperry & Hutchinson Co., 405 U.S. 233, 240, 31 L. Ed. 2d 170, 92 S. Ct. 898 (1972)*. The FTC nevertheless has, recently at least, exercised sparingly the enforcement and interpretive powers that broad language invites. As the FTC explained in *In re Gen. Foods Corp., 103 F.T.C. 204, 365 (1984)*,

> "While Section 5 may empower the [FTC] to pursue those activities which offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed" (footnote omitted).

See, e.g., *E.I. Du Pont De Nemours & Co. v. Federal Trade Commn., 729 F.2d 128, 137-138 (2d Cir. 1984)*. In the area nominally covered by the Robinson-Patman Act, the FTC's only significant movement beyond the Act itself has occurred in the area of knowing buyer inducements of discriminatory promotional allowances and services, which, unlike knowing inducements of prohibited discriminatory prices, the Act itself does not prohibit. See *15 U.S.C. § 13(f)*. See generally *Grand Union Co. v. Federal Trade Commn., 300 F.2d 92 (2d Cir. 1962)*; *Giant Food, Inc. v. Federal Trade Commn., 113 U.S. App. D.C. 227, 307 F.2d 184 (D.C. Cir. 1962)*, cert. denied, ***372 U.S. 910, 9 L. Ed. 2d 718, 83 S. Ct. 723 (1963)***; Scher, Antitrust Advisor

§§ 4.01-4.02, 4.39 (4th ed. rev. 2001).

[13] *Section 2(a)* also prohibits discrimination that injures competitors of a seller's favored customers (secondary line competition), *Federal Trade Commn. v. Morton Salt Co., 334 U.S. 37, 42-44, 92 L. Ed. 1196, 68 S. Ct. 822, 44 F.T.C. 1499 (1948)*, or has an adverse impact on competing customers of the favored and disfavored purchasers. *Falls City Indus., Inc. v. Vanco Bev., Inc.,*

HN10[] At the primary line, however, price discrimination is an unfair trade practice only if the discrimination has an adverse impact on competition itself, not simply an adverse impact on competitors. [14] As one commentator has explained, **[***14]**

> "injury to competitors in the primary line may well be caused by competition which is 'fair.' Unless the lower price is below marginal cost, or unless so many sellers are driven out of the business that, in view of the power and purpose of the seller, a continuation of the discrimination would be inconsistent with the healthy continuation of a competitive market, the practice does not possess the requisite degree of unfairness necessary to fall within the policy of section 5 [of the FTC Act]."

Reeves, Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation, 16 B.C. Indus. & Com. L. Rev. 151, 184 n.161 (1975). See **[***15]** *Anti-Monopoly, Inc*. v. *Hasbro, Inc., 958 F. Supp. 895, 905 (S.D.N.Y. 1997)*.

Put another way, ***HN11***[] at the primary line, the essence of a viable claim for price discrimination under *§ 2(a)* of the Robinson-Patman Act, and, thus, under § 5(a)(1) of the FTC Act, is that "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Group Ltd*. v. *Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*. The injury thereby created is similar to the injury produced by violating *§ 2* of the Sherman Act, *15 U.S.C. § 2*, which prohibits monopolizing a market or attempting to do so. Accordingly, proof of prohibited discrimination at the primary line requires proof of two elements, i.e., that (a) the rival's prices are below an appropriate measure of the rival's **[*861]** cost, *Brooke Group Ltd*. v. *Brown & Williamson Tobacco Corp., supra*, and (b) the rival has a reasonable prospect that its scheme will ultimately allow it to charge noncompetitively high, or supercompetitive, **[***16]** prices sufficient to recoup "the amounts expended on the predation, including the time value of the money invested in it." *Id. at 225*. In the last analysis, "recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation." *Id. at 224*.

HN12[] The risk of supercompetitive prices spawned by predation is the social harm that justifies prohibiting primary line discrimination. Without that harm, or its realistic prospect, even predatory pricing is an insufficient trigger for regulatory intervention because such pricing "produces **[**486]** lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers." *Ibid*.

At the State level, the current version of c. 93, to which, as stated, c. 93A, *§ 11*, directs the interpreter, contains no specific analog to the Robinson-Patman Act and no other specific reference to price discrimination. Until the first fourteen sections of c. 93 were revised and streamlined **[***17]** in 1978 by St. 1978, c. 459, *§ 1*, however, *G. L. c. 93, § 8*, the embodiment of St. 1912, c. 651, *§ 1* (see *Opinion of the Justices, 211 Mass. 620, 99 N.E. 294* [1912]), prohibited price discrimination carried out, inter alia, "for the purpose of destroying the business of a competitor and of creating a monopoly in any locality." Cf. *Commonwealth v. Dyer, 243 Mass. 472, 498, 138 N.E. 296 (1922)*. The pre-1978 statute thus prohibited price discrimination with an adverse impact on competition at the primary line. While old *§ 8* disappeared in the 1978 streamlining, its residuum in the current provisions of c. 93 [15] suggests that,

460 U.S. 428, 436, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983). See generally *Godfrey v. Pulitzer Pub. Co., 276 F.3d 405, 408 n.7 (8th Cir. 2002)*; Reeves, Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation, 16 B.C. Indus. & Com. L. Rev. 151, 178-183 (1975). Those types of discrimination, and the separate analytical matrices attendant on them, are inapplicable here.

[14] At the secondary line, which this case does not involve, the Robinson-Patman Act does protect against injury to competitors. See note 13, *supra*. See also *In re Gen. Motors Corp., 103 F.T.C. 641, 701 (1984)*. See generally Scher, Antitrust Advisor § 4.03 (4th ed. rev. 2001).

at the primary line, only price discrimination **[*862]** designed to create a monopoly is an unfair practice or an unfair method of competition.

[*18]** *J. & J. Enterprises, Inc*. v. *Martignetti, 369 Mass. 535, 341 N.E.2d 645 (1976)*, a case the plaintiff cites to support its claim that c. 93A, *§ 11*, provides a private remedy for all price discrimination that violates c. 138, *§ 25A*, does not, in our view, tend in a direction different from that suggested by the FTC Act and our own c. 93. In *J. & J. Enterprises*, the plaintiff alleged that the defendants had violated several provisions of c. 138, including *§ 25A*, and sought to recover damages under c. 93A, *§ 11*. *Id. at 536-537*. The trial court allowed the defendant's motion to dismiss. The Supreme Judicial Court reversed, holding that, instead of dismissing the action, the court should have stayed all proceedings pending initiation and completion of proceedings before the ABCC. [16] *Id. at 541*.

[*19]** Critical to an understanding of *J. & J. Enterprises*, however, is that the plaintiff did not just allege serial violations of c. 138. Instead, the plaintiff alleged that the defendants had attempted to create a monopoly and had engaged in trade-restraining combinations and conspiracies, all of which were prohibited by the antitrust provisions of c. 93, *§§ 2*, *9* (now c. 93, §§ 4, **[**487]** 5). According to the complaint, the violations of c. 138 were the particular acts and practices the defendants employed in carrying out their unlawful restraints of trade. *369 Mass. at 537-538*. *J. & J. Enterprises*, thus, does not support the plaintiff's claim that price discrimination, without more, gives rise to a right of action under *§ 11* of c. 93A.

In sum, ***HN13***[] price discrimination without an adverse impact on **[*863]** competition, and not simply on competitors, is not an unfair method of competition or an unfair trade practice within the meaning of *G. L. c. 93A, § 2*, at least when the discrimination occurs, as alleged here, at the primary line. Because the complaint alleges nothing more than price discrimination and injury to the plaintiff, a competitor, the complaint was rightly dismissed. **[***20]** [17]

Judgment affirmed.

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[15] Disappearance of the section is consistent with two features of the new, streamlined Massachusetts Antitrust Act. First, § 5 of the new Act globally prohibited all attempts to monopolize, of which old *§ 8* violations were but one variety. Second, insofar as competition at the primary line was concerned, *G. L. c. 93, § 14F*, which had been inserted by St. 1938, c. 410, and amended by St. 1941, c. 494, and which was unaffected by the 1978 changes, prohibited certain predatory pricing, whether or not discriminatory, done with the intent to injure either competition or competitors. At the primary line, therefore, *§ 14F* already did the work of old *§ 8* and then some.

[16] Referral to the ABCC was necessary because trade practices permitted by a State agency charged with responsibility for overseeing a particular industry typically do not violate c. 93A. *SDK Med. Computer Serv. Corp*. v. *Professional Operating Mgmt. Group, Inc., 371 Mass. 117, 126-127, 354 N.E.2d 852 (1976)*. Moreover, the impact and effect of some industry practices are arcane and can be determined only with insights flowing from administrative expertise. See, e.g., *Whitehall Co., Ltd*. v. *Alcoholic Bevs. Control Commn., 7 Mass. App. Ct. 538, 389 N.E.2d 419 (1979)*; *M. H. Gordon & Son, Inc*. v. *Alcoholic Bevs. Control Commn., 14 Mass. App. Ct. 973, 438 N.E.2d 1095 (1982)*; *Somerset Importers, Ltd*. v. *Alcoholic Bevs. Control Commn., 28 Mass. App. Ct. 381, 551 N.E.2d 545 (1990)*.

[17] Given the allegations of the complaint, allegations that are tantamount to a claim that the defendants were engaged in illegal competition and not the restraint thereof, see note 5, *supra*, our decision is concerned solely with the existence in this case of a private right of action. It has no impact on the ABCC's power to enforce the price discrimination provisions of c. 138, *§ 25A*, through administrative proceedings aimed at an alleged offender's license. See *Miller Brewing Co. v. Alcoholic Bevs. Control Commn., 56 Mass. App. Ct. at 805-808*.

Brunson Communs., Inc. v. Arbitron, Inc.

United States District Court for the Eastern District of Pennsylvania

December 31, 2002, Decided

CIVIL ACTION NO. 02-3223

Reporter

239 F. Supp. 2d 550 *; 2002 U.S. Dist. LEXIS 25756 **

BRUNSON COMMUNICATIONS, INC. v. ARBITRON, INC.

Subsequent History: Reconsideration denied, reported at: Brunson Communs., Inc. v. Arbitron, Inc., 246 F. Supp. 2d 446, 2003 U.S. Dist. LEXIS 2776 (E.D. Pa. Feb. 21, 2003).

Disposition: **[**1]** Defendant's motion to dismiss amended complaint granted. Plaintiff granted leave to file second amended complaint.

Core Terms

amended complaint, allegations, conspiracy, competitors, monopolization, measurement, advertising, monopoly power, Sherman Act, antitrust, stations, disparagement, viewer, Transmission, television, horizontal, group boycott, anticompetitive, asserts, probability, conspired, restraint of trade, relevant market, market share, resellers, entities, factors, contracts, Courts, alleged conspiracy

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

See Fed. R. Civ. P. 12(b).

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

HN2[] **Amount in Controversy, Determination**

Once a good faith pleading of the amount in controversy vests the district court with diversity jurisdiction, the court retains jurisdiction even if the plaintiff cannot ultimately prove all of the counts of the complaint or does not actually recover damages in excess of the jurisdictional amount.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

HN3[] Federal & State Interrelationships, Erie Doctrine

In a diversity case, where all relevant events alleged occurred in one state, the court will apply the law of that state in determining the legal sufficiency of the plaintiff's common law claims. *28 U.S.C.S. § 1652*.

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

HN4[] Motions to Dismiss, Failure to State Claim

When deciding a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court may look only to the facts alleged in the complaint and its attachments. The court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. A *Rule 12(b)(6)* motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Contracts Law > Types of Contracts > Unilateral Contracts > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Actual Monopolization, Anticompetitive & Predatory Practices

The "very essence" of a *15 U.S.C.S. § 1* claim is the existence of an agreement. Unilateral activity by a single person or entity will not suffice. The United States Supreme Court has explained that even if a single company's conduct has the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of agreement.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN7[] Actual Monopolization, Anticompetitive & Predatory Practices

The United States Court of Appeals for the Third Circuit has long held that a *15 U.S.C.S. § 1* plaintiff must plead the facts constituting the conspiracy, its object and accomplishment. Moreover, a general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Accordingly, only allegations of conspiracy which are particularized will be deemed sufficient. To adequately allege the element of concerted activity, a plaintiff must do more than insert the word "conspiracy" into his pleading. The allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN8[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A horizontal group boycott involves entities at the same level of the market structure conspiring amongst themselves, with a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both. Group boycott cases usually involve joint efforts at persuading suppliers or customers to refuse to deal with a certain competitor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > General Overview

HN9[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Courts have refused to find a horizontal conspiracy, where a single entity or person engages in separate vertical conspiracies with multiple parties, who do not conspire amongst themselves horizontally. Courts analyze such "hub-and-spoke" scenarios under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN10[] Price Fixing & Restraints of Trade, Vertical Restraints

Some conspiracies have elements of both horizontal and vertical agreements. An example of such a hybrid is the "hub-and-spoke" conspiracy. Although some of the earlier hub-and-spoke cases have suggested at least the theoretical possibility that an actionable conspiracy might be found where there were hub and spokes but no rim, more recent cases require that a plaintiff must present evidence sufficient to allow the inference of an agreement constituting the rim of the conspiracy.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN11[] Actual Monopolization, Anticompetitive & Predatory Practices

According to the United States Supreme Court, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Where a defendant had no rational motive to join a conspiracy, and defendant's conduct is as consistent with permissible competition as with illegal conspiracy, the plaintiff's unspecific allegations do not support an inference of antitrust conspiracy. Thus, if the defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. In such a case, where an inference of conspiracy is "implausible," the court should dispose of the *§ 1* claim without submitting the conspiracy issue to a jury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Though the language of *15 U.S.C.S. § 1* of the Sherman Act could conceivably encompass a broader array of activity, the United States Supreme Court has limited its application to agreements which unreasonably restrain trade. This principle has come to be known as the "rule of reason."

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN13[] Conspiracy to Monopolize, Sherman Act

In order to plead a claim that a defendant's practices violate the rule of reason under *15 U.S.C.S. § 1* of the Sherman Act, a plaintiff must allege four "elements": (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The United States Supreme Court has explained that, in determining the reasonableness of a restraint, the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Reciprocal Contracts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN15[] **Practices Governed by Per Se Rule, Boycotts**

The court's inquiry as to the legality of a defendant's actions in an antitrust case must be guided by the rule of reason, unless the challenged action falls into the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Thus, where a defendant's conduct is "manifestly anticompetitive," a court may adopt a per se rule of illegality, bypassing an inquiry under the rule of reason. Courts have found such conduct as price fixing, tying arrangements, reciprocal dealing agreements and resale price maintenance to be per se unreasonable restraints of trade. Group boycotts are also often treated as per se, but the per se rule is not employed until courts have considerable experience with the type of challenged restraint at issue. A plaintiff's labeling of certain conduct as a group boycott does not necessitate per se treatment. Rather, United States Supreme Court precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Without a per se theory on which to proceed, an antitrust plaintiff must allege a restraint of trade with actual competitive harm or diminution of competition in a relevant market in order to proceed in a case under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

An allegation of diminution in competition in the overall market is necessary to state a claim for restraint of trade under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN18[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Restraints of trade are typically categorized as either "horizontal" or "vertical." A horizontal restraint stems from an agreement among competitors at the same level of distribution, whereas a vertical restraint arises from an agreement between entities operating at different levels of the market structure, such as manufacturers and distributors. According to the United States Supreme Court, a vertical restraint is not illegal per se unless it includes some agreement on price or price levels.

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

When ruling on a motion to dismiss a vague antitrust claim, the court must consider the costs that would be imposed on the defendant if forced to undertake discovery, but must also recognize the dilemma of the plaintiff, who may be unable to provide details of the alleged conspiracy without the opportunity to obtain evidence and information from the alleged conspirators themselves.

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN20[] **Antitrust & Trade Law, Sherman Act**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. And in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN21[] **Antitrust & Trade Law, Sherman Act**

There is no per se rule that antitrust claims are not subject to summary disposition, and courts have not hesitated to dismiss antitrust claims at the pleading stage in proper cases. Where the complaint offers only uncertain clues as to plaintiff's theory of liability and the facts which would support a finding of Sherman Act liability it is simply not fair to the defendants, and it would be an onerous imposition on the judicial process, to permit litigation to go forward on the basis of such conclusory and speculative allegations.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN22[] **Sherman Act, Scope**

Title *15 U.S.C.S. § 2* of the Sherman Act applies to every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of interstate commerce. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN23[] **Monopolies & Monopolization, Actual Monopolization**

To state a claim of monopolization under *15 U.S.C.S. § 2*, a plaintiff must allege (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN24[] **Monopolies & Monopolization, Actual Monopolization**

The United States Supreme Court has defined monopoly power as the power to control prices or exclude competition. Courts are reluctant to find monopoly power where the defendant business controls less than 50 percent of the given market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN25[] **Monopolies & Monopolization, Actual Monopolization**

Failure to allege a substantial market share is not itself fatal to a plaintiff's monopolization claim. Rather, the court may consider other factors tending to show monopoly power, apart from market share. These factors include the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN26[] **Monopolies & Monopolization, Actual Monopolization**

Alleging market share alone is not sufficient to state a claim under the Sherman Act. Monopolization or threatened monopolization requires something more, which may include the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN27[] **Monopolies & Monopolization, Actual Monopolization**

The fact that a product, due to its alleged superiority, may "hereinafter" replace all competition, does not mean that the company producing the product has actual monopoly power at the current time.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN28[] **Monopolies & Monopolization, Attempts to Monopolize**

To sustain an attempted monopolization theory a plaintiff must allege (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN29[] **Regulated Practices, Market Definition**

Generally, there is a presumption that attempt does not occur in the absence of a rather significant market share. As the United States Court of Appeals for the Third Circuit has explained, a dangerous probability of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN30[] **Regulated Practices, Market Definition**

According to the United States Court of Appeals for the Third Circuit, without any share in the relevant market, there can be no inference that defendants hold sufficient economic power in that market to create a dangerous probability of monopoly.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN31[] **Monopolies & Monopolization, Attempts to Monopolize**

The specific intent element of an attempt to monopolize requires more than a mere intention to prevail over rivals or improve market position.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN32[] **Monopolies & Monopolization, Conspiracy to Monopolize**

To properly state a conspiracy to monopolize claim a plaintiff must allege facts constituting the conspiracy, its period and object, and what the alleged participants did to achieve the conspiracy's object.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN33[] **Trade Dress Protection, Causes of Action**

See *15 U.S.C.S. § 1125(a)*.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN34[] **False Advertising, Elements of False Advertising**

Section 43(a) (*15 U.S.C.S. § 1125(a)*) of the Lanham Act creates a federal cause of action for unfair competition, even absent a federal registered trademark. Generally, the statute provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising. Courts have refused to interpret § 43(a) more broadly than necessary, so as to eliminate frivolous claims and prevent flooding the federal courts with Lanham Act claims contrary to the type envisioned by Congress.

Civil Procedure > ... > Justiciability > Standing > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

HN35[] **Justiciability, Standing**

The "dispositive question" as to § 43(a) (*15 U.S.C.S. § 1125(a)*) of the Lanham Act standing is whether the plaintiff has a reasonable interest to be protected against false advertising. The United States Court of Appeals for the Third Circuit has set forth the following five factors to consider in analyzing standing under § 43(a) of the Lanham Act, borrowing the five factors established by the United States Supreme Court for standing in antitrust cases: (1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the Lanham Act?; (2) The directness or indirectness of the asserted injury; (3) The proximity or remoteness of the party to the alleged injurious conduct; (4) The speculativeness of the damages claim; (5) The risk of duplicative damages or complexity in apportioning damages.

Civil Procedure > ... > Justiciability > Standing > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

HN36[] **Justiciability, Standing**

While there may be circumstances in which a non-competitor may have standing to sue under § 43(a) (*15 U.S.C.S. § 1125(a)*) of the Lanham Act, the focus of the Lanham Act is on commercial interests that have been harmed by a competitor's false advertising.

Civil Procedure > ... > Justiciability > Standing > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

HN37[] **Justiciability, Standing**

To have standing on a § 43(a) (*15 U.S.C.S. § 1125(a)*) of the Lanham Act claim: (1) that the defendant has made false or misleading statements as to his own product or another's; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods traveled in interstate commerce; and (5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > Trade Libel > General Overview

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

HN38[] **Trade Libel, Elements**

Traditionally, to sustain a claim of commercial disparagement under Pennsylvania law, a plaintiff had to plead three elements: (1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; (2) that no privilege attaches to the statement; and (3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement. Recently, however, the United States Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would alter the "parameters" of the tort by adopting a Restatement section that had never before been cited by the state's highest court. The Restatement section at issue, *Restatement (Second) of Torts § 623A*, provides that: One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity. Notably, this Restatement formulation of the tort includes an element of knowledge or "reckless disregard" as to truth or falsity. Such state of mind was not required by the traditional three-prong formulation.

Torts > Business Torts > Trade Libel > General Overview

HN39[] **Business Torts, Trade Libel**

The Pennsylvania Supreme Court has recently cited Restatement (Second) of Torts § 623(A).

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

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN40[] **Intentional Interference, Elements**

The elements of the tort of interference with prospective contractual relations are as follows: (1) the existence of a contractual or prospective contractual relationship between the plaintiff and a third party; (2) a purpose or intent to harm an existing relationship or to prevent a prospective relationship from accruing; (3) the absence of privilege or justification on part of the defendant; and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct. As to the first element, a prospective contract is something less than a contractual right, something more than a mere hope. It exists if there is a reasonable probability that a contract will arise from the parties' current dealings. A plaintiff cannot rest its tortious interference claim on the mere hope that additional contracts or customers would have been forthcoming but for defendant's interference.

Torts > ... > Elements > Causation > General Overview

Torts > Negligence > General Overview

HN41[] **Elements, Causation**

Under Pennsylvania law, a negligence claim consists of four elements: (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Negligence > General Overview

HN42[] **Types of Losses, Economic Losses**

The "economic loss doctrine" prevents recovery on a negligence theory for an economic loss, where the plaintiff's entitlement flows only from a contract. The rationale is that negligence law is not intended to compensate a party for a loss resulting from a breach of duty, where that duty was assumed only by the parties' agreement.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN43[] **Consideration, Promissory Estoppel**

In Pennsylvania, in order to succeed on a promissory estoppel theory, a party must establish that (1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. An action for promissory estoppel should be dismissed where the complaint is "bereft of any allegation of a promise or reliance thereupon.

Counsel: For BRUNSON COMMUNICATIONS, INC., Plaintiff: ROBERT J. SUGARMAN, ROBERT MORRIS, PHILADELPHIA, PA.

For ARBITRON, INC., Defendant: ALFRED FABRICANT, MARC LIEBERSTEIN, OSTROLENK FABER GERB & SOFFEN LLP, NEW YORK, NY.

For ARB+ITRON, INC., Defendant: BRUCE BELLINGHAM, DAVID B. PICKER, SPECTOR GADON & ROSEN PC, PHILADELPHIA, PA.

Judges: MICHAEL M. BAYLSON, U.S.D.J.

Opinion by: MICHAEL M. BAYLSON

Opinion

[*555] MEMORANDUM

Baylson, J.

December 31, 2002

Plaintiff Brunson Communications, Inc., owner of Channel 48, WGTW-TV, a small television station serving the Philadelphia area, alleges that Defendant, in the business of measuring television viewing by the public, is liable under several causes of action: Sherman Act antitrust violations, unfair competition under the Lanham Act, disparagement of commercial products, tortious interference with prospective contractual relations, negligence and promissory estoppel. Defendant moves to dismiss the entirety of the Amended Complaint pursuant to **[**2]** *Federal Rule of Civil Procedure 12(b)(6)*, for failure to state a claim upon which relief can be granted. For the reasons which follow, Defendant's Motion will be granted without leave to amend as to the antitrust and Lanham Act claims, and two of the common law claims. As to claims for negligence and disparagement, the Motion will **[*556]** be granted without prejudice to Plaintiff's right to file a Second Amended Complaint.

I. Procedural History

Plaintiff filed its original Complaint on May 24, 2002. After Defendant moved for dismissal, Plaintiff filed an Amended Complaint with factual materials attached. Defendant thereafter filed the present Motion to Dismiss the Amended Complaint and also attached factual materials. Following oral argument on Defendant's Motion, the Court allowed the parties a period of limited discovery to ascertain the nature and extent of Defendant's reports about its measurement of Plaintiff's penetration of the Philadelphia television market.

The parties then submitted affidavits and other evidentiary materials. While it appears that the contents of Defendant's surveys, discussed below, are largely undisputed, it is clear that Plaintiff and Defendant assert **[**3]** different views as to the nature of certain verbal statements made by Defendant or its representatives regarding those surveys. *See infra* Part III. Because the material submitted by the parties is not conclusive, it will not be considered in determining the legal sufficiency of the Amended Complaint. [1]

[4] II. Jurisdiction and Legal Standards**

This Court has jurisdiction over Plaintiff's Sherman Act claims pursuant to *28 U.S.C. §§ 1331* and *1337*, and over Plaintiff's Lanham Act claim, which arises under federal law. *See 28 U.S.C. § 1331*. With respect to Plaintiff's four common law claims, this Court has jurisdiction pursuant to *28 U.S.C. § 1332*, in that Plaintiff has alleged diversity of citizenship and an amount in controversy in excess of $ 100,000. *See* Amended Complaint P 1-3; *Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997)* ***HN2***[] ("Once a good faith pleading of the amount in controversy vests the district court with diversity jurisdiction, the court retains jurisdiction even if the plaintiff cannot ultimately prove all of the counts of the complaint or does not actually recover damages in excess of [the jurisdictional amount]").

HN3[] All relevant events alleged in the Amended Complaint occurred in Pennsylvania. Accordingly, this Court will apply Pennsylvania law in determining the legal sufficiency of Plaintiff's four common law claims. *See 28 U.S.C. § 1652*.

[5]** ***HN4***[] When deciding a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the court may look only to the facts alleged in the complaint and its attachments. *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*. The Court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. *Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985)*. A *Rule 12(b)(6)* motion **[*557]** will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. *Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)*.

III. Allegations of the Amended Complaint

Plaintiff alleges the following facts, which, for the purpose of deciding the instant motion, will be viewed in the light most favorable to Plaintiff. Channel 48, WGTW TV, is a television station owned by Plaintiff, broadcasting within the Philadelphia area. *See* Amended Complaint P 6-7. WGTW is a "small corporation" and "independent of all networks and cable systems." *Id.*

Defendant Arbitron, Inc. is in **[**6]** the business of "constructing and operating measurement systems that monitor listeners and viewers for usage by radio, cable and more recently television stations, and purchasers of advertising time from television stations." *Id.* P 9. Defendant has developed a new technology for measuring television viewership, known as the personal people meter ("PPM"). *Id.* P10. This PPM technology

> operates by embedding an inaudible signal in the transmitter of the various stations. It then places a receiving device on the person of individuals to detect and record when he is watching television sets tuned to only those stations whose signals which [*sic*] have been imbedded by Arbitron.

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[1] *Rule 12(b)* provides that if

> ***HN1***[] on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to *and not excluded by the court,* the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b) (emphasis added). However this Court has "complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a 12(b)(6) motion." *Stauske v. Healtheast, Inc.,* No. 91-cv-1265, *1991 U.S. Dist. LEXIS 8603*, at *2 (E.D. Pa. June 24, 1991) (Cahn, J.) (*quoting* 5 Wright & Miller, *Federal Practice and Procedure* § 1366 (1966)).

Id. Plaintiff asserts that Arbitron's PPM technology "hereinafter will supplant any other system because of its superior accuracy and reliability." *Id.* P 49.

According to the Amended Complaint, prior to Defendant's development of PPM, another entity, Nielsen Media Research ("Nielsen"), had the only television viewership measurement system. *Id.* P 11. Plaintiff alleges that Nielsen and Arbitron have "entered into a corporate financial relationship by which Nielsen and Arbitron **[**7]** are related in regard to the new system, the details of which are not known to plaintiff." *Id.* Plaintiff claims that Nielsen is an owner or joint venturer in the PPM project. *Id.* Without specifying any details of the alleged relationship between Arbitron and Nielsen, Plaintiff asserts that together the two companies enjoy a monopoly in the TV viewership measurement market. *Id.* at P 12.

Sometime in 2001, Arbitron began a "test" program to introduce its PPM technology into the Philadelphia market. *Id.* at P 14-15. Plaintiff alleges that Defendant embedded its PPM signal only in the transmitters of Plaintiff's competitors -- the larger networks and cable systems -- omitting Plaintiff's station from the PPM survey data. *Id.* at P 17. According to Plaintiff, Arbitron then began to release periodic PPM survey data to advertising agencies, advertisers, television stations and other media sources. *Id.* at P 25. At the time of its PPM test, in the fourth quarter of 2001, Defendant "announced" that the PPM data would "accurately and creditably measure the performance of the entire market." *Id.* at P 15. Moreover, according to the Amended Complaint, on May 20, 2002, at **[**8]** a meeting of the Pennsylvania Association of Broadcasters, Kevin Smith, a Senior Vice President of Arbitron, represented that the PPM survey was fair, accurate and complete. *Id.* at P 32. Plaintiff suggests that these statements were false and malicious. *Id.* at P 17, 32.

Further, Plaintiff alleges, without specifying any details, that the exclusion of Plaintiff from the PPM test was a "boycott imposed at the request of plaintiff's competitors." *Id.* at P 19. Plaintiff claims that Defendant's omission of WGTW from **[*558]** the survey impaired Plaintiff's ability to compete in the market for sales of advertising time, in that advertising agencies would be unable to confirm from the survey that WGTW had a measurable viewership. *Id.* at P 20, 26.

The Amended Complaint asserts that Arbitron had "many meetings" with the larger stations "while designing and pre-testing the system," without inviting Plaintiff. P 34. As a result, Arbitron failed to inform Plaintiff, prior to the test, that inclusion in the survey required the embedding of a signal into WGTW's transmitter. *Id.* at P 21. Allegedly, Defendant only informed Plaintiff's competitors of this requirement, causing Plaintiff **[**9]** to believe that no action on its part was necessary. *Id.* Plaintiff did not learn of the embedding requirement until April 2002, at which time Arbitron visited WGTW to install a PPM encoder. *Id.* P 23, 68. By then the initial PPM survey was substantially completed. *Id.* Plaintiff suggests that, despite its full knowledge of the detrimental effects the omission would have on WGTW, Arbitron refused to reconstruct the PPM survey to include WGTW. *Id.* at P 29. Nor would Arbitron "prominently" inform the public that WGTW had improperly been omitted. *Id.* at P 34. Plaintiff claims that Defendant's motive in omitting Plaintiff was

> to obtain the benefits of working with the larger networks, plaintiff's competitors, who have most of the outlets in the markets. Therefore its pursuit of profits caused it to knowingly give preferential treatment to plaintiff's competitors and exclude an independent non-network station that did not have the market power of the competitors.

Id. at P 35. Though a PPM signal was eventually embedded in WGTW's transmitter in April 2002, *id.* at P 24, the Amended Complaint asserts that Defendant "intentionally and/ or negligently" **[**10]** caused defective encoding of the signal. *Id.* at P 36. This resulted in the continued omission of WGTW from the PPM surveys until at least June 2002, and further injured Plaintiff's ability to compete. *Id.*

IV. Counts I and II of the Amended Complaint Do Not State a Claim under the Antitrust Laws upon which Relief Can Be Granted

A. Count I -- Sherman Act, Section One

Plaintiff's Amended Complaint substantially expanded upon the original Complaint. Not only did Plaintiff add to its Amended Complaint new counts of negligence and promissory estoppel, but Plaintiff also broadened its antitrust allegations. Whereas the original Complaint contained only a single antitrust count under Sherman Act Sections One and Two, the Amended Complaint broke down the two Sherman Act sections into two separate counts, and substantially expanded the antitrust claim.

The two antitrust counts of the Amended Complaint contain a panoply of antitrust theories that are so broadly described, as to make it difficult to understand how Plaintiff has been injured by anything forbidden by the antitrust laws. Plaintiff has made allegations of monopolization, refusal to deal, group boycott, **[**11]** "combining and coordinating" and exclusion of Plaintiff. The breadth of the Section One charging paragraphs with some factual content about Plaintiff or Defendant can be seen from these verbatim quotes:

> 43. Defendant Arbitron has and has utilized its monopoly power, in and with an agreement and financial participation of Nielsen over the data markets, and on information and belief, marketing participation of Nielsen and in concert with **[*559]** plaintiff's competitors, in the sales of time market [sic] in Philadelphia, to promote and effect the exclusion of plaintiff from the advertising sales or broadcasting viewing in the Philadelphia SMSA listener market, through a refusal to deal with plaintiff, by conducting, providing and promoting its survey, with plaintiff excluded, in restraint of trade in interstate commerce, in violation of the Sherman Act *Section 1*.
>
> 45. Arbitron (with Nielsen) enjoys monopoly powers in the providing of viewer measurement in the relevant market, i.e, Philadelphia area television viewing market, which is a well recognized market for television viewers and advertisers. It is defined by the reach of signals of stations, and the service areas of the cable **[**12]** systems. It includes a radius of about sixty miles from City Hall, Philadelphia.
> 48. Through their monopoly over viewer measurement, in the Philadelphia market, Arbitron/ Nielsen exercise market control over competitors in the viewing market.
> 49. Though [sic] its proprietary imbedded system which herein after will supplant any other system because of its superior accuracy and reliability (when employed fairly) Arbitron has monopoly power over the Philadelphia viewer measurement market.
>
> 50. By combining and coordinating with plaintiff's competitors to exclude plaintiff from the survey, and through falsely representing it as complete defendant sponsored, and practiced a group boycott, and participated with plaintiff's competitors in a program to exclude plaintiff from the Philadelphia television advertising sales market, injuring competition for the sale of advertising and delivery of programming, contrary to *Section 1*, antitrust injury. [sic]

HN5[] Section One of the Sherman Act, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. [2] Defendant asserts that Count **[**13]** I must be dismissed because Plaintiff fails to sufficiently allege a conspiracy, a plausible market, a cognizable antitrust injury, or a factual basis to support its claim of an antitrust violation by Defendant.

1. Concerted Action

HN6[] The "very essence" of a *Section 1* claim is "the existence of an agreement." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)*. Unilateral activity by a single person or entity will not suffice. *See* *Fisher v. Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)*. The Supreme Court has explained that even if a single company's conduct has "the same economic effect as concerted action might have, **[**14]** there can be no liability under Section One in the absence of agreement." *Id.*

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[2] Although Plaintiff's first count alleges violations of *Section 1*, it also uses phrases, such as "monopoly power" which are, strictly speaking, *Section 2* concepts, *see* § B *infra.* However, consistent with principles of liberal construction of the complaint, the court will ignore these technical misstatements.

HN7[] The Third Circuit has long held that a Section 1 plaintiff "must plead the facts constituting the conspiracy, its object and accomplishment." *Black & Yates v. Mahogany Ass'n, 129 F.2d 227, 231 (3d Cir. 1942)*. Moreover, a "general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action." *Id.* Accordingly, only "allegations of conspiracy which are particularized … will be deemed sufficient." **[*560]** *Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988)*. *See* cases collected in ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* (5th Ed. 2002), Vol. 1, p. 3, n. 14.

To adequately allege the element of concerted activity, a plaintiff must do more than insert the word "conspiracy" into his pleading. As the Third Circuit has stated, the "allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman **[**15]** Act." *Garshman v. Universal Resources Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987)*.

In *Garshman,* plaintiffs were partners in an entity engaged in oil and gas exploration. Defendant Universal Resources Holding, Inc. was a producer of natural gas. Plaintiffs and Universal had entered into an agreement whereby plaintiffs would drill wells in return for payment and assignment of certain rights. The drilling was to take place on land owned by Columbia Gas Transmission Corporation ("Transmission"). Transmission had also contracted to purchase, through Universal, 75 percent of the gas produced from the wells.

Subsequently the demand for natural gas declined. As a result, Transmission found itself contractually obligated to purchase more gas through Universal than it could resell. Under pressure to renegotiate, Universal agreed to change the price provisions in its contracts with Transmission. This resulted in a decreased return from the wells, harming plaintiffs' economic interests under the drilling contract. *See* *Garshman, 824 F.2d at 225-27*.

Plaintiffs sued on antitrust, tort and contract grounds. Universal filed a crossclaim against Transmission **[**16]** and its parent corporation, Columbia Gas System ("System"), also raising antitrust grounds. In its Sherman Act, Section One claim, Universal alleged that System and Transmission had "entered into one or more agreements, contracts or conspiracies, and have engaged in concerted action with other entities, which agreements are in restraint of trade and are unreasonable, to achieve the anti-competitive and unlawful actions and effects as alleged in this crossclaim." *Garshman 824 F.2d at 230*. The district court dismissed Universal's Section One count for failure to state a claim.

The Court of Appeals affirmed, observing that Universal had identified neither the "contracts," nor the "other entities," nor the "anti-competitive and unlawful actions and effects" involved. *Id.* The court held that the "allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act." *Id.* Moreover, the price-renegotiation contracts undertaken by Transmission did not result in price increases to consumers or in the market generally. Universal's allegations failed **[**17]** to suggest an adverse effect upon competition in any relevant market. Therefore the claim was properly dismissed. *See* *Garshman, 824 F.2d at 231*.

The Circuit's affirmation of the dismissal of the antitrust claims in *Garshman* (without leave to amend) is precedent for the dismissal here. The *Section 1* claim in this case is similarly deficient of the necessary facts.

In the *PepsiCo* case, the Commonwealth of Pennsylvania brought a *parens patriae* antitrust action, alleging that a soft drink maker and two of its bottlers had conspired to eliminate horizontal competition between resellers of the soft drink product. **[*561]** *See* *PepsiCo, 836 F.2d at 175*. The state alleged that the three defendants purposefully withheld the product from certain resellers so that the resellers could not compete with the bottlers. According to the Commonwealth's amended complaint, defendants had engaged in the following practices in furtherance of this conspiracy:

> using a coding identification system to trace and monitor soft drink sales; fining bottlers when their product is shipped out of their territory; refusing to deal with resellers who engage in transshipping; **[**18]** refusing to

> deal with resellers who buy from or sell to other resellers; threatening termination of resellers who engage in such sales; and limiting sales to resellers to the amount the reseller needs solely for its own retail sales, in order to prevent that reseller from wholesaling.

Id. The district court dismissed the Section One count for failure to state a claim, and the Third Circuit affirmed.

The Court of Appeals noted that under the Soft Drink Interbrand Competition Act, because only a horizontal conspiracy was actionable, the state's pleading burden was higher than in a typical antitrust case. *PepsiCo Inc. 836 F.2d at 181*. As to the sufficiency of the amended complaint, the court first observed that the state's allegations "consistently refer to conduct by 'defendants and their co-conspirators' -- not otherwise identified." *Id.* The court continued:

> Equally significant is the fact that Pennsylvania did not allege any meetings between [the defendant bottlers], any communications between them, or any other means by which their alleged conspiracy came about. This notwithstanding that in this circuit, "only allegations of conspiracy which are particularized **[**19]** … will be deemed sufficient." *Garshman v. Universal Resources Holding, Inc., 641 F. Supp. 1359, 1370 (D.N.J.1986)*, *aff'd* *824 F.2d 223 (3d Cir.1987)* (*quoting* *Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385, 1400 (D.Del.1984)*, *aff'd,* *769 F.2d 152 (3d Cir.1985))*. Instead, all that appellant was apparently prepared to plead was a naked conclusion dropped into the amended complaint, reciting a bare-bones assertion that there had been a "horizontal" conspiracy.

Id.

The *PepsiCo* court found that the Commonwealth's allegations "did not come close to adequately pleading conduct amounting to" a price fixing agreement, a horizontal [3] **[**20]** restraint of trade, or a group boycott. [4] The court therefore affirmed the dismissal with prejudice in that the Commonwealth had already amended its complaint once, with leave of court. *See* *836 F.2d at 180*.

a. Group Boycott

Although Plaintiff does allege a group boycott, here again the conclusory allegation is devoid of details. ***HN8***[] A horizontal group boycott involves entities at the same level of the market structure conspiring amongst themselves, with "a purpose **[*562]** either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *PepsiCo Inc., supra 836 F.2d at 183* (*quoting* *De Filippo v. Ford Motor Co., 516 F.2d 1313, 1318 (3d Cir. 1975))*. Group boycott cases usually involve joint efforts at persuading suppliers or customers to refuse to deal with a certain competitor. *See, e.g.,* *Northwest Wholesale Stationers Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*. **[**21]** Aside from the conclusory phrase "group boycott," the Court concludes that Plaintiff has not adequately plead Defendant participated in an illegal group boycott.

b. "Hub-and-Spoke"

HN9[] Courts have refused to find a horizontal conspiracy, where a single entity or person engages in separate vertical conspiracies with multiple parties, who do not conspire amongst themselves horizontally. *See, e.g.,* *Dickson v. Microsoft Corp., 309 F.3d 193, 2002 U.S. App. LEXIS 22466*, at *17-24 (4th Cir. 2002); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 590 (8th Cir. 1987)*. *Cf.* *Kotteakos v. United*

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[3] As discussed below, for purposes of determining whether concerted action is unreasonable, courts usually analyze the alleged combination as either "horizontal" (between or among competitors on the same level of business) or "vertical" (between entities operating on different levels, e.g., manufacturer and distributor).

[4] If the Commonwealth had succeeded in demonstrating any of these types of anticompetitive conduct, the defendants may have lost the protection they otherwise would have had under the Soft Drink Interbrand Competition Act of 1980, *15 U.S.C. §§ 3501-3503*. *See* *PepsiCo, Inc. 836 F.2d at 175*.

States, 328 U.S. 750, 752, 769, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946) (holding, in non-antitrust criminal conspiracy case, that jury instruction should have explained "vital difference" between one conspiracy, in which all defendants conspired amongst each other, and numerous separate conspiracies between each defendant and one "common key figure"). Courts analyze such "hub-and-spoke" scenarios under the rule of reason. *See* Dickson, 309 F.3d 193, 2002 U.S. App. LEXIS 22466, at *17-24 (finding plaintiff alleged **[**22]** merely "separate vertical conspiracies" or "a wheel without a rim," rather than single horizontal conspiracy; applying rule of reason because anticompetitive effect "not obvious"); Lomar, 824 F.2d at 590 (refusing to apply *per se* rule where plaintiff did not allege suppliers conspired "among themselves," but rather that one distributor "separately coerced each of the suppliers into boycotting" plaintiff, thus forming "a rimless, spoked wheel"). Plaintiff's allegations that Arbitron met with and agreed with most of the larger television stations to exclude Plaintiff from its viewer measurement studies more resembles a "hub-and-spoke" style of conspiracy than a horizontal group boycott. As noted in ***Antitrust Law*** *Developments, supra,* pp. 24-5:

> **HN10**[] Some conspiracies have elements of both horizontal and vertical agreements. An example of such a hybrid is the "hub-and-spoke" conspiracy.
> ****
>
> Although some of the earlier hub-and-spoke cases have suggested at least the theoretical possibility that an actionable conspiracy might be found where there were hub and spokes but no rim, more recent cases require that a plaintiff must present evidence **[**23]** sufficient to allow the inference of an agreement constituting the rim of the conspiracy. (Footnotes omitted).

As explained above, under any theory, Plaintiff has not alleged the essential statutory element of concerted activity.

With these precedents as guideposts, we review the antitrust allegations in the Amended Complaint. In the instant case, Plaintiff has identified none of the entities which allegedly conspired with Defendant. While Plaintiff need not necessarily supply names of all alleged conspirators, the cases cited above require an antitrust plaintiff to supply more detail to make out a Section One claim. The facts alleged in the Amended Complaint are extremely vague and do not sufficiently describe any contract, combination or conspiracy between Arbitron and the larger TV stations.

[*563] The Amended Complaint never answers the common-sense question as to why Plaintiff's competitors, who allegedly already dominate the market, would seek the exclusion of a single, small, independently-owned station from Arbitron's test-runs of the new PPM technology. Further, though the Amended Complaint alleges a "boycott imposed at the request of plaintiff's competitors," *id.* P 19, **[**24]** Plaintiff has not provided a single detail as to when, why, or how the conspirators decided upon this alleged boycott. The most that Plaintiff alleges is that Arbitron had "many meetings" with the larger stations "while designing and pre-testing the system." *Id.* P 34. Thus, while Plaintiff's Amended Complaint is extremely broad in charging Section One antitrust liability, it falls far short on the facts.

Aside from the dearth of specific allegations, the Court also concludes that the Amended Complaint fails to sufficiently allege concerted activity for the simple reason that the supposed conspiracy "makes no economic sense." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). **HN11**[] The Supreme Court has found that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a Section One case." Id. at 588. Where a defendant had no rational motive to join a conspiracy, and defendant's conduct is as consistent with permissible competition as with illegal conspiracy, the plaintiff's unspecific allegations do not support an inference of antitrust conspiracy. *See* **[**25]** ***Antitrust Law*** *Developments, supra,* p. 8. Thus, as the court in *Matsushita* explained, if the defendants "had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." 475 U.S. at 596-97. In such a case, where an inference of conspiracy is "implausible," the court should dispose of the Section One claim without submitting the conspiracy issue to a jury. Id. at 594. Accordingly, in *Matsushita,* upon finding that the alleged conspiracy would have been "economically senseless," the Court found summary judgment proper. Id. at 598.

Though *Matsushita* was decided in the context of a motion for summary judgment, its reasoning, nevertheless, has been used to decide motions to dismiss and suggests that Plaintiff's Section One claim should be dismissed. [5] The sparse facts set **[*564]** forth in the Amended Complaint are not sufficient to support an inference that defendants acted conspiratorially. Accepting all of the facts of the Amended Complaint as true, the conspiracy theorized by Plaintiff is, for several **[**26]** reasons, economically implausible. Plaintiff, a television station, suggests no logical reason why Defendant, which is allegedly dominant in the viewer measurement market, would conspire with Plaintiff's competitors, the larger stations, in order to exclude Plaintiff from Defendant's PPM tests. If Defendant is, in fact, dominant in the viewer measurement market, to exclude Plaintiff's data would absolutely contradict Defendant's business purpose and jeopardize the credibility of its measurements. At oral argument, Plaintiff's counsel suggested that Arbitron's motive in excluding WGTW was "to accommodate [WGTW's] competitors." Transcript of Motion to Dismiss Hearing (Oct. 8, 2002) at 35. Counsel added that WGTW is "small potatoes in the market. We are the classic kind of competitor who the standard competitors would just as soon not have in the market." *Id.* at 36. Plaintiff's argument makes a gigantic leap from omission of Plaintiff's data in a market survey, to exclusion of Plaintiff from the television market. However, the other deficiencies in Plaintiff's Amended Complaint do not require the Court to decide whether Plaintiff's allegation that merely omitting Plaintiff's data **[**27]** from Defendant's viewer measurement reports could result in liability under the antitrust laws for excluding Plaintiff as a competitor in the overall television market. However, it is hard to understand how even purposely eliminating Plaintiff's data from Defendant's reports for a six-month period could conceivably cause Plaintiff to be excluded as a competitor in the overall Philadelphia television market. It is of public notice that as of the date of today's Order, Plaintiff is fully functioning as a television station.

[28]** Plaintiff's brief in opposition to Defendant's Motion to Dismiss on this ground has offered no rational explanation for any desire on the part of the larger stations to see Plaintiff omitted from Arbitron's tests. Nor has Plaintiff suggested any plausible reason why Arbitron would willingly compromise the integrity of its own measurements. Assuming that Defendant sought to establish sound business relationships with the larger stations, such a desire would not, reasonably, entice Arbitron to eliminate Plaintiff's station from its PPM measurements -- thereby corrupting its own product.

Accordingly, this Court finds that Plaintiff has not alleged concerted action, which is the core element of any Sherman Act, Section One claim. *See* Fuentes v. South Hills Cardiology, 946 F.2d 196, 198.

2. Restraint of Trade

Even though the Court concludes Plaintiff has not adequately pleaded concerted action, this Memorandum will also examine whether Plaintiff has pleaded a restraint of trade, and concludes it has not. **HN12**[] Though the language of Section One of the Sherman Act could conceivably encompass a broader array of activity, the Supreme Court has limited its application to agreements which *unreasonably* **[**29]** restrain trade. *See* Standard Oil Co. v. United States, 221 U.S. 1, 66, 55 L. Ed. 619, 31 S. Ct. 502 (1911). This principle has come to be known as the "rule of reason." *See* National Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 690, 55 L. Ed. 2d 637, 98 S. Ct.

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[5] *See, e.g.,* DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999) (affirming Rule 12(b)(6) dismissal where complaint alleged "highly implausible" conspiracy) (*aff'd* 2 F. Supp. 2d 226, 230 (D.R.I. 1998) (*quoting* Matsushita's "rational economic motive" language in dismissing complaint)); United Magazine Co. v. Murdoch Mag. Distrib., 146 F. Supp. 2d 385, 402 (S.D.N.Y. 2001) (holding that because "plaintiffs' alleged conspiracy to engage in predatory pricing is entirely unnecessary and makes no economic sense, plaintiffs fail to state a claim under section 1"); Cancall PCS v. Omnipoint Corp., 2000 U.S. Dist. LEXIS 2830, No. 99- CIV-3395, 2000 WL 272309, at *7 n.4 (S.D.N.Y. 2000) ("Although *Matsushita* involved a motion for summary judgment, not a motion to dismiss, here, the plaintiffs have pled facts which, even if true and viewed in the light most favorable to plaintiffs, cannot support a claim for predatory pricing, and the Court will therefore dismiss any such claim at this stage."). *Cf.* Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1109-10 (7th Cir. 1984) (pre-dating *Matsushita,* yet holding dismissal was appropriate where complaint set forth no facts showing anti-competitive effect and alleged conspiracy was "inherently implausible" -- as it suggested defendant Ford "conspired to injure itself"); Salts v. Moore, 107 F. Supp. 2d 732, 742-43 (N.D. Miss. 2000) (granting Rule 12(c) motion for judgment on the pleadings where plaintiffs failed to establish inference of conspiracy, in part due to lack of rational economic motive to conspire).

1355 (1978) (noting "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition").

HN13[] In order to plead a claim that a defendant's practices violate the rule of **[*565]** reason under Section One of the Sherman Act, a plaintiff must allege four "elements":

> (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Rossi v. Standard Roofing, Inc., 156 F.3d 452, 464-65 (3d Cir. 1998).

Plaintiff alleges a restraint of trade only once, in paragraph 43, and only in the most conclusory terms. **[**30]** Plaintiff never alleges how trade has been restrained, or how the market in which Plaintiff does business has become less competitive due to the actions of Defendant.

HN14[] The Supreme Court has explained that, in determining the reasonableness of a restraint, the "true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*.

a. Per Se Rule

HN15[] This Court's inquiry as to the legality of a defendant's actions must be guided by the rule of reason, unless "the challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)* **[**31]** (*quoting* *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*). Thus, where a defendant's conduct is "manifestly anticompetitive," a court may adopt a *per se* rule of illegality, bypassing an inquiry under the rule of reason. *Continental T. V. v. GTE Sylvania, 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Courts have found such conduct as price fixing, tying arrangements, reciprocal dealing agreements and resale price maintenance to be *per se* unreasonable restraints of trade. *See, e.g.,* *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir.1979)*. Group boycotts are also often treated as *per se,* but the *per se* rule is not employed until courts have "considerable experience with the type of challenged restraint" at issue. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 20 n.33, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*.

Plaintiff's labeling of certain conduct as a group boycott does not necessitate *per se* treatment. *See* *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* **[**32]** (declining to apply boycott "pigeonhole;" observing that *per se* approach "has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"); *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 463 (3d Cir. 1998)* (noting that labeling alleged refusal to deal as "group boycott" does not have "a talismanic effect, automatically bringing the case under the *per se* rubric"). Rather, Supreme Court precedent "limits the *per se* rule in the boycott context to cases involving *horizontal agreements among direct competitors."* *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135* (emphasis added).

[*566] As noted above, Plaintiff has not adequately alleged any agreement *among* competitor television stations to boycott Plaintiff. The Amended Complaint claims only that Defendant Arbitron -- the only named Defendant -- conspired with certain unnamed stations, with the aim of excluding Plaintiff's station from the PPM surveys. Though Plaintiff states, "on information and belief, the exclusion was a boycott imposed at the request of plaintiff's competitors," Amended Complaint P 19, Plaintiff never **[**33]** contends, let alone provides any required details, that the competitor stations *jointly* agreed to request WGTW's exclusion. [6]

[34]** Because Plaintiff's claims do not allege any price-fixing, a per se group boycott, or other activities condemned as per se illegal, but are so broad and diffuse, and no factually similar antitrust claims have been found reported, there is no basis on which to conclude that the per se rule applies in this case.

b. Relevant Market

HN16[] Without a per se theory on which to proceed, Plaintiff must allege a restraint of trade with actual competitive harm or diminution of competition in a relevant market in order to proceed in a case under the rule of reason. *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*, *Eichorn v. AT&T Corp., 248 F.3d 131, 147-8 (3d Cir. 2001)*. Plaintiff alleges no details of actual competitive harm, but alleges a relevant product market as follows:

> 14. This product is a product (a) in 7the television viewer measurement market, (b) a product utilized and also creates a new product market, i.e., imbedded direct measuring, whereby no reporting by the viewer is required (unlike the Nielsen system). Defendant enjoys a monopoly in both markets.

The above-cited paragraph describes Defendant's **[**35]** own product, which cannot itself be a relevant market for antitrust purposes. *Tunis Bros Co. v. Ford Motor Co., 952 F.2d 715 (3d Cir. 1992)*. Another attempt to define a market in the Amended Complaint, paragraph 45, is quoted above. There is absolutely ***HN17***[] no allegation of diminution in competition in the overall market, which is necessary to state a claim for restraint of trade under the rule of reason. *Angelico v. Lehigh Valley Hospital Inc., 184 F.3d 268 (3d Cir. 1999)*. **[*567]**

c. Horizontal or Vertical Conduct

HN18[] Restraints of trade are typically categorized as either "horizontal" or "vertical." A horizontal restraint stems from an agreement "among competitors at the same level of distribution," whereas a vertical restraint arises from an agreement between "entities operating at different levels of the market structure, such as manufacturers and distributors." *Yeager's Fuel v. Pennsylvania Power & Light Co., 953 F. Supp. 617, 654 (E.D. Pa. 1997)* (*quoting* Black's Law Dictionary 737, 1563 (6th ed. 1991)). As already discussed, there are no sufficient allegations to charge a horizontal restraint. The Supreme Court has held that a "vertical **[**36]** restraint is not illegal *per se* unless it includes some agreement on price or price levels." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*. There are no such allegations.

As to the remaining requirements for a violation of Section One, Arbitron's business decisions cannot be said to have had illegal objectives. The alleged relationship between Defendant and Nielsen is confusing if not

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[6] Plaintiff places much emphasis on the Third Circuit's decision in *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 462 (3d Cir. 1998)*. There, the plaintiff, a price-cutting distributor, alleged that his full-price competitors had joined together and persuaded their mutual suppliers not to sell to him. The Court of Appeals concluded that the plaintiff's allegations should be analyzed using the *per se* framework.

> The economic impact of their actions -- driving a *price-cutting* competitor out of business -- is clear .... Importantly, all of this [conspiratorial] activity was done against the backdrop of [the competitors'] dissatisfaction with Rossi's *price-cutting* proclivities, and thus an inference can be drawn that the conspiracy was at least partially conceived as a *price restraint.*
>
> For these reasons, we find it implausible that the alleged behavior by the defendants would "enhance overall efficiency and make markets more competitive," *Northwest Wholesale Stationers, 472 U.S. at 294*.

Rossi 156 F.3d at 464 (emphasis added). The conspiracy alleged in *Rossi* was not completely horizontal, in that the plaintiff's theory involved both horizontal and vertical components, *i.e.,* the distributors who competed with Rossi and the suppliers who allegedly acquiesced in the boycott. In the instant case, even if this Court were to find horizontal, as well as vertical components, there is no allegation of price cutting, or any other impact on price, whatsoever. For that reason, the *Rossi* decision, though insightful, does not bear directly on these facts.

contradictory. According to the Amended Complaint, PP 15-17, Arbitron's PPM surveys were a "test" of the new technology. Assuming that Arbitron did, in fact, choose to encode only the larger network stations for participation in that test, Plaintiff's own allegations establish this was for a short period of time, and Plaintiff has not adequately alleged any actual past or ongoing adverse impact on competition.

HN19[] When ruling on a Motion to Dismiss an antitrust claim as vague as Plaintiff's, this Court must consider the costs that would be imposed on the defendant if forced to undertake discovery, but must also recognize the dilemma of the plaintiff, who may be unable to provide details of the alleged conspiracy without the opportunity to obtain **[**37]** evidence and information from the alleged conspirators themselves. *See, e.g, Advanced Lifeline Serv's, Inc. v. Northern Health Fac., Inc., 1997 U.S. Dist. LEXIS 19550*, No. 97-cv-3757, *1997 WL 763024*, at *8 (E.D. Pa. Dec. 9 1997). As the Supreme Court has explained,

> We have held that ***HN20***[] "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" …. And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators" … dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976) (citations omitted). Yet, the Court has, on several occasions, found antitrust allegations to be "insufficient as a matter of law," and therefore subject to dismissal. *E.g. Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*.

As this District Court has observed, ***HN21***[] "there **[**38]** is no *per se* rule that antitrust claims are not subject to summary disposition, and courts have not hesitated to dismiss antitrust claims at the pleading stage in proper cases." *Alpern v. Cavarocchi,* No. 98-cv-3105, *1999 U.S. Dist. LEXIS 5929*, at *4 (E.D. Pa. April 29, 1999). Over two decades ago, this Court, in dismissing a Section One claim, reasoned that, where the complaint

> offers only uncertain clues as to plaintiff's theory of liability and the facts which would support a finding of Sherman Act liability … it is simply not fair to the defendants, and it would be an onerous imposition on the judicial **[*568]** process, to permit litigation to go forward on the basis of such conclusory and speculative allegations.

Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 491 (E.D. Pa. 1982).

Based on the allegations of the Amended Complaint, this Court finds that Plaintiff can prove no set of facts in support of its Sherman Act, Section One claim that would entitle it to relief. *See Hospital Bldg. Co., 425 U.S. at 746*. Accordingly, Count I must be dismissed.

B. Count II -- Sherman Act, Section Two

Plaintiff next asserts **[**39]** a violation of ***HN22***[] *Section 2* of the Sherman Act, which applies to "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of" interstate commerce. *15 U.S.C. § 2*. Count II of the Amended Complaint claims that Defendant, through "acquisition combinations with Nielsen, *intentionally became and is a monopolist* in the Philadelphia viewer measurement market." *Id. at P 53* (emphasis added). Alternatively, Plaintiff asserts that Arbitron, "through its combination with Nielsen, is *attempting* to monopolize" that same market. *Id. at P 54* (emphasis added). Further, Plaintiff contends that Arbitron has used its monopoly power to injure Plaintiff, specifically, injuring WGTW's ability to compete in the sale of advertising time. *Id. at P 55*.

Defendant asserts that Count II should be dismissed because Plaintiff fails to sufficiently plead intent, antitrust injury, or facts suggesting a probability of monopoly. This Court will consider Plaintiff's claims of monopolization and attempted monopolization in turn.

1. Monopolization

HN23[] To state a claim of monopolization under Section [**40] 2, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 249 n.27 (3d Cir. 2001) (*quoting* United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). The facts as pled by Plaintiff cannot fulfill either of these elements.

As to the first element, HN24[] the Supreme Court has defined monopoly power as the power "to control prices or exclude competition." United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 392, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). Courts are reluctant to find monopoly power where the defendant business controls less than fifty percent of the given market. *See, e.g.,* Ideal Dairy Farms v. John Labatt, Ltd., 90 F.3d 737, 749 (3d Cir. 1996) (finding control of 47% of the New Jersey market, "without concrete evidence of anticompetitive behavior," did not show monopoly power); *Fineman v. Armstrong World Indus., 980 F.2d 171, 201 (3d Cir. 1992)* **[**41]** ("As a matter of law, absent other relevant factors, a 55 percent market share will not prove the existence of monopoly power."); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490 (5th Cir. 1984) (stating "absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization"); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2nd Cir. 1945) (Hand, J.) (stating "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three is not"); Yeager's Fuel v. Pennsylvania Power & Light Co., [*569] 953 F. Supp. 617, 654 (E.D. Pa. 1997) (holding "market share of 31% is insufficient as a matter of law to establish monopoly power").

Returning to Garshman, supra, in its Sherman Act, Section Two claim, Universal alleged that Transmission possessed monopoly power in the gas resale market for the middle Atlantic region. *See* 824 F.2d at 228. Universal further claimed, *inter alia,* that Transmission had unlawfully maintained its monopoly to fix, stabilize or set the price of natural gas in interstate commerce; had denied Universal **[**42]** equal access to the pipeline network in order to secure price concessions from producers; had used its economic power to breach existing contracts in order to reduce payment liability; and had conditioned the purchase of natural gas upon price concession agreements extorted from Universal and other gas producers. As a result of these alleged antitrust violations, Universal was unable to meet its contract with plaintiffs and other companies, was forced to incur unforseen expenses, and suffered damage to its good will and competitive position. *See id.*

In dismissing the Section Two count for failure to state a claim, the district court found that Universal could prove no set of facts which would entitle it to relief. Rather, "the most that Universal could attempt to prove is that, faced with a constricting market and falling resale prices for natural gas, System and Transmission reacted by demanding successfully price concessions from their suppliers." 824 F.2d at 229. The Court of Appeals affirmed, explaining that under the undisputed economic structure of the industry,:

> Monopolization arose, if at all, solely out of System's and Transmission's ownership of the underlying **[**43]** leasehold rights. It is that ownership which permitted Transmission to demand that gas be sold only to it. It is that ownership which permitted Transmission to threaten to exclude from future exploration those producers unwilling to renegotiate .... There is no contention that System and Transmission owned such a proportion of the underlying leaseholds for natural gas that they were in any position to prevent the exploration and the production of new gas.

Id.

In the present case, Plaintiff has not alleged any particular percentage of any relevant market controlled by Arbitron. In Count II, Plaintiff incorporates all prior paragraphs, and the relevant market is described as the "Philadelphia viewer measurement market." However, this HN25[] failure to allege a substantial market share is not itself fatal to Plaintiff's monopolization claim. Rather, this Court may consider other factors tending to show monopoly power, apart from market share. These factors include "the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand." Crossroads Cogeneration Corp. v. Orange & Rockland Utils., 159 F.3d 129, 141 (3d Cir. 1998) **[**44]** (*quoting* Barr

Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 112 (3d Cir. 1992)). However, the Amended Complaint contains no allegations whatsoever related to any of these factors.

The Third Circuit has affirmed the dismissal of a Section Two claim where the plaintiff alleged 100 percent market share, yet failed to allege facts related to any of the other factors relevant to a finding of monopoly power. *See* Crossroads, 159 F.3d at 141. In *Crossroads,* the defendant, O&R was "virtually the sole retail provider of electric power to residential, commercial, and industrial customers" in each county in which it operated. Id. at 132. **[*570]** The plaintiff, an independent producer of electricity, asserted breach of contract and antitrust claims, based on O&R's refusal to purchase energy from the plaintiff. In dismissing the Section Two claim, the district court wrote:

> Plaintiff fails, as a matter of law, to sufficiently allege monopoly power. Plaintiff merely states that defendant is the sole provider of electricity to certain customers in the counties it services .... Plaintiff fails to allege such necessary facts as defendant's **[**45]** market share in the markets in which plaintiff is a competitor or that barriers that exist which prevent plaintiff's entry into such markets. These deficiencies in the Complaint mandate dismissal of plaintiff's Sherman Act claims.

Crossroads 159 F.3d at 141. The Court of Appeals affirmed the dismissal of the Section Two claim, holding as follows:

> We agree with the district court's reasoning.
>
> ***HN26***[] Alleging market share alone is not sufficient to state a claim under the Sherman Act. Monopolization or threatened monopolization *requires something more,* which *may include* "the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand." *Barr Labs,* 978 F.2d at 112. Crossroads *has not alleged any of these factors.* Nor is it likely that it could have done so. Crossroads admits that it acts as a competitor to O&R in selling its excess capacity in O&R's service area, and it provides no reason why it is prevented from doing so in the future. *The complaint simply fails to allege anything to suggest monopolization* by O&R cognizable by the Sherman **[**46]** Act.

Crossroads 159 F.3d at 141-42 (emphasis added).

Citing *Crossroads,* this Court has dismissed a Section Two claim where the complaint provided no factual allegations concerning either the alleged relevant market or the defendant's relationship to or power in that market. *See Alpern v. Cavarocchi,* No. 98-cv-3105, 1999 U.S. Dist. LEXIS 5929, at *8 & n.7 (E.D. Pa. April 29, 1999).

In the present case, Plaintiff has not only failed to allege any facts regarding Arbitron's market share, but also, none of the other factors associated with monopoly power. The Amended Complaint states that Nielsen and Arbitron have "entered into a corporate financial relationship by which Nielsen and Arbitron are related in regard to the new system, the details of which are not known to plaintiff." Amended Complaint P 11. Plaintiff, later in the pleading, alleges that Arbitron's "acquisition combinations" with Nielsen somehow confer monopoly power upon Arbitron. Id. P 53. Yet, Plaintiff makes no attempt to explain how this unspecified business relationship renders Arbitron a monopolist in the Philadelphia viewer measurement market.

Plaintiff also asserts that Arbitron's **[**47]** PPM technology "hereinafter will supplant any other system because of its superior accuracy and reliability." Amended Complaint P 49. Of course, ***HN27***[] the fact that Arbitron's product, due to its alleged superiority, may "hereinafter" replace all competition, does not mean that Arbitron has actual monopoly power at this time. *Cf.* Pastore v. Bell Telephone Co. of Pennsylvania, 24 F.3d 508, 513 (3d Cir. 1994) (affirming summary judgment against plaintiffs who, in their claim of attempted monopolization, "confined their discussion to defendants' *future* entry into the market").

Even if Plaintiff has suffered some market deprivation or loss of profits, that does **[*571]** not make an antitrust case. The deficiencies in Plaintiff's market definition were noted above. Arbitron's alleged dominant role in the viewer measurement market may make the omission of Plaintiff's data from the Arbitron reports the "cause" of Plaintiff's deprivation, but the absence of other specific allegations necessary for a monopoly claim to proceed does not allow imposition of antitrust liability on Arbitron. The penalties for antitrust violations are severe, and it is good social policy as well as a legal **[**48]** requisite to require specific allegations, which clear precedent demand, before allowing an antitrust case to proceed. [7]

[49]** Because Plaintiff has failed to allege facts which would support a finding of monopoly power, Plaintiff cannot satisfy that core element of monopolization.

2. Attempted Monopolization

Nor has Plaintiff set forth a claim of attempted monopolization. (P 54). ***HN28***[] To sustain an attempted monopolization theory a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. Plaintiff's allegations support none of these elements.

With respect to the third element, this Court cannot, based on the facts as pled, discern a "dangerous probability" that Arbitron will achieve monopoly power. ***HN29***[] Generally, there is a "presumption that attempt does not occur in the absence of a rather significant market share." *Pastore v. Bell Telephone Co. of Pennsylvania, 24 F.3d 508, 513 (3d Cir. 1994)* (*quoting* 3 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** P 831 at 336 (1978)). As the Court of Appeals has explained, "a dangerous probability **[**50]** of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct." *Barr Laboratories, 978 F.2d at 112* (*quoting* *International Distrib. Ctrs, Inc. v. Walsh Trucking Co., 812 F.2d 786, 791 (2d Cir. 1987))*.

In *Pastore,* the Court of Appeals affirmed a grant of summary judgment **[*572]** against the plaintiffs who, in their claim of attempted monopolization, "confined their discussion to defendants' *future* entry into the market." *24 F.3d at 513*. Plaintiffs, who were in the business of installing a "unique" security network, alleged that their former client had attempted to monopolize the market for that same type of network. 24,F.3d at 512. The defendants submitted an affidavit stating that they were not "engaged" in the relevant market. *24 F.3d at 513*. Plaintiffs submitted no evidence to show that defendants had entered the market; indeed, they merely suggested that defendants were "intent upon entering" or "poised to enter" the market. *Id.* In affirming summary judgment for defendants, the Third Circuit held that ***HN30***[] "without any share in the **[**51]** relevant market as described by plaintiffs, there can be no inference that defendants hold sufficient economic power in that market to create a dangerous probability of monopoly." *Id.*

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[7] As a recent economic commentator noted, "The antitrust laws and antitrust enforcement institutions are not designed or well suited to identify and "fix" all market imperfections that lead markets to depart from textbook models of perfect competition. Neither the state of economic science, nor the capabilities of public and private policy enforcement institutions, would make it feasible or desirable for antitrust policy to seek to identify a wide range of market imperfections, and associated firm behavior and market structures, and then to evaluate each case to determine whether some way can be found to improve economic efficiency by changing the structure of the market or constraining firm behavior. This kind of micromanagement of firms and markets cannot be successful because it would involve enormous transaction costs.

U.S. antitrust policy is primarily a deterrence system not a regulatory system. That is, antitrust policy and the associated enforcement hierarchy are not, in general, designed broadly to scrutinize, screen, or approve firm behavior or market structures throughout the economy. Instead, antitrust policy relies on administrative and case law developed through public and private antitrust enforcement actions to develop a set of "antitrust legal rules" which businesses are expected to internalize into their decisions. The incentives firms have to understand and adhere to antitrust rules derive from the potential costs of treble damage actions, administrative restrictions on their behavior, other equitable relief (e.g., divestiture), and for certain infringements (e.g., price fixing), fines and prison terms all weighted by the probability of getting caught and convicted."

Joskow, "Transaction Cost Economics, Antitrust Rules, and Remedies", *Journal of Law, Economic and Organization* (April 2002).

Though *Pastore* was decided in the context of a motion for summary judgment, its holding is applicable to the present motion to dismiss. The facts alleged do not suggest that Arbitron has gained control over an appreciable portion of the market for television viewer measurement in Philadelphia. Rather, the Amended Complaint states that Arbitron has only "recently" entered the television viewing measurement market. Amended Complaint P 9. Plaintiff also claims that Arbitron's PPM technology "hereinafter will supplant any other system because of its superior accuracy and reliability." *Id. P 49*. As noted above, this cannot be an antitrust violation.

This Court has recently dismissed a Section Two claim where the plaintiff stated only a "conclusory allegation" as to the probability of monopolization. *Fresh Made, Inc. v. Lifeway Foods, Inc., 2002 U.S. Dist. LEXIS 15098, 01*-cv-4254, 2002 WL 31246922, at *8 (E.D. Pa. Aug. 9, 2002). In *Fresh Made,* plaintiff, a maker of dairy products, alleged that its competitor's **[**52]** gross annual revenues were five times as large as plaintiff's, and that it had used its influence to threaten distributors and food markets who did not agree to its demands. *Id.* Yet plaintiff's amended complaint failed to "allege the overall size of the proposed market, identify [defendant's] percentage share of the proposed market, identify other participants and competitors in the market, or allege what percentage of [defendant's] gross annual revenues are derived from the proposed market." *Id.* Accordingly, this Court found that the allegations regarding the relative size of the parties did not sufficiently demonstrate a dangerous probability of achieving monopoly power. *Id.*

The facts set forth by Plaintiff offer no guidance as to Arbitron's probability of achieving market power. Accordingly, Plaintiff cannot satisfy the dangerous probability element. With respect to the remaining elements of attempted monopolization, the allegations fail to demonstrate any specific intent to monopolize, much less predatory or anticompetitive conduct.

HN31[] The specific intent element requires more than "a mere intention to prevail over rivals or improve market position." *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa., 745 F.2d 248, 261 (3d Cir. 1984)*. **[**53]** While acknowledging that Nielsen remains an active competitor in the market, Plaintiff provides no explanation whatsoever as to how Arbitron's unspecified "combination" with Nielsen furthers the attempted monopolization. [8] Amended Complaint P 54.

[54] [*573]** Count II merely states, in conclusory language, that Arbitron and Nielsen's business relationship, coupled with Arbitron's recent PPM tests (which, of course, omitted WGTW), renders Arbitron an attempted monopolist. Such bald and unsubstantiated assertions cannot satisfy Plaintiff's pleading burden. *See Fresh Made,* 2002 WL 31246922, at *8.

Plaintiff has not stated a viable claim under *Section 2* of the Sherman Act. Accordingly, Count II must be dismissed.

3. Whether to Allow Further Amendment

The Court is well aware of the line of Third Circuit decisions requiring District Courts to allow plaintiffs to amend defective complaints. *See Shane v. Fauver, 213 F.3d 113 (2000)*. However, many Third Circuit decisions have also affirmed dismissals of antitrust complaints without leave to amend *[Garshman supra, PepsiCo. supra].* In this case, this Court has determined not to allow Plaintiff to amend further the antitrust claims for the following reasons:

1. Plaintiff has already amended its antitrust claims once, and despite oral argument raising the issues discussed in this Memorandum, Plaintiff has still not satisfied the legal **[**55]** requirements, or requested further leave to amend.

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[8] It is not clear from the Amended Complaint whether Plaintiff wishes to also make a claim of conspiracy to monopolize under Section Two Nevertheless, the facts alleged do not support such a claim. ***HN32***[] To properly state a conspiracy to monopolize claim a plaintiff "must allege facts constituting the conspiracy, its period and object, and what the alleged participants did to achieve the conspiracy's object." *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 855 F. Supp. 108, 110 (E.D. Pa. 1994)*, *aff'd 107 F.3d 1026 (3d Cir. 1997)*. Plaintiff has made no effort to describe the supposed "combination," other than the vague allegation that Nielsen and Arbitron have "entered into a corporate financial relationship by which Nielsen and Arbitron are related in regard to the new system, the details of which are not known to plaintiff." Amended Complaint P 11.

2. The nature of the industry, and the absence of any rational economic theory to support Plaintiff's Complaint, indicate that it would be futile for Plaintiff to make further amendment. *See* F.R.Civ. P. 15. *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d. Cir. 1997)*.

C. Count III -- Lanham Act, § 43(a)

Plaintiff's next theory is raised under the Lanham Act. Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*, provides:

HN33[] (a) Civil action.

(1) *Any person* who, on or *in connection with any goods or services,* or any container for goods, *uses in commerce any* word, term, name, symbol, or device, or any combination thereof, or any *false designation of origin, false or misleading description of fact, or false or misleading representation of fact,* which--

(A) *is likely to cause confusion,* or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial **[**56]** advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (emphasis added). As courts have recognized, **HN34**[] § 43(a) "creates a federal cause of action for unfair competition, even absent a federal registered trademark." *Williams v. Curtiss-Wright* **[*574]** *Corp., 691 F.2d 168, 172 (3d Cir. 1982)*. Generally, the statute "provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising." *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3d Cir. 1990)*. Courts have refused to interpret § 43(a) more broadly than necessary, so as to "eliminate frivolous claims and prevent flooding the federal courts with Lanham Act claims contrary to the type envisioned by Congress." *Thorn v. Reliance Van Co., 736 F.2d 929, 933 (3d Cir. 1984)*.

In the present **[**57]** case, Plaintiff alleges that Arbitron has "knowingly and maliciously misrepresented, knowingly [*sic*] the characteristics and qualities of plaintiff's goods, services and activities, whereby plaintiff has been substantially damaged." Amended Complaint P 58. Specifically, Plaintiff claims that Arbitron misrepresented the quality of WGTW's services through both its omission of WGTW from the PPM test data, and through its representations to the industry that the PPM data were, nevertheless, accurate. *Id. P 59*. Plaintiff's theory seems to be that advertisers, noticing WGTW's absence from the PPM test reports, which Arbitron had touted as accurate, would thereby assume that WGTW had no ratings worth measuring.

Defendant raises several arguments as to why this count should be dismissed. However, this Court must first consider the threshold question of whether Plaintiff has standing to bring a § 43(a) claim. **HN35**[] The "dispositive question" as to 43(a) standing is whether the plaintiff "has a *reasonable interest* to be protected against false advertising." *Thorn, 736 F.2d at 933* (emphasis added). The Court of Appeals has set forth the following five factors to consider **[**58]** in analyzing standing under § 43(a), borrowing the five factors established by the Supreme Court for standing in antitrust cases:

(1) The nature of the plaintiff's alleged injury: Is the injury "of a type that Congress sought to redress in providing a private remedy for violations of the [Lanham Act]"?

(2) The directness or indirectness of the asserted injury.

(3) The proximity or remoteness of the party to the alleged injurious conduct.

(4) The speculativeness of the damages claim.

(5) The risk of duplicative damages or complexity in apportioning damages.

Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233 (3d Cir. 1998) (*citing* Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (discussing antitrust-standing)).

In the instant case, four of the five factors weigh against Plaintiff's standing. As to prong one, it is significant that Arbitron and Plaintiff are not competitors. As the *Conte* court put it, ***HN36***[] "while there may be circumstances in which a non-competitor may have standing to sue ... *the* **[**59]** *focus* of the Lanham Act is on 'commercial interests [that] have been harmed by a *competitor's false advertising.*'" 165 F.3d at 234 (emphasis added) (*quoting* Granite State Ins. Co. v. AAMCO Transmis. Inc., 57 F.3d 316, 321 (3d Cir. 1995)). None of Arbitron's alleged actions can be reasonably construed as false advertising.

Arbitron's release of test PPM reports, omitting any measurements for WGTW, bears no resemblance to advertising activity. Plaintiff also claims that, recently, at a meeting of the Pennsylvania Association of Broadcasters, Kevin Smith, a Senior Vice President of Arbitron, represented that **[*575]** the PPM survey was fair, accurate and complete. Id. at P 32. Even if this vague, generic remark were, in fact, advertising, it conveys no specific content which could be considered false. The Amended Complaint does not assert that Smith or any other Arbitron representative ever mentioned WGTW in any context. Yet Plaintiff suggests that an advertising agency viewing Arbitron's PPM reports, or hearing Smith's statements regarding their accuracy, would naturally conclude that WGTW's ratings are too minute to affect the test's accuracy. This theory is, at most, **[**60]** wild speculation. Assuming that a media professional, reading the PPM test surveys, would draw any conclusion about a station that was not covered in the surveys, such conclusion would not necessarily be that WGTW had insubstantial ratings. Indeed, as Plaintiff acknowledges, Nielsen has long operated a television viewership measurement system, Id. P 11, which would allow another view of Plaintiff's viewer penetration. Thus, the mere omission of WGTW from Arbitron's purportedly accurate reports would not impact Plaintiff's ability to compete, nor detract from Plaintiff's good will. *See* Conte, 165 F.3d at 234. Any loss suffered by Plaintiff as a result of these alleged statements by Arbitron is not the type of loss which the Lanham Act was intended to redress.

As to the second and third standing prongs, Plaintiff's alleged injury is extremely indirect, and Plaintiff's business is only remotely connected to Arbitron's PPM test monitoring. As to the fourth prong, the alleged damages are highly speculative; Plaintiff would have great difficulty proving a direct link between Arbitron's conduct and actual WGTW dollars lost. The final prong, though, weighs for Plaintiff, **[**61]** as there is no apparent risk of duplicative damages or complexity in apportioning damages.

Balancing the above five factors, it is apparent that Plaintiff lacks standing to bring a § 43(a) claim. Yet, even if this Court were to find standing, the facts pled cannot satisfy the elements necessary ***HN37***[] to prevail on such a claim:

> 1) that the defendant has made false or misleading statements as to his own product [or another's]; 2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) that the deception is material in that it is likely to influence purchasing decisions; 4) that the advertised goods traveled in interstate commerce; and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922-23 (3d Cir. 1990) (*quoting* Max Daetwyler Corp. v. Input Graphics, Inc., 545 F. Supp. 165, 171 (E.D. Pa. 1982) (Pollak, J.)).

With respect to the first element, the Amended Complaint does not allege that Arbitron made any statements about WGTW, specifically. As **[**62]** to the second element, Arbitron's PPM test reports, which omitted data for WGTW, could not plausibly "deceive" a substantial portion of the intended audience. Nor would Defendant's representation that such reports were accurate cause a reasonable person to infer anything whatsoever negative about WGTW. Similarly, as to the third element, the facts pled do not support a conclusion that Arbitron's actions caused "material" deception. As Plaintiff acknowledges, Nielsen has long been in the television ratings market and continues to operate in that regard, separately from the PPM system now being developed. Id. P 11; Transcript of Motion to Dismiss Hearing (Oct. 8, 2002) at 35 ("Nielsen is in the market, absolutely."). Therefore, any advertiser could easily refer to Nielsen's **[*576]** data on the Philadelphia market, and would not, rationally, be influenced in making purchasing decisions by the absence of WGTW from Arbitron's PPM tests.

As Plaintiff's pleading cannot satisfy any of the first three elements of a § 43(a) claim, it is not necessary to consider the elements of interstate commerce or injury. Because Plaintiff has not stated a valid claim under the Lanham Act, Count III must be **[**63]** dismissed. Because the Court believes, given the industry structure and nature of Plaintiff's business compared to Defendant's business, any effort to amend would be futile, dismissal is with prejudice.

D. Count IV -- Disparagement of Commercial Products

Plaintiff next asserts that Arbitron has "unfairly and falsely disparaged plaintiff's product, *i.e.* by misrepresenting its listening [*sic*] audience and importance in the market." Amended Complaint P 63. Plaintiff appears to allege that Arbitron misrepresented the quality of WGTW's broadcasts or viewership, by omitting WGTW from the PPM test data, and by representing to the industry that the PPM data were, nevertheless, complete and accurate. *See id. P 59*.

The tort at issue here is "variously referred to as 'trade libel,' 'commercial disparagement,' and 'injurious falsehood.'" *Neurotron Inc. v. Medical Serv. Ass'n of Pa., 254 F.3d 444, 448 (3d Cir. 2001)*; *Electro Med. Equip. Ltd. v. Hamilton Med. AG,* No. 99-cv-579, *2000 U.S. Dist. LEXIS 7078*, at *8 n.3 (E.D. Pa. May 24, 2000). ***HN38***[] Traditionally, to sustain a claim of commercial disparagement under Pennsylvania law, a plaintiff had to **[**64]** plead three elements:

> 1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; 2) that no privilege attaches to the statement; and 3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement.

Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 579 (E.D. Pa. 1999); *Electro Med., 2000 U.S. Dist. LEXIS 7078*, at *9.

Recently, however, the Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would alter the "parameters" of the tort by adopting a Restatement section that had never before been cited by the state's highest court. *Neurotron, 254 F.3d at 449*. The Restatement section at issue, *§ 623A*, provides that:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he *intends* for publication of the statement to result in harm to interests of the other having a pecuniary value, *or* either recognizes or should *recognize that it is likely* to do so, *and*
>
> (b) he *knows* that the statement **[**65]** is *false* or acts in *reckless disregard* of its truth or falsity.

Restatement (Second) of Torts § 623A (1977) (emphasis added). Notably, this Restatement formulation of the tort includes an element of knowledge or "reckless disregard" as to truth or falsity. Such state of mind was not required by the traditional three-prong formulation. *See* *Synygy, 51 F. Supp. 2d at 579*; *Electro Med., 2000 U.S. Dist. LEXIS 7078*, at *9.

Prior to *Neurotron,* the state Supreme Court had not decided a trade libel case in over two decades. *See* *Neurotron, 254 F.3d at 448*. However, the Superior Court, along with several Pennsylvania federal district courts, had cited *Restatement § 623A*. Moreover, as the Court of **[*577]** Appeals observed, the Pennsylvania Supreme Court has consistently adopted Restatement provisions. *Id. at 449-50*. Thus, the *Neurotron* court found that the state's highest court would accept *§ 623A* as the "most reliable collation of the common law of injurious falsehood." *Id. at 451*. Accordingly, the Court of Appeals applied the "reckless indifference" standard to the facts presented in **[**66]** *Neurotron.* *Id. at 452*. Finding that the record did not support a finding that the defendant acted with knowledge of falsity, or reckless disregard, the court affirmed summary judgment for the defendants. *Id. at 454*.

Fulfilling the Third Circuit's prediction, **HN39**[] the Pennsylvania Supreme Court has recently cited Restatement § 623A. *See* Pro Golf Mfg. v. Tribune Rev. Newsp. Co., 570 Pa. 242, 809 A.2d 243, No. 18- WAP-2001, 2002 Pa. LEXIS 2194, at *6 (Pa. Oct. 22, 2002). In *Pro Golf,* the plaintiff, a golf equipment maker, sued a newspaper which had allegedly stated, falsely, that the plaintiff's premises were soon to be demolished. The trial court dismissed the claim based on a one-year limitations period. The Superior Court reversed, finding that a longer limitations period applied. In analyzing the tort of commercial disparagement, the Superior Court cited Restatement § 623A:

> The Restatement (Second) of Torts § 623A labels this tort as "injurious falsehood." Regardless of the label, the publication of a disparaging statement concerning the business of another is actionable where: (1) the statement is false; (2) the publisher either *intends* the **[**67]** publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either *knows* that the statement is false or acts in *reckless disregard* of its truth or falsity. Restatement (Second) of Torts § 623A (1977).

Pro Golf Mfg., Inc., v. Tribune Review Newspaper Co., 2000 PA Super 273, 761 A.2d 553, 555-56 (Pa. Super. 2000) (emphasis added).

The Pennsylvania Supreme Court reversed, holding that the trial court had correctly applied a one-year limitations period to the commercial disparagement action. *See Pro Golf, 809 A.2d 243, 2002 Pa. LEXIS 2194*, at *7. In the October 2002 decision, however, the Supreme Court quoted the above passage from the Superior Court's opinion with approval, which included the "reckless disregard" element and a citation to § 623A. Id. at *5-6.

Thus, the state courts have, very recently, indicated a substantial change in the law of commercial disparagement. Accordingly, to sustain its cause of action under Count IV, Plaintiff must allege, *inter alia,* that Arbitron made a false statement, which **[**68]** caused pecuniary loss to Plaintiff, and that Arbitron knew that the statement was false or acted with reckless disregard of its truth or falsity. The allegations of the Amended Complaint do not fulfill these requirements.

Both parties, in their briefings, discuss only the traditional three-prong formulation of the commercial disparagement tort. Plaintiff and Defendant rely on *Synygy,* 51 F. Supp. at 579, for definition of the cause of action's parameters. Though Plaintiff asserts that Arbitron "maliciously" disparaged WGTW, Amended Complaint P 62, Count IV contains no allegation that Arbitron acted with the knowing or indifferent state of mind referred to in *Pro Golf* and *Neurotron.* Accordingly, the claim cannot be sustained based on the facts as pled.

Nevertheless, as noted above, this claim should not be dismissed with prejudice unless amendment would be futile. Considering the whole of the Amended Complaint, Plaintiff has provided enough factual **[*578]** background such that, if amended is allowed, the elements of the tort may be satisfied. For that reason, Plaintiff may amend its pleading to plead facts to support all necessary elements of its commercial disparagement **[**69]** claim. If Plaintiff files a Second Amended Complaint, it shall contain sufficient factual detail to describe the nature of Arbitron's statements and the reason why each was false; Arbitron's intention and knowledge in making the statement; and the causal relationship between the statement and an approximate amount of pecuniary loss to Plaintiff. Hence, Count IV is dismissed without prejudice to Plaintiff's right to file a second amended complaint.

E. Count V -- Tortious Interference with Prospective Contractual Relations

Next, Plaintiff claims that Arbitron has "improperly interfered with plaintiff's likely and prospective contractual relations," by omitting WGTW from the PPM test data and representing to the industry that the PPM data were, nevertheless, complete and accurate. Amended Complaint P 59, 66. **HN40**[] The elements of the tort of interference with prospective contractual relations are as follows:

> (1) the existence of a contractual or prospective contractual relationship between the plaintiff and a third party; (2) a purpose or intent to harm an existing relationship or to prevent a prospective relationship from accruing; (3) the absence of privilege or justification **[**70]** on part of the defendant; and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct.

Fresh Made, Inc. v. Lifeway Foods, Inc., 01-cv-4254, 2002 WL 31246922, at *12 (E.D. Pa. Aug. 9, 2002).

As to the first element, a prospective contract "'is something less than a contractual right, something more than a mere hope.' ... It exists if there is a reasonable probability that a contract will arise from the parties' current dealings." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1015 (3d Cir. 1994)* (*quoting* *Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895, 898-99 (Pa. 1971))*. Plaintiff cannot rest its tortious interference claim on the "mere hope that additional contracts or customers would have been forthcoming but for defendant's interference." *Fresh Made, Inc.,* 2002 WL 31246922, at *12.

Plaintiff has not identified a single past, present or prospective customer of WGTW with whom it had a prospective contract which did not finalize because of Defendant's actions. Nor does Plaintiff assert facts which would suggest the loss of any particular potential **[**71]** client. If these events had occurred, Plaintiff would have knowledge. Nor has Plaintiff endeavored to explain a causal connection between Arbitron's conduct and WGTW's loss of a contract that otherwise might have been realized. The tort of tortious interference is entirely inapplicable to the facts alleged in the Amended Complaint. Accordingly, Count V is dismissed with prejudice.

F. Count VI -- Negligence

Next, Plaintiff alleges negligence. ***HN41***[] Under Pennsylvania law, a negligence claim consists of four elements:

> (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another.

Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1366 (3d Cir. 1993). **[*579]**

Plaintiff states that, in April 2002, Arbitron "requested permission to, and was permitted," to enter WGTW's premises for the purpose of installing a PPM encoder. Amended Complaint P 67-68. Plaintiff asserts that Defendant was, thereafter, obligated to inform WGTW of any **[**72]** defect or malfunction in the encoder and to provide WGTW with instructions as to its use. *See* *id. P 70-71*. Yet, Arbitron breached this duty of care, Plaintiff claims, by improperly installing the equipment, failing to instruct WGTW as to its use and failing to correct a defect in the equipment. *Id. P 73*. Moreover, even after Plaintiff learned of the defect, Arbitron continued to exclude Plaintiff from its PPM surveys. *Id. P 77*. These actions or omissions allegedly caused "irreparable damage" to Plaintiff. *Id.*

Defendant stresses that Plaintiff's negligence claim is barred by ***HN42***[] the "economic loss doctrine." That rule prevents recovery on a negligence theory for an economic loss, where the plaintiff's entitlement "flows only from a contract." *Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995)*; *Constar, Inc. v. National Distrib. Ctrs., Inc., 101 F. Supp. 2d 319, 322 (E.D. Pa. 2000)*. The rationale is that negligence law is not intended to compensate a party for a loss resulting from a breach of duty, where that duty was assumed only by the parties' agreement. *See* *Constar, 101 F. Supp. 2d at 322*. **[**73]**

This Court cannot discern from the Amended Complaint whether or not Plaintiff bases his theory of duty upon the existence of an agreement, or other business arrangement, between the parties. On one hand, Plaintiff claims that Arbitron "requested permission to, and was permitted" by Plaintiff to enter WGTW's premises. Amended Complaint P 67-68. Plaintiff further claims that Arbitron "directly and knowingly assumed" a duty of care when it visited WGTW for the purpose of installing a PPM encoder. *Id. P 68-69*. On the other hand, Plaintiff does not use the word "contract" to describe the business relationship between the parties. Under clear Pennsylvania precedent, if Arbitron's duty arose from the parties' agreement, then Plaintiff may not recover for economic losses caused by Arbitron's negligence. If Plaintiff envisions some other basis for Arbitron's duty, other than a business relationship between the parties, Plaintiff has not sufficiently alleged that basis.

As Plaintiff has not properly stated a legal duty, this Court need not address the remaining elements of breach, causation and injury. Nevertheless, Plaintiff's Amended Complaint offers enough clues as to his negligence **[**74]** theory to allow an amended pleading on this count. Therefore, with respect to Count VI, the motion to dismiss is granted, without prejudice to Plaintiff's right to submit a Second Amended Complaint, with sufficient factual details to establish a claim for negligence.

G. Count VII -- Promissory Estoppel

Finally, Plaintiff raises a claim under the equitable doctrine of promissory estoppel. HN43[] In order to succeed on a promissory estoppel theory, a party must establish that

> (1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.

Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997). *See also* Crouse v. Cyclops Indus., 560 Pa. 394, 745 A.2d 606, 610 (Pa. 2000). An action for promissory estoppel should be dismissed where **[*580]** the complaint is "bereft of any allegation of a promise or reliance thereupon." Holewinski v. Children's Hosp., 437 Pa. Super. 174, 649 A.2d 712, 714 (Pa. Super. 1994). **[**75]**

Count VII of Plaintiff's Amended Complaint states that:

> Upon gaining and being allowed entry to the plaintiff's equipment, defendant assumed, accepted, and is burdened with the duty to use a reasonable standard of care in regard to the protection of the equipment, and the proper utilization of the equipment for the purpose for which it was admitted, *i.e.,* to provide an accurate and satisfactory transmission of plaintiff's viewership.
>
> [P] 81. Through its neglect and failure to observe the standard of care, and due to its reckless and malicious conduct, for the reasons aforesaid, defendant, and others which may become known to plaintiff through discovery and otherwise, defendant violated the duty of reasonable care, causing serious injury to the plaintiff, as aforesaid.

Amended Complaint P 80-81. Upon review of the entire Amended Complaint, Plaintiff has not alleged that Arbitron made a promise, or that Plaintiff reasonably relied on such promise. Moreover, Plaintiff's assertion that Arbitron "violated the duty of reasonable care," *id. P 81*, simply makes no sense in the context of a promissory estoppel claim. If facts existed to support such a claim, Plaintiff **[**76]** would know them. Accordingly, Count VII must be dismissed, with prejudice.

V. Conclusion

For the foregoing reasons, Defendant's motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6) is granted. Counts I, II, III, V and VII are dismissed with prejudice. Counts IV (Disparagement of Commercial Products) and VI (Negligence) are dismissed without prejudice to Plaintiff's right to file a second amended complaint. An appropriate Order follows.

ORDER

AND NOW, this 31 day of December, 2002, it is hereby ORDERED that the Defendant's motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6) is GRANTED.

It is further ORDERED that:

1. Counts I, II, III, V and VII are dismissed with prejudice; and

2. Counts IV and VI are dismissed without prejudice to Plaintiff's right to file a Second Amended Complaint within twenty (20) days.

BY THE COURT:

MICHAEL M. BAYLSON, U.S.D.J.

Ashley Creek Phosphate Co. v. Chevron USA, Inc.

United States Court of Appeals for the Tenth Circuit

January 2, 2003, Filed

No. 01-4017, No. 01-4031, No. 01-4066

Reporter
315 F.3d 1245 *; 2003 U.S. App. LEXIS 33 **; 2003-1 Trade Cas. (CCH) P73,912

ASHLEY CREEK PHOSPHATE COMPANY, Plaintiff-Counter-Defendant-Appellant, and STATE OF UTAH, Plaintiff-Counter-Defendant, v. CHEVRON USA, INC.; SF PIPELINE LIMITED COMPANY; SF PHOSPHATES LIMITED COMPANY; J.R. SIMPLOT COMPANY; FARMLAND INDUSTRIES, INC.; FS, INC., a Utah corporation; CHEVRON INDUSTRIES, INC., a Delaware corporation; CHEVRON CHEMICAL COMPANY, a Delaware corporation; CHEVRON PIPE LINE COMPANY, a Delaware corporation; CHEVRON CORPORATION, a Delaware corporation, Defendants-Counter-Claimants-Appellees. ASHLEY CREEK PHOSPHATE COMPANY, Plaintiff-Counter-Defendant, and STATE OF UTAH, Plaintiff-Counter-Defendant-Appellant, v. CHEVRON USA, INC.; SF PIPELINE LIMITED COMPANY; SF PHOSPHATES LIMITED COMPANY; J.R. SIMPLOT COMPANY; FARMLAND INDUSTRIES, INC.; FS, INC., a Utah corporation; CHEVRON INDUSTRIES, INC., a Delaware corporation; CHEVRON CHEMICAL COMPANY, a Delaware corporation; CHEVRON PIPE LINE COMPANY, a Delaware corporation; CHEVRON CORPORATION, a Delaware corporation, Defendants-Counter-Claimants-Appellees. ASHLEY CREEK PHOSPHATE COMPANY, Plaintiff-Counter-Defendant-Appellant, and STATE OF UTAH, Plaintiff-Counter-Defendant. v. CHEVRON USA, INC.; SF PIPELINE LIMITED COMPANY; SF PHOSPHATES LIMITED COMPANY; J.R. SIMPLOT COMPANY; FARMLAND INDUSTRIES, INC.; FS, INC., a Utah corporation; CHEVRON INDUSTRIES, INC., a Delaware corporation; CHEVRON CHEMICAL COMPANY, a Delaware corporation; CHEVRON PIPE LINE COMPANY, a Delaware corporation; CHEVRON CORPORATION, a Delaware corporation. Defendants-Counter-Claimants-Appellees.

Subsequent History: Related proceeding at *Ashley Creek Phosphate Co. v. Chevron Corp., 76 Fed. Appx. 238, 2003 U.S. App. LEXIS 19329 (10th Cir. Colo., Sept. 17, 2003)*

US Supreme Court certiorari denied by *Ashley Creek Phosphate Co. v. Chevron U.S.A. Inc., 540 U.S. 820, 124 S. Ct. 103, 157 L. Ed. 2d 38, 2003 U.S. LEXIS 5615 (Oct. 6, 2003)*

Prior History: **[**1]** Appeal from the United States District Court for the District of Utah. (D.C. Nos. 89-CV-554-K and 96-CV-340-K).

Ashley Creek Phosphate Co. v. Chevron, 129 F. Supp. 2d 1299, 2000 U.S. Dist. LEXIS 17203 (D. Utah, July 14, 2000)

Disposition: Judgment of the district court affirmed in part, reversed in part, and remanded; appeal dismissed in part; all other motions denied.

Core Terms

district court, counterclaims, phosphate, tariff, pipeline, antitrust, concentrate, summary judgment, proceedings, motion to dismiss, preparedness, anti trust law, steps, antitrust claim, mineral lease, civil proceeding, fertilizer, costs, wrongful use, abuse of process, reasons, leases, notice of appeal, preparation, financing, selling, courts, cases, state court, Clayton Act

LexisNexis® Headnotes

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

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews a grant of summary judgment de novo, applying the same standard used by the district court under *Fed. R. Civ. P. 56(c)*. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Rule 56(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Entitlement as Matter of Law, Appropriateness**

Although in the broad sense summary judgment should be used sparingly in antitrust cases, the usual rules governing summary judgment still apply. Where the record clearly indicates that there are no circumstances under which the plaintiff can prevail, summary procedures are appropriate to avoid needless trials and unnecessary expense. Moreover, even in antitrust cases, a reviewing court is not limited to the grounds upon which the trial court relied but may base summary judgment on any proper grounds found in the record to permit conclusions of law.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

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

HN3[] Standing, Clayton Act

A district court's ruling that a plaintiff lacked standing under *§ 4* (*15 U.S.C.S. § 15*) of the Clayton Act is a question of law subject to de novo review.

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

HN4[] Private Actions, Standing

Section 4 (*15 U.S.C.S. § 15*) of the Clayton Act confers on private parties the power to enforce federal antitrust laws. *15 U.S.C.S. § 15(a)*.

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

HN5[] Private Actions, Standing

See *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > Remedies > Damages > Monetary Damages

HN6[] Clayton Act, Claims

Although *§ 4* (*15 U.S.C.S. § 15*) of the Clayton Act appears to be a broad grant of standing, a plaintiff's right to sue for money damages is subject to a number of limitations unique to the antitrust laws that are based upon the express words of the statute and policies found by courts to be implicit in the structure and purpose of the antitrust laws. The United States Supreme Court may be concerned about reading *§ 4* too broadly. To maintain standing to bring an antitrust claim under *§ 4*, a plaintiff must show (1) an "antitrust injury" and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN7[] **Clayton Act, Claims**

To meet the first prong of the test to maintain standing to bring an antitrust claim under *§ 4* (*15 U.S.C.S. § 15*) of the Clayton Act, a plaintiff must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. A violation of the Act without resultant injury to the plaintiff is insufficient to confer standing; the plaintiff must show the antitrust injury resulted directly from the defendant's violation of ***antitrust law***.

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

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

HN8[] **Private Actions, Standing**

An antitrust injury to either a plaintiff's business or property will be sufficient to confer standing on the plaintiff to raise antitrust claims. *15 U.S.C.S. § 15(a)*.

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

Energy & Utilities Law > Antitrust Issues > General Overview

HN9[] **Private Actions, Standing**

Most courts have not required a plaintiff to actually be engaged in an ongoing business in order to have standing under the antitrust laws. It is sufficient if he has manifested an intention to enter the business and has demonstrated his preparedness to do so.

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

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

HN10[] **Private Actions, Standing**

Most courts have held that injury to an enterprise in the planning stage is actionable under the antitrust laws, provided that the plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so. The United States Court of Appeals for the Tenth Circuit has identified the following as "key elements" in evaluating the plaintiff's preparedness to enter a business: (1) ability to finance the business and purchase the necessary facilities and equipment; (2) consummation of contracts needed for the proposed venture; (3) affirmative actions by the plaintiff to engage in the proposed business; and (4) the background and experience of the plaintiff in the prospective business. In examining preparedness, courts have uniformly drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his intention to enter a field; he must also demonstrate his preparedness to do so.

Civil Procedure > Appeals > Standards of Review > General Overview

HN11[] **Appeals, Standards of Review**

An appellate court will not search the record in an effort to determine whether there exists dormant evidence which might require submission of a case to a jury.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

HN12[] **Clayton Act, Claims**

Several courts have recognized that in order to show preparation to enter a given market, an antitrust plaintiff need not take those steps which would have been rendered futile by an alleged monopolist. A defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a competitor. It would be inconsistent with one purpose of the Clayton Act--to protect the business interests of the victims of monopolistic practices--to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture. The United States Court of Appeals for the Tenth Circuit has no doubt that there exists some type of futility exception to the preparation requirement set out in Curtis. Whatever the parameters of such an exception, however, it clearly does not excuse a plaintiff from performing the most basic preparatory steps.

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

Energy & Utilities Law > Antitrust Issues > General Overview

Governments > Courts > Judicial Precedent

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

HN13[] **Private Actions, Remedies**

Allowing an antitrust plaintiff to recover merely upon a showing of a violation of the act, without a demonstration of injury-in-fact, would conflict with United States Court of Appeals for the Tenth Circuit precedent. A violation of the act without resultant injury to the plaintiff is insufficient to confer standing.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN14[] **Clayton Act, Claims**

The United States Court of Appeals for the Tenth Circuit rejects the assertion that possession of property alone confers antitrust standing. The language of the Clayton Act makes clear that it is the injury to property, rather than its mere possession, that confers standing. *15 U.S.C.S. § 15(a)*

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

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Energy & Utilities Law > Mining Industry > Mineral Leases > General Overview

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

HN15[] **Private Actions, Remedies**

To have standing to allege antitrust injury to an inchoate business interest, a plaintiff must establish its preparedness to enter the market.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Notice of Appeal

HN16[] **Appellate Jurisdiction, Interlocutory Orders**

Fed. R. App. P. 3(c)(1)(B) requires that a notice of appeal designate the judgment, order, or part thereof being appealed. A district court's interlocutory orders merge into its final orders and judgments, and the identification of the final order in the notice of appeal is sufficient to support appellate jurisdiction to review the earlier now-merged interlocutory orders.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN17[] **Appellate Jurisdiction, Final Judgment Rule**

Fed. R. Civ. P. 54(b) provides that in the absence of a *Rule 54(b)* certification from the district court, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.

Civil Procedure > Appeals > Notice of Appeal

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN18[] **Appeals, Notice of Appeal**

In a situation in which other claims were effectively dismissed after a notice of appeal was filed, *Fed. R. App. P. 4(a)(2)* permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal. In such cases generally the appellate court will consolidate or companion the earlier appeal with any subsequent appeals arising out of the same district court case.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN19[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Federal courts have an independent obligation to examine their own jurisdiction.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Labor & Employment Law > Wrongful Termination > Remedies > Costs & Attorney Fees

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Parties

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN20[] **Appellate Review, Appealability**

Where a party is the prevailing party as to a pendent claim because the claim has been dismissed, albeit without prejudice, the party can still appeal the district court's merits-based denial of a summary judgment motion as long as it can demonstrate a personal stake in the outcome of the appeal. If a successful appeal would alter, inter alia, future litigation costs, the personal stake requirement of U.S. Const. art. III is met.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Labor & Employment Law > Wrongful Termination > Remedies > Costs & Attorney Fees

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Parties

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

HN21[] **Appellate Review, Appealability**

When a district court denies summary judgment on the merits, and then exercises its discretion to decline pendent jurisdiction, the moving party is a party aggrieved by a judgment and has an appeal as of right on the merits of the denial of summary judgment.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Courts > Judicial Comity

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN22[] **Jurisdiction, Jurisdictional Sources**

District courts would be wise to keep in mind the rule set out in Jarvis and Pell when faced with a complaint invoking the court's federal question jurisdiction which also includes pendent state law claims. Pendent jurisdiction need not be exercised in every case in which it is found to exist. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. If federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN23[] **Supplemental Jurisdiction, Pendent Claims**

Taken together, Jarvis, Pell, and Bauchman counsel against deciding dispositive motions addressed to pendent state law claims unless it appears that a federal claim will proceed to trial or a decision is necessary because of some peculiar aspect of the case (e.g., coordination of trial docket and discovery). This is especially true where the state law the district court must apply to dispose of the motion is undeveloped. Absent such restraint, the parties may well be deprived of the surer-footed reading of applicable law that would be provided them by the relevant state court.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN24[] **Pleadings, Counterclaims**

The Utah Supreme Court has adopted the analytical framework set out in the Restatement (Second) of Torts for distinguishing between the following three distinct torts involving abusive manipulation of judicial procedures: (1) abuse of process, (2) malicious prosecution, and (3) wrongful use of civil proceedings. Despite the fact that it has in the past utilized the term as a catch-all description of any private misuse of judicial resources, the supreme court has recognized that abuse of process is a narrow tort applying only to one who uses a legal process against another primarily to accomplish a purpose for which it is not designed.

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Torts > Intentional Torts > Abuse of Process > Elements

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

Torts > ... > Malicious Prosecution > Elements > General Overview

HN25[] **Wrongful Termination, Remedies**

An abuse of process claim can be raised as a counterclaim under Utah law because there is no requirement that the judicial proceedings giving rise to the tort claim have been terminated in the counterclaimant's favor. The tort of wrongful use of civil proceedings, in contrast, focuses on the whether the procurement, initiation, or continuation of civil proceedings was for the purpose of harassment or annoyance and without probable cause. The action of malicious prosecution, which began as a remedy for unjustifiable criminal proceedings, has been undergoing a slow process of extension into the field of the wrongful initiation of civil suits. A claim for wrongful use of civil proceedings is not ripe until the underlying proceedings are terminated in favor of the person against whom they are brought.

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN26[] **Intentional Torts, Malicious Prosecution**

In an abuse of process claim, the gravamen of the misconduct is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed.

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN27[] **Abuse of Process, Elements**

The gist of the tort of abuse of process is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently, it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Energy & Utilities Law > Pipelines & Transportation > Easements & Rights of Way

Torts > Intentional Torts > Malicious Prosecution > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN28[] **Pleadings, Counterclaims**

Utah state law wrongful use of civil proceedings claims cannot be maintained as counterclaims. Institution of a civil action by summons and complaint is not legally considered process capable of being abused.

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

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

HN29[] **Standards of Review, De Novo Review**

An appellate court reviews the denial of a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss counterclaims de novo, applying the same standard as the district court, and accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the counterclaimants.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Energy & Utilities Law > Pipelines & Transportation > Easements & Rights of Way

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN30[] **Pleadings, Counterclaims**

With respect to a claim of wrongful use of civil proceedings, it is the plaintiff's burden to prove lack of probable cause and improper purpose.

Counsel: E. Craig Smay, Salt Lake City, Utah, (Philip Pugsley, Assistant Attorney General, State of Utah, Salt Lake City, Utah, with him on the briefs), for Ashley Creek Phosphate Company and State of Utah, Plaintiffs-Counter-Defendants-Appellants.

Peter W. Billings, Fabian & Clendenin, Salt Lake City, Utah, (Douglas B. Cannon, Fabian & Clendenin, Salt Lake City, Utah; James S. Jardine, Jonathan A. Dibble, and Cameron M. Hancock, of Ray, Quinney & Nebeker, Salt Lake City, Utah, with him on the briefs), for SF Pipeline Limited Company; SF Phosphates Limited Company, J. R. Simplot Company; Farmland Industries, Inc.; and FS, Inc., Defendants-Counter-Claimants-Appellees.

E. Scott Savage, (Stephen R. Waldron, with him on the briefs), Berman, Gaufin, Tomsic & Savage, Salt Lake City, Utah, for Chevron **[**2]** USA, Inc.; Chevron Industries, Inc.; Chevron Chemical Company; Chevron Pipe Line Company; and Chevron Corporation, Defendants-Counter-Claimants-Appellees.

Judges: Before KELLY, Circuit Judge, BRORBY, Senior Circuit Judge, and MURPHY, Circuit Judge.

Opinion by: MURPHY

Opinion

[*1248] **MURPHY,** Circuit Judge.

INTRODUCTION

Ashley Creek Phosphate Company ("Ashley Creek") brought suit against Chevron Corporation and several related entities (collectively "Chevron") and J. R. Simplot Company, Farmland Industries, Inc., and three entities owned by, or operated as joint ventures between, Simplot **[*1249]** and Farmland (collectively "SF"). Ashley Creek alleged, *inter alia*, that Chevron and SF violated various provisions of the Sherman and Clayton Acts by refusing to set reasonable tariffs for a pipeline utilized to transport phosphate concentrate slurry. The state of Utah brought claims against Chevron identical to and derivative of Ashley Creek's claims. Chevron and SF responded by filing state-law counterclaims against Ashley Creek, asserting that it had filed its complaint and initiated other proceedings in bad faith and without a justifiable basis.

The district court granted summary judgment in favor **[**3]** of Chevron and SF on the antitrust claims, concluding that: (1) Ashley Creek lacked standing to bring its antitrust claims; and (2) in the alternative, the tariffs announced by Chevron and SF for the use of the pipeline were reasonable. Because Utah conceded that its claims were "entirely derivative" of Ashley Creek's claims, the district court dismissed Utah's claims against Chevron on the same bases. The district court dismissed Chevron's and SF's state-law counterclaims without prejudice after disposing of all of the federal claims.

Ashley Creek appeals, contending that the district court erred in granting summary judgment in favor of Chevron and SF on the antitrust claims (No. 01-4017) and in refusing to dismiss Chevron's and SF's state-law counterclaims with prejudice (No. 01-4066). Utah appeals the district court's grant of summary judgment to Chevron (No. 01-4031). This court exercises jurisdiction pursuant to *28 U.S.C. § 1291* and, for the reasons set out below, **affirms** in part, **dismisses** in part, **reverses** in part, and **remands** to the district court for further proceedings consistent with this opinion.

Appeal Nos. 01-4017, 01-4031

[4] I. BACKGROUND**

The factual and procedural background of this case is lengthy and complex. We set forth only those very limited background facts necessary to put the legal dispute and this court's decision in context.

A. Factual/Procedural Background

In the 1980's, Chevron built an integrated phosphate fertilizer project. The purpose of the project was to utilize sulfur by-product from Chevron's natural gas operations in Carter Creek, Wyoming. Rather than attempt to sell the sulfur to existing phosphate fertilizer producers, Chevron chose to produce phosphate fertilizer itself. Entry into the phosphate fertilizer business was consistent with Chevron's preexisting nitrogen fertilizer business and fertilizer distribution system.

In furtherance of this plan, Chevron purchased an operating phosphate mine located near Vernal, Utah. Because it was roughly equidistant between Carter Creek and Vernal, and because it was a railhead, Chevron chose to construct its fertilizer plant in Rock Springs, Wyoming. Chevron built a pipeline to transport phosphate concentrate slurry from the Vernal mine to the fertilizer plant in Rock Springs. This pipeline runs over lands owned by **[**5]** the United States, including environmentally sensitive lands, pursuant to a right-of-way issued by the Bureau of Land Management ("BLM"). The project became operational with the first shipments of phosphate concentrate through the pipeline sometime after May of 1986. [1]

[6] [*1250]** The state of Utah also owns phosphate deposits in Vernal within a reasonable proximity to the phosphate mine purchased by Chevron. Utah has leased some or all of its phosphate holdings in Vernal to Ashley Creek. [2] When Ashley Creek learned that Chevron intended to construct a pipeline to transport phosphate from Vernal to Rock Springs, it approached Chevron about the possibility of constructing the pipeline as a joint venture. In fact, Ashley Creek requested that the BLM condition the granting of any right-of-way "upon requirements that operators of nearby properties which may be benefitted by a pipeline be given reasonable opportunity to participate in the line upon payment of an appropriate share of expenses." The BLM denied this request on the grounds that it understood the proposed pipeline would be subject to the jurisdiction of the Interstate Commerce Commission ("ICC") and that Ashley Creek would be able to ship its phosphate through the pipeline under tariffs set by the ICC.

[7]** In November of 1986, Ashley Creek approached Chevron requesting rate information for the shipment of phosphate slurry through the pipeline. Although Chevron provided Ashley Creek with preliminary rate estimates, it refused to publish a tariff. In response, Ashley Creek filed a complaint with the ICC alleging that Chevron was a common carrier by pipeline unlawfully operating without a tariff. In a decision issued in 1989, the ICC determined that Chevron was a common carrier and ordered it to establish rates and file a tariff for the transportation of phosphate slurry through the pipeline. *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C.2d 303 (1989)*.

In response to the order, Chevron published a tariff. On June 19, 1989, the day before the tariff became effective, Ashley Creek and Utah filed suit against Chevron, asserting that Chevron's actions with regard to the pipeline violated the antitrust laws of the United States. Shortly thereafter, the ICC, Ashley Creek, Utah, and Chevron all agreed and stipulated as follows: "the determination of whether the rates which [Chevron has] established in its tariff for transporting phosphate through the Chevron **[**8]** slurry pipeline from Vernal, Utah, to Rock Springs, Wyoming, are unjust, discriminatory or unreasonable, is hereby referred to the [ICC]." The district court stayed resolution of Ashley Creek's and Utah's antitrust claims against Chevron pending the resolution of the issues referred to the ICC.

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[1] When Chevron purchased the Vernal phosphate mine it assumed an existing phosphate sales contract with Cominco, Ltd., a phosphate fertilizer producer in western Canada. Prior to the time the pipeline became operational, Chevron supplied Cominco by trucking phosphate to a railhead near Park City, Utah. In 1988, Cominco cancelled its phosphate contract with Chevron, concluding that it could obtain all the phosphate it needed at a lower cost from its own mining operations. Neither Chevron nor its successor-in-interest, SF, ever sold phosphate concentrate to a third-party after 1988, despite repeatedly trying to find outsider purchasers. During the entire time Chevron owned and operated the pipeline, no additional phosphate mines were developed in the United States and, after 1988, there were no third-party phosphate sales from a western United States phosphate mine. In 1992, Chevron completely exited the business by selling its interest in the entire integrated fertilizer project to SF for $ 64 million, only half of what it paid for the Vernal mine alone.

[2] As set out more fully below, Ashley Creek has no employees, no credit history, and no assets other than these undeveloped phosphate leases. John Archer, Ashley Creek's sole shareholder, pays, on behalf of Ashley Creek, $ 11,000 per year for the leases.

For the next seven years, the reasonableness of the published tariffs on the phosphate pipeline was litigated before the ICC and its successor agency, the Surface Transportation Board ("STB"). [3] While the **[*1251]** matter was pending before the ICC, Chevron published a revised tariff in August of 1991 and a second revised tariff in February of 1992. Each revised tariff reduced the rates of the prior tariff. In April of 1992, Chevron sold its entire integrated phosphate fertilizer project to SF. SF immediately adopted the Chevron tariff then in effect. In response to this transaction, Ashley Creek filed a complaint with the ICC naming SF as a defendant and repeating the allegations regarding the pipeline set out in its original ICC filing. The ICC consolidated the two complaints and indicated that it would apply the identical ratemaking methodology in both cases.

[9]** In October of 1996, the STB issued a decision on Ashley Creek's consolidated administrative complaints(the "1996 Order"). *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, Nos. 40131, 40810, 1996 WL 625471 (S.T.B. 1996). The STB found that the published tariffs were "unreasonable for shipments at many volume levels." *Id.* at *19. It nevertheless concluded that "there may be certain shipping patterns where the tariff rate structure would be reasonable," and ultimately summarized its decision as follows:

> On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek[] has the ability to serve that market. Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage scenarios [4] -- or, indeed, a scenario that we did not even consider at all -- is more useful for purposes of the antitrust **[**10]** litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is the subject to our primary jurisdiction.

We find:

> Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT, to Rock Springs, WY, are unreasonable to the extent discussed in this decision.

Id. (footnote omitted). [5]

[11]** After the STB issued the 1996 Order, the district court granted Ashley Creek permission to file an amended complaint alleging antitrust claims against SF. The district court further indicated that the stay it had previously entered pending the STB's resolution had expired as a result of the issuance of the 1996 Order. Utah declined to join Ashley Creek's amended complaint to the extent it stated claims against SF; instead, SF and Utah entered into an agreement whereby SF guaranteed **[*1252]** that the tariff then in effect would not be raised. [6]

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[3] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), abolished the ICC and transferred certain functions and pre-existing proceedings to the STB effective January 1, 1996.

[4] Appended to the 1996 Order were several tables evaluating the reasonableness of the tariffs at different volumes of phosphate shipped through the pipeline.

[5] The parties vigorously contested before the district court, and continue to contest on appeal, whether the 1996 Order definitively concluded that the published tariffs were unreasonable or, instead, merely provided a framework for analyzing the reasonableness of the tariffs for the district court to apply. The district court concluded that the 1996 Order merely set out an analytical framework to be applied by it and that the necessary analysis "hinged on the resolution of substantial factual questions." Utilizing a new tariff published by SF in 1999, along with the three previously published tariffs utilized by the STB in conducting its analysis, the district court ultimately concluded that the tariffs were reasonable. In light of this court's affirmance *infra* of the district court's conclusion that Ashley Creek lacks standing to bring its antitrust claims, we need not address the propriety of the district court's alternative ruling that the published tariffs were reasonable.

[6] In 1999, SF published a new tariff, the fourth tariff to be published since 1989. The fourth tariff recovers only operating and new capital costs, not original capital costs. Although this fourth tariff played a key role in the district court's decision that the published tariffs on the pipeline were reasonable, this court need not reach the issue.

B. District Court Order

After the STB issued its 1996 Order and the district court indicated that its previously imposed **[**12]** stay had expired, SF filed a motion for summary judgment. In its motion, SF asserted that it was entitled to summary judgment on two independent bases: (1) Ashley Creek failed to demonstrate that it had standing to bring its antitrust claims; and (2) its tariff for the use of the pipeline was not exclusionary. The district court granted the motion, ruling in favor of SF on each of the independent bases advanced in its motion.

The district court began by noting that to have standing to bring antitrust claims, Ashley Creek must demonstrate: (1) it has an antitrust injury to either its business or its property; and (2) there is a direct causal connection between that injury and the alleged violation of antitrust laws. *See* *Sports Racing Serv. Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997)*. Ashley Creek asserted both injury to its business (exclusionary tariffs prevented it from entering the phosphate concentrate and phosphate fertilizer industries) and injury to its property (those same exclusionary tariffs impaired the value of its mineral leases). Nevertheless, because Ashley Creek had never been in the business of selling phosphate concentrate **[**13]** or producing and selling phosphate fertilizer, the district court concluded that Ashley Creek could not demonstrate an "antitrust injury" to its business unless it could demonstrate that it "manifested an intention to enter" the market **and** "a preparedness to do so." *Curtis v. Campbell-Taggart, Inc., 687 F.2d 336, 338(10th Cir. 1982)*. With these standards in mind, the district court concluded that Ashley Creek failed to demonstrate either an antitrust injury or a causal nexus between the alleged antitrust injury and the alleged antitrust violation.

As to the antitrust-injury prong of the standing requirement, the district court assumed, without deciding, that Ashley Creek manifested an intention to enter the relevant markets; it concluded, however, that Ashley Creek failed to demonstrate preparedness to enter the market. In summary, the district court determined that: (1) Ashley Creek had failed to determine whether there is a market for phosphate and the price Ashley Creek would have to charge to cover its costs if the pipeline tariff were zero; (2) Ashley Creek had not even come close to taking the affirmative steps necessary to obtain financing of a capital **[**14]** intensive venture; and (3) Ashley Creek did not have any background or experience in mining, milling, or selling phosphate or phosphate fertilizer. The district court specifically rejected Ashley Creek's claim that SF's allegedly excessive tariffs excused it from taking steps to enter the market. The district court noted that there were numerous steps necessary for market entry that were completely unrelated to the cost of shipping phosphate from Vernal to Rock Springs. For these exact same reasons, the district court also concluded that Ashley Creek had failed to satisfy the causal-nexus prong of the standing requirement.

The district court likewise rejected Ashley Creek's claim that it had standing solely by virtue of its mineral leases. The district court noted that the mineral leases, for which Ashley Creek pays the state **[*1253]** of Utah approximately $ 11,000 per year, were only a minor component in the development of a heavily capital-intensive industry. Because Ashley Creek had failed to establish its viability in the relevant markets, the district court concluded that it would be mere speculation to recognize the leasehold interest as being injured. In that regard, the district court **[**15]** noted that mineral leases only hold value if the minerals can be economically mined, milled, and sold; without showing that its leases could be developed economically, the district court concluded that Ashley Creek could only speculate on their value.

Although the district court concluded that Ashley Creek did not have standing to bring its antitrust claims, it nevertheless went on the analyze whether SF's tariffs were sufficiently unreasonable to be exclusionary under the essential facilities doctrine. *See generally* *City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 647-49(10th Cir. 1992)*(discussing essential facilities doctrine). Utilizing the framework set forth in the 1996 Order, the district court concluded that SF's tariffs were not unreasonable, when considered together and over the twenty-year life of the pipeline, because the tariffs actually resulted in a significant under-collection with regard to return on capital.

In light of the district court's grant of summary judgment to SF, Chevron filed a summary judgment motion contending that it was entitled to summary judgment on the same grounds. Ashley Creek did not contest that the district court's **[**16]** resolution of SF's summary judgment motion would also necessitate dismissal of its claims against Chevron. Instead, Ashley Creek argued that the district court's order granting summary judgment to SF was wrongly decided. The district court therefore treated Ashley Creek's memorandum in opposition to Chevron's summary judgment motion as a motion for reconsideration. So construed, the district court denied the motion on the grounds that it was not supported by previously unavailable evidence or an intervening change in controlling law. *See* *Fed. R. Civ. P. 59(e)*. The district court then granted Chevron summary judgment for the same reasons previously articulated in granting SF summary judgment.

II. DISCUSSION

A. Standard of Review

HN1[] This court reviews a grant of summary judgment *de novo*, applying the same standard used by the district court under *Fed. R. Civ. P. 56(c)*. *Sports Racing, 131 F.3d at 882*. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party **[**17]** is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN2***[] Although this court has noted that in the broad sense summary judgment should be used sparingly in antitrust cases, "the usual rules governing summary judgment still apply." *Sports Racing, 131 F.3d at 882*; *see also* *Curtis, 687 F.2d at 338* ("Summary procedures are to be used sparingly in anti-trust litigation. But where . . . the record clearly indicates that there are no circumstances under which plaintiff can prevail, summary procedures are appropriate to avoid needless trials and unnecessary expense."). "Moreover, even in antitrust cases, we are not limited to the grounds upon which the trial court relied but may base summary judgment on any proper grounds found in the record to permit conclusions of law." *Sports Racing, 131 F.3d at 882*(quotation and alteration omitted). ***HN3***[] The district court's ruling that Ashley Creek lacked standing under *Section 4* of the Clayton Act, *15 U.S.C. **[*1254]** § 15*, is a question of law subject to *de novo* review. *Id.*

B. Analysis

HN4[] *Section 4* of the Clayton Act confers on private parties the power to enforce federal **[**18]** antitrust laws. *See* *15 U.S.C. § 15(a)*("Any ***HN5***[] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [in the appropriate federal district court]."); *see also id.* *§ 12(a)*(defining "antitrust laws"). ***HN6***[] Although *Section 4* appears to be a broad grant of standing, "a plaintiff's right to sue for money damages is subject to a number of limitations unique to the antitrust laws that are based upon the express words of the statute and policies found by courts to be implicit in the structure and purpose of the antitrust laws." ABA Section of ***Antitrust Law***, ***Antitrust law*** *Developments* 839(5th ed. 2002); *see also id.* 839 n.29(collecting cases); *Reazin v. Blue Cross & Blue Shield of Kan., 899 F.2d 951, 962 n.16 (10th Cir. 1990)*("We are also aware that the Supreme Court may be concerned about reading *section 4* of the Clayton Act too broadly."). "To maintain standing to bring an antitrust claim under *§ 4* of the Clayton Act, *15 U.S.C. § 15*, a plaintiff must show (1) an 'antitrust injury'; and (2) a direct causal connection between that injury and a **[**19]** defendant's violation of the antitrust laws." *Sports Racing, 131 F.3d at 882*.

HN7[] To meet the first prong [a plaintiff] must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the defendant's] acts unlawful. A violation of the Act without resultant injury to the [plaintiff] is insufficient to confer standing, [plaintiff] must show the antitrust injury resulted directly from [the defendant's] violation of ***antitrust law***.

City of Chanute, 955 F.2d at 652(citations and quotations omitted).

Ashley Creek claims that Chevron's and SF's allegedly exclusionary tariffs for the use of the phosphate slurry pipeline caused an antitrust injury to both Ashley Creek's business and property. ***HN8***[] An antitrust injury to *either* Ashley Creek's business *or* property would be sufficient to confer standing on Ashley Creek to raise the instant antitrust claims. *See 15 U.S.C. § 15(a)*.

1. Injury to Business

Ashley Creek is not, and has never been, in the **[**20]** business of mining and selling phosphate concentrate. [7] "However, ***HN9***[] most courts have not required a plaintiff to actually be engaged in an ongoing business in order to have standing under the anti-trust laws. It is sufficient if he has manifested an intention to enter the business and has demonstrated his preparedness to do so." *Curtis, 687 F.2d at 338*(quotation omitted); *see also* ABA Section of ***Antitrust Law***, ***Antitrust law*** *Developments* 842 & n.38 (5th ed. 2002)(collecting cases for following proposition: ***HN10***[] "Most courts have held that injury to an enterprise in the planning stage is actionable, provided that the plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so."). This court has identified the following as "key elements" in evaluating **[*1255]** the plaintiff's preparedness to enter a business: (1) ability to finance the business and purchase the necessary facilities and equipment; (2) consummation of contracts needed for the proposed venture; (3) affirmative actions by the plaintiff to engage in the proposed business; and (4) the background and experience of the plaintiff in the prospective **[**21]** business. *Curtis, 687 F.2d at 338*. In examining preparedness, courts have uniformly

> drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so.

Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 994(D.C. Cir. 1977)(cited with approval in *Curtis, 687 F.2d at 338*).

[22]** In analyzing whether Ashley Creek could demonstrate standing under the standards set out by this court in *Curtis*, the district court began by assuming, without deciding, that Ashley Creek had manifested its intention to enter the phosphate concentrate market. The district court concluded, however, that Ashley Creek could not satisfy any of the key elements identified in *Curtis* for measuring preparedness to enter the phosphate concentrate market. In that regard, the district court noted that Ashley Creek's own estimates placed the cost of entering the phosphate concentrate market at something in excess of $ 67 million during the relevant time frame. The record revealed, however, that Ashley Creek had only a thousand dollars on hand and had done nothing to obtain financing. The record further revealed that Ashley Creek had completed only a limited "Type 1" feasibility study, and that a "Type 3" or "Type 4" study would be necessary to secure financing. In addition, the district court noted that Archer, Ashley Creek's sole shareholder, testified that to obtain financing Ashley Creek would need signed contracts with customers to purchase phosphate concentrate at a specified price. **[**23]** The record revealed, however, that Ashley Creek had never discussed price with any potential customer. The district court noted that this was most likely because Ashley Creek's very preliminary feasibility study left it unable to project its own costs of production at anything less than a margin or error of plus or minus 25%. In fact, Ashley Creek did not know whether there were any customers who would buy concentrate at the price Ashley Creek would have to charge even if the tariff was zero. Finally, the district court noted that although Archer, the only then-current officer of Ashley Creek, did have experience in buying and selling phosphate reserves, he did not have any experience in mining and selling phosphate concentrate.

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[7] To the extent that Ashley Creek's appellate filings could be read to hint at an antitrust claim relating to its potential entry into the phosphate fertilizer market, we agree with the district court that there is absolutely no evidence in the record that Ashley Creek was ever prepared to enter that market. Accordingly, this court, like the district court, restricts its analysis to Ashley Creek's claims regarding the phosphate concentrate market.

The district court likewise rejected Ashley Creek's assertion that it was not required to demonstrate any further preparatory steps to enter the phosphate concentrate market because the actions of Chevron and SF had rendered such steps futile. Although noting that not all courts had adopted such a futility exception and that this court had yet to decide the question, the district court nevertheless concluded that Ashley Creek failed to fall within the ambit **[**24]** of the rule. The district court pointed out that Ashley Creek's assertion that it could not conduct relevant feasibility studies because Chevron had refused to publish a tariff was not borne out by the record. In particular, at no time after Chevron published a tariff in 1989 did Ashley Creek take steps to determine whether it was economically feasible to sell phosphate under the 1989 tariff or any of the successively lower tariffs. This was true even after **[*1256]** the State of Utah and SF entered into a settlement agreement guaranteeing that the tariff would not be raised and after SF published the fourth tariff which recovers only operating and new capital costs and no original capital costs. More importantly, the district court noted that even assuming some or all of the first three tariffs were too high, Ashley Creek was not prevented from determining: (1) what price customers were willing to pay for phosphate concentrate, assuming there was actually a market for phosphate concentrate; (2) the freight cost to ship phosphate concentrate from the railhead in Rock Springs; or (3) its own production costs with sufficient precision to know the significance of a few dollars difference in the **[**25]** tariff. These factors, coupled with Archer's deposition testimony that Ashley Creek would not move forward with its project, regardless of the amount of the applicable tariff, without owning a 40% share of the pipeline, led the district court to conclude that a futility exception did not apply.

Although its brief before this court is less than clear, Ashley Creek appears to challenge both the district court's ruling that it lacked standing because it failed to demonstrate preparedness to enter the phosphate concentrate market and the district court's ruling that its lack of preparation is not excused by some futility exception to the preparedness doctrine. Neither of Ashley Creek's arguments are convincing.

This court can easily dispose of Ashley Creek's assertion that it was, in fact, prepared to enter the market during the relevant time frame. [8] **[**27]** Ashley Creek sets out the following list of eleven steps that it took prior to the point Chevron refused to publish a tariff: (1) obtained the mineral leases; (2) hired a mining engineer to explore the leaseholds and test the ore and provide a preliminary assessment on the economic feasibility of producing phosphate concentrate; (3) obtained **[**26]** the promise of common carriage in the pipeline; (4) obtained a contract for necessary water [9]; (5) filed a mine plan and commenced acquisition of necessary permits; (6) commenced acquisition of an appropriate plot of land at Rock Springs [10] **[**28]** ; **[*1257]** (7) preliminarily designed a mining operation [11]; (8) performed a preliminary feasibility study; (9) commenced initial negotiations with potential

[8] We note with some frustration that Ashley Creek completely fails to distinguish between the actions of Chevron and SF in asserting that it was prepared to enter the market for phosphate concentrate. Whether Ashley Creek was prepared to enter the market during the time Chevron controlled the pipeline is a distinct question from whether Ashley Creek was prepared to enter the market when SF was in control of the pipeline. Likewise, whether the actions of Chevron or SF rendered such preparation futile presents different questions. Ashley Creek never distinguished between the actions of Chevron and SF before the district court and does not do so on appeal. Nevertheless, our review of the entire appellate record leads this court to conclude that Ashley Creek was never prepared to enter the market during the entire time frame at issue.

[9] Although Ashley Creek asserts in its brief that it "obtained a contract" for water, it does not appear that such a contract was ever executed. Instead, the record demonstrates only that it engaged in negotiations with the Uintah Water Conservancy District and the Department of Interior regarding water supplies.

[10] In support of this assertion, Ashley Creek cites to page 669 of SF's appendix. This citation is to the text of Ashley Creek's own memorandum in opposition to SF's motion for summary judgment. That memorandum does assert that Ashley Creek began negotiations with the BLM to acquire an appropriate parcel of land in Rock Springs for drying and loading facilities. Nevertheless, the cited exhibits attached to the memorandum do not support the proposition. Instead, the referenced exhibits relate exclusively to negotiations between Ashley Creek, the Department of Interior, and the Uintah Water Conservancy District regarding water supplies for a potential mining project. Accordingly, Ashley Creek has not directed this court to any record support for the assertion. We further note that Ashley Creek's consistent practice of citing to its own factual assertions in its various legal memoranda filed below, rather than citing to the relevant portions of the record supporting a given factual assertion has seriously delayed the resolution of this appeal.

customers [12]; (10) commenced inquiries regarding financing [13]; (11) formed a corporation to carry on the business. These very preliminary steps are insufficient to show preparedness to enter the market.

[29]** First, as noted by the district court, Ashley Creek had no financing commitment and was in no position to obtain financing. In particular, Ashley Creek has not cited to a single piece of record evidence indicating that it made even a preliminary inquiry regarding financing of a mining and milling operation, an operation which Ashley Creek itself estimated to cost in excess of $ 67 million. Even if it had made such contacts, Ashley Creek does not contest the district court's conclusion that the "Type 1" feasibility study conducted by Ashley Creek was completely insufficient for such purposes. Nor had Ashley Creek consummated any of the contracts necessary to operate a phosphate mine. The record citations provided by Ashley Creek on appeal show only that it engaged in negotiations regarding water supplies to the proposed mine and that it discussed sales of phosphate concentrate with Cominco without ever discussing a price. Furthermore, although Ashley Creek notes that it commenced the application process for a mining permit, that is only one of the many permits necessary to develop and operate the mine, it points to no record evidence that it ever obtained the necessary permits. In **[**30]** fact, the record demonstrates that when Ashley Creek filed its **[*1258]** mining plan and applied for a mining permit in March of 1986, the application was rejected on multiple grounds. Finally, it is clear that Ashley Creek did not have the necessary experience and background in the business of selling phosphate concentrate. Ashley Creek has never had any paid employees. Archer, the sole shareholder, pays all of Ashley Creeks bills and runs the corporation out of his house. Although Archer has been in the business of acquiring and selling mineral properties and reserves, neither he nor Ashley Creek has ever developed or operated a mine. For these reasons, we agree with the district court that Ashley Creek was not prepared to enter the market at the point when Chevron refused to publish a tariff. Furthermore, as set out at length in the district court's opinion, *Ashley Creek Phosphate Co. v. Chevron, 129 F. Supp. 2d 1299, 1304-05 (D. Utah 2000)*, Ashley Creek did not take any further, meaningful preparatory steps at any point after Chevron and SF filed a series of successively lower tariffs. Accordingly, the district court correctly concluded that Ashley Creek lacked standing **[**31]** under *Section 4* of the Clayton Act for its injury to business claim, having failed to demonstrate that it was prepared to enter the market.

This court also agrees with the district court that Ashley Creek's lack of preparation is not excused by a futility exception to the preparation requirement. As Ashley Creek quite correctly notes, ***HN12***[] several courts have recognized that in order to show preparation to enter a given market, an antitrust plaintiff need not take those steps which would have been rendered futile by an alleged monopolist. *See, e.g.*, *Thompson v. Metro. Multi-List, Inc., 934*

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[11] It is far from clear how this supposed preparatory step is different from the fifth preparatory step identified by Ashley Creek as both are supported by the same ultimate citation to a Notice of Intention to Commence Mining Operations and Mining and Reclamation Plan, Form MR-1.

[12] In support of this assertion, Ashley Creek cites to three separate pages of its memorandum in opposition to SF's motion for summary judgment. Although the memorandum does use the term "customers," only one customer, Cominco, is identified and supported by a citation to record evidence.

[13] In support of this assertion, Ashley Creek cites to page 669 of SF's appendix, again a citation to Ashley Creek's memorandum in opposition to SF's motion for summary judgment rather than a citation to record evidence. The only relevant material on the referenced page is the following paragraph:

> Discussions with potential customers and regarding financing were necessarily preliminary and inconclusive. While a number of correspondents indicated interest if the pipeline were constructed and available at economic rates, in the absence of a reliable statement of pipeline transport costs, no estimate of Ashley Creek's potential price for phosphate concentrate FOB Rock Springs could be given potential customers allowing discussions to go further. Absent clear expressions of interest from potential customers, discussions of financing could not progress.

The assertions in Ashley Creek's memorandum regarding commencing inquiries as to financing are not supported by a citation to record evidence. Accordingly, Ashley Creek has once again directed this court to a portion of the voluminous record that does not support its factual assertions. Counsel is reminded that ***HN11***[] this court "will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury." *Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1546 (10th Cir. 1995)*. Accordingly, Ashley Creek has provided no record support for the assertion that it made initial inquiries regarding financing.

F.2d 1566, 1572(11th Cir. 1991)("[A] defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a [competitor]."); Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 180 (E.D. Pa. 1976)("It would be inconsistent with one purpose of the Clayton Act -- to protect the business interests of the victims of monopolistic practices -- to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive **[**32]** gesture."). Although this court has not yet addressed the issue, we have no doubt that there exists some type of futility exception to the preparation requirement set out in *Curtis*. Whatever the parameters of such an exception, however, it clearly does not excuse Ashley Creek from performing the most basic preparatory steps to determine whether: (1) there was a market for phosphate concentrate and, if so, what price customers were willing to pay; (2) the exact nature of its reserves; and (3) its own costs of production and delivery within a reasonable margin, including shipping costs from the railhead in Rock Springs, in order to determine whether it could profitably sell concentrate even if the tariff were set at zero. Without undertaking the basic preparatory steps to answer these questions, Ashley Creek has absolutely no basis for showing that its "business" was in any way damaged by the allegedly exclusionary tariffs or other factors. *See Ashley Creek*, 129 F. Supp. 2d at 1305(quoting following from 1993 statements of David Aro, Ashley Creek's consulting mining engineer: "I have felt for some time that the level of *legal effort* far exceeds the level of **[**33]** *technical data* that is essential to verifying the reserves and costs. Without 'proven' reserves and 'acceptable' costs, the legal arguments could be 'hypothetical and meaningless.'").

Ashley Creek's futility argument boils down to an assertion that a proposed market participant need take no further preparatory steps, even of the most basic and preliminary nature, after an asserted violation of the antitrust laws by the party in **[*1259]** control of an essential facility. Such an approach would eviscerate the standing requirement, rendering it wholly dependent on the merits of the plaintiffs case. *See* Gas Utils. Co. of Ala., Inc. v. S. Natural Gas Co., 825 F. Supp. 1551, 1573(N.D. Ala. 1992)(holding that plaintiff could not use defendant's denial of access to a pipeline to create an inference of antitrust injury to business or property). ***HN13***[] Allowing an antitrust plaintiff to recover merely upon a showing of a violation of the act, without a demonstration of injury-in-fact, would conflict with this court's precedent. *See* City of Chanute, 955 F.2d at 652("A violation of the Act without resultant injury to the [plaintiff] is insufficient to confer standing. **[**34]** " (quotation omitted)). Furthermore, none of the cases cited by Ashley Creek support its assertion that this court should adopt such an expansive reading of the futility doctrine. In the very cases cited by Ashley Creek, the courts applied the four-factor preparedness test and analyzed whether the plaintiff had presented adequate evidence of concrete preparedness. *See, e.g.*, Thompson, 934 F.2d at 1572(applying preparedness requirement and finding standing when plaintiff was already an established realtor in the market served by the defendant board of realtors and multiple listing service); Jayco Sys. v. Savin Bus. Mach. Corp, 777 F.2d 306, 314(applying four-part test and finding standing only for injury to plaintiff's normal course of business, not to its proposed business expansion); Hecht, 570 F.2d at 994(applying four-part test and noting that plaintiff's preparation must be at "a stage where it is accompanied by certain indicia of ultimate success").

For these reasons, in addition to those separate reasons set out by the district court, [14] we conclude that Ashley Creek's almost complete failure to prepare to enter the phosphate **[**35]** concentrate market is not excused by the futility doctrine.

2. Injury to Property

Ashley Creek also claims standing flowing from injury to its property, i.e., the mineral leases. It is uncontested that Ashley Creek's mineral leases constitute "property" for purposes of *Section 4* of the Clayton Act. In rejecting Ashley Creek's assertion that it had standing to raise its antitrust claims solely by virtue of its mineral leases, the district court concluded as follows:

> The mineral leases (for which Archer or Ashley Creek now pays a little over $ 11,000 per year) is only one minor component in the development of a project that Ashley Creek admits would have cost $ 67 million in capital in 1990. Because Ashley Creek has not established the necessary steps to show its viability in that

[14] *Ashley Creek*, 129 F. Supp. 2d at 1305-06; *see also supra* pp. 18-19 (discussing district court's analysis of Ashley Creek's futility claim).

> market, it would be too speculative and remote to recognize **[**36]** the leasehold interest as being injured. The mineral leases only hold value if the minerals can be economically mined, milled, and sold. Without showing that its leases could be developed economically, Ashley Creek can only speculate on the leases' value.

Ashley Creek, 129 F. Supp. 2d at 1307. On appeal, Ashley Creek asserts that the district court erred in applying the preparation rule from *Curtis* to its claim of injury to property. Instead, Ashley Creek posits that its "leases represent a value protected by *Section 4* of the Clayton Action without more." Appellant's Br. at 25. In support of this assertion, Ashley Creek relies on a 1964 district court decision in *Waldron v. British Petrol. Co., 231 F. Supp. 72 (S.D.N.Y. 1964)*. **[*1260]**

HN14[] We reject Ashley Creek's assertion that possession of property alone confers standing. The language of the Clayton Act makes clear that it is the injury to property, rather than its mere possession, that confers standing. *See* *15 U.S.C. § 15(a)*(Any person who shall be injured in his . . . property by reason of anything forbidden in the antitrust laws may sue therefor in any district court **[**37]** of the United States . . . ."). In this case, there is no evidence that Chevron or SF clouded Ashley Creek's title to the leases. Nor is there any evidence that the leases were less valuable after the supposedly anti-competitive acts than they were before those acts. [15] **[**38]** In fact, there is not a single citation to the record in that section of Ashley Creek's brief relating to its claim of injury to property. In reality, Ashley Creek's claimed injury relates to a proposed business -- a phosphate concentrate supply business that would have used the mineral leases. ***HN15***[] To have standing to allege injury to an inchoate business interest, Ashley Creek must establish its preparedness to enter the market. As set out at length above, however, Ashley Creek has utterly failed to demonstrate that it was prepared to develop the mineral leases. In these narrow circumstances, [16] this court concludes that the district court properly considered Ashley Creek's lack of preparedness to enter the phosphate concentrate market in analyzing whether Ashley Creek had demonstrated an injury to its mineral leases.

The district court opinion in *Waldron* is not to the contrary. In *Waldron*, the plaintiff had a "highly desired contract" with the Iranian Oil Company to purchase oil. *231 F. Supp. at 78*. The plaintiff alleged a conspiracy among the defendant major oil companies to refuse to purchase either oil or the contract from the plaintiff. *See* *id. at 79-81, 86-87*. The court held that although the plaintiff could not claim standing based on injury to his business because he was not prepared to enter the business of selling oil, he did have standing based on injury to his property in the form of the contract itself. *See* *id. at 86-87*. Unlike the plaintiff in *Waldron*, however, Ashley Creek never tried to sell its leases to Chevron or SF during the relevant time period. Instead, the record reveals that Archer testified that the leases were not for sale. Furthermore, in *Waldron*, there was **[**39]** a material dispute of fact as to whether the contract *qua* contract had any value. *See* *id. at 87*. In contrast, the record in this case is completely devoid of evidence relating to the value of the leases during the relevant time periods. Accordingly, Ashley Creek has simply not put forward even a scintilla of evidence to demonstrate that it suffered any harm to its property at the hands of Chevron and SF.

[*1261] III. Conclusion

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[15] The history of these particular mineral leases reveal multiple failed attempts to develop the phosphate deposits. Archer first acquired the leases from Utah in 1963; he immediately sold the leases to Mountain Fuel Supply Company. Mountain Fuel failed to develop a mine and, instead, allowed the leases to lapse. Archer reacquired the leases in 1974 and assigned them to Utah International in 1975. Utah International also failed to develop a mine, after determining that development was not feasible at then-current and projected phosphate prices. After the leases were re-assigned to Archer in 1984, he attempted to sell them to Chevron and Cominco. Both companies indicated that they were not interested. In 1997, Archer approached Agrium about its interest in investing in the leases. Agrium declined the invitation. Accordingly, the record reveals that every company Ashley Creek approached has failed or declined to develop the leases.

[16] That is, when the plaintiff's claimed injury to property flows from its claim that it would have used the property as part of an anticipated business venture.

For those reasons set out above, this court concludes that Ashley Creek has failed to adduce evidence from which a trier of fact could conclude that it has suffered an antitrust injury to either its business or property. We therefore **affirm** the district court's dismissal of Ashley Creek's antitrust claims for lack of standing. Our conclusion that Ashley Creek lacks standing to assert its antitrust claims obviates the need to address the district court's alternative conclusion that tariffs charged by Chevron and SF were reasonable. This court offers no opinion on that question.

Appeal No. 01-4066

I. Background

In response to Ashley Creek's underlying complaint, Chevron filed a state-law counterclaim alleging that **[**40]** Ashley Creek had brought the action in bad faith and without a justifiable basis. In support of its claim, Chevron asserted as follows: (1) Ashley Creek had falsely stated that Chevron's published tariff was unreasonable and that it was entitled to a preferential tariff; (2) Ashley Creek was wrongfully attempting to force Chevron to sell it an interest in the pipeline; and (3) Ashley Creek had involved Chevron in extensive and costly litigation before state and federal agencies and state court. Ashley Creek moved the district court to dismiss the counterclaim. It first asserted that under Utah state law, claims for malicious prosecution, such as the claims asserted by Chevron, cannot be filed until the lawsuit which forms the basis of that claim has been concluded. In the alternative, assuming Chevron could maintain its claim as a counterclaim, Ashley Creek asserted that the claim failed as a matter of law for the following reasons: (1) the STB had concluded Chevron's published tariff was unreasonable; and (2) Ashley Creek could not have a bad faith ulterior motive of forcing Chevron to sell it an interest in the pipeline because Chevron had previously sold its entire interest in the **[**41]** pipeline.

The district court, Judge David Sam presiding, denied the motion to dismiss. Judge Sam first concluded that under Utah law, a claim for abuse of process may be asserted by way of counterclaim. He further concluded that, viewed through the lens of the motion to dismiss standard, Chevron's counterclaim alleged the necessary elements of an abuse of process claim. Judge Sam noted that under Utah law the essential element of an abuse of process claim was the use of judicial proceedings for an ulterior purpose for which they were not intended. *See* *Crease v. Pleasant Grove City, 30 Utah 2d 451, 519 P.2d 888, 890 (Utah 1974)*. In concluding that Chevron's counterclaim stated this basic element, Judge Sam indicated as follows:

In its counterclaim Chevron alleges that [Ashley Creek] has brought the underlying action in bad faith and without justifiable basis; that [Ashley Creek's] real motive in filing the litigation is to improperly force defendants to sell plaintiff an interest in the pipeline; and that [Ashley Creek] has involved Chevron in state and federal proceedings seeking to invalidate easements over public land for the pipeline and to increase the **[**42]** expense and burden of litigation.

After SF was joined as a third-party defendant, it also brought a bad faith litigation counterclaim against Ashley Creek. Ashley Creek moved to dismiss the SF counterclaim on the following grounds: (1) SF's counterclaim did not allege that Ashley Creek was pursuing the litigation for the improper ulterior motive of forcing divestiture of the pipeline and, in any event, forced divestiture was an available and appropriate remedy in antitrust cases **[*1262]** involving an essential facility; (2) SF's assertion that Ashley Creek was only seeking a preferential tariff was demonstrably false in light of the STB's decision that the published tariff was unreasonable; and (3) no abuse of process claim could lie based on the state and federal regulatory proceedings initiated by Ashley Creek because it was SF that had intervened in those proceedings. SF then amended its counterclaim to include an allegation that Ashley Creek had filed the underlying action with the improper ulterior motive of forcing SF to divest the pipeline. In the interim between the filing of Ashley Creek's motion to dismiss Chevron's counterclaim and the filing of Ashley Creek's motion to dismiss **[**43]** SF's counterclaim, this entire matter was reassigned to Judge Dale Kimball. Judge Kimball entered an order denying Ashley Creek's motion to dismiss SF's counterclaim for those reasons set forth by Judge Sam in denying Ashley Creek's motion to dismiss Chevron's identical counterclaim.

Judge Kimball thereafter granted summary judgment, as set forth above, to SF and Chevron on Ashley Creek's underlying federal claims; he directed the Clerk of the Court "to enter judgment accordingly and then close the case." Ashley Creek then appealed the district court's grant of summary judgment in favor of Chevron and SF and asserted in its docketing statement that the district court had resolved all claims as to all parties. Shortly thereafter, SF's counsel sent a letter to Judge Kimball noting that it had still had a counterclaim pending and requesting that its pendent state law claim be dismissed without prejudice "to avoid any confusion about the finality of the judgment being appealed." In support of this request, SF noted that pendent state law claims should be dismissed without prejudice when federal claims are dismissed before trial. *See* *Bauchman ex rel. Bauchman v. West High Sch., 132 F.3d 542, 549(10th Cir. 1997)*. **[**44]** In an order dated March 13, 2001, the district court dismissed without prejudice Chevron's and SF's counterclaims and directed that its order of dismissal be entered *nunc pro tunc* as of the date of the judgment. In so doing, the district court expressly acknowledged that its prior order closing the case was erroneous because "the SF Defendants and the Chevron Defendants still have counterclaims against Ashley Creek." Ashley Creek then filed a separate notice of appeal, appealing from the district court's dismissal of Chevron's and SF's counterclaims without prejudice, instead of with prejudice pursuant to its two motions to dismiss. That appeal is now before this court.

II. Sufficiency of the Notice of Appeal

Chevron raises two separate challenges to the sufficiency of Ashley Creek's notice of appeal. First, Chevron appears to assert that Ashley Creek has not appealed the district court's decision denying its motion to dismiss Chevron's counterclaim because Ashley Creek did not specifically reference that order in its notice of appeal. Despite Chevron's failure to cite to any precedent or clearly identify the basis of its claim, we assume that it is referring to ***HN16***[] the **[**45]** requirement in *Fed. R. App. P. 3(c)(1)(B)* that the notice of appeal "designate the judgment, order, or part thereof being appealed." Chevron's position in this regard was recently rejected by this court. *See* *McBride v. Citgo Petroleum Corp., 281 F.3d 1099, 1103-04 (10th Cir. 2002)*(holding that a district court's interlocutory orders merge into its final orders and judgments and that the identification of the final order in the notice of appeal is sufficient to support appellate jurisdiction to review the earlier now-merged interlocutory orders).

Second, Chevron asserts that Ashley Creek's notice of appeal is untimely. **[*1263]** *See* Chevron Brief, No. 01-4066, at 10 ("Ashley's motion to dismiss was denied well before the District Court granted appellees' summary judgment motions and dismissed Ashley's claims. Ashley appeals the dismissal of its claims in the main appeal. If it wanted also to appeal any other order entered prior to that dismissal, Ashley was required to do so as part of the main appeal."). The short answer to Chevron's assertion is that the order entered by the district court on January 25, 2001, directing the clerk to "close the case" was not a final order. **[**46]** As the district court itself recognized in its order of March 13, 2001, Chevron's and SF's state law counterclaims against Ashley Creek were still pending, as was Utah's derivative claim against Chevron. ***HN17***[] *See* *Fed. R. Civ. P. 54(b)*(providing that in the absence of a *Rule 54(b)* certification from the district court, "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties"). Accordingly, both the notice of appeal filed by Ashley Creek on January 26, 2001, and amended notice of appeal filed by Ashley Creek on February 6, 2001, were premature. When the district court finally adjudicated the remaining state law counterclaims and Utah's independent claim against Chevron in its order of March 13, 2001, the previously filed notices of appeal ripened and, along with the final notice of appeal filed by Ashley Creek on April 12, 2002, brought each of the issues asserted by Ashley Creek in these various appeals properly before the court. *See* *Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645(10th Cir. 1988)*(en **[**47]** banc)("In ***HN18***[] the situation like that before us, in which the other claims were effectively dismissed after the notice of appeal was filed, we believe *Fed. R. App. P. 4(a)(2)* permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal. . . . In such cases generally we will consolidate or companion the earlier appeal with any subsequent appeals arising out of the same district court case.").

III. Article III Jurisdiction

Both Chevron and SF filed motions to dismiss this appeal on the ground that it is moot. They allege that the district court's subsequent dismissal of the counterclaims without prejudice mooted its earlier denial of Ashley Creek's motions to dismiss because it is unclear whether the counterclaims will ever be refiled. [17] Although SF's and Chevron's mootness arguments are at odds with Tenth Circuit precedent, this court does, nevertheless, perceive a jurisdictional problem with this appeal. *See* *Qwest Communications Int'l, Inc. v. F.C.C., 240 F.3d 886, 891(10th Cir. 2001)*(holding that ***HN19***[] federal courts have an "independent obligation to examine their own jurisdiction" (quotation omitted)).

[48]** This court's decision in *Jarvis v. Nobel/Sysco Food Servs. Co.* easily disposes of Chevron's and SF's arguments that this appeal does not present a live case or controversy simply because there is no guarantee that they will ever refile their **[*1264]** counterclaims in state court. *See 985 F.2d 1419 (10th Cir. 1993)*. In *Jarvis*, the plaintiff brought both federal and state law claims against his employer. *Id. at 1421*. The district court granted a motion for summary judgment filed by the employer as to every claim except a state law retaliatory discharge claim. *Id.* As to that claim, the district court denied the employer's summary judgment motion on the merits. *Id.* Having dismissed all federal claims, the district court declined to exercise pendent jurisdiction over the state-law retaliatory discharge claim, dismissing the claim without prejudice. *Id. at 1421-22*. The plaintiff appealed the grant of summary judgment to the employer and the employer cross-appealed the district court's refusal to grant it summary judgment on the retaliatory discharge claim. *Id. at 1422*.

In resolving the employer's cross-appeal, this **[**49]** court began by noting a potential jurisdictional problem. *Id. at 1424*. *Jarvis* concluded that ***HN20***[] although the employer was a prevailing party as to the state-law retaliatory discharge claim because the claim had been dismissed, *albeit* without prejudice, the employer could still appeal the district court's earlier merits-based denial of its summary judgment motion as long as it could demonstrate a personal stake in the outcome of the appeal. *Id. at 1424-25*. Relying on the Supreme Court's decision in *Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980)*, this court held that if a successful appeal by the employer would alter, *inter alia*, future litigation costs, the "personal stake requirement of Article III was met." *Jarvis*, 985 F.2d at 1425; *see also id* ("In this case, a successful appeal by [the employer] would eliminate any possible re-filing of the retaliatory discharge claim in state court. As avoiding a state court suit would substantially reduce [the employer's] future litigation costs, we find that [the employer] has the requisite stake in the appeal. **[**50]** "). Accordingly, the *Jarvis* court concluded that ***HN21***[] "when a district court denies summary judgment on the merits, and then exercises its discretion to decline pendent jurisdiction, the moving party is a party aggrieved by a judgment and has an appeal as of right on the merits of the denial of summary judgment." *Id. at 1425-26* (quotation and citation omitted). [18]

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[17] *See, e.g.*, SF's Reply Memorandum in Support of Its Motion to Dismiss, at 2-3 ("Ashley Creek is appealing a 1998 Utah District Court decision denying Ashley Creek's motion to dismiss the SF Defendant's counterclaims on the pleadings. On March 12, 2001, the district court dismissed these same claims without prejudice. As a result of that dismissal, Ashley Creek's appeal no longer relates to a live case or controversy. Since the SF Defendants may never refile the counterclaims, it is at best uncertain whether a ruling by this Court would have any effect. Certainly, Ashley Creek cannot guarantee that any decision by this Court whether the district court should have dismissed the counterclaims because they were not pled properly would be anything but an academic exercise.").

[18] In so ruling, the *Jarvis* court was careful to indicate that the result would have been entirely different if the district court had declined to rule on the merits of the employer's motion for summary judgment. ***Jarvis v. Nobel/Sysco Food Servs. Co., 985 F.2d 1419, 1425(10th Cir. 1993)***. In such a circumstance, the employer would have presented an issue not passed upon by the district court; appellate courts generally will not consider such issues in the first instance. *Id.*(citing *Pell v. Azar Nut Co., 711 F.2d 949, 950 (10th Cir. 1983)*).

HN22[] District courts would be wise to keep in mind the rule set out in *Jarvis* and *Pell* when faced with a complaint invoking the court's federal question jurisdiction which also includes pendent state law claims. As this court noted in *Bauchman ex rel. Bauchman v. West High Sch., 132 F.3d 542, 549(10th Cir. 1997)*,

The United States Supreme Court has counseled, pendent jurisdiction "need not be exercised in every case in which it is found to exist. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the

[51]** **[*1265]** In this case, it would appear that Ashley Creek's appeal of the district court's denial of its motion to dismiss fits comfortably within the rule announced in *Jarvis*. The district court denied Ashley Creek's motion to dismiss on the merits, concluding that Chevron's and SF's counterclaims stated claims for abuse of process which could be maintained as counterclaims under Utah law. It thereafter declined to exercise pendent jurisdiction and dismissed the counterclaims without prejudice. Because of the nature of the arguments presented by Ashley Creek on appeal, however, there is a real question whether the personal stake requirement of Article III is satisfied.

Although Ashley Creek asserts that the district court should have dismissed Chevron's and SF's counterclaims on the merits, it also continues to assert on appeal that the counterclaims were never proper counterclaims under Utah law. In *Gilbert v. Ince, 1999 UT 65, 981 P.2d 841, 844-46(Utah 1999)*, ***HN24***[] the Utah Supreme Court adopted the analytical framework set out in the Restatement (Second) of Torts for distinguishing between the following three distinct torts involving abusive manipulation of judicial procedures: **[**52]** (1) abuse of process; (2) malicious prosecution; and (3) wrongful use of civil proceedings. Despite the fact that it had in the past utilized the term "as a catch-all description of any private misuse of judicial resources," the court recognized that abuse of process is a narrow tort applying only to "'one who uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed.'" *981 P.2d at 845*(quoting *Restatement (Second) of Torts § 682* (1977)). ***HN25***[] An abuse of process claim can be raised as a counterclaim under Utah law because there is no requirement that the judicial proceedings giving rise to the tort claim have been terminated in the counterclaimant's favor. *See* *Restatement (Second) of Torts § 682 cmt. a*(1977); William L. Prosser, *Law of Torts* § 121, at 856 (4th ed. 1971); *Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1570 & n.15 (D. Utah 1995)*(cited with approval in *Ince, 981 P.2d at 846*). [19] The tort of wrongful use of civil proceedings, in contrast, focuses on the whether the *procurement, initiation, or continuation* of civil proceedings **[*1266]** was "for the purpose of harassment or annoyance" **[**53]** and without probable cause. *Ince, 981 P.2d at 846*(quotation omitted); *see also* *Restatement(Second) of Torts § 674*(1977). *See generally* William L. Prosser, *Law of Torts* § 120, at 850-851(4th ed. 1971)("The action of malicious prosecution, which began as a remedy for unjustifiable criminal proceedings, has been undergoing a slow process of extension into the field of the wrongful initiation of civil suits."). A claim for wrongful use of civil proceedings is not ripe until the underlying proceedings are "'terminated in favor of the person against whom they are brought.'" *Ince, 981 P.2d at 845*(quoting *Restatement (Second) of Torts § 674*(1977)).

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parties, by procuring for them a surer-footed reading of applicable law." [*United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)]*. If federal claims are dismissed before trial, leaving only issues of state law, "the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." [*Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)*; *Gibbs, 383 U.S. at 726*].

HN23[] Taken together, *Jarvis*, *Pell*, and *Bauchman* counsel against deciding dispositive motions addressed to pendent state law claims unless it appears that a federal claim will proceed to trial or a decision is necessary because of some peculiar aspect of the case (e.g., coordination of trial docket and discovery). This is especially true where, as here, the state law the district court must apply to dispose of the motion is undeveloped. Absent such restraint, the parties may well be deprived of the "surer-footed reading of applicable law" that would be provided them by the relevant state court. *Gibbs, 383 U.S. at 726*.

[19] This is so because

> ***HN26***[] the gravamen of the misconduct . . . is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings termination in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under this rule . . . ."

Restatement (Second) of Torts § 682, cmt. a (1977); *see also* William L. Prosser, *Prosser on Torts* § 121, at 856(4th ed. 1971)("The ***HN27***[] gist of the tort [of abuse of process] is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently, . . . it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor . . . ." (footnote omitted)).

[54]** Whether Chevron's and SF's counterclaims are properly categorized as sounding in abuse of process or wrongful use of civil proceedings answers in part the question whether Ashley Creek's appeal satisfies the personal stake requirement of Article III. If the counterclaims state a claim for abuse of process, they were properly brought as counterclaims and, pursuant to *Jarvis*, this court would have jurisdiction to determine whether the district court properly denied Ashley Creek's motion to dismiss the counterclaims with prejudice. This is so because a ruling in Ashley Creek's favor would prevent the refiling of the claims in state court and, thereby, reduce or eliminate Ashley Creek's future litigation costs. *Jarvis, 985 F.2d at 1425*. If, on the other hand, Ashley Creek is correct that the counterclaims state only claims for wrongful use of civil proceedings, Article III's personal stake requirement is not satisfied unless the underlying proceedings were terminated in Chevron's and SF's favor. *See* *Restatement (Second) of Torts § 674(b)* (1977); *Ince, 981 P.2d at 846* (adopting Restatement formulation of wrongful use of civil proceedings); *Keller, 896 F. Supp. at 1570 n.15* **[**55]** (applying Utah law). [20] If the counterclaims in question are for wrongful use of civil proceedings and the underlying proceedings have not been terminated in Chevron's and SF's favor, the appropriate response to Ashley Creek's motion to dismiss the counterclaims would be to dismiss the counterclaims without prejudice. Because this is exactly what the district court eventually did when it declined to exercise pendent jurisdiction, this court could provide Ashley Creek no further relief and the appeal would not present a live case or controversy.

[56]** As noted above, Ashley Creek contends on appeal that Chevron's and SF's counterclaims sound in wrongful use of civil proceedings rather than in abuse of process. Chevron and SF did not respond to this contention in their appellate filings. For the most part, this court agrees with Ashley Creek. Chevron's and SF's counterclaims state the following three general allegations: (1) the underlying antitrust action was brought in bad faith and without a justifiable basis for the purpose of obtaining a preferential tariff; (2) the underlying antitrust action was brought in bad faith and without a justifiable basis in an effort to gain an equity interest in the **[*1267]** pipeline; and (3) Ashley Creek had involved the counterclaimants in extensive and costly litigation in state and federal agencies and state court for the purpose of seeking disallowance of the pipeline right-of-way, which proceedings Ashley Creek had lost. It is clear that the first two categories of these allegations, which refer to the initiation of the underlying antitrust lawsuit, rather than to the improper use of otherwise properly issued process, ***HN28***[] state wrongful use of civil proceedings claims which, as correctly noted by Ashley **[**57]** Creek on appeal, cannot be maintained as counterclaims. *See* *Brown, 525 N.Y.S.2d at 980* (noting that "institution of a civil action by summons and complaint is not legally considered process capable of being abused" (quotation omitted)). Because the district court's ultimate dismissal of those claims without prejudice is all the relief to which Ashley Creek is entitled, its appeal of the district court's treatment of those claims does not present a live case or controversy to this court. Chevron's and SF's claims regarding proceedings in state and federal administrative tribunals and Utah state court regarding the validity of the right-of-way over which the pipeline travels, however, are ripe no matter how viewed because all of the proceedings referred to have been terminated in Chevron's and SF's favor. Accordingly, this court has jurisdiction to review the district court's refusal to dismiss those claims with prejudice.

IV. Merits

SF's ripe counterclaim provides as follows [21] :

[58]** 6. Counterclaim Defendant has involved the Counterclaimants in extensive litigation causing large expense in fees and costs, including the following:

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[20] *Cf. also* *Mann v. Genoa Twp., 2002 Ohio 727, 2002 WL 221112 at 7*(Ohio Ct. App. Feb. 11, 2002)(holding that trial court erred in dismissing malicious prosecution claim on merits where claim was not ripe); *Brown v. Bethlehem Terrace Assocs., 136 A.D.2d 222, 525 N.Y.S.2d 978, 979 (N.Y. App. Div. 1988)*(holding that defendant's counterclaim for abuse of process actually stated claim for malicious prosecution and that claim was not ripe for adjudication as a counterclaim); *Neil v. S. Fla. Auto Painters, Inc., 397 So. 2d 1160, 1166 (Fla. Dist. Ct. App. 1981)*(noting that a malicious prosecution claim does not ripen until the termination of the underlying proceedings supposedly giving rise to the claim).

[21] Chevron's ripe counterclaim is identical in substance and substantially similar in text.

(a) Proceedings before the Utah State agencies, the Utah Third District Court and the Utah Supreme Court seeking disallowance of Utah State easements for the pipeline over state land and has lost all of such proceedings.

(b) Proceedings before the divisions of the United States Department of Interior resulting ultimately in an appeal by Counterclaim Defendant to the Interior Bureau of Land Appeals and has lost all such proceedings which have become final.

Because of the foregoing, the Counterclaimants are entitled to their attorney's fees and costs in defending all of the suits and proceedings described above.

HN29[] This court reviews the denial of a *Rule 12(b)(6)* motion to dismiss *de novo*, applying the same standard as the district court, and accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the counterclaimants. *Benefield v. McDowall, 241 F.3d 1267, 1270 (10th Cir. 2001)*.

With these standards in mind, we conclude that the district **[**59]** court erred in denying Ashley Creek's motion to dismiss this particular wrongful use of civil proceedings claim because the claim is deficient on its face. Although Chevron and SF alleged that Ashley Creek involved them in administrative and state court litigation regarding the validity of the pipeline right-of-way, they do not allege that such litigation was undertaken without probable cause and for an improper purpose. *See* *Ince, 981 P.2d at 846*(setting out essential elements of wrongful use of civil proceedings claim); *Restatement (Second) of Torts § 674*(1977); *id.* § 681A(noting that ***HN30***[] it is plaintiff's burden to prove lack of probable cause and improper purpose). Instead, the counterclaim **[*1268]** merely alleges that Ashley Creek involved Chevron and SF in costly litigation which Ashley Creek ultimately lost. This is in stark contrast to the other two segments of Chevron's and SF's counterclaims which specifically allege both the lack of probable clause and improper purpose elements. Accordingly, taking as true the allegations set out in this one segment of the counterclaims, and drawing all reasonable inferences in favor of Chevron and SF, the counterclaims fail **[**60]** to state a viable claim upon which relief could be granted. [22]

V. Conclusion

The district court's order denying Ashley Creek's motion to dismiss Chevron's and SF's counterclaims related to litigation involving the validity of the right-of-way is hereby **reversed** and the matter is **remanded** to the district court to dismiss the claims with prejudice. The remainder of the appeal is dismissed for lack of Article III jurisdiction.

CONCLUSION

For those reasons set out above, the United States District Court for the district of Utah is hereby **AFFIRMED** in Nos. 01-4017 and 01-4031. In No. 01-4066, the appeal is **DISMISSED** in part, the district court is **REVERSED** in part, and the matter is **REMANDED** to the district court **[**61]** for further proceedings consistent with this opinion. All other outstanding motions are hereby **DENIED**.

End of Document

[22] Because this court concludes that this aspect of Chevron's and SF's counterclaims is facially deficient, we need not address Ashley Creek's contention that the claim fails because Chevron and SF were actually intervenors in the relevant proceedings.

Phillips Getschow Co. v. Green Bay Brown County Prof'l Football Stadium Dist.

United States District Court for the Eastern District of Wisconsin

January 2, 2003, Decided ; January 2, 2003, Filed

Case No. 02-C-437

Reporter

270 F. Supp. 2d 1043 *; 2003 U.S. Dist. LEXIS 9725 **; 2003-2 Trade Cas. (CCH) P74,167

PHILLIPS GETSCHOW COMPANY, Plaintiff, v. GREEN BAY BROWN COUNTY PROFESSIONAL FOOTBALL STADIUM DISTRICT, LAMBEAU FIELD REDEVELOPMENT, LLC, and TURNER CONSTRUCTION COMPANY, Defendants.

Disposition: Defendants' motion to dismiss granted; action dismissed.

Core Terms

bid, antitrust, anti trust law, competitor, consumers, antitrust claim, allegations, prices, state law claim, contractors, per se violation, anticompetitive, defendants', suppliers, renovations, bidder, federal claim, antitrust violation, motion to dismiss, invited, price fixing, submit a bid, purchasers, vertical, damages, lawsuit, Paving, buyer

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* challenges the sufficiency of the complaint to state a claim upon which relief may be granted. Dismissal of an action under such a motion is warranted if the plaintiff can prove no set of facts in support of its claims that would entitle it to relief. The essence of a *Rule 12(b)(6)* motion is not that the plaintiff has pleaded insufficient facts, it is that even assuming all of his facts are accurate, he has no legal claim.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

Unreasonable restraints of trade are prohibited by *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.* Under *§ 1*, such an illegal restraint of trade is a felony.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Practices Governed by Per Se Rule, Boycotts

While 15 U.S.C.S. § 1 literally prohibits every agreement in restraint of trade, the United States Supreme Court has read § 1 to prohibit only restraints that violate the "rule of reason," i.e., practices that under all the circumstances impose an unreasonable restraint on competition. Because rule of reason analysis may entail significant litigation, the Supreme Court has also recognized per se violations of § 1. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. Per se violations include, for instance, price fixing, division of markets, group boycotts, and tying arrangements.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

A violation of 15 U.S.C.S. § 1 is not enough by itself, however, to support a civil lawsuit for restraint of trade. 15 U.S.C.S. § 15, also known as § 4 of the Clayton Act, is the required vehicle for a civil lawsuit for restraint of trade or other antitrust violations.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Clayton Act

See 15 U.S.C.S. § 15(a).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

According to the United States Supreme Court, 15 U.S.C.S. § 15(a) creates an additional element for a civil claim based upon an alleged antitrust violation. A plaintiff must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

An antitrust injury does not arise until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct, i.e., a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. As the courts have repeatedly noted, the antitrust laws were enacted for the protection of competition, not competitors. In other words, the antitrust laws do not protect a business from a loss of profits to a competitor related to continued or increased competition. A plaintiff suing under *15 U.S.C.S. § 15*, therefore, must link its losses to a defendant's anticompetitive conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Neither injury in fact nor a per se violation of *15 U.S.C.S. § 1* equals antitrust injury. The antitrust injury requirement is not met by allegations of harm from competitive conduct, meaning harm to only a specific competitor rather than to the market. Nor is the requirement met by allegations of harm just to the market rather than to the specific competitor. The competitor itself must be harmed by conduct that is anticompetitive.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > Clayton Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

As the antitrust laws protect competition rather than competitors, whether the injury to a competitor is really antitrust injury often may be ascertained by looking for related harm to consumers. The antitrust injury doctrine essentially requires a plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers. If no consumer interest can be discerned even remotely in a suit brought by a competitor - if, as here, a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers - a court is entitled to question whether a violation of ***antitrust law*** is being charged. If injury to a competitor, caused by wrongful conduct, were enough to bring the antitrust laws into play, the whole state tort law of unfair competition would be absorbed into federal ***antitrust law***; it has not been: unfair competition, as such, does not violate the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Examination of the remedy sought is a clue to whether there is antitrust injury. If a plaintiff simply wants the transfer of benefits that a defendant is reaping in the market, without discernable benefits to consumers, it is likely that no antitrust injury exists.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

Claims of antitrust injury also are especially suspect when they accuse the consumers of misunderstanding their own interests. An allegation that competition is harmed by a conspiracy, in which the consumer is involved, to steal business from one firm and give it to another, for instance, is suspect if the consumer must be deemed irrational by causing itself to pay higher prices in the future.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

The main question for antitrust injury is whether the plaintiff has suffered an injury that reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

Only a private lawsuit raises the *15 U.S.C.S. § 15(a)* requirement of antitrust injury.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. At the same time, other laws, for example, unfair competition laws, business tort laws, or regulatory laws, provide remedies for various competitive practices thought to be offensive to proper standards of business morality.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16[] Public Enforcement, State Civil Actions

Analysis of a state antitrust claim is generally guided by federal court decisions on federal ***antitrust law***.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN17[] Jurisdiction, Jurisdictional Sources

Jurisdiction over supplemental claims is governed by *28 U.S.C.S. § 1367*. Pursuant to *§ 1367(c)*, a court may decline to exercise supplemental jurisdiction over a state law claim if the court has dismissed all federal claims. When all federal claims are dismissed before trial, the usual and preferred course is to dismiss the supplemental state law claims without prejudice, especially when there has been almost no discovery or pretrial proceedings.

Counsel: [1]** For Phillips Getschow Company, Plaintiff: Philip J Danen, Stellpflug Janssen Nell Hammer Kirschling & Bartels, De Pere, WI.

For Green Bay Brown County Professional Football Stadium District, Lambeau Field Redevelopment LLC, Turner Construction Company, Defendants: Eric L Maassen, G Michael Halfenger, Thomas L Shriner, Jr, Foley & Lardner, Milwaukee, WI. Gregory B Conway, Liebmann Conway Olejniczak & Jerry, Green Bay, WI.

Judges: William C. Griesbach, United States District Judge.

Opinion by: William C. Griesbach

Opinion

[*1044] DECISION AND ORDER

This action arises out of the renovation of Lambeau Field. A company that bid on the heating, venting and air conditioning contract but was not awarded the work has sued the entities in charge of the renovations, asserting improprieties in the bidding process. Defendants now contend that the only federal claim in the lawsuit should be dismissed. I agree, and order the federal claim and its state counterpart dismissed. And since the remaining claims arise solely under state law and there is no diversity of citizenship, I conclude that federal jurisdiction over them is lacking and that they too should be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

[2]** Plaintiff Phillips Getschow Company filed this case in this court on April 30, 2002, alleging several state law claims and, more importantly for present purposes, a federal antitrust claim. According to the complaint, defendant Green Bay Brown County Professional Football Stadium District ("District") is a Wisconsin municipality created specifically for the project of renovating Lambeau Field. Defendant Lambeau Field Redevelopment, LLC

("Developer"), acting on behalf of the District, contracted for the design and construction of the Lambeau Field renovations. Defendant Turner Construction Company is the designer and general contractor of the renovations.

Phillips asserts that the Lambeau Field renovations project is a "public contract" under *Wis. Stat. § 66.0901 (1)*, which provides for a closed bidding system whereby **[*1045]** bids are not opened until all bids are in and a bidder may only withdraw its bid and rebid upon the project if the project is readvertised. The defendants allegedly represented to Phillips that the Lambeau Field renovations bidding was to be closed, that bid amounts were not to be disclosed until a contract was awarded, and that the lowest bid was to be accepted by **[**3]** the defendants.

Phillips submitted a bid for bid package No. 6 HVAC & Temperature Control. Phillips's bid was allegedly the lowest bid submitted for that bid package. According to the complaint, however, the defendants "opened the submitted bids and disseminated the information contained within the submitted bids to certain contractors, and those contractors were improperly allowed to submit a new and lower bid." (Compl. P 17.) in other words, the defendants "informed an invited bidder to withdraw its previously submitted and opened bid . . . [and] informed this same invited bidder of the lowest bid received by the defendants for the bid package." *(Id.* PP 22-23.) The "invited bidder" then was allowed to submit a new bid that matched or was lower than Phillips's bid, and the "invited bidder" was awarded the bid package. *(Id.* P 24.)

The only federal claim in the complaint is count III, which alleges federal (and state) antitrust violations. Count III alleges that

> the defendants' conduct in opening the submitted bids and disseminating the information contained within the submitted bids to certain contractors, and allowing those contractors to submit new and lower bids **[**4]** violates The Sherman Antitrust Act, *15 U.S.C. 1, et seq.*, and state antitrust laws in that defendants' conduct was an unreasonable restraint of trade, designed to eliminate competition and otherwise adversely affect the free market.

(Id. P 32.) Phillips allegedly suffered damage in the form of its expense in preparing and submitting its proposed bid, "which, in the ordinary course of business and absent the defendants' illegal conduct, would have resulted in the award of the project, business income and future maintenance to the plaintiff." *(Id.* P 33.) Phillips seeks treble damages, attorney fees, and costs.

Defendants have filed a motion to dismiss the federal and state antitrust claims with prejudice under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim. They also seek dismissal of the remaining state law claims without prejudice under *Fed. R. Civ. P. 12(b)(1)* for lack of jurisdiction or under *28 U.S.C. § 1367* the supplemental claims statute.

II. DISCUSSION

A. Antitrust Claims

HN1[] A motion to dismiss under *Rule 12(b)(6)* challenges the sufficiency of the complaint to state a claim upon which relief **[**5]** may be granted. *See Fed. R. Civ. P. 12(b)(6)*. Dismissal of an action under such a motion is warranted if the plaintiff can prove no set of facts in support of its claims that would entitle it to relief. *Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080 (7th Cir. 1997)*; *see Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. The essence of a *Rule 12(b)(6)* motion is not that the plaintiff has pleaded insufficient facts, it is that even assuming all of his facts are accurate, he has no legal claim. *Payton v. Rush-Presbyterian St. Luke's Med. Ctr., 184 F.3d 623, 627 (7th Cir. 1999)*.

HN2[] Unreasonable restraints of trade are prohibited by The Sherman Act, *15 U.S.C. § 1*, which reads in pertinent part: ***HN3***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several **[*1046]** States, or with foreign nations, is hereby declared to be illegal." Under *§ 1*, such an illegal restraint of trade is a felony.

HN4[] While *§ 1* literally prohibits *every* agreement in restraint of trade, the United States Supreme Court has read *§ 1* to prohibit only restraints **[**6]** that violate the "rule of reason," i.e., practices that under all the circumstances impose an *unreasonable* restraint on competition. *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-43, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. Because rule of reason analysis may entail significant litigation, the Supreme Court has also recognized per se violations of *§ 1*. *Id. at 343-44*. "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Id. at 344*. Per se violations include, for instance, price fixing, division of markets, group boycotts, and tying arrangements. *Id. at 344 n.15*.

HN5[] A violation of *§ 1* is not enough by itself, however, to support a civil lawsuit for restraint of trade. Although not specifically cited by Phillips in its complaint, *15 U.S.C. § 15*, also known as § 4 of the Clayton Act, is the required vehicle for a civil lawsuit for restraint of trade or other antitrust violations. Under *§ 15(a)*; ***HN6***[] "any person who shall be injured in his business or property **[**7]** by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States." In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, ***HN7***[] the Supreme Court held that *§ 15(a)* creates an additional element for a civil claim based upon an alleged antitrust violation. A plaintiff

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

429 U.S. at 489; *see also* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)* (summarizing *Brunswick Corp.).*

HN8[] An antitrust injury does not arise "until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct," *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*, i.e., "a plaintiff can recover only if the loss stems **[**8]** from a competition-reducing aspect or effect of the defendant's behavior," *id. at 344*. As the courts have repeatedly noted, "the antitrust laws were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp., 429 U.S. at 488* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. In other words, the antitrust laws do not protect a business from a loss of profits to a competitor related to continued or increased competition. *Cargill, Inc., 479 U.S. at 116*; *Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)* ("[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other. If King's defection should be called unfair competition, it is nonetheless *competition."); see* *Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996)* ("Over and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more **[*1047]** of the business."). A plaintiff suing under *§ 15*, **[**9]** therefore, must link its losses to a defendant's anticompetitive conduct.

Both *Brunswick Corp.* and *Atlantic Richfield Co.* are instructive on precisely this point. In *Brunswick Corp.,* the plaintiffs, three small bowling centers, alleged that Brunswick violated *§ 1 of the Sherman Act* by acquiring and operating bowling alleys that had defaulted on the purchase of its equipment. They alleged that the acquisitions had made Brunswick the largest bowling center operator in the country, thereby creating a monopoly. The plaintiffs claimed that they were harmed because the bowling centers purchased by Brunswick would have gone out of business but for the acquisitions. The plaintiffs alleged loss in the amount of income they would have earned had the acquired centers ceased existence.

While acknowledging that the plaintiffs' injury may have been causally related to Brunswick's alleged monopolization, the Supreme Court held that permitting such injury to state a claim would "divorce[] antitrust recovery from the purposes of the antitrust laws." *429 U.S. at 487*. At heart, the plaintiffs asserted damages from continued, not lessened, competition, and recovery for such **[**10]** alleged damage was in fact contrary to the antitrust laws. *Id. at 487-88*.

Similarly, in *Atlantic Richfield Co.,* the plaintiff, an independent retail marketer of gasoline, alleged that Atlantic Richfield had entered into a vertical, maximum price fixing agreement with its dealers, who were plaintiff's competitors. Plaintiff alleged that the price fixing agreement was a per se violation of *§ 1* and that it had suffered losses as a result of competition with Atlantic's dealers. Notwithstanding these allegations, the Supreme Court held that plaintiff had failed to allege an antitrust injury. Although it acknowledged that a vertical, maximum price fixing agreement was a per se violation of antitrust laws, the Court nevertheless found that the plaintiff had failed to allege antitrust injury because the only losses it claimed resulted from competition with the other firms. *Id. 495 U.S. at 336*. Because the loss claimed had not resulted from predatory pricing, the Court concluded that the plaintiff was unable to show antitrust injury. *Id. at 339*. "'To hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] **[**11]** price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.'" *Id. at 338* (quoting *Cargill, Inc., 479 U.S. at 116*) (alteration in original); *see also id. at 340* ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.").

Thus, in sum, ***HN9***[] neither injury in fact nor a per se violation of *§ 1* equals antitrust injury. *See 459 U.S. at 339 n. 8, 341-42*. The antitrust injury requirement is not met by allegations of harm from *competitive* conduct, meaning harm to only a specific competitor rather than to the market. Nor is the requirement met by allegations of harm just to the market rather than to the specific competitor. *See 495 U.S. at 339 n. 8*. The competitor itself must be harmed by conduct that is anticompetitive.

HN10[] As the antitrust laws protect competition rather than competitors, whether the injury to a competitor is really antitrust injury often may be ascertained by looking for related harm to consumers. The antitrust injury doctrine essentially **[**12]** requires a plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers. *Chi. Prof'l Sports Ltd. P'ship **[*1048]** v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992)*.

> If no consumer interest can be discerned even remotely in a suit brought by a competitor - if, as here, a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers - a court is entitled to question whether a violation of ***antitrust law*** is being charged. If injury to a competitor, caused by wrongful conduct, were enough to bring the antitrust laws into play, the whole state tort law of unfair competition would be absorbed into federal ***antitrust law***; it has not been: unfair competition, as such, does not violate the antitrust laws.

Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266-67 (7th Cir. 1984) (citation and internal quotation marks omitted).

In *Riegel Textile,* the Seventh Circuit found no consumer interest and no antitrust injury in allegations that Riegel Textile, through theft of a patent, took away a monopoly that rightfully belonged to Brunswick as the real inventor. *Id. at 267.* **[**13]** Whether Riegel Textile as opposed to Brunswick held monopoly power meant nothing to consumers; thus Brunswick did not suffer antitrust injury.

Similarly, ***HN11***[] examination of the remedy sought is a clue to whether there is antitrust injury. *Id.* If the plaintiff simply wants the transfer of benefits that a defendant is reaping in the market, without discernable benefits to consumers, it is likely that no antitrust injury exists. *See id.*

HN12[] Claims of antitrust injury also are especially suspect "when they accuse the consumers of misunderstanding their own interests." *Stamatakis Indus., 965 F.2d at 471*. An allegation that competition is harmed by a conspiracy, in which the consumer is involved, to steal business from one firm and give it to another, for instance, is suspect if the consumer must be deemed irrational by causing itself to pay higher prices in the future. *See id. at 471-72*; *cf. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1109 (7th Cir. 1984)* ("It is inherently implausible that Ford, as a buyer . . . , would conspire in order to allow its new carrier, Nu-Car, to charge noncompetitive prices; the plaintiffs are alleging, **[**14]** in essence, that Ford conspired to injure itself.").

In light of these principles, it is apparent that Phillips has alleged no antitrust injury. Phillips's allegations in no way assert anticompetitive conduct. The complaint asserts that the alleged bidding process was "designed to eliminate competition and otherwise adversely affect the free market" (Compl. P 32), but no elimination of competition is apparent, and in response to the motion to dismiss, Phillips identifies none. Phillips merely asserts in conclusory fashion that the vertical bid-rigging scheme had "inherent anti-competitive consequences." (Pl.'s Mem. of Law in Opp'n at 2.) But the facts Phillips alleges in the complaint actually resulted in *increased* competition, and it is the increased competition that caused Phillips harm. Phillips was harmed when a competitor was allowed to step in and submit another bid. Whether the competition was proper or improper makes no difference as far as the antitrust claim is concerned. As described above, damages from continued or increased competition are not the type of harm the antitrust statutes address.

As for adverse effects on the market, again no such harm is apparent and **[**15]** Phillips identifies none. In the market of Lambeau Field renovation (assuming the market can be so defined), the buyer paid the same or a lower price than Phillips wanted, which cannot be considered an adverse effect at all. Assuming Phillips's bid was the same as the "invited bidder's," the award of the bid was immaterial to the **[*1049]** consumer, just as the identity of the patent holder in *Riegel Textiles* was immaterial to the public in that case. Assuming Phillips's bid was in fact higher than the "invited bidder's," Phillip's desired remedy - imposing damages on the defendants for their failure to accept Phillips's higher bid - would violate the fundamental purpose of ***antitrust law***, which is to protect consumers from producers; not to protect producers from each other or to ensure that one firm gets more of the business. Nothing in this alleged bid-rigging scheme interfered with the freedom of the buyer or actual seller to buy and sell in accordance with their own judgment.

Phillips has argued no adverse effects at all in the broader market of construction. No allegations or even suggestions of predatory pricing are made such that the acceptance of this one bid could harm market competition **[**16]** in the future. And again, ***HN13***[] the main question for antitrust injury is whether the plaintiff has suffered an injury that "reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp., 429 U.S. at 489*. Neither the facts alleged by Phillips, nor reasonable inferences to be drawn therefrom, show such an injury. In fact, they show the absence of antitrust injury.

Phillips's opposition to the motion to dismiss focuses mainly on whether vertical bid rigging schemes are per se violations of *§ 1*. As *Atlantic Richfield Co.* makes clear, however, the existence of a per se violation is not enough to allow a plaintiff to recover damages in a civil action. There must be antitrust injury as well. The cases cited by Phillips regarding bid-rigging or price fixing - *United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982)*; *M.C. Mfg. Co. v. Tex. Foundries, Inc., 517 F.2d 1059 (5th Cir. 1975)*; *Sunny Hill Farms Dairy. Co. v. Kraftco Corp., 381 F. Supp. 845 (E.D. Mo. 1974)* - all predate *Atlantic Richfield Co.,* and two predate even *Brunswick* **[**17]** *Corp.* The two cases predating *Brunswick Corp.* did not discuss antitrust injury at all - they incorrectly state that only a causal connection between the antitrust violation and the alleged injury must exist, rather than an injury that the antitrust laws were meant to address. *See M.C. Mfg. Co., 517 F.2d at 1063-64*; *Sunny Hill Farms Dairy Co., 381 F. Supp. at 851, 857*. The case postdating *Brunswick Corp.* also does not discuss antitrust injury, as it was a federal prosecution under *15 U.S.C. § 1* rather than a private lawsuit under *15 U.S.C. §§ 1and 15*. *See Portsmouth Paving Corp., 694 F.2d at 315*. ***HN14***[] Only a private lawsuit raises the *§ 15(a)* requirement of antitrust injury. Moreover, the bid rigging scheme in *Portsmouth Paving Corp.* was horizontal between competitors and had the undisputed effect of forcing the government purchasers of roadway construction and surface paving to pay more for those services than had there been free competition. *See id. at 317, 319*. Thus, even if antitrust injury had been required it would have been found, as competition was being **[**18]** restricted and as a result the consumer plaintiff was paying higher prices for the services it was purchasing.

The other case relied upon by Phillips - a 1973 opinion by Judge John W. Reynolds from this district - merely describes the undisputed proposition that there is no heightened or special pleading standard for antitrust claims. *See Kolb v. Chrysler Corp., 357 F. Supp. 504, 507 (E.D. Wis. 1973)*. The defendants' motion dismiss attacks the facts of the complaint on the merits under *Fed. R. Civ. P. 12(b)(6)*, not on any defects in particularized pleading. Moreover, *Kolb* does not support the use of any *lesser* standard for examining an antitrust complaint than other complaints. The *Rule 12(b)(6)* standard described above applies to this case as it does to any **[*1050]** other. *See* *also* Car Carriers, Inc., 745 F.2d at 1106 ("The pleader may not evade these [Rule 12(b)(6)] requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'").

In sum, even taking all of Phillips's alleged facts **[**19]** and the per se violation argument as true, no antitrust injury can be found in this case. The federal antitrust claim must therefore be dismissed. But even if Phillips were able to show an antitrust injury, its claim would nevertheless fail because the facts alleged show no violation of § 1 occurred.

Phillips argues that the allegations in its complaint show that the defendants "conspired between themselves, together with their contractor of choice, to form a vertical bid-rigging scheme which deprived Plaintiff of its competitive right to contract for the Lambeau Field Renovation." "Such schemes," it argues; "are inherently anti-competitive and *per se* violations of the Sherman ***Antitrust Law***." (Pl's Mem. of Law in Opp'n, at 3) in support of its argument, Phillips cites *Portsmouth Paving Corp.,* and Sunny Hill Farms Dairy Co. Neither case supports its argument.

Portsmouth Paving Corp., as noted above, involved an agreement by contractors who were ostensibly competing against one another for the work that had the effect of forcing purchasers of road construction and paving services to pay inflated prices for those services. Under the scheme devised by the contractors, they **[**20]** would discuss their bids for various projects among themselves prior to submitting them, agree on which of them would be the low bidder on which project, and then arrange for the others to refrain from bidding or to submit intentionally high bids on that project so that it would be awarded to the chosen contractor at an inflated price. This is what is commonly meant by the term "bid rigging."

The allegations in this case, however, are wholly dissimilar. Defendants are the purchasers, not the suppliers of construction services. And according to the complaint they improperly, even illegally, disclosed a sealed bid submitted by Phillips so that a favored contractor would have an opportunity to reduce and resubmit its bid, thereby allowing the other contractor to win the contract. While such conduct, if proved at trial, may very well result in defendants' liability to Phillips on one of its state law claims, it does not amount to a violation of §1. At most, the allegations of the complaint show a favoritism by defendants toward one of Phillips' competitors. Without more, however, the fact that a buyer favored one supplier over another does not violate §1. ***HN15***[] "The freedom to switch **[**21]** suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage." *NYNEX v. Discon, Inc., 525 U.S. 128, 136, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*. "At the same time, other laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws, provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.'" *Id. at 137* (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 651d at 78 (1996)).

Sunny Hill Farms Dairy Co., the other case cited by Phillips in support of its claim of a per se violation, is similarly inapposite. That case involved a horizontal price fixing agreement between competing milk suppliers. The agreement also provided for a reduction in the plaintiff's in-store display space in favor of that of the defendant suppliers in retail stores operated or controlled by one of the defendant **[*1051]** suppliers. The plaintiff alleged that it had suffered reduced sales as a result of the pricing and display space agreements. Here, by contrast, while Phillips has characterized the defendants' alleged conduct as "price fixing," it has actually alleged only that **[**22]** the defendants' improperly disclosed what should have been a sealed bid. Although Phillips alleges that this allowed its competitor to submit a reduced bid, there is no allegation that the price was "fixed," except in the sense that prices are normally fixed, i.e., by voluntary agreement of the buyer and seller. Also unlike this case, *Sunny Hill Farms Dairy Co.* involved principally a horizontal agreement, one that was between suppliers. Here, the allegedly illegal agreement between the defendant purchaser and an unnamed supplier. Nothing in the complaint suggests how such an agreement could result in harm to competition or a relevant antitrust market. Accordingly, I conclude that the complaint fails to allege an antitrust violation, either per se or under the rule of reason, and for this reason also, the federal claim must be dismissed.

HN16[] Analysis of the state antitrust claim is generally guided by federal court decisions on federal ***antitrust law***. *Lerma v. Univision Communications, Inc., 52 F. Supp. 2d 1011, 1015-16 (E.D. Wis. 1999)*; *see* Carlson &

Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 650, 665, 529 N.W.2d 905 (1995); Am. Med. Transp. of Wis., Inc. v. Curtis-Universal, Inc., 148 Wis. 2d 294, 299, 435 N.W.2d 286 (Ct. App. 1988), **[**23]** *rev'd on other grounds*, 154 Wis. 2d 135, 452 N.W.2d 575 (1990). Phillips offers no argument that in regard to antitrust injury the federal law and state law differ. Therefore, the state antitrust claim fails for lack of antitrust injury as well.

B. Supplemental State Law Claims

With the only federal claim in this case dismissed, I must address the continued jurisdiction over the supplemental state law claims. ***HN17***[] Jurisdiction over supplemental claims is governed by 28 U.S.C. § 1367. Pursuant to § 1367(c), I may decline to exercise supplemental jurisdiction over a state law claim if I have dismissed all federal claims. When all federal claims are dismissed before trial, the usual and preferred course is to dismiss the supplemental state law claims without prejudice, especially when there has been almost no discovery or pretrial proceedings. Van Harken v. City of Chicago, 103 F.3d 1346, 1354 (7th Cir. 1997). Other than regarding the state antitrust claim, for which further state court proceedings would be an unnecessary burden on the state courts, I see no need to deviate from the presumed route in this case. Phillips contends that **[**24]** it may have a statute of limitations problem if I dismiss the remaining state law claims, but the supplemental jurisdiction statute sufficiently addresses that. *See* 28 U.S.C. § 1367(d).

III. CONCLUSION

Because the facts alleged in the complaint establish that Phillips has not suffered antitrust injury and no antitrust violation occurred, the federal and state antitrust claims must be dismissed on the merits. I decline supplemental jurisdiction over the remaining state law claims.

THEREFORE, IT IS ORDERED that the defendants' motion to dismiss is granted.

IT IS ORDERED that the federal and state antitrust claims are dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

FURTHER, IT IS ORDERED that the remaining state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c).

[*1052] The clerk of court is directed to enter judgment accordingly.

Dated this 2nd day of January, 2003.

William C. Griesbach

United States District Judge

Decision by Court. This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion **[**25]** to dismiss is GRANTED;

IT IS FURTHER ORDERED that the federal and state antitrust claims are dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim;

IT IS FURTHER ORDERED that the remaining state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c);

IT IS FURTHER ORDERED that this action is dismissed.

WILLIAM C. GRIESBACH

United States District Judge

Dated this 3rd day of January 2003, at Milwaukee, Wisconsin.

Daniel v. Am. Bd. of Emergency Med.

United States District Court for the Western District of New York

January 3, 2003, Decided ; January 3, 2003, Filed

90-CV-1086A(F)

Reporter

269 F. Supp. 2d 159 *; 2003 U.S. Dist. LEXIS 11466 **

GREGORY F. DANIEL, M.D., et al., Plaintiffs, v. AMERICAN BOARD OF EMERGENCY MEDICINE, HENRY A. THIEDE, M.D., FRANK A. DISNEY, M.D., COUNCIL OF EMERGENCY MEDICINE RESIDENCY DIRECTORS, CHILDREN'S HOSPITAL (SAN DIEGO), CHILDREN'S HOSPITAL OF MICHIGAN, DETROIT RECEIVING HOSPITAL AND UNIVERSITY HEALTH CENTER, FORSYTH MEDICAL CENTER, THE JOHNS HOPKINS HOSPITAL, PART OF THE JOHNS HOPKINS HEALTH SYSTEM, KETTERING MEDICAL CENTER, LINCOLN MEDICAL & MENTAL HEALTH CENTER, LOMA LINDA UNIVERSITY MEDICAL CENTER, LUTHERAN GENERAL HOSPITAL, MEDICAL COLLEGE OF PENNSYLVANIA AND HOSPITAL, MERCY CATHOLIC MEDICAL CENTER-MISERICORDIA DIVISION, MERCY HOSPITAL AND MEDICAL CENTER, METHODIST HOSPITAL OF INDIANA, OHIO STATE UNIVERSITY HOSPITAL, OREGON HEALTH SCIENCES UNIVERSITY HOSPITAL, OUR LADY OF MERCY MEDICAL CENTER, RIVERSIDE METHODIST HOSPITALS, SAINT FRANCIS MEDICAL CENTER, ST. ANTHONY HOSPITAL, TRI-CITY MEDICAL CENTER, UNIVERSITY OF CALIFORNIA MEDICAL CENTERS AT LOS ANGELES, IRVINE AND SAN DIEGO, UNIVERSITY HOSPITAL AT STATE UNIVERSITY OF NEW YORK AT STONY BROOK, UNIVERSITY HOSPITAL AT THE UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER, and UNIVERSITY MEDICAL CENTER (TUCSON), Defendants.

Subsequent History: Adopted by, Complaint dismissed at, Request denied by *Daniel v. Am. Bd. of Emergency Med., 269 F. Supp. 2d 159, 2003 U.S. Dist. LEXIS 11467 (W.D.N.Y., June 20, 2003)*

Prior History: *Daniel v. Am. Bd. of Emergency Med., 212 F.R.D. 134, 2002 U.S. Dist. LEXIS 26066 (W.D.N.Y., 2002)*

Disposition: [1]** Magistrate recommended that defendants' cross-motion to dismiss second amended complaint be granted. Alternatively, magistrate recommended that plaintiffs' motion for class certification be granted in part and denied in part.

Core Terms

Plaintiffs', Defendants', antitrust, certification, track, damages, class certification, class member, competitors, conspiracy, eligible, classwide, regression, predominate, allegations, emergency medicine, closure, anti trust law, proposed class, factors, cases, prices, cross motion, credential, class action, methodology, emergency physician, high prices, anticompetitive, report and recommendation

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN1[] Preclusion of Judgments, Law of the Case

Under the law of the case doctrine, courts generally refrain from reconsidering matters previously determined absent "cogent" or "compelling" reasons. The doctrine is discretionary, however, and does not constitute a limitation on the court's power.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2[] Private Actions, Standing

In an antitrust action, a court first, must assess standing to sue based on the standing of the named plaintiffs and not upon the standing of identified class members. Standing is to be determined on the basis of the pleadings and all material allegations of the complaint must be accepted as true and construed in favor of the complaining party. In applying the threshold requirement of antitrust standing, a court may consider other relevant information in the record.

Civil Procedure > ... > Justiciability > Standing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN3[] Justiciability, Standing

It is now well settled in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them injury. Rather, antitrust plaintiffs must plead and prove that the injury they have suffered derives from some anticompetitive conduct and is the type the antitrust laws were intended to prevent.

Antitrust & Trade Law > Clayton Act > Claims

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

HN4[] Clayton Act, Claims

A § 4 of the Clayton Act plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN5[] Robinson-Patman Act, Claims

A Robinson-Patman Act plaintiff is not excused from its burden of proving an antitrust injury.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN6[] Remedies, Damages

The antitrust standing requirement for private actions brought under §§ 4 or 16 of the Clayton Act seeks to avoid over deterrence resulting from the use of the somewhat draconian treble damage award, available for Sherman Act violations. By restricting the availability of private antitrust actions to certain parties, courts ensure that suits in apposite to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN7[] Clayton Act, Claims

The requirement of antitrust injury and standing, as a prerequisite to suit under §§ 4 and 16 of the Clayton Act, has been extended to plaintiffs who as competitors in the market seek a professional credential that will enable them to charge higher prices for their services in that market, and a request for such relief in a federal antitrust complaint negates the existence of an antitrust injury and standing requiring dismissal of the complaint.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

HN8[] **Horizontal Refusals to Deal, Boycotts**

To be actionable under the antitrust laws, boycotts or concerted refusals to deal generally involve joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.

Governments > Courts > Judicial Precedent

HN9[] **Courts, Judicial Precedent**

Courts of the Second Circuit are compelled to follow approaches adumbrated by the United States Supreme Court without concern whether the results are consistent with language in earlier Second Circuit cases.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN10[] **Private Actions, Standing**

The requirement for standing that an antitrust plaintiff, or group of plaintiffs, sufficiently allege an antitrust injury does not depend on an allegation that the target conduct operates to reduce competition. Rather, the requirement of an antitrust injury turns not on the illegality of the defendant's conduct -- indeed, such illegality is presupposed -- but on the fact that a plaintiff seeks to engage in or benefit from the same activity.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN11[] **Clayton Act, Claims**

For standing to sue under §§ 4 or 6 of the Clayton Act, the United States Supreme Court requires that, in addition to meeting the threshold requirement of having alleged an antitrust injury, a plaintiff also must be an efficient enforcer of antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

HN12[] **Standing, Clayton Act**

The United States Supreme Court requires consideration of several factors to determine whether a plaintiff in a federal antitrust action can be an efficient enforcer of such laws: the (1) nature of a plaintiff's injury, whether as a consumer or competitor; (2) directness or speculative nature of the relationship between the alleged antitrust violation and plaintiff's alleged injury; (3) potential for duplicative recovery or complex apportionment damages; and (4) existence of a more direct victim of the alleged antitrust violation. Additionally, some, but not all, of the above factors are relevant to deciding whether a plaintiff has standing to seek injunctive relief pursuant to § 16 of the Clayton Act.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN13[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23(a)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14[] **Class Actions, Prerequisites for Class Action**

See *Fed. R. Civ. P. 23(b)(2)* and *(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN15[] **Class Actions, Certification of Classes**

In determining the required elements of class action superiority, relevant to a proposed certification pursuant to *Fed. R. Civ. P. 23(b)(3)*, a court shall consider (A) the interest of members of the class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forums; (D) the difficulties likely to be encountered in the management of a class action. A class or subclass may be certified as to particular issues. *Fed. R. Civ. P. 23(c)(4)*. *Rule 23* also requires that adequate notice be provided to the class members and in the case of certification pursuant to *Rule 23(b)(3)*, an opportunity to request an "opt out" exclusion from the class. *Fed. R. Civ. P. 23(c)(2)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN16[] **Class Actions, Certification of Classes**

Well established principles applicable to requests for *Fed. R. Civ. P. 23* class certification guide a court's determination. First, the decision to grant certification is discretionary with the court. If the court finds both the requirements of *Rule 23(a)* have been met, and that the claims fall within the scope of *Rule 23(b)(3)*, the court may, in its discretion, certify the class. Whether plaintiffs have stated a cause of action or will ultimately prevail on the merits at trial is irrelevant; the threshold question is whether the requirements of *Rule 23* are met. However, in assessing a request for class certification the court may also consider the evidentiary record including any affidavits and results of discovery. Plaintiffs seeking class status bear the burden that each requirement under *Rule 23* has been satisfied. Class actions are favored in the litigation of antitrust claims. Questions regarding class certification should be resolved in favor of and not against the maintenance of class action.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Mergers & Acquisitions Law > Antitrust > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Federal Regulations, Antitrust Regulations**

In antitrust cases, the required degree of commonality of issues is generally satisfied by pleading an antitrust conspiracy among defendants. The very nature of the case -- involving allegations of antitrust conspiracy among defendants -- appears to insure that the commonality requirement is satisfied. The claims of those requesting class certification are deemed typical of those of the class where the claims of the representative plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, where the claims are based on the same legal theory and where the class members have allegedly been injured by the same course of conduct as which allegedly injured the proposed representatives. Identicality of situations between the named representatives and the class members is not required. Typicality refers to the nature of the claim of the class representatives and not to the specific facts from which the claim arose or relief is sought. The commonality and typicality requirements tend to merge because both serve as guideposts for determining whether the named plaintiff's claim and class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN18[] **Prerequisites for Class Action, Predominance**

In judging whether alleged common issues predominate over individual issues, *Fed. R. Civ. P. 23(b)(3)* does not require that every issue in the case be similar to every other issue presented by each class member's case. In determining whether common questions predominate, the court's inquiry is directed primarily to classwide questions of liability.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Issuance of Visas

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Prerequisites for Class Action, Predominance**

The *Fed. R. Civ. P. 23(b)(3)* predominance requirement tests whether a proposed class is sufficiently cohesive to warrant adjudication by representation. In order to meet the predominance requirement of *Rule 23(b)(3)*, a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject to individualized proof.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Civil Procedure > ... > Class Actions > Class Members > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN20[] **Regulated Industries, Sports**

That the damages suffered by class members in antitrust actions may vary does not in itself require a disqualification for class action status. Moreover even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN21[] **Private Actions, Remedies**

An antitrust plaintiff's intention to establish the fact of antitrust injury on a classwide basis, in contrast to a specific plaintiff's damages, favors class certification. Further, antitrust plaintiffs seeking class action status may also satisfy their burden of showing that a common impact upon class members caused by an alleged conspiracy can be proven on a classwide basis through the use of economic expert testimony and statistical analysis.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN22[] **Private Actions, Remedies**

In evaluating proffered expert opinion and results of statistical analysis on the question of classwide impact and damages, courts should determine whether the plaintiff's expert's proposed econometric methodologies have a reasonable probability of establishing at trial plaintiffs' claims by common proof. Where defendants offer opposing statistical expert opinion, in considering class certification, courts should avoid statistical dueling; rather, their inquiry is limited to determining whether the proposed methodology was sufficiently reliable and not "fatally flawed" rendering it inadmissible at trial.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN23[] **Prerequisites for Class Action, Adequacy of Representation**

Proposed class representatives will be deemed adequate for purposes of *Fed. R. Civ. P. 23(a)* unless the representatives are found to have "palpable" conflicts with the class members which outweigh the substantial interest of every class member in proceeding with the litigation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN24[] **Class Actions, Certification of Classes**

To qualify for *Fed. R. Civ. P. 23* certification the proposed class must be objectively defined and capable of reasonable ascertainment.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

HN25[] **Remedies, Damages**

The fact that an antitrust plaintiff may have incurred even greater damages from other effects of the conspiracy that were conceivably avoidable does not exempt the charged conspiracy from antitrust liability.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN26[] **Private Actions, Remedies**

Use of multiple variable regression analysis to prove antitrust impact on a classwide basis has been accepted by the courts as justifying class certification.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN27[] **Private Actions, Remedies**

Multiple regression analysis is a statistical tool used to determine the influence that various independent, predetermined factors (so-called "independent variables") have on an observed phenomenon (the so-called "dependent variable"). The first step in such a regression analysis is to specify all of the possible legitimate factors not prohibited by law that are likely to significantly affect the dependent variable and which could account for the alleged disparities in plaintiffs' income.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN28[] **Private Actions, Remedies**

It is sufficient for class certification that the proposed regression analysis be reasonably capable of providing evidence from which the causation element of the plaintiffs' case be inferrable on a classwide basis.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN29[] **Private Actions, Remedies**

In the context of class certification, a regression analysis can be used to determine whether incorporating additional information (e.g., years of experience) results in more reliable individual damage estimates.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Visa Application Denials

HN30[] **Class Actions, Prerequisites for Class Action**

So long as the party seeking class certification has provided a "colorable method" for proving classwide injury, courts should not deny certification on the basis that such method may ultimately be unpersuasive at trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN31[] **Class Actions, Certification of Classes**

Any determination that an essential element of plaintiffs' claims is incapable of proof, whether through use of the results of a multi-variable regression analysis or other data and expert opinion, must be interposed and resolved by summary judgment or at trial.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN32[] **Regulated Industries, Sports**

At the class certification stage, plaintiffs need only demonstrate the existence of a reasonable basis on which damages can be determined at trial. In an antitrust case, the trier of fact will use a just and reasonable estimate based on relevant data including both probable and inferential as well as direct and positive proof. Employing relevant data to be collected from the class during merit based discovery, plaintiffs' proposed regression analysis is expected to be capable of reasonably estimating the damages suffered by individual class members irrespective of particular circumstances.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN33[] **Private Actions, Remedies**

Although individual circumstances necessarily exist among the members of the plaintiff class, a reasonable approximation of damages is achievable through a common formula. Indeed, the presence of individual damages issues cannot, in itself, defeat class certification particularly in antitrust actions. Even if it develops that each class member's damages must be separately determined, class certification would still be appropriate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN34[] **Class Actions, Prerequisites for Class Action**

The proposition that the existence of individual defenses defeats class certification has been rejected by other courts, and is not the law in the Second Circuit.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN35[] **Class Members, Named Members**

Fed. R. Civ. P. 23(a)'s typicality requirement is met where the claims of the representative plaintiffs arise from the source of conduct that gives rise to the claims of the other class members, where the claims are based on the same legal theory, and where class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representatives.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN36[] Prerequisites for Class Action, Superiority

Fed. R. Civ. P. 23(b)(3) requires that class treatment is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN37[] Prerequisites for Class Action, Numerosity

In the context of class certification, there is no general rule which requires a trial plan as an essential element of the superiority requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN38[] Class Actions, Prerequisites for Class Action

Once a district court has found an action maintainable under any single category of *Fed. R. Civ. P. 23(b)*, there is no necessity of showing that it may also be brought under any other. Further, if certification is granted pursuant to both *Rule 23(b)(3)* and *(b)(2)* major procedural problems can arise where different procedural consequences can attach depending on the subsection used.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

HN39[] Class Actions, Prerequisites for Class Action

Where substantial damages are a potential outcome, the primary concern about certifying a class with significant damages under *Fed. R. Civ. P. 23(b)(2)* is the absence of mandatory notice and opt-out rights.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Remedies > Damages > Monetary Damages

HN40[] Class Actions, Certification of Classes

Class certification under *Fed. R. Civ. P. 23(b)(2)* is unavailable where the relief requested relates predominantly to money damages. For purposes of *Rule 23(b)(2)*, a claim for money damages is said to predominate unless it is found to be incidental, i.e., damages which automatically "flow to the class" once liability is established based on objective standards rather than requiring additional hearings or the need to determine any new or significant legal or fact issues.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN41[] **Class Actions, Prerequisites for Class Action**

In the context of class certification, damages are to be assessed by on individual characteristics of a plaintiff.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN42[] **Private Actions, Remedies**

There are cases where the mere request for treble damages in an antitrust action was held to place the action outside the parameters of class certification under *Fed. R. Civ. P. 23(b)(2)*.

Counsel: RALPH L. HALPERN, MITCHELL J. BANAS, JR., and MARY C. FITZGERALD, of Counsel, JAECKLE, FLEISCHMANN & MUGEL, LLP, Buffalo, New York, for Plaintiffs.

GEORGE J. WADE, KATHLEEN M. COMFREY, of Counsel, SHEARMAN & STERLING, New York, New York, for Plaintiffs.

ROBERT A. RAWSON, JR., JEFFERY D. UBERSAX, ELIZABETH A. GROVE, and JEFFERY SAKS, of Counsel, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, for American Board of Emergency Medicine, Henry A. Theide, and Frank A. Disney, Defendants.

ROBERT E. GLANVILLE, of Counsel, PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, Buffalo, New York, for American Board of Emergency Medicine, Council of Emergency Medicine Residency Directors and as Liaison, Defendants.

Judges: LESLIE G. FOSCHIO, UNITED STATES MAGISTRATE JUDGE.

Opinion by: LESLIE G. FOSCHIO

Opinion

[*164] AMENDED REPORT and RECOMMENDATION

JURISDICTION

This matter was referred, pursuant to *28 U.S.C. § 636(b)(1)(A)& (B)*, to the undersigned **[*165]** on April 24, 1991 by **[**2]** Hon. Richard J. Arcara for all pretrial matters. The matter is presently before the court on Plaintiffs' motion for class certification, filed February 24, 1994 (Doc. No. 69) ("Plaintiffs' Motion"), and Defendants' cross motion to dismiss the Second Amended Complaint, pursuant to *Fed.R.Civ.P. 16(b)(1)* filed May 4, 2000 (Doc. No. 773) ("Defendants' Cross Motion").

BACKGROUND

In their Second Amended Complaint, brought pursuant to Sections 4 and 16 of the Clayton Act, *15 U.S.C. § 15* ("Section 4"), *15 U.S.C. § 26* ("Section 16"), Plaintiffs alleged violations of Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1, 2*, and sought monetary damages and injunctive relief. Prior proceedings in this action include *Daniel v. American Board of Emergency Medicine, et al, 802 F. Supp. 912 (W.D.N.Y. 1992)* (*"Daniel I"*) (sustaining Amended Complaint against motion to dismiss); *Daniel v. American Board of Emergency Medicine, et al., 988 F. Supp. 112 (W.D.N.Y. 1997)* (*"Daniel II"*); and, *Daniel v. American Board of Emergency Medicine, et al., 988 F. Supp. 127 (W.D.N.Y. 1997)* **[**3]** (*"Daniel III"*). Discovery on the merits of Plaintiffs' claims has been stayed pending resolution of the numerous motions filed by Defendants attacking the Second Amended Complaint and Defendants' opposition to Plaintiffs' instant motion for class certification.

In a Report and Recommendation filed on January 16, 1996 (Doc. No. 435), the undersigned recommended dismissal of ten Defendants, including Tri-City Medical Center, University of California Medical Centers at Los Angeles, Irvine and San Diego, University of Massachusetts Medical Center, University Hospital of University of New Mexico School of Medicine, Oregon Health Services University Hospital, Ohio State University Hospital, University Hospital at State University of New York at Stony Brook, and Lincoln Medical and Mental Health Center, on grounds of *11th Amendment* immunity, state action immunity, Local Government Antitrust Act immunity, and personal jurisdiction. District Judge Richard J. Arcara adopted the Report and Recommendation in an Order filed on November 19, 1997 (Doc. No. 580). *Daniel III.* Based on later filed motions seeking dismissal upon *11th Amendment* and state action immunity grounds, the undersigned **[**4]** recommended dismissing four additional Defendants. Report and Recommendation filed January 20, 2000 (Doc. No. 751) (recommending dismissal of Defendants Kettering Medical Center, Children's Hospital-San Diego, and University Medical Center Corporation (Tucson, Arizona)) and Report and Recommendation filed September 27, 2001 (Doc. No. 830) (recommending dismissal of Defendant Riverside Medical Center, but recommending against dismissal of Defendant Our Lady of Mercy Medical Center). In a Report and Recommendation filed on February 12, 1999 (Doc. No. 642), the undersigned recommended that final judgment, pursuant to *Fed.R.Civ.P. 54(b)*, be entered as to Defendants Tri-City Medical Center, University of California Medical Centers at Los Angeles, Irvine and San Diego, University of Massachusetts Medical Center, University Hospital of University of New Mexico School of Medicine, Oregon Health Services University Hospital, Ohio State University Hospital, University Hospital at State University of New York at Stony Brook, and Lincoln Medical and Mental Health Center.

Judge Arcara adopted the Reports and Recommendations by Orders filed August 21, 2002. Doc. No. 846 (adopting Report and Recommendation **[**5]** filed February 12, 1999 (as amended by Order filed October 9, 2002 (Doc. No. 862))), Doc. No. 847 **[*166]** (adopting Report and Recommendation filed September 27, 2001), and Doc. No. 848 (adopting Report and Recommendation filed January 20, 2000). Final judgments dismissing all the above Defendants were filed on August 23, 2002 and on October 10, 2002. Doc. Nos. 849, 850, 851 and 863. [1] Plaintiffs have appealed such dismissals on September 19 and November 5, 2002; Tri-City Medical Center cross appealed on October 2, 2002. (Doc. Nos. 868 and 857, respectively). Two of the original Defendants have settled the claims against them including Porter Memorial Hospital (Stipulation and Order filed September 21, 1994 (Doc. No. 313)), and Medical College of Pennsylvania and Hospital (Order filed May 29, 2001 (Doc. No. 822)). The court is also informed that three previously dismissed Defendants, Oregon Health Sciences University, Children's Hospital - San Diego, and University Medical Center - Tucson, settled in principle with Plaintiffs. Doc. No. 870.

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[1] By letter dated November 8, 2002 (Doc. # 870), the court was advised that Hospital Defendants, Children's Hospital of Michigan, Detroit Receiving Hospital and University Health Center, The Johns Hopkins Health System, Loma Linda University Medical Center and St. Anthony Hospital - Central are presently represented by LeBoeuf, Lamb, Greene & MacRae ("LeBoeuf, Lamb"), Jonathan A. Damon, of counsel; and that LeBoef, Lamb also represents University of California Medical Centers at Los Angeles, Irvine, and San Diego, University of Massachusetts Medical Center, University Hospital at the University of New Mexico School of Medicine, Oregon Health Sciences University Hospital, Children's Hospital - San Diego and University Medical Center (Tuscon, Arizona).

[6]** Plaintiffs' Memorandum of Law in Support of the motion for class certification was filed on February 24, 1994 (Doc. No. 70). At Defendants' request, limited discovery was permitted, by order dated October 28, 1998, directed to Plaintiffs' Motion (Doc. No. 630). Plaintiffs' Revised Memorandum of Law in Support of Class Certification was filed on March 6, 2000 ("Plaintiffs' Revised Memorandum") (Doc. No. 761) together with a Declaration of Jeremy R. Kasha, Esq. in Support of Plaintiffs' Motion for Class Certification dated March 4, 2000 (Doc. No. 762) with attached exhibits. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and in Support of Defendants' Cross Motion to Dismiss for Lack of Standing along with Declaration of Jeffrey D. Ubersax, Esq. ("Ubersax Declaration") (Doc. No. 775) with attached exhibits was filed May 4, 2000 ("Defendants' Memorandum") (Doc. No. 774). Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and in Opposition to Defendants' Cross Motion to Dismiss was filed July 17, 2000("Plaintiffs' Reply Memorandum") (Doc. No. 797). Defendants' Surreply Memorandum in Support of Defendants' **[**7]** Cross Motion to Dismiss (Doc. No. 811) and Defendants' Surreply Memorandum in Opposition to Plaintiffs' Motion for Class Certification (Doc. No. 812) were filed on July 31, 2000 ("Defendants' Surreply Re: Standing") and ("Defendants' Surreply Re: Class Certification"), respectively. By letter dated October 24, 2001, Plaintiffs provided additional authority in support of their class certification motion (Doc. No. 864); Defendants responded by letter dated October 29, 2001 (Doc. No. 865). Oral argument was conducted on November 8, 2002. [2]

[*167] Based on the following, Defendants' cross motion to dismiss should be GRANTED; alternatively, Plaintiffs' motion for class **[**8]** certification pursuant to *Rule 23(b)(3)* should be GRANTED; alternatively, Plaintiffs' motion for certification pursuant to *Rule 23(b)(2)* should be DENIED.

FACTS

[3]

Plaintiffs originally included 176 physicians who claimed to be eligible based upon prior experience in the practice of emergency medicine, to take Defendant American Board of Emergency Medicine's (ABEM) certification examination, [4] Second Amended Complaint, Exhibit A. Specifically, prior to June 30, 1988, ABEM permitted physicians to sit for its certification examination, consisting of both written and oral components, based upon completion either of an approved residency in emergency medicine or of 7,000 hours and 60 months of emergency room medical practice, with 2,800 hours accumulated within 24 consecutive months, and an accumulation of 50 hours of continuing medical education in emergency medicine deemed acceptable to ABEM for each **[**9]** complete year in practice after 1973 ("the practice track"). Second Amended Complaint P P 6, 7, 50. Upon passing both components of the ABEM examination, physicians are granted ABEM Diplomate status. *Id.* P 3. After June 30, 1988, in order to qualify to sit for the ABEM examination, a physician who wished to obtain ABEM certification was required to successfully complete an approved residency training program in emergency medicine. Second Amended Complaint P P 6, 7, 50. However, special practice track eligibility for the ABEM examination remained available until 1995 to physicians certified by the American Board of Internal Medicine ("ABIM") and who also served in significant academic positions. Second Amended Complaint PP 11, 71-73. Plaintiffs claim they represent a class of 14,000 physicians who but for the closure of the practice track would have applied to take the ABEM certification examination. *Id.* P P 23-24, 44(a). [5]

[10]** In addition to ABEM, Defendants include two members of ABEM's board of directors, Henry A. Thiede, M.D. and Frank A. Disney, M.D., 28 hospitals which are alleged to offer residency programs in emergency medicine

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[2] Both sides handed up supplemental authorities following oral argument, the court has reviewed such authorities, however, because of their bulk, the submissions were not filed. Plaintiffs and Defendants submitted additional arguments and authorities by letters dated November 12th, 13th, 18th and 21st, 2002 (Doc. Nos. 871, 872, 873, and 874, respectively).

[3] Taken from the pleadings and papers filed in connection with the instant motion and cross motion.

[4] As a result of prior motions to dismiss and withdraw, the number of Plaintiffs has been reduced to 154.

[5] At oral argument, Plaintiffs stated the present number was now closer to 10,000.

("Hospital Defendant(s)"), Second Amended Complaint P P 4, 30, 31, 34, Exhibit B, [6] and the Council of Emergency Residency Directors ("CORD"), an association of directors of residency programs in emergency medicine. Second Amended Complaint P P 32-33. It is alleged that ABEM, CORD, and the Hospital Defendants conspired unlawfully **[*168]** to close, and keep closed, ABEM's practice track as a basis for eligibility to gain ABEM certification. *Id.* P 34. Plaintiffs also assert that several professional organizations in the field of medicine, not named as defendants in the action, including the American College of Emergency Physicians, Society for Academic Emergency Medicine, ABIM, as sponsoring organizations of ABEM, are also co-conspirators. *Id.* P 38. Plaintiffs further charge that other unidentified hospitals offering residency training programs in emergency medicine are part of the alleged conspiracy as well as the executive director of ABEM, 40 of its former officers and directors, **[**11]** and 17 physicians who served as directors of their respective emergency medicine residency programs. *Id.* P P 34, 41-43; Exhibits C, D.

Plaintiffs claim Defendants conspired, among themselves and with the other organizations and persons not named as defendants, to restrain trade **[**12]** in and monopolize the national market for emergency medicine physicians certified by ABEM ("ABEM physicians") and physicians who have qualified for the ABEM certification examination pursuant to the ABEM medical residency program requirement ("ABEM eligible physicians"), as offered by Hospital Defendants, the only means (except of the special practice qualification track for certain ABIM physicians) by which a physician can qualify to take the ABEM examination following closure of the practice track in 1988. Second Amended Complaint P P 3-4, 51, 91-92. [7] For residency track applicants who began their residency training prior to July 1, 1997, ABEM required successful completion of 36 months of post-medical school training with 24 months controlled by an accredited emergency medicine training program; thereafter, 36 months of approved residency study was required. *Id.* P 51. Plaintiffs allege Defendants have, through the conspiracy to close the practice track and keep it closed, artificially reduced the availability of ABEM physicians and ABEM eligible physicians in the national market for such services with a resulting noncompetitively created increase in the remuneration paid to **[**13]** such physicians. *Id.* P P 94-95. During the 12 year period of availability of the practice track, 8,000 physicians obtained ABEM Diplomate status of which 7,000 qualified through the practice track. Second Amended Complaint P 7.

As a consequence Defendants' actions in relation to the practice track's closure, Plaintiffs claim that Defendants' restraint of trade, monopolization, and attempted monopolization of the market for ABEM physicians and ABEM eligible physicians caused Plaintiffs to "receive substantially less remuneration than ABEM certified physicians (in an average amount of less than $ 50,000 annually). **[**14]** " *Id.* P 104. Plaintiffs also allege the loss of "increases in remuneration for which they would otherwise be qualified." *Id.* P 109. Additionally, Plaintiffs claim several other forms of damage including numerous disadvantages and impediments to their professional advancement, *e.g.,* loss of the chance for increased professional prestige, research opportunities supported by financial grants from various funding sources, greater professional mobility, and academic appointments in the field of emergency medical practice. *Id.* P P 13, 88(a), (e), (g), (k).

[*169] Plaintiffs further assert that Defendants' closure of the ABEM practice track not only reduces competition in the market for the services of ABEM physicians and ABEM eligible physicians, but also misleads the public into a belief that emergency physicians who are not ABEM certified are less capable than ABEM physicians or ABEM

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[6] As noted, 14 Hospital Defendants have been dismissed based on various immunity and personal jurisdiction grounds, and two Hospital Defendants were dismissed following settlements with Plaintiffs. Thus, 12 Hospital Defendants, all private organizations, remain in the action, including Forsyth Medical Center, Children's Hospital of Michigan, Detroit Receiving Hospital and University Health Center, the Johns Hopkins Hospital, Part of the Johns Hopkins Health System, Loma Linda University Medical Center, Lutheran General Hospital, Mercy Catholic Medical Center - Misericordia Division, Mercy Hospital and Medical Center, Methodist Hospital of Indiana, Our Lady of Mercy Medical Center, Saint Francis Medical Center and St. Anthony Hospital.

[7] Following commencement of this action, the Board of Certification of Emergency Medicine ("BCEM") was established which permitted physicians to become certified with an emergency medicine residency qualification or, until 1997, based on 10,000 hours of experience in emergency medicine practice over at least six years. Defendants' Memorandum at 19. As of May 2000, 60 Plaintiffs have become BCEM certified.

eligible physicians. Second Amended Complaint P 16. Plaintiffs contend that Hospital Defendants obtained benefits from the conspiracy through the increased availability of resident emergency medicine physicians to staff their respective emergency room programs at a relatively lower cost. *Id.* P **[**15]** 14. Additionally, Hospital Defendants are alleged to benefit from the conspiracy through increased residency enrollments, greater federal funding and larger Medicare and Medicaid reimbursement rates, more research grants, and higher donations and greater opportunities for endowed teaching chairs. *Id.* P 90.

Plaintiffs state the putative class to be certified, pursuant to *Rule 23 of the Federal Rules of Civil Procedure*, include physicians who, in addition to the Plaintiffs, are physicians presently, or through passage of time could have, qualified for the ABEM certification examination under the practice track. Second Amended Complaint P 44(a). Plaintiffs further allege that their claims are typical of those to be asserted by the class and that common questions of fact and law predominate over individual issues including the existence and effect upon Plaintiffs and the proposed class of the alleged conspiracy and anticompetitive conduct by Defendants and the other described coconspirators. *Id.* P 44(d).

Plaintiffs further allege that a class action is suitable and superior to other forms of adjudication in this case because the numerosity of the class renders joinder of individual **[**16]** plaintiffs impracticable. Second Amended Complaint P 44(e). Plaintiffs also allege that identification of class members can be made based on readily available information and that the class size does not present unusual problems of judicial management or notice. *Id.* Additionally, Plaintiffs assert that because Defendants have refused to act to reopen the practice track as requested by Plaintiffs on grounds applicable to all class members, injunctive relief is proper against Defendants together with an award of damages. *Id.* P 44(f).

DISCUSSION

I. Summary of Arguments on the Respective Motions.

A. Plaintiffs' Contentions in Support of Plaintiffs' Motion for Class Certification.

Each of the 176 originally named Plaintiffs in this action is alleged to be a duly licensed physician who has practiced or is practicing emergency medicine in the United States but none of whom has completed or is attending a residency program in emergency medicine. Plaintiffs' Revised Memorandum of Law at 5. Plaintiffs claim that entry into and completion of a residency program in emergency medicine as the sole available means to qualify for the ABEM examination is burdensome **[**17]** and impractical. Plaintiffs' Reply Memorandum at 41. Each Plaintiff is alleged to have met the prior ABEM practice track requirements or is currently practicing emergency medicine so that each Plaintiff will, with the passage of time, meet the prior existing practice track requirements. *Id.* Plaintiffs, as of 1994 when the Second Amended Complaint was filed, estimated that approximately 14,000 emergency physicians were then, or would become in the future, eligible to take the ABEM certification **[*170]** examination but for Defendants' allegedly unlawful closure of the practice track qualification criteria. *Id.* at 5. As noted, Plaintiffs believe that figure is now approximately 10,000. Plaintiffs contend that the facts of this case satisfy the criteria for certification of a class as required by *Fed.R.Civ.P. 23(b)(3)*. Plaintiffs' Revised Memorandum at 25. Alternatively, Plaintiffs request certification pursuant to *Fed.R.Civ.P. 23(b)(2)*. *Id.* at 34.

B. Defendants' Contentions in Opposition to Plaintiffs' Motion for Class Certification and in Support of Defendants' Cross Motion to Dismiss.

Defendants argue that although the proposed class is admittedly numerous in nature, the representative **[**18]** Plaintiffs do not present claims typical of the class and that, because of differences in the reasons for the Plaintiffs' inability to achieve ABEM eligibility under the former practice track, together with great variations in the potential damages incurred by class members, including representative Plaintiffs, alleged to result from the practice track closure, common issues of law or fact do not exist, or do not predominate over individual issues particularly in relationship to the elements of causality and damages. Defendants' Memorandum at 4. Finally, Defendants assert that a class action is not superior to other methods for resolving the merits of the instant action. *Id.*

On their cross motion to dismiss, Defendants contend, based on the allegations contained in the Second Amended Complaint as well as evidence developed in connection with Defendants' opposition to Plaintiffs' motion for class certification, that Plaintiffs lack antitrust standing requiring dismissal of the action. Defendants' Memorandum at 6. Specifically, Defendants argue that because Plaintiffs seek to reopen the practice track and obtain ABEM certification to obtain higher levels of compensation expected **[**19]** to result from gaining the ABEM certification which Plaintiffs ultimately seek, Plaintiffs fail to allege an antitrust injury, a prerequisite to a private federal antitrust action under *Sections 4and 16* of the Clayton Act. *Id.* Additionally, Defendants argue Plaintiffs lack antitrust standing because they are not "efficient enforcers" of the antitrust laws. *Id.* While Plaintiffs' motion for class certification preceded by several years Defendants' cross motion to dismiss, as standing "is essential to a [district] court's ability to entertain any claim," the analysis of the standing question raised by Defendants' cross motion "precedes any determination under *Fed.R.Civ.P. 23*." *Kent-Chojnicki v. Runyon, 180 F.R.D. 237, 240 (W.D.N.Y. 1998)* (citing cases). Accordingly, the court will first address Defendants' cross motion.

II. Defendants' Cross Motion to Dismiss for Lack of Antitrust Standing.

At the outset, Plaintiffs contend that Defendants' cross motion should be rejected as this court has previously sustained Plaintiffs' Second Amended Complaint against Defendants' prior motions to dismiss for failure to state a claim, Plaintiffs' Reply Memorandum **[**20]** at 5, and that as such holdings represent the law of the case, Defendants' cross motion to dismiss should be denied. *Id.*

A. Law of the Case.

HN1[] Under the law of the case doctrine, "courts generally refrain from reconsidering matters previously determined absent 'cogent' or 'compelling' reasons." *Baden v. Koch, 799 F.2d 825, 828 (2nd Cir. 1986)*. The doctrine is discretionary, however, and "does not constitute a limitation on the court's power." *United States v. Birney, 686 F.2d 102, 107 (2nd Cir. 1982)*.

[*171] A careful review of the procedural history of this case reveals that Defendants' standing argument, as a basis of dismissal, has not previously been presented to the court. In particular, in their initial motion to dismiss Plaintiffs' Amended Complaint, filed February 7, 1991, Defendants argued that the Amended Complaint was insufficient because it failed to adequately allege (i) the required degree of impact on interstate commerce flowing from Defendant ABEM's alleged unlawful practices, (ii) personal jurisdiction over defendants in that action, [8] (iii) the putative conspiracy, and (iv) a product and geographic market. Defendants' Memorandum **[**21]** of Law in Support of Motion to Dismiss Amended Complaint (Doc. No. 13) at 9-36; *Daniel I, supra, at 917-27*. In support of that motion to dismiss, Defendants contended, *inter alia,* that Dr. Daniel, then the sole plaintiff in the action, had suffered no antitrust injury based on a lack of notice of the scheduled closing of the ABEM practice track in 1988 citing in a footnote to *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Doc. No. 13 at 5. However, at that time, Defendants did not argue, as Defendants do on the instant cross motion, that Plaintiffs had failed to allege antitrust standing because the object of Dr. Daniel's lawsuit, as pleaded in the Amended Complaint, was to increase Dr. Daniel's income through an antitrust challenge to ABEM's closure of the practice track.

Defendants' first motion to dismiss the Second Amended Complaint was predicated **[**22]** on statute of limitations grounds and for failure to state a claim. *Daniel II at 116*. In that motion, Defendants also sought summary judgment based on immunity, lack of personal jurisdiction, and improper venue, *Daniel III at 150*; however, Defendants' challenge to the Second Amended Complaint at that time did not include assertion of the antitrust injury doctrine as a basis to find Plaintiffs lacked standing. Thus, as the specific question now raised by Defendants as a ground for dismissal on Defendants' cross motion, *i.e.,* a lack of Plaintiffs' antitrust standing, has been neither previously presented nor addressed by the court, the law of the case doctrine is inapplicable to Defendants' cross motion. Accordingly, the court turns to the merits of Defendants' cross motion.

B. Plaintiffs' Failure to Allege an Antitrust Injury.

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[8] ABEM, Dr. Benson S. Munger, Executive Director of ABEM, and 18 officers and directors of ABEM.

HN2[] A court first, "must assess standing to sue based on the standing of the named plaintiff[s] and not upon the standing of identified class members." *Kent-Chojnicki, supra, at 240* (citing cases). Standing is to be determined on the basis of the pleadings and all material allegations of the complaint must be accepted as true and **[**23]** construed in favor of the complaining party. United States v. Vazquez, 145 F.3d 74, 81 (2nd Cir. 1998) (citing Warth v. Seldin, 422 U.S. 490, 501, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)). *See also* Independent Contractors of California v. California States Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); State of Connecticut v. Physicians Health Services, 287 F.3d 110, 114 (2nd Cir. 2002). [9] In applying the threshold **[*172]** requirement of antitrust standing, a court may consider other relevant information in the record. Antares Aircraft v. Federal Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991) (court may consider evidence outside pleadings on motion to dismiss for lack of standing), *vacated on other grounds, 505 U.S. 1215 (1992)*. *See* Sanjuan v. American Board of Psychiatry, and Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994) (considering on motion to dismiss antitrust claim not only the "skimpiness" of the complaint, but also plaintiffs' failure to provide information responsive to district judge's inquiry), *cert. denied, 516 U.S. 1159, 134 L. Ed. 2d 191, 116 S. Ct. 1044 (1996).* **[**24]**

[25]** In this case, Plaintiffs allege that Defendants' "unlawful conspiracy in closing the practice track has precluded Plaintiffs and … [other purported class members] from attaining ABEM certification or ABEM eligibility and thereby competing with ABEM certified and ABEM eligible physicians." Second Amended Complaint P 8 (bracketed material added). Plaintiffs further claim that both they and "the class they represent have been injured by defendants' unlawful and anticompetitive acts … [as] among other things, plaintiffs have been denied increases in remuneration …. *Id.* P 13. Plaintiffs also charge that Defendants' unlawful conspiracy "restricted output and reduced competition in the market for ABEM certified and ABEM eligible emergency physicians to hospitals and others." *Id.* P 92. According to Plaintiffs, "the effect of [Defendants'] unlawful actions is to raise artificially the price of ABEM certified and ABEM eligible emergency physicians." *Id.* As a result, Plaintiffs assert Defendants violated Sections 1and 2 of the Sherman Act and, pursuant to Clayton Act Sections 4and 16, seek a determination that Defendants have violated the Sherman Act, trebling of any **[**26]** actual damages Plaintiffs have sustained, an injunction allowing them to take the ABEM certification examination if qualified under the ABEM practice track criteria, and attorneys fees and costs. *Id.* P P 126, 130, 135, X. Assuming the truth of Plaintiffs' allegations, Plaintiffs, who would have obtained ABEM certification but for closure of the practice track and, as suppliers of emergency medical services identical to those rendered by ABEM physicians and ABEM eligible physicians, state they are now entitled to treble the amounts of the extra compensation Plaintiffs have lost as a result of being unable to obtain ABEM certification based on eligibility for obtaining such certification under the practice track. *Id. P 135*. However, applicable antitrust caselaw requires the court find that Plaintiffs lack standing to bring this lawsuit and that it should therefore be dismissed. **HN3**[] "It is now well settled in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them injury." Balaklaw v. Lovell, 14 F.3d 793, 796 (2d Cir. 1994) (citations omitted) (physician who lost exclusive, service contract **[**27]** with hospital for anesthesiology service failed to establish antitrust standing). Rather, antitrust plaintiffs "must plead and prove that the injury they have suffered derives from some anticompetitive **[*173]** conduct and is the type the antitrust laws were intended to prevent." (Underlining added). Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991). *See also* Balaklaw, supra, at 796 ("Plaintiffs must prove antitrust injury, … injury of the type antitrust laws were intended to prevent ….") (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)).

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[9] Although Defendants' cross motion is brought pursuant to Fed.R.Civ.P 12(b)(1) (lack of subject matter jurisdiction), the court finds that the motion attacks Plaintiffs' standing based on whether Plaintiffs have "a sufficient stake in a judicial controversy to obtain judicial resolution of that controversy." Siena Club v. Morton, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). *See also* Physicians Health Services, supra, at 116-17 (distinguishing between a lack of standing based on absence of an injury in fact sufficient to create a case or controversy under Article III and other statements of the standing doctrine). Accordingly, the court treats Defendants' motion as one brought pursuant to Fed.R.Civ.P. 12(b)(6). *See* Finkelstein v. Aetna Health Plans of New York, Inc., 1997 U.S. Dist. LEXIS 10759, 1997 WL 419211, *6 (S.D.N.Y. July 25, 1997) (dismissing, upon remand for failure to permit plaintiff to replead, under Fed.R.Civ.P. 12(b)(6) amended complaint for failure to demonstrate antitrust standing), *aff'd*, ***152 F.3d 917 (2d Cir. 1998)*** (Table).

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, plaintiffs claimed as damages additional profits they lost because defendant had unlawfully acquired several failing bowling alleys in plaintiffs' market which, but for defendant's acquisition, would have closed for lack of profitability. *Id. at 481*. The Supreme Court found the essence of plaintiffs' claim was that they could not obtain "profits they would have realized had competition been reduced." *Id. at 488*. Because, as the **[**28]** Supreme Court stated, the "antitrust laws … were enacted for the 'protection of *competition,* not *competitors,*' *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* … it is inimical to the purposes of these laws to award damages for the type of injury [the loss of windfall profits] claimed here." *Id.* (italics in original) (bracketed material added). In the Court's view, plaintiffs' alleged losses of such profits flowing to plaintiffs from the expected reduction of competition would have resulted from the challenged merger between defendant and the prior owners of the failing bowling alleys regardless of whether defendant was financially capable of taking predatory actions against plaintiffs or had obtained new financing on their own thereby preserving their presence on the market. *Id. at 487*. Because plaintiffs' asserted losses did not result from any antitrust misconduct by defendant, but, rather, from the prospect of continued competition from the merged bowling alleys, the Court found that plaintiffs' injury "was not of 'the type that the statute *[Section 4 of the Clayton Act*] was intended to forestall.'" *Id.* (internal citation omitted). Thus, **[**29]** the Court stated that ***HN4***[] a *Section 4* plaintiff

> must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations … would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*.

Brunswick Corp., supra, at 489.

Because in *Brunswick* plaintiffs could not establish that their asserted injury and damage -- loss of extra profits based on reduced competition -- was of the type antitrust laws were intended to protect or that such losses flowed from business actions rendered illegal by operation of the antitrust laws, plaintiffs' damage claim was held not cognizable under *Section 4*. *429 U.S. at 488*. As the Court stated: "While respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that [predatory action against plaintiffs] which made the acquisition **[**30]** unlawful." *Id. at 488* (bracketed material added). Thus, because plaintiffs sought to recoup profits lost through increased, albeit unwanted competition to plaintiff, the Court found the injury one not proper for redress under the antitrust laws. The requirement that to have standing, an antitrust plaintiff should have incurred an antitrust injury was later extended **[*174]** to nonmerger cases. *See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* (for any antitrust violations "a plaintiff must make some showing of an actual injury attributable to something the antitrust laws were designed to prevent.") In *J. Truett Payne Co., supra*, the Court held ***HN5***[] a Robinson-Patman Act plaintiff was "not excused from its burden of proving an antitrust injury." *451 U.S. at 568*.

In *Matsushita Electric Ind. Co. v. Zenith Radio, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, the Supreme Court found that plaintiffs' claim for damages based on an alleged conspiracy to charge higher than competitive prices was barred under the *Sherman Act* because, as defendants' **[**31]** competitors, plaintiffs "[stood] to gain from any conspiracy to raise the market price [for the relevant product]." *Matsushita, supra at 583*, (citing *Brunswick, supra*) (bracketed material added). Nor, as the Court stated, can a competitor sue "to recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output … [because] such restrictions, though harmful to competition, actually *benefit* competitors by making supra competitive pricing more attractive [to such competitors]." *Id.* (italics in original) (bracketed material added). Because in *Matsushita* plaintiffs, as defendants' competitors in the U.S. market and as potential competitors of defendants in defendants' Japanese market, sought to challenge, in the Court's view, conduct beneficial to them as competitors, the Court found plaintiffs had no "cognizable claim against [defendants] for antitrust damages." *Id.* Thus, the Court held that as defendants' competitors seeking damages pursuant to *Clayton Act Section 4*, plaintiffs could not challenge under the antitrust laws noncompetitive arrangements that benefitted **[**32]** them as competitors. The requirement that an antitrust plaintiff allege it suffered a cognizable antitrust injury caused by a defendant as prerequisite to a request for injunctive relief pursuant to *Section 16 of the Clayton Act* was established in *Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*.

HN6[] The antitrust standing requirement for private actions brought under *Sections 4or 16* of the Clayton Act seeks to "avoid over deterrence resulting from the use of the somewhat draconian treble damage award," available for *Sherman Act* violations. *Todorov, supra, at 1449*. "By restricting the availability of private antitrust actions to certain parties, we ensure that suits in apposite to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." *Id.*

HN7[] The requirement of antitrust injury and standing, as a prerequisite to suit under *Section 4and 16* of the Clayton Act, has been extended to plaintiffs who as competitors in the market seek a professional credential that will enable them to charge **[**33]** higher prices for their services in that market, and a request for such relief in a federal antitrust complaint negates the existence of an antitrust injury and standing requiring dismissal of the complaint. In *Sanjuan, supra*, the Seventh Circuit held plaintiffs, psychiatrists who failed the oral portion of defendant's board certification examination, lacked antitrust standing where damages sought allegedly resulted from plaintiffs' inability to charge higher fees without such certification. As the court stated, "the claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up." *Sanjuan, **[*175]** supra, at 251* (citing cases). "Plaintiffs, who want to obtain a credential that will help them charge higher prices, have pleaded themselves out of court on their antitrust claim." *Id. at 252*. *Sanjuan* thus extends *Brunswick* and *Matsushita* to competitors who challenge the granting of a competitive advantage to a competitor in order to increase the price of their services, a purpose not protected by the *Sherman Act*.

Here, Plaintiffs **[**34]** do not claim that they were prevented from practicing emergency medicine; rather, Plaintiffs allege that because of the anticompetitive closure of the practice track they were unable to obtain the ABEM certification that would permit them to earn higher incomes as ABEM certified emergency physicians. As such, Plaintiffs' alleged damages flow directly from Plaintiffs' consequent inability to earn and benefit from a professional credential, ABEM certification, with which they expect to obtain greater compensation at a level resulting from the anticompetitive conduct they seek to condemn; therefore, the deprivation of such an economic advantage, *i.e.,* the ability to raise prices because of a competitor's noncompetitive conduct, to a competitor or prospective competitor, is an economic consequence to which the antitrust laws are indifferent. *Matsushita, supra*; *Brunswick, supra.*

Applying the requirement that a *Clayton Act Sections 4or 16* plaintiff allege a cognizable antitrust injury, courts have consistently rejected antitrust claims based on lack of antitrust standing including cases where physicians, as antitrust plaintiffs, have sought to confer economic **[**35]** advantage, in addition to board certifications, upon themselves by attacking business practices by competitors and purchasers of their services having the effect of excluding them from the market. *Balaklaw, supra* (plaintiff anesthesiologist lacked antitrust standing for action to cancel award of exclusive service contract by hospital to a competitor); *Todorov, supra* (radiologist who sought radiology department privileges to administer and read CT head scans in order to share in supercompetitive fees charged by staff radiologists for same service lacked antitrust standing as plaintiff sought to "reap" that which the competing CT scan radiologists enjoyed); *Salamon v. Our Lady of Victory Hospital, 1999 U.S. Dist. LEXIS 15954, 1999 WL 955513, *2 (W.D.N.Y. Oct. 5, 1999)* (plaintiff physician alleging restraint of trade based on defendant's exclusion from referrals for her medical services lacked antitrust standing); *Korshin v. Benedictine Hospital, 34 F. Supp.2d 133, 138 (N.D.N.Y. 1999)* (physician who lost exclusive services contract to provide anesthesiology services to hospital failed to allege antitrust injury); *Ezekwo v. American Board of Internal Medicine, 18 F. Supp.2d 271, 277 (S.D.N.Y. 1998)* **[**36]** (physician seeking hospital admission privileges and participation in an HMO failed to allege sufficient facts demonstrating injury to competition and market area and thus no antitrust injury sufficient for standing); *aff'd, 173 F.2d 844 (2nd Cir. 1999)*; *Ginsberg v. Memorial Healthcare Systems, Inc., 993 F. Supp. 998 (S.D.Texas 1997)* (physician's alleged inability to successfully practice medicine at defendant hospital, based on defendants' refusal to refer patients, declining to provide cross-coverage and black-listing, failed to allege an antitrust injury); *Finkelstein, supra, 1997 U.S. Dist. LEXIS 10759, [WL] at *5* (alleged coercive provisions imposed by combination of hospitals and insurance carrier upon plaintiff-physicians' decision making authority in care of patient-insureds failed to allege an antitrust injury). *See also* *Appraisers Coalition v. Appraisal Inst, 1999 U.S. Dist.*

LEXIS 1626, 1999 WL 89663 (N.D.Ill. Feb. 12, 1999) (real estate appraisers seeking special qualification designation from defendant **[*176]** trade organization made up of competing appraisers failed to allege antitrust injury).

A fair reading of the Second Amended Complaint, Plaintiffs' Revised **[**37]** Memorandum, Plaintiffs' Reply Memorandum, and consideration of discovery related to Plaintiffs' class certification motion demonstrates that Plaintiffs have failed to plead any cognizable antitrust injury sufficient to confer antitrust standing under either Section 4or 16 of the Clayton Act. Specifically, the Second Amended Complaint alleges that Defendants' conspiracy caused them to be denied "increases in remuneration" based on their inability to obtain ABEM certification. Second Amended Complaint P 13. Further, according to Plaintiffs, they and members of the alleged class "receive substantially less remuneration than ABEM certified physicians (in an average amount of no less than $ 50,000 annually)." Second Amended Complaint P 104. Additionally, Plaintiffs claim the loss of "increases in remuneration for which they otherwise would be qualified" if they were able to sit for and pass the ABEM certification examination through the practice track. *Id.* P P 88(a), (e), (g), (k); 109.

Plaintiffs' legal argument reinforces Plaintiffs' compensation enhancing purposes. Specifically, in connection with the allegations in support of class certification, Plaintiffs include among the common **[**38]** issues Plaintiffs assert exist with respect to each proposed class member

> ". The purpose and effect of defendants' conspiracy to restrain competition and increase the economic and other professional benefits associated with ABEM certification;
>
> ***
>
> . The artificial elevation of the prices paid by the public for the services of ABEM-certified and ABEM-eligible emergency physicians caused by defendants' actions;
>
> . The artificial reduction in the earnings of plaintiffs and proposed class caused by defendants' actions in unlawfully withholding eligibility for ABEM certification from plaintiffs and the proposed class."

Plaintiffs' Revised Memorandum at 19 (emphasis added).

Further, in contending that both Plaintiffs and members of the proposed class suffered an injury in fact caused by the Defendants' alleged antitrust violations, Plaintiffs stated that Defendants' "conspiracy has prevented all Plaintiffs from obtaining the higher salaries that ABEM certified and ABEM eligible emergency physicians command …." Plaintiffs' Memorandum at 26 (Doc. No. 70) (underlining added). Such allegations do not describe "an injury the antitrust laws were intended **[**39]** to prevent" and do not "flow[] from that which makes defendants' acts unlawful." Brunswick, supra, at 489. *See* Balaklaw, supra; Sanjuan, supra; Todorov, supra.

Additionally, the testimony of individual Plaintiffs obtained through discovery manifests Plaintiffs' primary objective in this lawsuit as that of increasing their income based on obtaining ABEM certification. For example, Dr. Daniel, the lead Plaintiff, acknowledged that obtaining ABEM certification would enable him to "command a higher hourly rate" by achieving "parity" with ABEM certified physicians who receive higher compensation. Daniel Deposition at 135-36, Appendix to Defendants' Memorandum of Law Vol. II, Exhibit K. [10] **[*177]** Dr. Timmons, another Plaintiff, testified that as a result of receiving ABEM certification in 1996, upon qualifying under the special track available to ABIM members with academic credentials, he successfully negotiated a "significant" salary increase. Timmons Dep. at 11. Dr. Timmons also stated that he is seeking $ 279,000 in damages for the period 1990-1994 representing the higher compensation he believes he would have earned had he then **[**40]** held ABEM certification during that period. Timmons Dep. at 51.

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[10] Unless indicated otherwise "Dep. at _" refers to deposition testimony of individual Plaintiffs or their expert contained in Volumes II (Keil-Wayne) or III (Alexander - Gross), Exhibit K of Appendix to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and In Support of Defendant's Cross-Motion to Dismiss for Lack of Standing (Doc. Nos. 773-775) filed under seal.

Further confirmation that such enhanced compensation upon achieving ABEM board certification based on practice track eligibility, as the goal of the instant litigation, is provided by other Plaintiffs. For example, Plaintiff Dr. Ian Cummings testified that if he were ABEM certified, he expected to be paid more by his group practice organization. Cummings Dep. at 44, 51, 70. Dr. K. Michael Keil, another Plaintiff, testified that with ABEM certification, his group practice organization for emergency services could have placed him at a hospital **[**41]** which paid $ 10 more per hour than his current hourly rate. Keil Dep. at 201. Plaintiff Dr. Phillip LaStella testified that with ABEM certification it was conceivable that he could earn more than his present income of about $ 500,000 per year. LaStella Dep. at 109. Dr. Douglas Middleton, another Plaintiff, testified that he is confident his annual income would have been as much as $ 100,000 to $ 200,000 higher, depending on the hospital at which he had been hired, if he then held ABEM certification. Middleton Dep. at 51-55. According to answers to Defendants' interrogatories, Dr. Muran's compensation as an emergency physician without ABEM certification was between $ 70,000 to $ 100,000 per year lower than it would have been with ABEM certification. Muran Answer to Interrogatory No. 17(a) dated May 28, 1999, Vol. III, Exh. K to Appendix to Defendants' Memorandum of Law in Opposition. Plaintiff Dr. Kurt Papenfus estimated, without particulars, his annual compensation loss from his lack of ABEM certification to be about $ 1 million over a 10 year period. Papenfus Answer to Defendants' Interrogatory No. 17(a) dated July 10, 1999. *Id.*

Plaintiffs' expert, Dennis W. Carlton, Ph.D., who **[**42]** holds a doctorate in economics from the University of Chicago, in the course of deposition testimony explaining the rationale for his multiple regression analysis to support Plaintiffs' request for class certification, discussed in Section III, *infra,* also confirmed that Plaintiffs' ultimate objective in bringing this lawsuit is to benefit themselves economically through increased compensation by obtaining ABEM certification:

> Q. Isn't it true that the plaintiffs in this case are seeking a credential that will help them charge higher prices?
>
> A. I think plaintiffs are seeking a credential to which they believe they're entitled by virtue of their qualifications that would be reflected in the marketplace <u>as a higher price than they are currently earning.</u>
>
> Q. In other words, they believe that if board certified, <u>they'll be able to make more money?</u>
>
> A. <u>Correct.</u>
> ***
>
> Q. And you believe that if the members of the class do get the ABEM credential that they would then be <u>able to charge **[*178]** higher prices</u> than they're currently charging for their services?
>
> A. <u>Yes,</u> I believe that.

Deposition of Dennis W. Carlton, Ph.D., Carlton Dep. **[**43]** at 334-36 (underlining added). "Indeed, if certification did not typically result in higher wages, it is not clear why individuals [including Plaintiffs] would have an incentive to become certified." Reply Affidavit of Dennis W. Carlton, Ph.D., dated July 12, 2002 (Doc. No. 798) ("Carlton Reply Affidavit") P 14 (bracketed material added).

Thus, based on the allegations presented in the Second Amended Complaint, Plaintiffs' supporting legal memoranda, and the record on Plaintiffs' motion, through the relief Plaintiffs request, they seek to qualify for ABEM certification and damages for being prevented from obtaining ABEM certification, for the purpose of obtaining higher prices for their services in the market for ABEM physicians and ABEM eligible physicians and, but for the alleged wrongful closure of the practice track, damages representing the loss of such higher income as they have pleaded. As prospective competitors of ABEM physicians or ABEM eligible physicians who seek higher income based on ABEM certification, Plaintiffs' requested relief is not recognized as a permissible objective under the antitrust laws, and, as such, Plaintiffs lack standing. *Sanjuan, supra;* **[**44]** *Todorov, supra.*

Plaintiffs advance several grounds to defeat Defendants' cross motion. First, Plaintiffs contend that the requirement of antitrust injury as an element of standing should be resolved at trial. Plaintiffs' Reply Memorandum at 7-9. However, there is no merit to this contention as courts frequently dismiss complaints in antitrust actions prior to trial for insufficient allegations of antitrust injury and standing. *See* *Sanjuan, supra* (dismissing complaint for lack of standing based on absence of showing plaintiff had suffered antitrust injury affirmed); Korshin, supra (same); Salamon, supra (same) Finkelstein, supra (same). *See also* Balaklaw, supra (granting summary judgment against plaintiff who failed to demonstrate antitrust injury and therefore lacked standing); Todorov, supra (same); The Appraisers Coalition, supra (same). *Cf.* Matsushita, supra (recognizing on motion for summary judgment unavailability of Sherman Act remedies based on suit by plaintiff competitors challenging conspiracy to raise prices in defendant **[**45]** competitors' domestic market). As noted, standing issues are to be determined based on the material allegations in the complaint. Vazquez, supra; Finkelstein, supra. Hence, it is proper to determine Plaintiffs' antitrust standing at this stage of the proceedings.

Second, Plaintiffs argue that sellers and producers including "injured competitors" against whom the antitrust misconduct was directed have been held to have standing to enforce antitrust laws. Plaintiffs' Reply Memorandum at 10 (citing cases). Plaintiffs' cited authorities do not support such a broad generalization and are, in any event, inapposite. For example, in Full Draw Productions v. Eastern Sports, Inc., 182 F.3d 745 (10th Cir. 1999) trade show operators' claims of group boycott by suppliers were found to establish standing based on the rule that group boycott claims do not require that plaintiffs and defendant competitors operate at the same market level. Full Draw, supra, at 745 (citing cases). In Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983), plaintiff had standing to challenge defendants' effort to induce boycott **[**46]** of plaintiff's trade show which was sponsored by plaintiff to increase competition against defendant for cable TV programming. Crimpers Promotions, **[*179]** supra, at 294. Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957) also involved a boycott claim based on an alleged blacklisting of plaintiff, a professional football player. In Municipal Utils. Bd. v. Alabama Power Co., 934 F.2d 1193 (11th Cir. 1991) the court found municipal electric suppliers had standing to challenge a state sponsored retail market allocation scheme to benefit retail electrical cooperatives which competed with plaintiffs. Here, the Second Amended Complaint contains no group boycott or market division allegations. As Plaintiffs do not allege a group boycott or an unlawful market allocation scheme among competitors, the caselaw upon which Plaintiffs rely fails to establish that Plaintiffs enjoy antitrust standing. [11] Moreover, unlike the instant matter, in none of these cases did plaintiffs seek to gain an economic advantage the would enable them to charge higher prices.

[47]** Nor does Plaintiffs' reliance on Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) and Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), Plaintiffs' Reply Memorandum at 14, 15-16, support Plaintiffs' motion. In *McCready,* the Supreme Court upheld antitrust standing for a subscriber of health care insurers' coverage challenging the insurer's arbitrary refusal to pay for a licensed psychologist's therapy services while allowing reimbursement for psychotherapy services by psychiatrists. As such, the Court found plaintiff's standing depended on a finding of direct financial harm to plaintiff deriving from her position as a consumer not as a supplier of psychotherapy services but which was the necessary

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[11] Despite Plaintiffs' contention at oral argument, the court finds Plaintiffs have not alleged a group boycott. ***HN8***[] To be actionable under the antitrust laws, boycotts or concerted refusals to deal "generally involve[] joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284, 292, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985) (citing authorities and cases) (underlining added). However, Plaintiffs have alleged that "defendants' unlawful conspiracy in closing the practice track has precluded the plaintiffs ... from attaining ABEM certification or ABEM eligibility and thereby competing with ABEM eligible physicians." Second Amended Complaint P 8 (underlining added). Plaintiffs construe their allegations in a similar manner. "In the present case, plaintiffs have clearly alleged that there is a market for ABEM - certified emergency - medicine physicians to which they have been denied access." Plaintiffs' Reply at 11. (underlying added). It is unclear how Plaintiffs can be considered competitors in the relevant market if they allege the conspiracy deprives them of that status. Significantly, in each case relied on by Plaintiffs, the plaintiff was an established competitor of defendants. However, assuming for the sake of analysis that Plaintiffs have asserted a group boycott because, as discussed, Plaintiffs seek to benefit from the same credential that will enable them to realize higher compensation -- and thus costs to consumers -- their inability to demonstrate a procompetitive effect by lowering prices through greater competition, resulting from greater access to the market, defeats antitrust standing. Even allowing for application of the principles of liberal construction and alternate theories of pleading, the court fails to see how Plaintiffs can be found to have asserted group boycott claims sufficient to establish antitrust standing on that basis.

result of the conspiracy to withhold payments to the psychologists as competitors of the psychiatrists. *McCready, 457 U.S. at 483-84*. No similar direct harm to Plaintiffs following from an arbitrary restriction on competition is alleged here, rather, Plaintiffs seek to raise the price for their services as they gain professional competitive parity with **[**48]** ABEM physicians and ABEM eligible physicians. As such, *McCready* provides no **[*180]** support to Plaintiffs' efforts to establish antitrust injury and standing.

In *Calderone, supra,* a landlord sued for decreased rental income caused by defendants' conspiracy to force the showing of "inferior" films at plaintiffs' movie houses thus reducing the landlord's rental revenue. *Calderone, 454 F.2d at 1294*. Applying Second Circuit precedent, the court in *Calderone* found plaintiff lacked standing under *Section 4 of the Clayton Act* as plaintiff was not within the target area of the antitrust conspiracy, "*i.e.,* a person against whom the conspiracy was aimed, such as a competitor of the persons sued." *Id. at 1292*. However, in *Crimpers, supra,* the Second Circuit held that following holdings of the Supreme Court subsequent to*Calderone,* as to the scope of *Section 4 of the Clayton Act*, "courts in this circuit should start their analysis of standing under *Section 4* with the Supreme Court opinions rather than engage in extensive parsing of *Billy Baxter* [*Inc. v. Coca-Cola Co. 431 F.2d 183 (2d Cir. 1970)]* and *Calderone.* **[**49]** " *Id.* (citing authorities criticizing the "target area approach" to determinations of antitrust standing applied in *Billy Baxter* and *Calderone*). *Crimpers, supra, at 292* (Friendly, J.) (bracketed material added). ***HN9***[] "Courts of this circuit ... are compelled, to follow approaches adumbrated by the Supreme Court ... without concern whether the results are consistent with language in earlier Second Circuit cases." *Id.* Accordingly, Plaintiffs' assertion that because Defendants' alleged conspiracy was directed at them, even if true, is in itself insufficient to establish standing unless Plaintiffs' allegations also comport with more recent and relevant Supreme Court holdings, discussed *supra,* propounding the prerequisite of antitrust standing for *Section 4* cases. *See* *Balaklaw, supra* (analyzing antitrust standing issue as to physician's boycott and concerted refusals to deal claims based on Supreme Court cases without reference to prior Second Circuit standing caselaw considering whether antitrust plaintiff was 'target' of alleged antitrust conspiracy). Thus, *Calderone's* application of the 'target area' test for antitrust standing provides **[**50]** no support to Plaintiffs as such approach is inconsistent with the Second Circuit's later decision in *Crimpers, supra.*

Third, Plaintiffs seek to distinguish *Sanjuan* on the basis that plaintiffs in that case, unlike Plaintiffs, failed to allege an unlawful exercise of market power, a reduction in output, or exclusion from competition in that, in *Sanjuan,* plaintiffs, who continued to practice in their specialty, were not precluded from taking defendant's certification examination, rather, they were unable to pass it. Plaintiffs' Reply Memorandum at 10-11. Plaintiffs further argue that this court has previously sustained the Amended Complaint and Second Amended Complaint against Defendants' attempts to dismiss. *Id.* at 11 (citing *Daniel I, supra* and *Daniel II, supra*). However, as explained in connection with the court's consideration of Plaintiffs' argument based on the law of the case doctrine, Discussion, *supra,* at 13-14, the court has not previously been presented with the specific ground for dismissal now interposed by Defendants, *i.e.,* that Plaintiffs lack standing based on a failure to allege a cognizable antitrust injury sufficient to **[**51]** permit recovery or injunctive relief pursuant to *Sections 4and 16* of the Clayton Act. Thus, while the court has sustained the Amended and Second Amended Complaint against Defendants' earlier motions to dismiss on grounds other than asserted here by Defendants, it does not follow that Plaintiffs can avoid scrutiny for failing to allege the existence of any cognizable antitrust injury and standing.

Likewise unavailing is Plaintiffs' effort to distinguish *Sanjuan* on the ground that **[*181]** because in *Sanjuan* plaintiffs were found by the court to be defendants' competitors the court's finding that plaintiffs lacked antitrust standing is inapplicable to Plaintiffs' allegations. Plaintiffs' Reply Memorandum at 11. Particularly, Plaintiffs contend that they are not yet in competition with ABEM certified or eligible physicians because they have not gained the opportunity to obtain ABEM certification (by qualifying through the practice track to take the ABEM examination), and thus cannot be said to compete with ABEM certified or eligible physicians. *Id.* at 11-12. Plaintiffs reason that because Plaintiffs are not competitors who challenge an anticompetitive practice that if engaged in **[**52]** by them will allow them to charge higher prices, the reasoning of *Sanjuan* -- holding that competitors who challenge anticompetitive practices beneficial to such competitors lack antitrust standing -- as to the requirements of antitrust injury and standing is inapplicable to this action. *Id.*

Specifically, *Sanjuan* holds that a competitor who "seeks to gain a credential that will help them charge higher prices" as competitors who enjoy the credential, "have pleaded themselves out of court on the antitrust claim." *Sanjuan, supra, at 251*. Assuming, *arguendo,* Plaintiffs in fact do not compete in the relevant market, *i.e.,* the market for ABEM or ABEM eligible physicians, because they are unable to qualify for the ABEM certifying examination, it is undisputed that by this action Plaintiffs seek to become such competitors through a request for equitable relief compelling reopening the practice track to enable Plaintiffs to qualify to take the ABEM certification examination and thereby achieve ABEM certification. Therefore, Plaintiffs' use of the antitrust laws to acquire a credential that, according to the allegations in the Second Amended Complaint, has **[**53]** as a primary objective giving Plaintiffs the capacity to enter the relevant market so they may substantially increase their compensation by charging more for their services upon obtaining ABEM certification thereby matching the compensation earned by their future competitors, equally fails to allege an antitrust injury and deprives Plaintiffs of standing under *Clayton Act Sections 4and 16*. Plaintiffs offer no reasoned basis to distinguish, for purposes of the relevant standing analysis, between competitors who possess an income enhancing credential and litigants who seek access to that credential in order to compete with those who have it. Thus, the court finds that Plaintiffs' status as competitors of ABEM or ABEM eligible physicians or as persons seeking to become such competitors is an irrelevant distinction to whether they have or can allege an antitrust injury. In either case, because their goal is to gain the credential that will cause noncompetitive prices to inure to Plaintiffs' benefit, their claim for relief falls outside the ambit of antitrust protection and they lack standing under the *Clayton Act*. As such, Plaintiffs' effort to avoid the holding in*Sanjuan* on this **[**54]** basis fails.

Equally unpersuasive is Plaintiffs' argument that when more than one competitor or potential competitor seeks, but is refused an opportunity to obtain, certification, such denial of access to the relevant market "evinces a reduction in competition in the market in general," thereby providing sufficient nexus to one of the fundamental purposes of the antitrust laws sufficient to create standing. Plaintiffs' Reply Memorandum at 14. ***HN10***[] The requirement for standing that an antitrust plaintiff, or group of plaintiffs, sufficiently allege an antitrust injury does not depend on an allegation that the target conduct operates to reduce competition. Rather, the requirement of an antitrust injury turns not on the illegality of the defendant's conduct -- **[*182]** indeed, such illegality is presupposed -- but on the fact that a plaintiff seeks to engage in or benefit from the same activity. *See* *Matsushita, supra, at 583* (challenged conspiracy to charge higher prices violates ***antitrust law*** but does not injure plaintiffs because as defendant's competitors, plaintiffs "stand to gain from any conspiracy to raise the market price ...."); *Brunswick, supra, at 489* ("the **[**55]** injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."); *Todorov, supra at 1453* (plaintiffs "damages are premised on his ability to profit while consumers paid an artificially inflated price."). Thus, as the alleged anticompetitive conduct alleged by Plaintiff -- arbitrary closure of the ABEM practice track -- operates to benefit competitors (including prospective competitors) who supply the relevant services in the market, Plaintiffs have no standing to challenge it. *Matsushita, 475 U.S. at 583*.

Finally, Plaintiffs attempt to avoid the holding in *Sanjuan* that the antitrust laws may not be invoked by a supplier to obtain a credential by which to increase the supplier's income. Specifically, Plaintiff argue they will benefit consumers and competitors because, if successful, Plaintiffs' lawsuit will, over time, effect a lowering of the price of emergency medical services, provided by ABEM certified and ABEM eligible physicians, resulting from "increased competition once the class members join the ABEM-eligible pool." Plaintiffs' Reply Memorandum at 12-13. This contention **[**56]** is without merit for several reasons. First, Plaintiffs' theory that reopening the ABEM practice track will eventually cause a reduction in the price of ABEM physician and eligible physician services through the presence of large numbers of additional ABEM or ABEM eligible physicians, is an expectation not advanced in the Second Amended Complaint nor supported by the record. While the Second Amended Complaint repeatedly charges that Defendants' conspiracy created and maintained artificially high prices for ABEM physicians' and ABEM eligible physicians' services, *see e.g.,* Second Amended Complaint PP 14, 16, 20(a), 21(a), 57, 82, 87, 88(h), 92, 95, 96 and 104, no where do Plaintiffs claim that a reopening of the practice track will result in lower prices to consumers of such services either in the short term or thereafter. Accordingly, there is no allegation, which, if its truth were assumed, supports Plaintiffs' contention that Plaintiffs' cause of action has an objective consistent with the purposes of the antitrust laws. *See* *Physicians Health Services, supra* (standing determined based on pleadings assuming the truth of the allegations); *Vazquez, supra* (same).

[57]** At oral argument, Plaintiffs contended that the court should reasonably infer from Plaintiffs' allegations of noncompetitively higher prices generated by the conspiracy that upon reopening of the practice track, the resulting additional ABEM certified physicians in the market will cause prices to decline. However, given the plethora of allegations asserting, as discussed, Discussion, *supra,* at 21-25, that Plaintiffs' objective is to advance their own economic interest by obtaining access to the same higher levels of compensation created by the charged conspiracy, the notion that Plaintiffs will also succeed in lowering such compensation to their economic detriment is an inference that is neither reasonable nor plausible. Simply put, Plaintiffs have no natural economic self-interest in achieving such a result. Whether given the economic complexities of the health care services market, including a high degree of government regulation and financial involvement, the normal laws of supply and demand can even be applied requires sophisticated **[*183]** economic analysis that is neither asserted nor presaged by anything within the four corners of the Second Amended Complaint drawing any inferences **[**58]** in Plaintiffs' favor. Significantly, Dr. Carlton had no opinion on the question whether prices to consumers of emergency medical services were likely to fall if Plaintiffs succeeded in the litigation. Carlton Dep. at 316-17. As such, the court finds Plaintiffs' assertion that their allegations can be read to reasonably infer that lower prices for emergency medical services will result from their lawsuit, if successful, to be without foundation in the pleadings and record, and an unsubstantiated afterthought.

Even if Plaintiffs had alleged that allowing their entry into the market for ABEM and ABEM eligible physicians resulting from this litigation would cause the price for such services to decline, a similar asserted basis for the existence of an antitrust injury and standing was rejected in *Todorov v. DCH HealthCare Auth., supra.* In *Todorov,* a neurologist to whom defendant had granted staff privileges to practice neurology, later requested additional privileges to perform CT scans of a patient's head. Plaintiff sought, but defendant refused to grant, radiology privileges so he could charge for the interpretation of CT scans instead of the defendant radiologists **[**59]** who had been conducting the scans and performing this diagnostic service for a fee. *Todorov, supra, at 1442*. Finding plaintiff had suffered no antitrust injury, the court upheld the grant of summary judgment against plaintiff because it found that plaintiff sought to share in the "supercompetitive profits" enjoyed by the radiologists as a result of the alleged anticompetitive pricing imposed by the radiologists on the patients and their insurers. *Id. at 1453-54*. As such, the court in *Todorov,* stated that plaintiff's "alleged damages equal the profits he would have garnered had he been able to share a part of [defendant] radiologists' supercompetitive, or monopoly, profits. This is not antitrust injury." *Id. at 1453* (bracketed material added).

As relevant to Plaintiffs' contention that they seek to reduce prices by increasing supply, the court in *Todorov* also considered whether the possibility that by seeking entry to the relevant market plaintiff could, through engendering greater competition with the radiologists, effect an eventual reduction in the cost of interpreting CT head scans as a result of his lawsuit and establish standing. *Todorov, supra, at 1454.* **[**60]** The court rejected this assertion because plaintiff's ability to realize a profit depended on maintaining a noncompetitive higher price and as plaintiff could realize no profit at a competitively established market price, the court found that plaintiff's only economic interest was to seek entry into the market to share in the alleged supercompetitive pricing of his would-be competitors. *Id. at 1454*. Further, in *Todorov* as in the instant case, plaintiff did not allege that his purpose was to drive down prices for the services at issue. *Id.* Likewise here, even considering Plaintiffs merely seek entry into the market for ABEM physicians' and ABEM eligible physicians' services and further positing that such market access through ABEM certification under the practice track could eventually reduce prices for such services as actual or prospective competitors and suppliers of such services, Plaintiffs' immediate and long term economic interest lies only in keeping the price of these services artificially elevated so that they may use ABEM certification to obtain the extra degree of compensation they specifically allege they will receive upon obtaining such certification. **[**61]** Thus, as in *Sanjuan* and *Todorov,* because Plaintiffs allege no **[*184]** injury the antitrust laws are intended to prevent, Plaintiffs lack standing. [12]

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[12] The fact that in *Todorov* plaintiff sought lost profits as an independent business entity and in this case, Plaintiffs seek extra compensation typically as employees of a hospital or medical corporation providing services to a hospital under contract is irrelevant. In either event, the alleged lost profits in *Todorov* or the lost additional compensation in the form of extra salary

Plaintiffs further argue that the large number of potential new entrants into the relevant market, that Plaintiffs believe will be the result of their lawsuit if successful, also distinguishes this case from those relied upon by Defendants. Plaintiffs' Reply Memorandum at 12. However, even it is supposed that a broader **[**62]** impact on competitiveness within the relevant market will result from Plaintiffs' entry into the relevant market, the economic interests of Plaintiffs upon which this action is based remains one that has been rejected by the courts. Discussion, *supra,* 19-26. While entry of large numbers of ABEM physicians and ABEM eligible physicians may result in greater competition among suppliers of emergency medical services, including a possible future reduction in the price of the emergency medical services rendered by suppliers, such potentialities do not avoid a finding that where present or prospective competitors seek to reap the benefits of supercompetitive pricing conferred by the alleged anticompetitive scheme, antitrust injury and standing are not present. *See* *Matsushita, supra, at 583* (potential competitors' attack on nonprice restrictions imposed by defendant cartel that increase price or limit output lacks antitrust standing); *Todorov, supra, at 1453* (entry into market by potential competitor which may produce lower prices does not negate fact that plaintiff's damages represent share of lost "profits" based on supercompetitive prices imposed by **[**63]** defendant competitors thereby defeating antitrust standing for plaintiff).

Plaintiffs' request for equitable relief presents the same deficiency, in demonstrating the existence of antitrust standing, as does Plaintiffs' request for damages, because removing the market entry barriers alleged against Defendants at issue to achieve greater supply and "unrestrained competition," albeit an "altruistic" motive, is not Plaintiffs' primary objective. *Todorov, supra, at 1454*. Rather, as discussed, Plaintiffs seek ABEM certification as a device that will enable them to gain the benefits of supercompetitive pricing presently enjoyed by ABEM physicians and ABEM eligible physicians, a goal that disqualifies them from using the equity power of the court to obtain market access. *Todorov, supra, at 1453-54*. As such, the court finds none of Plaintiffs' contentions overcome Defendants' grounds for dismissal for lack of antitrust standing. Accordingly, Plaintiffs' requests for damages and equitable relief are not of the type the antitrust laws are intended to promote, and Plaintiffs lack standing on this basis.

In post argument briefing, Plaintiffs rely on *Brader v. Allegheny General Hospital, 64 F.3d 869 (3d Cir. 1995)* **[**64]** and *Ertag v. Naples Community Hospital, 121 F.3d 721 (11th Cir. 1997)* (*per curiam*) (Table), an unreported decision of the Eleventh Circuit. [13] Neither case requires a different conclusion. In *Brader,* a case involving plaintiff's challenge to loss of hospital staff privileges, the court distinguished *Todorov* on the ground that unlike the complaint in the case before the court in *Todorov,* plaintiff's **[*185]** alleged loss of income resulting from the wrongful exclusion from the relevant market was potentially anticompetitive because it reflected an attempt by plaintiff's competitors to reduce competition. *Brader, supra, at 869*. To whatever extent the facts of *Todorov* may differ from *Brader,* in the instant case, unlike*Brader,* the challenged violation is not simply an exclusion of a competitor from the market but, as evidenced by Plaintiffs' allegations, Plaintiffs' challenge constitutes an attempt to obtain supercompetitive benefits which, as in *Todorov,* requires finding that Plaintiffs lack antitrust standing.*Ertag* is also easily distinguishable as there the plaintiff neurologists, according to the court's reading of the **[**65]** complaint, sought lost profits which they could reasonably expect to have realized but for defendants' attempts to enforce monopoly practices resulting from the defendant hospital's decision to award an exclusive contract for radiological services. Attachment to Doc. No. 871 at 2, 7. In contrast, as discussed, *supra,* at 32-34, Plaintiffs' allegations demonstrate they seek to share in the same super competitive pricing without any corresponding allegation that their presence in the market will result in lower prices to the consumers of their services. As such, *Ertag* provides no support for Plaintiffs' claims to antitrust standing. Moreover,*Ertag's* holding, granting standing to a physician's displaced by a hospital's award of an exclusive contract to the physician's competitor for specialized physicians services to challenge the award on antitrust grounds is contrary to controlling Second Circuit authority. *See* *Balaklaw, supra.*

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claimed as damages in the instant action derive from artificially high pricing levels created by the antitrust violation challenged by the respective plaintiffs.

[13] A copy of the decision is attached to Doc. No. 871.

[66]** In addition, Plaintiffs are not efficient enforcers of the antitrust laws and lack standing for this reason as well. ***HN11***[] For standing to sue under *Section 4* or *Section 6 of the Clayton Act*, the Supreme Court requires that, in addition to meeting the threshold requirement of having alleged an antitrust injury, a plaintiff also must be an efficient enforcer of antitrust laws. *Cargill, supra, at 110, n. 5*; *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 542, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*; *Balaklaw, supra, n. 9 at 797*. Defendants contend that because Plaintiffs' primarily seek to enhance their compensation as a result of the instant litigation, they have an interest directly opposed to consumers of their services, and are thus inadequate surrogates for those who have a more immediate stake in the antitrust claims presented by this case. Defendants' Memorandum at 15 (citing cases). ***HN12***[] The Supreme Court requires consideration of several factors to determine whether a plaintiff in a federal antitrust action can be an efficient enforcer of such laws: the (1) nature of a plaintiff's **[**67]** injury, whether as a consumer or competitor; (2) directness or speculative nature of the relationship between the alleged antitrust violation and plaintiff's alleged injury; (3) potential for duplicative recovery or complex apportionment damages; and (4) existence of a more direct victim of the alleged antitrust violation. *Contractors of California, supra, at 538, 539, 545*. *See also* *Volvo North American v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 66 (2nd Cir. 1988)*. Additionally, some, but not all, of the above factors are relevant to deciding whether a plaintiff has standing to seek injunctive relief pursuant to *Section 16* of the Clayton Act. *Cargill, supra, at 111, n. 6*; *Volvo, supra, at 66*. Applying these factors to Plaintiffs' allegations, the court finds Plaintiffs are not efficient enforcers as to their *Sections 14and 16* claims.

First, Plaintiffs' allegations of the nature of their alleged injury demonstrate, as discussed, Discussion II B, *supra,* at 15-38, they have not alleged a cognizable form of **[*186]** antitrust injury. Plaintiffs who seek access to a credential that, as alleged by Plaintiffs, **[**68]** will enable them to enjoy, as competitors, noncompetitive prices, *i.e.,* salaries, for their services, do not seek relief for a wrong the antitrust laws were intended to forestall. *Sanjuan, supra.*

Second, Plaintiffs' injuries are indirect. It is the hospitals which provide emergency medical services and thus employ or contract for emergency physicians, including Plaintiffs and ABEM physicians and ABEM eligible physicians, the insurers of the patients they treat and the self-paying patients themselves, who are directly injured as a result of the Defendants' alleged conspiracy to maintain artificially high prices for emergency service physicians through an arbitrary restriction on access to ABEM certification. *See* *Blue Shield of Virginia v. McCready, 457 U.S. 465, 479, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (insurer's refusal to reimburse insured for psychotherapy services provided by a psychologist as opposed to those provided by physicians and psychiatrists held to state a cause of action for restraint of trade for which the insured had standing to sue under *Clayton Act Section 4*). In the market for emergency medical services, the patient is **[**69]** not the most immediate purchaser of such services. The need for immediate medical treatment often caused by a serious health problem requiring emergency room services differs significantly from the typical selection or contact of a physician by a patient seeking more routine care, a decision often made under non-urgent circumstances. Indeed, the emergency patient in many instances will be unable to make any conscious selection of an emergency physician. Hospitals, as providers of emergency medical services by physicians, through contract or employment, competent to provide emergency medical services and health care insurers, including employers and government, that reimburse the hospitals for the emergency care provided to individual patients, therefore have the most direct economic interest in the cost of such services, and, hence, are most directly affected by any conspiracy to maintain artificially high emergency physician compensation levels. It is unrealistic to expect typical emergency room patients to complain about the costs of the treating physician, or for that matter whether such physicians are even board certified, and initiate an antitrust suit to challenge it. Accordingly, **[**70]** the alleged injury to Plaintiffs, artificially lowered compensation as a result of the claimed conspiracy, potential competitors of such ABEM physicians and ABEM eligible physicians, is in direct opposition to the economic interests of the most immediate purchasers of such services in obtaining lower costs. Even the ultimate economic interest of the patient-insured in lower costs is superior to a competitor and supplier of such services. *Compare* *McCready, supra, at 484* (insured's unreimbursed costs caused by defendant's arbitrary refusal to pay for psychotherapy provided by psychologists where insured's and psychologist's interests were "intertwined" sustained insured's antitrust standing under *Section 4*). No similar intertwining of consumers' and Plaintiffs' interests exist in the instant case.

Further, for the purposes of standing, the potential harm to Plaintiffs is somewhat speculative as even if Plaintiffs were allowed to sit for the ABEM certification examination, it cannot be predicted with certainty how many of the Plaintiffs and proposed class members will ultimately qualify for and pass the ABEM examination. Physicians who sat for the ABEM examination under **[**71]** the practice track had a failure rate of 25%, significantly higher than the 7% failure rate for eligible physicians based on completing the ABEM residency **[*187]** requirement. Report of Alan S. Frankel, Ph.D, Exh. A to Ubersax Declaration at 21.

Third, the court finds, however, that the potential for duplicative or complex apportionment of damages is insignificant as Plaintiffs do not sue derivatively but rather on their own behalf.

Finally, as discussed, *supra,* there are more direct 'victims,' *i.e.,* emergency service hospitals, health care insurers and insured, of the alleged antitrust violations asserted by Plaintiffs in this case. Accordingly, in this case, the majority of the relevant factors for determining whether Plaintiffs are efficient enforcers weigh against Plaintiffs, and Plaintiffs therefore also lack standing on this ground. In sum, for the reasons discussed, Defendants' motion to dismiss for lack of antitrust standing should be GRANTED.

Because, however, the matter is before the court for a report and recommendation, should the District Judge not accept the recommendation that Defendants' cross motion to dismiss be granted, it is necessary to consider Plaintiffs' **[**72]** motion for class certification. Accordingly, in the interest of completeness and to avoid delay, the court turns to Plaintiffs' motion for class certification.

III. Plaintiffs' Request for Class Action Certification.

Plaintiffs seek class certification for this action under *Rule 23 of the Federal Rules of Civil Procedure* ("Rule 23"). *Fed.R.Civ.P. 23(a)-(f)*. In particular, Plaintiffs contend the allegations of the Second Amended Complaint support certification pursuant to *Rule 23(a), (b)(2)and (b)(3)*. Plaintiffs' Motion to Certify Class filed February 24, 1994 ("Plaintiffs' Motion") (Doc. No. 69); Plaintiffs' Revised Memorandum of Law at 2.

Rule 23(a) sets forth four prerequisites for class action certification: ***HN13***[] "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed.R.Civ.P. 23(a)*. *Rule 23(b)*, as relevant, further requires that class status may be granted to an action if *Rule 23(a)* prerequisites **[**73]** are satisfied and additionally

> ***HN14***[] (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b)(2)and (3) (emphasis added). [14]

HN15[] In determining the required elements of class action superiority, relevant to a proposed certification pursuant to *Rule 23(b)(3)*, the court shall consider "(A) the interest of members of the class in individually controlling the prosecution **[**74]** … of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forums; **[*188]** (D) the difficulties likely to be encountered in the management of a class action." A class or subclass may be certified as to particular issues. *Fed.R.Civ.P. 23(c)(4)*.

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[14] As Plaintiffs discuss first the eligibility of Plaintiffs' motion under *Rule 23(b)(3)*, Plaintiffs' Revised Memorandum at 25, the court will follow this order.

Rule 23 also requires that adequate notice be provided to the class members and in the case of certification pursuant to *Rule 23(b)(3)*, an opportunity to request an 'opt out' exclusion from the class. *Fed.R.Civ.P. 23(c)(2)*.

Here, the proposed class is described as "all physicians who have or are now practicing medicine in the United States and who, but for the closing of the [ABEM] practice track on June 30, 1988, are now, or with the passage of time will be eligible to sit for the ABEM certification examination." Second Amended Complaint P 44(a) (bracketed material added). Plaintiffs maintain that the proposed class meets all prerequisites of *Rule 23(a)* as well as the grounds for certification required under *Rule 23(b)(2)and (b)(3)*. Plaintiffs' Revised Memorandum **[**75]** at 2.

In opposing Plaintiffs' request for a class action status, Defendants argue that (1) the proposed class is not objectively definable because determinations of eligibility for class membership by potential class members will be administratively difficult thus rendering the identification of potential class members not reasonably ascertainable. Defendants' Memorandum at 48-49; (2) the evidence required to establish how the practice track closure harmed individual class members and the determination of resulting damages cannot be established on a classwide basis, *id.* at 50-60; 64-65; (3) Defendants' defenses to each Plaintiff's claims will require individual proof, *id.* at 61; (4) the named Plaintiffs' claims are not typical of the claims of absent members of the proposed class, *id.* at 65-67; class action for this class is not superior to individual actions because of the possible need for numerous mini-trials relative to issues of causation and damages, *id.* at 68-69; and certification pursuant to *Rule 23(b)(2)* is unavailable as Plaintiffs' money damage claims predominate. *Id.* at 69-72.

HN16[] Well established principles applicable to requests for *Rule 23* class certification **[**76]** guide the court's determination. First, the decision to grant certification is discretionary with the court. *In re Holocaust Victims Assets Litigation, 225 F.3d 191, 201 (2d Cir. 2000)* ("the District Court has broad discretion in certifying the class."). "If the Court finds both the requirements of *23(a)* have been met, and that the claims fall within the scope 23(b)(3), the Court may, in its discretion, certify the class." *In re Buspirone Patent Litigation, 210 F.R.D. 43, 57 (S.D.N.Y. 2002)* (citing cases). Whether Plaintiffs have stated a cause of action or will ultimately prevail on the merits at trial is irrelevant; the threshold question is "whether the requirements of *Rule 23* are met." *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*. However, in assessing a request for class certification the court may also consider the "evidentiary record including any affidavits and results of discovery." *In re Buspirone Patent Litigation, supra at 56*. Plaintiffs seeking class status bear the burden that each requirement under *Rule 23* has been satisfied. *Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999),* **[**77]** *cert. denied sub nom, Metro-North Commuter R.R. Co., 529 U.S. 1107, 146 L. Ed. 2d 791, 120 S. Ct. 1959 (2000)*. Class actions are favored in the litigation of antitrust claims. *In re Playmobil Antitrust Litigation, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998)* ("Because of the important role that class actions play in the private enforcement of antitrust actions, courts resolve doubts in favor of certifying the class."). Questions regarding class certification should be resolved **[*189]** "in favor of and not against the maintenance of class action." *Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968)*.

HN17[] In antitrust cases, the required degree of commonality of issues is generally satisfied by pleading an antitrust conspiracy among defendants. *In re Alcoholic Beverages Antitrust Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982)*. "The very nature of the case -- involving allegations of antitrust conspiracy among defendants -- appears to insure that the commonality requirement is satisfied." *Id.* The claims of those requesting class certification are deemed typical of those of the class where "the claims of the representative plaintiffs **[**78]** arise from the same course of conduct that gives rise to the claims of the other class members, where the claims are based on the same legal theory and where the class members have allegedly been injured by the same course of conduct as which allegedly injured the proposed representatives." *In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 511 (S.D.N.Y. 1996)* (citing authorities). Identicality of situations between the "named representatives and the class members is not required." *Id.* (citations omitted). "Typicality refers to the nature of the claim of the class representatives and not to the specific facts from which the claim arose or relief is sought." *NASDAQ, supra, at 510*. The commonality and typicality requirements "'tend to merge' because 'both serve as guideposts for determining whether … the named plaintiff's claim and class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.'" *Caridad, supra, at 290* (quoting *General Telephone Co. v. Falcon, 457 U.S. 147, 157 n. 13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982))*.

Further, **[**79]** ***HN18***[] in judging whether the alleged common issues predominate over individual issues, *Rule 23(b)(3)* does not require that every issue in the case be similar to every other issue presented by each class member's case. *Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 37 (S.D.N.Y. 1977)*, *appeal dismissed*, *574 F.2d 656 (2d Cir. 1978)* ("the predominance requirement calls only for predominance, not exclusivity, of common questions."). In determining whether common questions predominate, the court's inquiry is directed primarily to classwide questions of liability. *In re Blech Sec. Litigation, 187 F.R.D. 97, 107 (S.D.N.Y. 1999)*; *Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 43 (S.D.N.Y. 1990)*.

HN19[] The *Rule 23(b)(3)* predominance requirement "tests whether [a] proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 623, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)* (bracketed material added and deleted). "In order to meet the predominance requirement of *Rule 23(b)(3)*, a plaintiff must establish that the issues **[**80]** in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject to individualized proof," *In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 136 (2d Cir. 2001)* (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000))*.

HN20[] That the damages suffered by class members in antitrust actions may vary does not in itself require a disqualification for class action status. *In re Visa Check/MasterMoney Antitrust Litigation, supra, at 139-40*; *In re Buspirone Patent Litigation, supra, at 59*; *Playmobil, supra, at 246*; *NASDAQ, supra, at 523*. "Moreover even if it could be shown that some individual class members were not **[*190]** injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class." *NASDAQ, supra, at 523*. *See also* *Brown v. Pro Football, Inc., 146 F.R.D. 1 (D.D.C. 1991)* (sustaining class action status against contention that variations in particular characteristics of **[**81]** individual class members related to value as a professional football player require numerous trials on damage claims).

HN21[] An antitrust plaintiff's intention to establish the fact of antitrust injury on a classwide basis, in contrast to a specific plaintiff's damages, favors class certification. *See* *In re Visa Check/MasterMoney, 280 F.3d at 140-44* (discussing that class action can be bifurcated as to liability and damages and holding that district court not required to choose proper measure of damages before certifying class). *See also* *Caridad v. Metro-North Commuter R.R., supra, at 291* (discussing class certification in employment discrimination context). Further, antitrust plaintiffs seeking class action status may also satisfy their burden of showing that a common impact upon class members caused by an alleged conspiracy can be proven on a classwide basis through the use of economic expert testimony and statistical analysis. *In re Visa Check/MasterMoney, 280 F.3d at 133-34* (holding that charged violation injured all class members, despite asserted defenses allegedly specific to each class member, may be established by mathematical **[**82]** formula and affirming grant of class action status). *See* *Caridad, 191 F.3d at 292* (accepting multiple regression analysis demonstrating classwide impact of alleged discriminatory practice in Title VII action despite differences in circumstances of members of class and reversing district court's denial of class certification).

HN22[] In evaluating proffered expert opinion and results of statistical analysis on the question of classwide impact and damages, courts should determine whether the plaintiff's expert's proposed "econometric methodologies 'have a reasonable probability of establishing' [at trial] plaintiffs' claims by common proof." *Visa Check/MasterMoney, 280 F.3d at 134* (quoting *In re Sumitomo Copper Litig., 182 F.R.D. 85, 91(S.D.N.Y. 1998))*. Where defendants offer opposing statistical expert opinion, in considering class certification, courts should avoid "statistical dueling," *Caridad, supra, at 292*; rather, their inquiry is limited to determining whether the proposed methodology was sufficiently reliable and not "fatally flawed" rendering it inadmissible at trial. *Visa Check/MasterMoney, 280 F.3d at 134.* **[**83]**

HN23[] Proposed class representatives will be deemed adequate for purposes of *Rule 23(a)* unless the representatives are found to have "palpable" conflicts with the class members which "outweigh the substantial interest of every class member in proceeding with the litigation." *NASDAQ, supra, 169 F.R.D. at 514-15*.

Defendants do not contest that Plaintiffs' proposed class satisfied *Rule 23(a)(1)*'s numerosity requirement. Defendants' Memorandum at 17. However, Defendants, at the threshold, contend the proposed class is not objectively definable. *Id.* at 47. Specifically, Defendants assert that Plaintiffs' definition of the proposed class is imprecise thereby creating undue administrative burdens based on the need for innumerable determinations of each class member's eligibility to sit for the ABEM examination. *Id.* at 48-49. Defendants further argue that as Plaintiffs' definition is open ended, *i.e.,* that based on Plaintiffs' claimed definition of the class which includes physicians who have practiced emergency medicine after 1988, potential class members may continue to qualify under the criteria of the former **[*191]** ABEM practice track and the members of the proposed class **[**84]** will never be accurately known. *Id.*

HN24[] To qualify for *Rule 23* certification the proposed class must be objectively defined and capable of reasonable ascertainment. *See In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 209 F.R.D. 323, 2002 WL 1560358, at *9 (S.D.N.Y. July 16, 2002)* ("'An identifiable class exists if its members can be ascertained by reference to objective criteria.'") (quoting *Zapka v. Coca-Cola Co., 2000 U.S. Dist. LEXIS 16552, 2000 WL 1644539, at *2 (N.D. Ill. Oct. 27, 2000)*; *Garrish v. United Automobile, Aerospace, and Agricultural Implement Workers of America, 149 F. Supp.2d 326, 330-31 (E.D.Mich. 2001)* (proposed class must be sufficiently defined "so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class … [and] the identity of class members, moreover, must be ascertainable by reference to objective criteria,") (internal quotations omitted); *McGee v. East Ohio Gas Company, 200 F.R.D. 382, 387 (S.D.Ohio 2001)* (class must be defined "such that a court can ascertain its membership in some objective manner"); *Neumont v. Monroe County, Florida, 198 F.R.D. 554, 557, (S.D.Fla. 2000)* **[**85]** (for a class definition to be viable, class membership must be capable of ascertainment under some objective standard); *Clay v. American Tobacco Co., 188 F.R.D. 483, 490 (S.D.Ill. 1999)* ("It is absolutely necessary that for a class action to be certified, the class must be susceptible to a precise definition."); and *O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D.Cal. 1998)* ("a class will be found to exist if the description of the class is definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member"). Here, the ABEM practice track eligibility requirements which existed up to June 1988 are not in doubt. ABEM Application Form attached as Exhibit D to Reply Declaration of Jeremy R. Kasha, Esq. dated July 31, 2000 (Doc. No. 799) ("Kasha Reply Declaration"). The fact that ABEM itself successfully applied these requirements to thousands of physician applicants over a 12 year period, Exhibit C to Kasha Reply Declaration, demonstrates that the criteria can be objectively applied. Further, as to those physicians who, over time, may become eligible, after 1988, for the ABEM examination **[**86]** under the practice track criteria, their credentials can be evaluated by ABEM, or, if necessary, a special master. *In re Visa Check/MasterMoney, 280 F.3d at 141*. Thus, Plaintiffs' proposed class, based on a reference to such criteria and despite the passage of time, is objectively defined.

For purposes of calculation of *Rule 23(b)(3)* class damages, physicians who qualify under the practice track criteria after 1988 and up to the date the court may grant relief would be considered class members as they then would have acquired the required degree of emergency medicine practice experience; thereafter, physicians who may qualify under the practice track would receive the benefit of a judgment under *Rule 23(b)(3)*, or any equitable relief the court may also order, making the practice track form of eligibility a continuing opportunity for qualification to be administered by ABEM as it had previously done. Plaintiffs' Reply Memorandum at 23. Defendants' cases, Defendants' Memorandum at 47-48, are distinguishable in that plaintiffs in those cases presented proposed class definitions which, as pleaded, were too amorphous to provide any objective basis upon which to determine **[**87]** class membership. *See, e.g., Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981)* (rejecting a class of persons who became discouraged by defendants' actions **[*192]** from applying for public assistance, because of the need to identify potential class members' state of mind). Accordingly, Plaintiffs' proposed class definition provides a sufficiently objective basis on which membership in the class may be ascertained.

Defendants' contentions that Plaintiffs' proposed class fails to satisfy the commonality, typicality and predominance tests for certification pursuant to *Rule 23(b)(3)* are also without merit. First, contrary to Defendants' assertion that Plaintiffs' alleged multiple conspiracies thus defeating Plaintiffs' asserted common issue of antitrust liability, Plaintiffs' have alleged a single conspiracy among Defendants. Second Amended Complaint P P 4, 5, 12, 45-62, (describing the history of ABEM's initial creation and subsequent closure of the practice track with the "cooperation, agreement, and encouragement of the other defendants and co-conspirators." P 62) As this is an antitrust case, the allegation satisfies both the commonality and predominance requisites. *NASDAQ, supra, at 518*. **[**88]** Second, numerous common questions of fact and law are presented by the Second Amended Complaint including whether Defendants and other alleged coconspirators are members of the charged conspiracy, Second Amended Complaint P P 56-57, 113, 132-34; its scope and effect upon Plaintiffs' ability to compete, *id.* P P 88, 115; the existence of the relevant market, *id.* PP 91-92; the reasonableness of the closure of the practice track, *id.* P 8; the closure's impact upon competition and the supply of ABEM emergency medicine certified physicians, *id.* P P 89-90, 92; Defendants' efforts to monopolize the relevant market, *id.* P 123; whether the conspiracy caused noncompetitive higher prices for the services of ABEM certified physicians and physicians eligible for ABEM certification, *id.* P P 92-96; and the economic losses of the class members, *id.* P P 103-110. As each class member alleges that the conspiracy operated upon them in violation of *Sections 1and 2* of the Sherman Act, each class member would, in the case of individual actions, be required to establish the existence of the conspiracy, its implementation, duration and scope, each defendant's participation, how **[**89]** the conspiracy violated federal ***antitrust law***, the effectiveness of the conspiracy, and whether it unreasonably injured competition. Thus, Plaintiffs' class allegations meet the commonality requirement. *See* *NASDAQ, supra, at 518*.

Defendants' contention that Plaintiffs have failed to establish a common conspiracy, Defendants' Memorandum at 62-63, and that each Hospital Defendant applied its hiring policies to specific Plaintiffs pursuant to the conspiracy, *id.,* impermissibly burdens Plaintiffs, for the purposes of the instant class certification motion, with the obligation to establish a likelihood of success on the merits. *See* *Eisen, supra* (improper for court to consider merits on motion for class certification). As noted, *supra,* Plaintiffs have pointedly alleged a common conspiracy among all named Defendants, including Hospital Defendants. Additionally, Plaintiffs have been, by prior orders of the court, precluded from pursuing discovery on the merits. Decision and Order dated October 20, 1998 (Doc. No. 630) P (f) at 13. [15] Moreover, Plaintiffs may rely on the principle that antitrust liability is joint and several among defendant coconspirators. **[**90]** *NASDAQ at 519*. Thus, any failure to establish for the purposes of the instant **[*193]** motion each class member's injury at the hands of a particular Hospital Defendant will not defeat Plaintiffs' ability to establish Defendants' liability, pursuant to *Sherman Act Sections 1and 2*, on a classwide basis as alleged in the Second Amended Complaint. Accordingly, Defendants' argument that Plaintiffs cannot establish each Plaintiff was harmed by a specific Hospital Defendant, does not bar class action status.

Defendants' reliance on *Abrams v. Interco, Inc.,719 F.2d 23 (2d Cir. 1983)*, Defendants' Memorandum at 64, is misplaced as in that case the complaint described several forms of conspiratorial misconduct and class member purchasers of multiple product lines. *Abrams, supra, at 23, 29-30*. Here, **[**91]** Defendants' liability and Plaintiffs' injuries are based on a common allegation of fact and law -- a wrongful withdrawal of a means, *i.e.,* the 1988 closure and continuing closure of the ABEM practice track -- by which suppliers of emergency medical services may obtain a competitive benefit. Indeed, Defendants' contention, as the basis for their cross motion to dismiss, that Plaintiffs, as individuals and as a class, lack antitrust standing, Discussion, *supra,* Section II B, is premised on the proposition that none of the class members, including representative Plaintiffs, have suffered a cognizable antitrust injury, an issue of palpable classwide dimension and controlling legal significance, demonstrating the existence of a classwide liability issue.

Defendants assert that as there are many categories of Plaintiffs who could not or would not have applied prior to June 1988 under the practice track, Plaintiffs' claims cannot satisfy *Rule 23*'s typicality and predominance requirements. Defendants' Memorandum at 20-34. For example, Defendants contend that because some Plaintiffs "could have qualified under the practice track by June 1988, but chose not to apply," *id.* at 20-21, and **[**92]** others decided upon specialization in fields other than emergency medicine and thereby were prevented from practice track qualification based on personal and professional decisions, *id.* at 21-22, it follows that representative Plaintiffs, and those within the class with similar personal and professional history characteristics, cannot demonstrate on a common basis antitrust injury and damage resulting from the alleged conspiracy. *Id. See* *Visa Check/MasterMoney Antitrust Litig., supra, at 136* (noting elements of certification of antitrust claims include proof of injury, causation and damages).

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[15] Referring to orders staying discovery directed to the merits of Plaintiffs' causes of action and Defendants' defenses dated April 29, 1994 (Doc. No. 139) and February 21, 1996 (Doc. No. 470).

Further, Defendants claim that as Dr. Dennis Carlton, Plaintiffs' expert, has only developed a proposed statistical methodology to establish the presence of classwide impact flowing from the conspiracy, the proposed methodology cannot satisfy the requirements of *Rule 23(b)(3)* that common issues of liability exist and predominate. *Id.* Specifically, Defendants state that the record in this case demonstrates that "many plaintiffs have experienced no impact at all caused by the closure of the practice track, and that the timing, duration, type and amount of the impact alleged **[**93]** by others varies enormously, and would in almost every case require substantial individualized proof of disputed facts." Defendants' Memorandum at 20. Defendants conclude that as Plaintiffs' proposed multiple variable regression model cannot take all such factors into account, it therefore will produce inaccurate results. *Id.* Defendants' contentions are unavailing for several reasons.

First, irrespective of Dr. Carlton's proposed multiple regression model, Plaintiffs' allegations that Defendants' contentions related to Plaintiffs' lack of antitrust **[*194]** standing and the opinion of Plaintiffs' and Defendants' econometric experts, demonstrate the existence of antitrust injury on a classwide basis. Plaintiffs' class members were all allegedly harmed in that as a result of the charged conspiracy, all class members were deprived of the opportunity to take the ABEM certification examination. Second Amended Complaint P P 13, 44(a); Carlton Dep. at 116. Moreover, as discussed, *supra,* Defendants' argument that Plaintiffs' ability to compete is not affected by the conspiracy raises questions of the existence of antitrust injury and its effect on Plaintiffs and the proposed class members **[**94]** on a classwide basis. Additionally, Dr. Carlton opined that his proposed regression analysis could establish the extent to which each class member was damaged based on the estimated annual pay loss resulting from the adverse economic effect of the conspiracy on a classwide basis regardless of individual variations, analogous to similar methods for calculating damages in class action price fixing cases. Carlton Dep. at 271-72, 275-76; Carlton Affidavit P 11. Further, any fees paid by class members to appeal a denial of eligibility based on practice experience represents a potential element of classwide damages directly attributable to the alleged violation sufficient to establish predominance. Carlton Dep. at 319-20. Finally, Dr. Frankel, Defendants' expert acknowledged the existence of classwide damages flowing from the challenged practice track closure as such class members were required to enter and complete an approved medical residency. Frankel Dep. at 397-402. Specifically, Dr. Frankel agreed that such damages accrued to class Plaintiffs who were rendered ineligible to take the ABEM examination by virtue of the practice track closure although the amount of such classwide antitrust **[**95]** injury was in Dr. Frankel's view limited to an assumed application fee and the cost to applicants of a residency program in emergency medicine. Frankel Dep. at 397. Thus, the fact that each class member, in order to avoid the loss of increased earning expected from ABEM certification, would have, after 1988, been required to incur the expense of achieving eligibility for ABEM certification solely through an approved residency program, demonstrates that each member of the class as defined incurred an antitrust injury caused directly by the alleged antitrust violation, potentially amounting to several hundreds of thousands of dollars for each class member so affected. *Id.* ***HN25***[] The fact that an antitrust plaintiff may have incurred even greater damages from other effects of the conspiracy that were conceivably avoidable, as Defendants contend, does not exempt the charged conspiracy from antitrust liability. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (citing cases) ("an antitrust plaintiff's burden of proving the fact of damage under *Section 4 of the Clayton Act* is satisfied by its proof of some damage **[**96]** flowing from the unlawful conspiracy") (underline added). Such questions are equally resolvable on a classwide basis here where the alleged conspiracy presented identical barriers to each class member's opportunity to obtain ABEM certification.

Second, ***HN26***[] use of multiple variable regression analysis, as proposed by Dr. Carlton, to prove antitrust impact on a classwide basis has been accepted by the courts as justifying class certification. *In Re Polypropylene Carpet Antitrust Litigation, 996 F. Supp. 18, 25-30 (N.D.Ga. 1997)* (certifying class in antitrust action where regression analysis was admissible under the *Daubert* test and established both common injury and damages on class-wide basis). *See, e.g., Caridad, supra* (multiple regression **[*195]** analysis sufficient to establish racial discrimination as to promotion and discipline on classwide basis despite existence of variations based on specific positions and development of discretionary authority to department supervisors). ***HN27***[] "Multiple regression analysis is a statistical tool used .... to determine the influence that various independent, predetermined factors (so-called "independent variables") have on **[**97]** an observed phenomenon (the so-called "dependent variable") .... The first step in such a regression analysis is to specify all of the possible "legitimate ... [factors not prohibited by law] that are likely to significantly affect the dependent variable and which could account for [the alleged] disparities in [plaintiffs' income]." *Ottaviani v. State University of New York at New Paltz, 875 F.2d 365, 366-67 (2d Cir. 1989)* (internal citations omitted) (multiple regression analysis admissible but determined to be insufficient to sustain plaintiffs' burden at trial) (bracketed material added), *cert. denied, 493 U.S. 1021 (1990)*. In this case, the dependent variable is the compensation of emergency medicine physicians. Carlton Affidavit P 19; Carlton Dep. at 191. Other factors which may affect the potential correlation between the dependent variable and the suspected independent or "explanatory" variable of having or not having ABEM certification should also be included in the proposed regression analysis but may be estimated. Carlton Dep. at 91-92. Here, Dr. Carlton has described a multiple regression analysis model which he believes is capable **[**98]** of establishing a causal relationship between the income of class members and the lack of ABEM certification. Carlton Affidavit at 8-11. Dr. Carlton also opines that another statistical method can be used to establish the value of damages suffered by members of the class. *Id.* at 5.

Defendants argue that Dr. Carlton's failure to take into account other factors such as professional or personal history bearing on the issue of causation and damages renders his proposed methodology incapable of sustaining Plaintiffs' burden to show that common issues of causation and damages predominate. Defendants' Memorandum at 5. However, Dr. Carlton's methodology will not exclude the additional factors Defendants point to as relevant to the capacity of the proposed regression analysis to accurately correlate ABEM certification with physician compensation, *e.g.,* "patient acuity" and "performance merit." Carlton Dep. at 215, 243. Rather, Dr. Carlton intends to use data which will be obtained through merit based discovery to determine which additional factors should be included. *Id.* at 251-52; 293-94. Nor is the model designed to award damages based on the lack of ABEM certification to any **[**99]** class member for the period when such class member did not practice emergency medicine. Carlton Reply Affidavit P 23.

HN28[] It is sufficient for class certification that the proposed regression analysis be reasonably capable of providing evidence from which the causation element of Plaintiffs' case be inferrable on a classwide basis. *See In re Sumitomo Copper Litig., 182 F.R.D. 85, 91 (S.D.N.Y. 1998)* (upholding class certification based on "plaintiffs' econometric methodologies [which have] a reasonable probability of establishing" plaintiffs' claims by common proof). The court finds Dr. Carlton's model capable of performing this function. *Bazemore v. Friday, 478 U.S. 385, 400-401, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)* (concurring op.) (multiple regression analysis which accounts for "major factors" need not account for all variables; omission of variables goes to probativeness not admissibility). Accordingly, as Dr. Carlton's proposed regression model will not **[*196]** necessarily overlook "major factors," *Bazemore, supra,* bearing on the relationship of ABEM certification to physician compensation, Defendants' objection that the statistical **[**100]** model has yet to produce proof that the effect of the practice track closure can be established for all class members is tantamount to asking the court to hold that Plaintiffs are unable to satisfy their burden as to the causation element of their claim, an issue beyond the purview of a motion seeking class certification. *See Eisen, supra; In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 134* (citing *Caridad, supra, at 292-93*). As such, Defendants' arguments do not require Dr. Carlton's methodology be rejected. *See In re Visa Check/MasterMoney Antitrust Litig., supra, at 133* (expert's "theory" of causation and "proffered" formula accepted as basis to demonstrate predominance on issues of causality and damages).

Dr. Carlton has offered a method, based on generally accepted statistical principles, which he believes is capable of sustaining Plaintiffs' burden on the issues of common impact and damages. "A standard statistical analysis can be used to estimate the effect of ABEM certification on an individual's income, holding constant all other characteristics that affect emergency medicine physicians' earnings." Carlton **[**101]** Affidavit P 17 (emphasis added). As noted, Dr. Carlton expects that other factors, such as those emphasized by Defendants, may be included in the regression model as a result of merit based discovery which has been stayed. ***HN29***[] "[A] regression analysis can be used to determine whether incorporating additional information (e.g., years of experience) results in more reliable individual damage estimates." Carlton Reply Affidavit P 21 (emphasis added). Dr. Carlton's status as an economic expert for antitrust cases has been accepted by other courts. *In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 78 (E.D.N.Y. 2000)* (Dr. Carlton's credentials as an economics expert found "impeccable"), *aff'd, 280 F.3d 124 (2d Cir. 2001)*.

Defendants' expert, Dr. Frankel, attempts to impeach the reliability of Dr. Carlton's methodology because it fails to take into account unobservable characteristics of emergency medicine such as "physician quality" and, thus the compensation of such physicians. Report of Alan S. Frankel, Ph.D., Exhibit A to Ubersax Declaration ("Frankel Report") at 46. However, as discussed, Dr. Carlton's proposed methodology, will not ignore **[**102]** factors objectively bearing on physician quality and compensation. Carlton Reply Affidavit P 27. "If 'quality' cannot be observed, it will not affect wages and thus cannot be a basis for damage estimates. Furthermore, if 'quality' can be observed to some extent by employers, it will not affect damage estimates if it is highly correlated with observable characteristics other than certification (*e.g.,* years of experience)." *Id.* The court finds this analysis sufficiently credible to support, based on Dr. Carlton's opinion, that primarily observable characteristics affect physician compensation. Moreover, as discussed, national surveys, uncontradicted by Defendants, support the view that ABEM accredition is strongly correlated with higher compensation for emergency physicians. Defendants do not contend that ABEM certification is an unobservable characteristic.

Dr. Frankel also states that Dr. Carlton's proposed regression analysis is insufficient as a basis for sustaining class status because it fails to take into consideration other factors likely, in Dr. Frankel's view, to influence emergency medicine physician compensation such as physician intelligence, performance reviews **[**103]** and recommendations. Frankel Report at 46. There are several reasons why this criticism **[*197]** does not demonstrate that classwide issues of liability, causation and damages do not predominate. First, as discussed, Dr. Carlton explained that the proposed regression model will include factors, other than those specifically mentioned in his affidavits such as employment in an urban area, years of experience, and size of hospital, Carlton Affidavit P 20, that could conceivably correlate with physician compensation to avoid the possibility that in their absence the regression model may erroneously correlate increased compensation with ABEM certification. Carlton Dep. at 196. Specifically, Dr. Carlton acknowledged that there are other possible independent variables he may consider adding including "performance merit." Carlton Dep. at 215, 222. Further, Dr. Carlton intends to employ standard econometric techniques to determine whether such factors may have significance and should be included in the regression model. Carlton Dep. at 216. To assist in this determination, Dr. Carlton will develop, through discovery, data from available sources upon which the relevance of such other potentially relevant **[**104]** variables may be determined, including the records of Hospital Defendants. *Id.* at 217.

However, the failure to include all such potential variables does not render the results of Dr. Carlton's proposed regression analysis invalid. Carlton Dep. at 219, 220. Specifically, in Dr. Carlton's opinion, the absence in the regression model of every variable that may correlate with the dependent variable of a physician's annual income does not render the model useless. *Id.* at 194. "It's routine and statistical [sic] in economic modeling that you … do not have every single factor that effects every single dependent variable, yet these models have turned out to have great usefulness." *Id.* As discussed, the failure to include all potential variables in an economic regression analysis does not render the analysis incompetent. *Bazemore v. Friday, 478 U.S. at 399-401*.

It is, moreover, improper to reject Dr. Carlton's methodology based on the criticism provided by Defendants' expert as such would render a determination based on "dueling experts." *Caridad, supra.* Whether, in the event of a trial on the merits, Dr. Carlton will be ultimately persuade **[**105]** the trier of fact that his method for establishing classwide impact and damages is accurate is beyond the purview of the instant motion. At this stage, ***HN30***[] so long as the party seeking class certification has provided a "colorable method" for proving classwide injury, *In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524, 531-32 (S.D.Fla. 1996)*, courts should not deny certification on the basis that such method may ultimately be unpersuasive at trial. *In re Visa Check/MasterMoney, 280 F.3d at 134*.

To the extent such additional factors may relate to determinations by employers of physician quality and thus influence compensation, Dr. Carlton states that, "quality effects can be controlled by analyzing the extent to which an individual physician's wages increase after that physician becomes ABEM certified -- because the physician's 'quality' does not change as a result of certification, the change in wage is attributable solely to certification." Carlton Reply Affidavit, P 28 (emphasis added). Additionally, Dr. Carlton, an acknowledged scholar and expert in the field of econometrics, has offered his expert opinion, based on published data and **[**106]** surveys of physicians' compensation, that "'but for' the [alleged] conspiracy, class members would have earned … more than they actually earned." Carlton Affidavit P 11. Dr. Carlton also opined that the conspiracy had a "common adverse impact on members of the class." *Id.* P **[*198]** P 13-15. Moreover, Dr. Carlton averrs that "it is possible to measure the damage that each member of the class can have expected to suffer by the use of a common formula." *Id. P 16*. Thus, Dr. Carlton's regression model which seeks to measure the relationship between physician income and ABEM certification is not without a rational basis, will not necessarily overlook important factors relevant to the issues, and, together with his expert opinion based on published data on the probable relationship between ABEM certification and emergency medicine physicians compensation, provides an adequate reason to find that Plaintiffs' claims satisfy the requirements of *Rule 23(a)and (b)(3)*. Even if the proffered regression analysis were to fail, Plaintiffs could still offer Dr. Carlton's expert opinion to establish the elements of their claims on a classwide basis. *See In Re Visa Check/MasterMoney, supra, at 136-37* **[**107]** (sustaining class action certification based on Dr. Carlton's expert opinion and proposed methodology without including a multiple regression analysis). Accordingly, Defendants' attack on Dr. Carlton's proposed methodology is premature and insufficient to require its rejection as a basis upon which to demonstrate commonality and predominance.

Defendants insist, nevertheless, that numerous explanations, arising from personal life and professional career choices, for the failure of particular Plaintiffs to achieve practice track qualification, require that class action status for this case be denied. Defendants' Memorandum at 20-42. Specifically, Defendants argue that as the existence of such individual variations demonstrates that Plaintiffs cannot show, based on common evidence, the practice track closure in 1988 caused their injuries, class certification is accordingly improper. Defendants' Memorandum at 20. However, such contention requires a finding that the causation element of Plaintiffs' antitrust claim on classwide basis through the use of common proof cannot be satisfied even with the use of Plaintiffs' proposed multiple regression analysis and, as such, amounts to a premature **[**108]** determination of the merits, prohibited at the class certification stage of the case. *Eisen, supra.* ***HN31***[] Any determination that an essential element of Plaintiffs' claims is incapable of proof, whether through use of the results of a multi-variable regression analysis or other data and expert opinion, must be interposed and resolved by summary judgment or at trial. *See Ford v. NYLCARE Health Plans of the Gulf Coast, Inc., 301 F.3d 329 (5th Cir. 2002)* (grant of summary judgment for lack of standing and denial of class certification affirmed where record failed to establish causal relationship between alleged violation and plaintiffs' damages). Defendants' argument also ignores the possibility that even if some class members chose not to attempt to qualify for the ABEM practice track prior to 1988, such qualification based on practice experience could have been acquired after that date if such physicians had subsequently chosen to do so. Plaintiffs' antitrust claims cover the initial closure of the practice track in 1988 by the conspiracy and its objective to ensure that the closure remain in effect thereafter. Second Amended Complaint P 12 ("Defendants and **[**109]** their co-conspirators have unlawfully conspired … to maintain closure of the practice track despite the needs of the public, the medical profession and the specialty of emergency medicine.")

As discussed, Defendants contend that the presence of numerous factors peculiar to each class member's personal circumstances affect calculation of the amount of any damages suffered by individual class members and requires numerous individual trials foreclosing class certification. Defendants' Memorandum at 64-65. **[*199]** However, ***HN32***[] at the class certification stage, Plaintiffs need only demonstrate the existence of a reasonable basis on which damages can be determined at trial. *United States Football League v. National Football League, 842 F.2d 1335, 1378 (2d Cir. 1988)* ("once proof of injury causation has been established, courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages."). In an antitrust case, the trier of fact will use "a just and reasonable estimate … based on relevant data" including both "probable and inferential as well as … direct and positive proof." *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946).* **[**110]** Employing relevant data to be collected from the class during merit based discovery, Plaintiffs' proposed regression analysis is expected to be capable of reasonably estimating the damages suffered by individual class members irrespective of particular circumstances. Carlton Affidavit P 14; Carlton Reply Affidavit P P 16-22.

In *Brown v. Pro Football, Inc., 146 F.R.D. 1 (D.D.C. 1991)* the court rejected as a basis to refuse class certification defendants' asserted differences among class members, professional football players, including experience, evaluations of athletic ability, and future employment opportunities. As the court stated, ***HN33***[] "although individual circumstances necessarily exist among the members of the plaintiff class, a reasonable approximation of damages is achievable through a common formula." Brown, supra, at 3. Indeed, the presence of individual damages issues cannot, in itself, defeat class certification particularly in antitrust actions. Playmobil, 35 F. Supp. 2d at 246. "Even if it develops that each class member's damages must be separately determined, class certification would still be appropriate." NASDAQ, supra, at 524 **[**111]** (citing cases).

Defendants' reliance, Defendants' Memorandum at 52, upon *Kent-Chojnicki v. Runyon, 180 F.R.D. 237 (W.D.N.Y. 1998)* is misplaced. In *Kent-Chojnicki,* this court denied class certification to a group of disabled postal workers who claimed violations of the Rehabilitation Act based on work assignments beyond the limitations prescribed by their respective physicians. *Kent-Chojnicki, supra, at 243*. Specifically, the court found that the proposed class could not satisfy Rule 23(a)'s requirements as the basis for the class members' claims turned on the job requirements imposed on each plaintiff by their respective physician's specific limitations, thereby negating the requisites of commonality and predominance. *Id. at 243*. Thus, in *Kent-Chojnicki,* plaintiffs' own allegations showed that individual circumstances governed the ability of plaintiffs to establish liability quite aside from any questions of causality or damages. Here, in contrast, Plaintiffs' alleged deprivation of access to a significant professional credential is based on a single causative act, closure of the ABEM practice track, by a single conspiracy. **[**112]** Seconded Amended Complaint P P 45-62. Thus, the issue of antitrust liability in this case is manifestly within the requirements of Rule 23(b)(3). Moreover, in *Kent-Chojnicki,* plaintiffs did not proffer any expert testimony or regression analysis to support their class certification request.

The case of *Continental Orthopedic Appliances, Inc. v. Health Insurance Plan of Greater New York, Inc., 198 F.R.D. 41 (E.D.N.Y. 2000)*, submitted to the court by Defendants' letter dated October 29, 2001 (Doc. No. 865), is also distinguishable. In *Continental Orthopedic,* the court found that the existence of different contractual relationships between class members and defendant insurer and differing percentages of total business income attributable to sales with defendant insurer necessitated a finding that individual issues of causation **[*200]** and damages predominated. Here, unlike allegations in *Continental Orthopedic,* Plaintiffs' claimed injuries all proceed from a single alleged violation, the closure of the practice track, and a reasonable basis, founded on accepted principles of economics and statistics and "impeccable" expert testimony, is presented to establish the **[**113]** causation and damage elements of Plaintiffs' claims on a classwide basis. Accordingly, the court finds *Continental Orthopedic Appliances, Inc., supra,* of no controlling effect.

Nor does the recent case, *Weisfeld v. Sun Chemical Corp., 210 F.R.D. 136 (D.N.J. 2002)*, submitted by Defendants after oral argument (Doc. No. 873), cast doubt on the court's finding that Dr. Carlton's proffered methodology is a sufficient basis upon which the predominance requirement as to classwide injury and damages may be shown. In *Weisfeld,* a proposed class of employees of defendants, printing ink manufacturers, during a four year period when defendants allegedly agreed not to solicit or hire each other's employees, attacked the agreement as a restraint of trade in violation of the Sherman Act. *Weisfeld, supra, at 137*. As relevant, plaintiffs in *Weisfeld* sought to satisfy Rule 23's predominance requirement on the issue of classwide antitrust injury by proffering an economist expert's affidavit which asserted that, using a multiple regression model and "yardstick" industry comparison, it would be possible to determine that but for the existence of **[**114]** the challenged agreement, compensation for plaintiffs' class would have been greater. Notwithstanding the expert's assertions that the methodologies, including a "preliminary analysis" which had found compensation levels would have been greater without the presence of defendants agreement, would provide "generalized proof" of a classwide antitrust impact resulting from the agreements, the court denied class certification. *Id. at 143-44*. Specifically, the court found that the expert had failed to specifically state the two methodologies would establish a causal relationship or impact between the agreement and each class member. *Id. at 143*. The court also held that the expert's failure to offer evidence, such as data, charts or exhibits to support his opinion, rendered such opinions "naked conclusions." *Id.* The court further noted the existence of several facts, particularly the existence of no-compete agreements executed by "some" class members, that cast doubt on whether plaintiffs had suffered any antitrust injury from the operation of the agreement. *Weisfeld, at 144*.

However, *Weisfeld* is readily distinguishable in several respects from **[**115]** the instant matter. First, Dr. Carlton, unlike plaintiffs' expert in *Weisfeld,* has opined that his proffered method will establish antitrust injury as to each plaintiff class member. "Based on my review of the economic evidence presently available, I find that the conspiracy alleged by the class would be expected to have an adverse effect on each class member. I also conclude that it would be possible to estimate expected damages suffered by each class member with a formula that could be applied to the entire class." Carlton Affidavit P 4 (underlining added). Second, Dr. Carlton has consulted a substantial body of existing data in reaching his preliminary findings. Specifically, Dr. Carlton referred to an independent national survey of the salaries of emergency physicians over the period 1991-1999 finding a $ 20,000 to $ 30,000 differential in per physician's annual compensation between non ABEM certified and ABEM certified physicians. Carlton Affidavit P 13. Regional surveys reflect similar findings. *Id.* P 14. A survey of differences in total compensation between such physicians was also relied upon by Dr. **[*201]** Carlton. *Id.* P 15. Dr. Carlton supplemented his affidavit **[**116]** with two charts compiling the survey data. Carlton Affidavit Figures 1 & 2. Further, Dr. Carlton's Reply Affidavit makes use of other independently developed data implying a classwide impact on Defendants' conspiracy. For example, Dr. Carlton referred to a 1999 survey suggesting that larger hospitals were ten times more likely to require board certification as a condition to employment for emergency physicians. Carlton Reply Affidavit P 9 n. 3. Dr. Carlton also relied upon an empirically based analysis showing a "substantial" positive relationship between board certification and physicians compensation. *Id.* Exh. A. Thus, Dr. Carlton's opinion is not based, as was found by the court regarding plaintiff's expert opinion in *Weisfeld,* on "naked conclusions." Rather, Dr. Carlton's opinion is based upon a substantial body of independently created data tending reasonably to confirm his preliminary conclusions as to the classwide impact of Defendants' closure of the practice track upon the compensation of the proposed class.

Finally, the nature of the individual factors which the *Weisfeld* court found to predominate do not compare in any relevant manner to those relied upon by **[**117]** Defendants. Particularly, the court in *Weisfeld* emphasized the potential existence of non-compete agreements between an unstated number within the proffered class as a fact likely to negate the existence of classwide antitrust injury. *Weisfeld, supra, at 144*. In contrast, here it is alleged that closure of the practice track directly prevented every class member from seeking ABEM certification, and continues to do so. As discussed, the multiple regression analysis and Dr. Carlton's "impeccable" credentials as a nationally recognized expert economist provide an adequate basis to account for any relevant variables in the particular circumstances of individual class members in seeking to establish a classwide impact caused by the charged violation in this case. Even if, based on the record in *Weisfeld,* the court's determination of the class certification issues presented was correct, the reasoning in that case has no relevance to the issues presented on the instant record.

Finally, even if the individual circumstances of some class members could eventually require special consideration as to the extent, if any, of their respective damages, such potentialities **[**118]** do not defeat class certification. *In re Buspirone, supra, at 56*. Such individual issues may be resolved after liability is established, and, if necessary, subclasses may be created to facilitate a complete and efficient resolution of the case. *Id.*

Thus, Defendants' contention that class certification should be denied in this case based on variations among class members' circumstances that may bear on the elements of causation and calculation of Plaintiffs' damages is without merit. Defendants' further argument that class certification should be denied because their defense of Plaintiffs' claims requires individual trials based on the existence of such personal factors, Defendants' Memorandum at 61 is also unpersuasive. *Broussard v. Meineke Discount Muffler Shops, 155 F.3d 331, 345 (4th Cir. 1998)* relied upon by Defendants for ***HN34***[] the proposition that the existence of individual defenses defeats class certification has been rejected by other courts, *e.g., Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 n. 4 (1st Cir. 2000)* and is not the law in this circuit. *See Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 138* **[**119]** (rejecting contention that presence of defendant's mitigation defense to damages suffered by plaintiffs as a result of defendant's alleged tying arrangement as "fact that a defense 'may arise and may affect **[*202]** different class members differently does not compel a finding that individual issues predominate over common ones'" (quoting *Waste Management Holdings, supra, at 296*)); *accord Williams v. Sinclair, 529 F.2d 1383, 1388 (9th Cir. 1975)* (stating that existence of a defense "does not compel a finding that individual issues predominate over common ones" when there is a "sufficient nucleus of common questions"). "Therefore the question for purposes of determining predominance is not whether a defense exists, but whether the common issues will predominate over the individual questions raised by that defense." *Visa Check/MasterMoney, supra, at 137*. *See also In re Buspirone, supra at 57* (extent of injury, based on allege defenses to individual class members' damage claim no ban to class certification) (citing *In re Visa Check/MasterMoney, supra* and other cases). Here, the court finds that classwide issues of the existence **[**120]** of the conspiracy, its effect on class members, and Plaintiffs' damages predominate.

Plaintiffs' allegations also satisfy the typicality requirements under *Rule 23(a)(3)*. ***HN35***[] *Rule 23(a)*'s typicality requirement is met where "the claims of the representative plantiffs arise from the source of conduct that gives rise to the claims of the other class members, where the claims are based on the same legal theory, and where class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representatives." *NASDAQ, supra, at 511* (citing cases). *See also* *Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)* ("*Rule 23(a)(3)*'s typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove defendant's liability."). Plaintiffs' allegations describe the same conspiratorial conduct directed against each Plaintiff and all class members by limiting the supply of ABEM certified physicians and ABEM eligible physicians, Second Amended Complaint P P 56-57, and, as such, the allegations are based on the same legal theory. **[**121]** *NASDAQ, 169 F.R.D. at 511*. Further, each of the six physicians proposed as class representatives by Plaintiffs, Drs. Daniels, Cummings, Timmons, Paulson, Romanosky, and McNulty, claim to have been injured by the same conduct as the Second Amended Complaint alleges as to members of the class. Daniel Decl. P 9; Cummings Decl. P 8; Timmons Decl. P 11; Paulson Decl. P 10; Romanosky Decl. P 10; McNulty Decl. P 9. [16] Thus, as the Second Amended Complaint alleges Plaintiffs have been injured in the same way as have members of the class based on the same antitrust violations and have incurred similar damages representative Plaintiffs' claims are typical of those of the class as required by *Rule 23(a)(3)*.

Finally, Defendants assert the proposed class fails to meet requirements of ***HN36***[] *Rule 23(b)(3)* that class treatment is "superior to other available methods **[**122]** for the fair and efficient adjudication of the controversy." Defendants' Memorandum at 68-69. Specifically, Defendants assert Plaintiffs have failed to provide a "trial plan" to show how Plaintiffs' claim can feasibly be tried. *Id.* Defendants further suggest that as several Plaintiffs intend to prosecute the action regardless of class certification, the superiority requirement has not been met. *Id.*

First, given that thousands of the alleged class members reside in numerous states, intervention is impractical and **[*203]** would create reverse case management difficulties affecting Plaintiffs and Defendants alike. Second, ***HN37***[] there is no general rule which requires a trial plan as an essential element of the superiority requirement. *Ruiz v. American Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998)*, relied upon by Defendants, Defendants' Memorandum at 68, is distinguishable in that the statement in that case addressed plaintiffs' failure to deal with potential intra-class conflicts, an issue not present in this action. *Ruiz at 197*. Third, while some Plaintiffs may proceed with or without class certification, nevertheless, given the common questions going to Defendants' asserted **[**123]** violations and responsibility for Plaintiffs' damages, without certification many class members are likely to be deprived of any opportunity for the full relief to which they may be entitled. Moreover, larger classes in antitrust actions have been certified. *In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. at 73-74* (class of 4 million merchants approved under *Rule 23(b)(3)*), *aff'd*, *280 F.3d 130*; *In re Martin Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975)* (class over 21,000 members); *In re Carbon Dioxide Antitrust Litig., 149 F.R.D. 229 (M.D. Fla. 1993)* (class in the "hundreds of thousands"). Finally, because the applicable statute of limitations has been tolled based on Plaintiffs' motion seeking class status, *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983)*, the possibility exists that if class certification is denied, a plethora of individual cases will be filed in other districts when the extensive litigation of the instant action strongly points in favor of a comprehensive resolution of this complex dispute by this court. As such, the **[**124]** court finds the proposed class certification pursuant to *Rule 23(b)(3)* is superior to other available forms of litigation available for the "fair and efficient adjudication" of the instant controversy. *Fed.R.Civ.P. 23(b)(3)*. Further, based on their vigorous and tenacious prosecution of this action there can be no serious question that Plaintiffs are adequate class representatives. Defendants' sole rationale for Plaintiffs' asserted inadequacy as class representatives is based on the notion that individual defenses

[16] Decl. refers to the aforementioned Plaintiffs' respective Declaration attached to Plaintiffs' Revised Memorandum of Law (Doc. No. 761).

predominate, Defendants' Memorandum at 67-68, a position rejected by this court based on recent Second Circuit authority. Discussion, *supra,* at 66-70. As noted, Defendants do not dispute that Plaintiffs' counsel are qualified to represent the class.

Plaintiffs alternatively, and in addition to *Rule 23(b)(3)*, seek certification pursuant to *Rule 23(b)(2)*. Plaintiffs' Reply Memorandum at 55-57. Defendants contend, Defendants' Memorandum at 70, that such an alternative or additional basis for certification is unavailable as, in this case, Plaintiffs' requests for relief "relate exclusively or predominantly to money damages." *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145* **[**125]** (quoting Advisory Committee Notes to 1966 Amendments to *Rule 23(b)(2)*). [17] The **[*204]** Second Circuit, in *Visa Check/MasterMoney, supra,* has held that ***HN38***[] once the district court has found an action "maintainable under any single category [of *Rule 23(b)*], there is no necessity of showing that it may also be brought under any other." *Id. at 146-47* (quoting 8 Julian O. von Kalinowski, *et al., Antitrust Laws and Trade Regulations* § 166.03) (2d ed. 1997) (bracketed material in original). Further, if certification is granted pursuant to both *Rule 23(b)(3)and (b)(2)* "major procedural problems can arise … where different procedural consequences can attach depending on the subsection used." *Chateau DeVille Prods., Inc. v. Tams Witmark Music Library, 586 F.2d 962, 966 n. 14 (2d Cir. 1978)*. Accordingly, because the court finds Plaintiffs' class should be certified pursuant to *Rule 23(b)(3)*, it should not proceed further to determine Plaintiffs' alternative request for *Rule 23(b)(2)* certification. *Visa Check/MasterMoney, supra, at 147*.

[126]** Plaintiffs argue that the court may certify the class pursuant to both *Rule 23(b)(2)and (3)*. Plaintiffs' Reply Memorandum at 59 (citing *Messier v. Southbury Training Sch., 183 F.R.D. 350, 353-54 (D.Conn. 1998)* (certifying class under *Rule 23(b)(2)and (3)* finding court may permit opt-out right to a *(b)(2)* claim)). However, in *Visa Check/MasterMoney, supra,* while acknowledging that the district court in that case certified the class under both *Rule 23(b)(2)and (3)*, *Id. at 146* (citing *Visa Check/Master Money,* 192 F.R.D.), the Second Circuit declined to determine the merits of certification pursuant to *Rule 23(b)(2)* and affirmed certification solely on the criteria of *Rule 23(a)(3)*. *Id. at 147*. Specifically, the court noted that ***HN39***[] where, as in *Visa Check* substantial damages are a potential outcome, "the primary concern about certifying a class with significant damages under *Rule 23(b)(2)* is the absence of mandatory notice and opt-out rights." *Visa Check/MasterMoney, supra, at 147* (citing cases). "Because those rights are guaranteed under *Rule 23(b)(3)*, pursuant to which this action will now proceed, our inquiry need progress no further. **[**127]** " *Id.* (citing cases). [18] Based on the Second Circuit's reasoning in *Visa Check/MasterMoney,* given that Plaintiffs seek substantial damages, this court should likewise decline to certify Plaintiffs' class pursuant to both *Rule 23(b)(3)and (b)(2)*.

However, as Plaintiffs' motion is before the court for a report and recommendation, should the District Judge find class certification is not available pursuant to *Rule 23(b)(3)*, alternatively, certification should be denied pursuant to *Rule 23(b)(2)*. ***HN40***[] Class certification **[**128]** under *Rule 23(b)(2)* is unavailable where the relief requested relates predominantly to money damages. *Visa Check/MoneyMaster, supra, 280 F.3d at 145* (quoting Advisory Committee Notes to 1966 Amendments to *Rule 23*). For purposes of *Rule 23(b)(2)*, a claim for money damages is said to predominate unless it is found to be incidental, *i.e.,* damages which automatically "flow to the class" once liability is established based on "objective standards" rather than requiring additional hearings or the need to

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[17] Defendants assert that Plaintiffs' *Rule 23(b)(2)* certification was not pleaded in the Second Amended Complaint. However, certification was alleged "pursuant to *Fed.R.Civ.P. 23* as a proper action." Second Amended Complaint P 1. While P 44 refers to *Rule 23(b)(3)* the prayer for relief, Second Amended Complaint Section X, requests relief pursuant to *Rule 23*. Moreover, Plaintiffs' Memorandum of Law in Support of Class Certification filed February 24, 1994 (Doc. No. 70) and Plaintiffs' Revised Memorandum of Law argue for certification under *Rule 23(b)(2)* as well as *(b)(3)*. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification at 29-31; Plaintiffs' Revised Memorandum at 34-37. Given the requirement that federal pleadings be liberally construed, the court should treat Plaintiffs' motion as one brought pursuant to *Rule 23(b)(2)and (b)(3)*.

[18] In *Visa Check* the estimated damages were $ 63 billion, *Visa Check, 192 F.R.D. at 88-89*; in this case, assuming a class of only 10,000 and based on the 14 years that have elapsed since 1988, without trebling and interest, the requested damages are $ 7 billion. Using Plaintiffs' start date of 1994, when the Second Amended Complaint was filed as suggested, without authority, by Plaintiffs, at oral argument, based on the alleged class of 14,000, the damages would be $ 4.2 billion.

determine any new or significant legal or fact **[*205]** issues. *Augustin v. Jablonsky, 2001 U.S. Dist. LEXIS 10276, 2001 WL 770839 (E.D.N.Y.) *6* (quoting *Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998))*.

In this case, Plaintiffs' damages for lost earnings, constituting the basis for Plaintiffs' asserted losses, do not "automatically" flow to the class from the fact of liability. Rather, Plaintiffs' classwide damages will be determined based on the trier of fact's acceptance of a statistical analysis and expert economic opinion, which in turn are likely to be influenced by a variety of relevant factors drawn from the characteristics of the class, particularly **[**129]** factors relating to the Plaintiffs' earning capacities. *See* Carlton Dep. at 374 (***HN41***[] damages to be assessed by on "individual characteristics of a plaintiff"). Thus, should the District Judge decline to certify Plaintiffs' class pursuant to *Rule 23(b)(3)*, Plaintiffs' alternative request for certification under *Rule 23(b)(2)* should also be declined because Plaintiffs' request for relief, as pleaded in the Second Amended Complaint, does not abjure the substantial money damages nevertheless requested by Plaintiffs should certification be considered pursuant to *Rule 23(b)(2)* only. In these circumstances, the request for money damages renders the request for injunctive relief incidental, and the money damages request predominant. [19]

[130]** Moreover, Defendants acknowledged, Defendants' Memorandum at 70, a legal duty to reopen the practice track necessarily flows from any judicial determination of liability in this case rendering the need for a formal injunction, intended to mandate any reopening of the practice track, redundant. Accordingly, Plaintiffs' damages request predominates thus defeating eligibility for certification pursuant to *Rule 23(b)(2)*.

CONCLUSION

Based on the foregoing, Defendants' cross motion should be GRANTED; alternatively, Plaintiffs' motion for class certification pursuant to *Rule 23(b)(3)* should be GRANTED; alternatively, Plaintiffs' motion for certification pursuant to *Rule 23(b)(2)* should be DENIED.

Respectfully submitted,

LESLIE G. FOSCHIO

UNITED STATES MAGISTRATE JUDGE

Dated: January 3, 2003

Pursuant to *28 U.S.C. § 636(b)(1)*, it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of service of this Report and Recommendation in accordance with the above statute, *Rules 72(b), 6(a)* and **[**131]** *6(e)* of the Federal Rules of Civil Procedure and Local Rule 72.3.

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[19] The court notes ***HN42***[] cases where the mere request for treble damages in an antitrust action was held to place the action outside the parameters of class certification under *Rule 23(b)(2)*. *See* *Hall v. Burger King Corp., 1992 U.S. Dist. LEXIS 18687, 1992 WL 372354, * 11 (S.D.Fla. Oct. 26, 1992)* ("it is settled that where antitrust plaintiffs seek treble damages, certification under *Rule 23(b)(2)* is improper even if injunctive relief is sought at well); *Christiana Mortgage Corporation v. Delaware Mortgage Bankers Association, 136 F.R.D. 372, 381-82 (D. Del. 1991)* ("it is generally inappropriate in an antitrust suit seeking treble damages to certify a class under *Rule 23(b)(2)*"); *In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 341-42 (E.D.Pa. 1976)* (concluding that class certification under *Rule 23(b)(2)* is inappropriate where treble damages are "significant part" of the action's damage aspect); and *Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 53 (D.Del. 1974)* (holding class certification in antitrust action was only available under *Rule 23(b)(3)* as recovery of treble damages was predominant consideration, rendering class certification under *Rule 23(b)(2)* inappropriate).

[*206] **Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the *District Court's Order.*** *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)*; *Small v. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir. 1989)*; *Wesolek v. Canadair Limited, 838 F.2d 55 (2d Cir. 1988)*.

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiffs and the Defendants.

SO ORDERED.

LESLIE G. FOSCHIO

UNITED STATES MAGISTRATE JUDGE

DATED: January 3, 2003

Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.(In re Cal. Wholesale Elec. Antitrust Litig.)

United States District Court for the Southern District of California

January 6, 2003, Decided ; January 7, 2003, Filed

No. 02-CV-1993-RHW, No. MDL 1405

Reporter

244 F. Supp. 2d 1072 *; 2003 U.S. Dist. LEXIS 3787 **; 2003-1 Trade Cas. (CCH) P74,025

IN RE CALIFORNIA WHOLESALE ELECTRICITY ANTITRUST LITIGATION; PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, Plaintiff, v. DYNEGY POWER MARKETING, INC., et al., Defendants.

Subsequent History: Motion denied by *T&E Pastorino Nursery v. Duke Energy Trading & Mktg., L.L.C., 268 F. Supp. 2d 1240, 2003 U.S. Dist. LEXIS 10234 (S.D. Cal., 2003)*

Prior History: *Hendricks v. Dynegy Power Mktg., Inc., 160 F. Supp. 2d 1155, 2001 U.S. Dist. LEXIS 21697 (S.D. Cal., 2001)*

Disposition: Defendant's motion to dismiss and motion to strike granted.

Core Terms

rates, wholesale, filed rate doctrine, electricity, energy, preemption, preempted, regulation, tariffs, interstate, markets, market-based, exclusive jurisdiction, state law, deregulated, antitrust, Defendants', proceedings, cost-based, motion to dismiss, state regulation, anti trust law, federal law, transmission, practices, occupies, prices, unfair, federal preemption, antitrust claim

LexisNexis® Headnotes

Administrative Law > Separation of Powers > Jurisdiction

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN1[] **Separation of Powers, Jurisdiction**

Where the Federal Energy Regulatory Commission has jurisdiction, that jurisdiction is exclusive.

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

HN2[] **Separation of Powers, Primary Jurisdiction**

16 U.S.C.S. § 824e(a) vests exclusive jurisdiction over interstate wholesale electricity rates and practices affecting such rates with the Federal Energy Regulatory Commission (FERC). *16 U.S.C.S. § 824e(a)*. FERC's exclusive jurisdiction extends not only to rates per se, but also to any rule, regulation, practice or contract affecting such rates. *16 U.S.C.S. § 824e(a)*. *16 U.S.C.S. § 824e(a)* states, in pertinent part, that FERC shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. *16 U.S.C.S. § 824e(a)*.

Constitutional Law > Supremacy Clause > General Overview

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > Electricity Generation

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN3[] **Constitutional Law, Supremacy Clause**

The filed rate doctrine, in the electricity context, results from the Federal Energy Regulatory Commission's (FERC) responsibility for setting and ensuring compliance with just and reasonable rates of wholesale electricity sale and transmission. The filed rate doctrine arises from the sum of these concepts, and holds that electricity generators who file their rates with FERC, as they are required to do by law, are insulated from lawsuits challenging those rates and from court orders having the effect of imposing a rate other than that filed with FERC. Because the filed rate doctrine is a product of federal regulatory jurisdiction staked out in the Federal Power Act, judicial enforcement of the filed rate doctrine is a matter of enforcing the *Supremacy Clause*.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN4[] **Exemptions & Immunities, Filed Rate Doctrine**

Under the filed rate doctrine, a state must give effect to U.S. Congress' desire to give the Federal Energy Regulatory Commission (FERC) plenary authority over, interstate wholesale rates, and to ensure the states do not interfere with this authority. Moreover, courts, both state and federal, are prohibited from considering any rate other than that-filed with FERC to be the appropriate wholesale rate. As such, the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Hearings & Orders > Judicial Review

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN5[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine bars all claims, state and federal, that attempt to challenge a rate that a federal agency has reviewed and filed. Moreover, the United States Court of Appeals for the Ninth Circuit makes clear that the filed rate doctrine prohibits not just a state court (or a federal court applying state law) from setting a rate different from that chosen by the Federal Energy Regulatory Commission (FERC), but also from assuming a hypothetical rate different from that actually set by FERC.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Governments > Federal Government > Claims By & Against

HN6[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine applies to any state law causes of action relating to rates established by federal agencies.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN7[] **US Federal Energy Regulatory Commission, Authorities & Powers**

As a regulatory agency, the Federal Energy Regulatory Commission has wide discretion to permit different types of tariffs.

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Hearings & Orders > Judicial Review

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN8[] **Hearings & Orders, Judicial Review**

Where rates are determined in a regulated market, the Federal Energy Regulatory Commission is still responsible for ensuring "just and reasonable" rates and, to that end, wholesale power rates continue to be filed and subject to agency review.

Constitutional Law > Supremacy Clause > General Overview

HN9[] **Constitutional Law, Supremacy Clause**

The Supremacy Clause, U.S. Const. art. VI, § 4, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN10[] **Federal & State Interrelationships, Federal Common Law**

In regard to a substantive preemption analysis, federal law may pre-empt state law in three different ways. First, U.S. Congress may preempt state law by so stating in express terms. Second, preemption may be inferred when federal regulation in a particular field is so pervasive as to make reasonable the inference that U.S. Congress left no room for the states to supplement it. Third, preemption may be implied when state law actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of U.S. Congress.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

HN11[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

Federal courts hold that through the Federal Power Act (FPA), *16 U.S.C.S. § 792 et seq.*, U.S. Congress preempted states, state courts; and even federal courts from acting in areas reserved exclusively for the Federal Energy Regulatory Commission. Therefore, under the FPA, a buyer or seller of electricity may not sue in court to change the filed rate for any reason.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN12[] **Federal & State Interrelationships, Federal Common Law**

If the federal government occupies a field, or an identifiable portion of it, any state regulation or state court action within the same, select area is necessarily preempted. State regulation is not preempted only when it conflicts with federal law. When the federal government completely occupies a given field or an identifiable portion of it, the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government. The metaphor "occupy the field" is strongly associated with, and often taken to automatically entail, exclusive federal control.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN13[] **Federal & State Interrelationships, Federal Common Law**

Even if U.S. Congress has not completely occupied a field, preemption exists if enforcement of state law could stand as an obstacle to the accomplishment and execution of the full purposes and objectives of U.S. Congress.

Even if U.S. Congress has permitted concurrent regulation within a particular field, state action is preempted if it interferes with, or even potentially interferes with, federal authority.

Energy & Utilities Law > Administrative Proceedings > Preemption

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

HN14[] **Administrative Proceedings, Preemption**

The United States Supreme Court repeatedly finds federal preemption wherever enforcement of state law would encroach on the Federal Energy Regulatory Commission's exclusive jurisdiction over wholesale interstate electricity rates.

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN15[] **Separation of Powers, Jurisdiction**

For preemption purposes, the Federal Energy Regulatory Commission's (FERC) jurisdiction need not cover the entire power industry, but rather only an "identifiable portion" of the field. FERC's exclusive jurisdiction over wholesale energy rates constitutes such an "identifiable portion" of the field.

Antitrust & Trade Law > Regulated Industries > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN16[] **Antitrust & Trade Law, Regulated Industries**

For preemption purposes, the policy declaration that federal regulation is to extend only to those matters which are not subject to regulation by the states is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN17[] **Civil Actions, Jurisdiction**

The simply fact that there is an "imminent possibility" that the state regulation at issue would conflict with the Federal Energy Regulatory Commission's jurisdiction supports a finding of preemption.

Counsel: FOR PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, plaintiff: Steve W. Berman, Hagens and Berman, Seattle, WA. Kevin P Roddy, Hagens Berman, Los Angelas, CA. Michael a Goldfarb, Law Offices of Michael Goldfarb, Seattle, WA.

For PG&E ENERGY TRADING HOLDINGS CORPORATION, defendant: Gregory P Lindstrom, Latham and Watkins, San Francisco, CA.

For RELIANT ENERGY SERVICES, INC., defendant: Christopher J Healey, Luce Forward Hamilton and Scripps, San Diego, CA.

For SEMPRA ENERGY TRADING, SEMPRA ENERGY RESOURCES, NRG ENERGY INC, CABRILLO POWER I, LLC, CABRILLO POWER II LLC, EL SEGUNDO POWER, LLC, LONG BEACH GENERATION, LLC, defendants: Timothy B Taylor, Sheppard Mullin Richter and Hampton, San Diego, CA.

For MIRANT CORPORATION, defendant: John A Sturgeon, White and Case, Los Angeles, CA. Robert B Pringle, **[**2]** Law Offices of Robert Pringle, San Francisco, CA.

For POWEREX CORP, defendant: Neil E Giles, J Clifford Gunter, III, Andrew M Edison, Bracewell and Patterson, Houston, TX. Steven Cruz Uribe, Butz Dunn Desantis and Bingham, San Diego, CA. Deanna E King, Paul W Fox, Bracewell and Patterson, Austin, TX.

Judges: ROBERT H. WHALEY, United States District Judge.

Opinion by: Robert H. Whaley

Opinion

[*1074] ORDER GRANTING MOTIONS TO DISMISS

Before the Court is Defendant Powerex Corporation's to Dismiss and Motion to Strike (Ct. Rep. 3) and Defendants' Motion to Dismiss Complaint (Ct. Rec. 12). [1] A hearing was held on December 19, 2002 in San Diego, California. Plaintiffs and Defendants were present and represented by counsel.

BACKGROUND

Defendants' motions for dismissal are premised on the "filed-rate doctrine" and federal preemption principles. **[**3]** In order to resolve these legal issues; however, it is important to detail the rather complex factual context in which they arise.

A. California's Deregulated Energy Market

Plaintiff Public Utility District No. 1 of Snohomish County ("Snohomish") brings the current lawsuit seeking money damages and injunctive relief for prices charged by the Defendants, a group of energy sellers, for sales of electricity made in the deregulated California energy market in the year 2000. A proper determination of the validity of Plaintiffs claims hinges on an understanding of the nature and operation of California's deregulated energy market.

In the mid-1990s, California moved to deregulate its energy markets. *See* California Assembly Bill 1890 (AB 1890). In restructuring its energy markets, California sought to separate utilities' vertically-integrated generation, transmission, and distribution functions with a framework under which competition would be allowed in the supply of electric power. This new scheme replaced the regulation of retail rates based upon cost and reasonable rate of return with competitively determined "market-based rates." Theoretically, deregulation was supposed to **[**4]** allow the free market to set electricity prices, rather than relying on cost-based rates set through regulation.

This restructuring involved the creation of two new non-governmental corporations to coordinate the transmission and sale of electricity: the Independent System Operator ("ISO") and the California Power Exchange ("PX"); These entities were, organized under California law, but regulated by the Federal Energy Regulatory Commission ("FERC"). Pursuant to deregulation, the price of energy was no longer set by regulators, but, rather, determined through competitive auctions administered by the PX. The PX operated a continuous state-wide auction, matching bids for sale and purchase of wholesale electricity. [2] The PX matched supply bids with requirements for the delivery of electricity, as **[*1075]** expressed by demand bids from buyers. The ISO operated the electrical grid for the State of California and purchased electricity as needed to assure system reliability. If customer demand was not met by the PX, then the ISO was required to procure power to maintain the stability of the grid.

[5]** In order for the PX and ISO to become operational, FERC was required to approve certain filings by the PX and ISO. In particular, the ISO and PX filed tariffs with FERC, and FERC reviewed and approved those tariffs as an appropriate means of achieving "just and reasonable" rates before authorizing the PX and ISO markets to operate. These tariffs comprised the rules for trading in the California wholesale electricity markets. Every participant in the

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[1] The second motion-Motion to Dismiss Complaint-is brought by a group of eight other Defendants besides Powerex.

[2] The PX is no longer operational.

market had to formally bind itself to comply with those tariffs. It is the alleged, ensuing manipulation of this new deregulated scheme that forms the basis of Plaintiffs complaint.

B. Allegations in the Complaint

Plaintiffs complaint seeks redress for alleged unfair business practices and market manipulation of the wholesale energy market by the Defendants. (Ct. Rec. 1.) More specifically, Plaintiff "alleges that defendants unlawfully manipulated the market for electric energy by fixing prices and restricting supply into the markets operated by the [PX] and the [ISO], or by engaging in other conduct for the purpose of artificially inflating the price of electricity and/or charging unlawful prices for such electricity." **[**6]** *Id.* In P 6 of its complaint, Plaintiff further alleges that it has been "forced to pay prices for electricity *in excess of rates that would have been achieved by a competitive market." Id.* (emphasis added).

Plaintiff brings a cause of action for violation of the California ***antitrust law*** ("*Cartwright Act*") and a cause of action for violation of *California's Unfair Competition Law* ("UCL"). *Id.* As to the state antitrust claim, Plaintiff alleges that Defendants "gamed" the market, which resulted in "wholesale energy being sold at prices that far exceed the price which energy would be sold in a truly competitive market." *Id.* In relation to Plaintiffs UCL claim, it alleges "defendants never filed their rates… with" the result of which "deprived the public… notice and information necessary to make informed decisions about rates." *Id.*

Of particular import to the current motion is the relief sought by Plaintiff in its complaint. Specifically, Plaintiff asks the Court to "enjoin the defendants from continuing to conduct business via the unlawful and unfair business acts or practices described herein," to order the Defendants "to disgorge" all monies wrongfully obtained, **[**7]** and to order the Defendants "to pay restitution to restore to plaintiff all funds acquired by means of any act or practice declared by this Court to be an unlawful or unfair act or practice." *Id.*

C. Ongoing FERC Proceedings

Currently, there are several cases pending before FERC regarding matters similar, if not identical, to those initiated by Plaintiff in this Court. There are pending *Section 206* proceedings at FERC filed by San Diego Gas & Electric, in which FERC is investigating whether refunds should be ordered for sales into the California wholesale energy markets. *See SDG&E v. Sellers, 92 F.E.R.C. P 61,172(2000)*. FERC is also conducting a broad investigation into whether any seller of electricity in the California wholesale markets manipulated, or "gamed," those markets. See *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 F.E.R.C. P 61,165 (2002).* Related proceedings have been brought with **[*1076]** respect to the Pacific Northwest markets. See*Puget Sound Energy v. Sellers, 96 F.E.R.C. P 63,044 (2001)*. **[**8]** Lastly, Snohomish itself has apparently filed two complaint proceedings with FERC concerning long-term power supply contracts that it executed with two suppliers. *See Nevada Power Co. and Sierra Pac. Power Co. v. Duke Energy Trading & Mktg., L.L.C., et al., 99 F.E.R.C. P 61,047(2002)* (consolidated proceedings).

Discussion

As noted, Defendants assert two related, but separate, grounds in support of their motions to dismiss Plaintiffs claims: the filed rate doctrine, and federal preemption. The validity of each of these principles as justification for dismissal is addressed, in turn, below.

I. The Filed Rate Doctrine

Defendants' motions to dismiss require the Court to consider the application of the "filed rate doctrine" to Plaintiffs state law claims. The filed rate doctrine has a long history in federal law, but here, it is being asserted in a contemporary regulatory context, which offers some new twists to its otherwise rather straightforward application. As noted above, the key feature of California's recently deregulated wholesale energy markets is the markets' reliance on "market-based rates." These rates are still subject to FERC oversight, **[**9]** but to a much lesser extent than traditional "cost-based rates." Thus, the determinant question in this case in regard to the application of the filed rate doctrine is whether the doctrine applies to the relatively new innovation of "market based rates" governing wholesale energy trading.

A. Contours of the Filed Rate Doctrine

The filed rate doctrine has its roots in the *Federal Power Act* ("FPA") itself. *See generally* *Federal Power Act*, §§ I *et seq.,* 321 as amended, *16 U.S.C.A. §§ 792 et seq.* Under the FPA, regulatory jurisdiction over electricity is divided into two components: states have regulatory authority over intrastate retail sales of electricity, and the federal government has exclusive jurisdiction over interstate, wholesale sales. Thus, in the FPA, Congress drew "a bright line easily ascertained between state and federal jurisdiction … this was done in the *Power Act* by making [FERC] jurisdiction plenary and extending to all; wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." **[**10]** *Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205, 215, 11 L. Ed. 2d 638, 84 S. Ct. 644*(1964). The "bright line" division of authority adopted by Congress precludes any attempt to inject state law into areas reserved to FERC. ***HN1***[] Where FERC has jurisdiction, that jurisdiction is exclusive. *See* *Public Utils. Comm'n of California v. FERC, 900 F.2d 269, 274(D.C. Cir. 1990)*("Here, if there be Commission jurisdiction over some component of the transaction, it is exclusive over the component.").

HN2[] *Section 824e(a) of the FPA* vests exclusive jurisdiction over interstate wholesale electricity rates and practices affecting such rates with FERC. [3] *See* *16 U.S.C. § 824e(a)*. FERC's exclusive jurisdiction extends not only to rates *per se,* but also to "any rule, regulation, practice or contract affecting such" rates. *16 U.S.C. § 824e(a)*.

[11] [*1077]** ***HN3***[] The filed rate doctrine, in the electricity context, results from FERC's responsibility for setting and ensuring compliance with just and reasonable rates of wholesale electricity sale and transmission. [4] *See* *Pacific Gas & Elec. v. Lynch, 216 F. Supp. 2d 1016, 1033(N.D. Cal. 2002)*. The filed rate doctrine arises from the sum of these concepts, and holds that electricity generators who file their rates with FERC, as they are required to do by law, are insulated from lawsuits challenging those rates and from court orders having the effect of imposing a rate other than that filed with FERC. Because the filed rate doctrine is a product of federal regulatory jurisdiction staked out in the *Federal Power Act*, judicial enforcement of the filed rate doctrine is "a matter of enforcing the *Supremacy Clause*." *Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986)*.

[12]** Thus, ***HN4***[] under the filed rate doctrine, "[a] State must… give effect to Congress' desire to give FERC plenary authority over, interstate wholesale rates, and to ensure the States do not interfere with this authority." *476 U.S. at 966*. Moreover, courts, both state and federal, are prohibited from considering any rate other than that-filed with FERC to be the appropriate wholesale rate. *Lynch, 216 F. Supp. 2d at 1033*. As such, "the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488(8th Cir. 1992)*.

Given the exclusive jurisdiction of FERC over the PX and ISO wholesale markets, Defendants argue that Plaintiffs claims are barred because they "go to the heart of the filed rate doctrine." Defendants maintain that the Court

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[3] *Section 824e(a)* states, in pertinent part, that FERC "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." *See* *16 U.S.C. § 824e(a)*.

[4] Judge Walker's opinion in *Lynch* contains a comprehensive and in-depth discussion regarding the history and genesis of the filed rate doctrine.

should apply the doctrine to dismiss the Plaintiffs claims because, in order to resolve those claims, the Court would have to do precisely what the doctrine forbids, namely, set a rate different from that chosen by FERC.

[13]** The Court agrees with Defendants-the filed rate doctrine indeed bars Plaintiffs claims. As the Ninth Circuit stated in *County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 863(9th Cir. 1997)*, ***HN5***[] "the filed rate doctrine bars all claims-state and federal-that attempt to challenge a rate that a federal agency has reviewed and filed." Moreover, the Ninth Circuit has made clear that "the filed rate doctrine [prohibits] not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC." *Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929-30(9th Cir. 2002)*.

Plaintiffs claims ask the Court to do exactly that. The allegedly improperly inflated rates paid by Plaintiff are those that resulted from the tariffs filed and approved by FERC. In its complaint, Plaintiff asserts that absent Defendants' improper conduct and anti-competitive acts, it would have paid different rates. As such, Plaintiff specifically seeks as redress the difference between the charged rates and the different, hypothetical **[**14]** rates it believes would have "been achieved in a competitive market." (Ct. Rec. 1.) Thus, in order to resolve Plaintiff's claims and provide it the damages it seeks, the Court would be expressly required to assume "a hypothetical rate different from that actually set by FERC." *Transmission, 295 F.3d at 929-30.* This, the Court cannot do. **[*1078]**

Each of the causes of action brought by Plaintiff require the Court to make this impermissible determination. As to Plaintiffs antitrust claims, Plaintiff seeks monetary compensation for "overcharges." The filed rate doctrine bars this claim because the Court would presumably have to measure the difference between the allegedly fixed wholesale price and an otherwise "just and reasonable" wholesale price. Indeed, the Ninth Circuit's decision in *County of Stanislaus* compels this conclusion. There, the plaintiff alleged that the "defendants' FERC-approved rates were the product of antitrust violations, and [sought] as damages the 'overcharge' that resulted from the fixed prices." **[**15]** *County of Stanislaus, 114 F.3d at 863*. The Ninth Circuit held, however, that such a claim was "precisely what the filed rate doctrine prohibits." *Id.*

The same result obtains concerning Plaintiff's UCL claims. Plaintiff alleges that Defendant engaged in "unlawful, fraudulent, or unfair business practices," which requires Defendants to provide "restitution to plaintiff for all funds unlawfully, unfairly or fraudulently obtained" as a result of Defendants' violations of the UCL. (Ct. Rec. 1.) Plaintiff also claims that the Court should order Defendants to "disgorge all revenues and profits acquired as a result of the unlawful business acts or practices." *Id.* Thus, to resolve this claim as well, the Court would be obliged to determine what level of disgorgement and restitution is appropriate, which, in turn, would require it to essentially determine what a "just and reasonable" rate would have been had Defendants not engaged in the alleged behavior. Such a determination, however, lies within the exclusive province of FERC, as ***HN6***[] the filed rate doctrine applies to any "state law causes of action relating to rates established by federal agencies." [5] **[**16]** *County of Stanislaus, 114 F.3d at 863*(citing Arkansas *Louisiana Gas Co. v. Hall, 453 U.S. 571, 580, 69 L. Ed. 2d 856, 101 S. Ct. 2925(1981))*.

Finally, the filed rate doctrine operates to bar the portion of Plaintiffs prayer for relief that asks the Court to order **[**17]** Defendants to "immediately cease all acts of unlawful and unfair competition and enjoin defendants from continuing to conduct business via the unlawful and unfair business acts or practices described herein."(Ct. Rec. 1.) Plaintiffs request for injunctive relief seeks to enjoin conduct subject to the tariffs filed with FERC. The FERC tariffs govern the operation of the California wholesale energy markets and, in essence, the "unlawful conduct" and "unfair business acts" that form the gravamen of Plaintiff's complaint. Issuance of the injunction

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[5] Although not binding authority, the Court notes that in *Day v. AT&T Co., 63 Cal. App. 4th 325, 336, 74 Cal. Rptr. 2d 55(1998)*, the California Court of Appeals held, in a case involving claims brought under the UCL challenging rates that had been filed by common carriers with the Federal Communications Commission, that "[a] claim attacking rate practices made public in the filed tariff schedules asks this court in involve itself in the rate-making process, which it cannot do." Further, the court held that plaintiffs "may not seek to recover any money from respondents, whether they label their request one for *disgorgement* or otherwise." *63 Cal. App. 4th at 337* (emphasis added).

sought by Plaintiff would impose judicial oversight of all Defendants' actions, thereby effectively changing the rules established by FERC for participating in these markets. The filed rate doctrine bars this result. *See* *Town of Norwood, Mass. v. New England Power Co., 202 F.3d 408, 419(1st Cir. 2000)*(holding injunctive relief barred by filed rate doctrine because relief sought by plaintiff interfered with tariffs filed with FERC).

[*1079] B. The Filed Rate Doctrine's Application In Regard to FERC's Market Based Rates Scheme

Plaintiff attempts to avoid the determination that the filed rate doctrine **[**18]** bars its claims by attacking the doctrine's application to FERC's modern market-based rate scheme employed in California's deregulated energy market. Plaintiff maintains that the filed rate doctrine does not apply in this scenario because the doctrine only bars claims that challenge rates specifically identified by tariff. Because the filed rate doctrine supposedly is to be construed narrowly, and under a market-based rate system; FERC does not review and approve rates *before* they are charged, Plaintiff claims the filed rate doctrine has no application here. Plaintiff argues that the doctrine does not apply because the FERC filings at issue do not include all the information required in traditional cost-based or formula-based rate filings. In any event, Plaintiff also maintains that the doctrine is inapplicable because Defendants obtained waivers of the FERC filing requirements. As the following discussion reveals, however, Plaintiff's arguments are not persuasive.

As an initial matter, the Court notes that Plaintiff mischaracterizes FERC oversight in the market-based rate scheme. Contrary to Plaintiffs assertions that FERC does not approve the rates charged in advance, FERC **[**19]** in actuality accomplished this review via the tariffs it approved.

HN7[] As a regulatory agency, FERC has wide discretion to permit different types of tariffs. *See. e.g., Farmer's Union Cent. Exch., Inc. v. FERC, 236 U.S. App. D.C. 203, 734 F.2d 1486, 1501(D.C. Cir. 1984)*("FERC is not required to adhere rigidly to a cost-based determination of rates"). As a result, in the case of wholesale electricity, FERC authorized the establishment of tariff-based market mechanisms for pricing power. Yet, the rates paid by wholesale buyers remained subject to FERC jurisdiction, and subject to FERC review. While Defendants do not file specific rates with FERC prior to selling power, they sell pursuant to the terms, conditions, and formulas established by the PX and ISO tariffs. As previously noted, FERC approved those tariffs as a means of achieving "just and reasonable" rates in advance of authorizing the PX and ISO markets to operate. As such, the filed rate doctrine applies: to bar claims challenging the rates set by FERC in a market-based rate system.

Most damning to Plaintiff's arguments is the simple fact that case law does not support its contentions that the market-based **[**20]** rate system circumvents the filed rate doctrine. This argument that the introduction of a market-based rate system skirts the reach of the filed rate doctrine-has been uniformly rejected by the courts. For instance, in *Town of Norwood,* the court rejected plaintiff's argument that "the filed rate doctrine should not apply where the 'regulated' rates have been left to the free market." *202 F.3d at 419*. Instead, the court held that ***HN8***[] where rates are determined in a regulated market, "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review."*Id.*

Even more on point is Judge Walker's opinion in *Lynch.* There, the court addressed the filed rate doctrine in the same context as presented here-in regard to the market-based rate scheme central to California's deregulated wholesale energy market. The court held "despite…the unique features of the regulatory context underlying the instant dispute, the court finds that the filed rate doctrine applies here in much the same way as it does under a cost-of-service regime." **[**21]** *Lynch, 216 F. Supp. 2d at 1038*. Likewise, in ***[*1080]*** *Campbell v. San Diego Gas & Electric Co., 2001 U.S Dist. LEXIS 24297, 2001 WL 1860381(E.D. Wash. 2001)*, this Court plainly rejected the contention that the filed rate doctrine does not apply to market-based rates.

As a result, Plaintiff's additional assertion that the filed rate doctrine does not apply because the FERC filings do not include all the information required in cost-based or formula-based rate filings must be rejected. With market-based rates, FERC assures "just and reasonable" rates through a market analysis, which necessitates independent filing requirements for the market-based tariff system. *Nothing in the Federal Power Act* supports the assumption that because certain elements are necessary in a cost-based or formula-based rate tariff, they must also be found in the market-based system. As noted by Judge Walker in *Lynch,* "passing fashions in regulatory schemes of the day cannot rework the structure of the regulation established by Congress in the FPA." **[**22]** 216 F. Supp. 2d at l039. FERC has the authority to vary the oversight it wishes to employ depending on the type of rate used. As long as power generators file the information required by FERC, the filed rate doctrine is satisfied.

Lastly, the Court rejects Plaintiff's argument that the filed rate doctrine does not apply here because Defendants supposedly "waived" the FERC filing requirements. Rather, FERC appears to have only granted Defendants a waiver as to regulations used to determine cost-based rates under the Code of Federal Regulations. Since Defendants sold power pursuant to market-based rates, the requirements for cost-based rates were unnecessary and, thus, FERC waived them. This waiver does not jeopardize application of the filed rate doctrine here.

In sum, the filed rate doctrine protects FERC's decisions as to what constitutes a "just and reasonable" rate under a market-based rate system. Plaintiff's complaint cannot be characterized as anything but a direct attack on rates or an attack on matters underlying wholesale electricity rates, nor can the relief it requests be granted without affecting the terms, conditions, and rates for wholesale electricity. As such, the **[**23]** Court finds that the filed rate doctrine bars Plaintiff's claims.

II. Federal Preemption

The second ground for dismissal raised by Defendants rests on the doctrine of federal preemption. Defendants maintain that the relief Plaintiff seeks-monetary relief to reduce past rates, and injunctive relief to regulate future conduct in the wholesale electricity market-cannot be granted without interfering with exclusive federal authority over wholesale power transactions.

From the outset, it is important that the Court differentiate between the different types of preemption that exist under the law. Defendants base their motion on a substantive preemption analysis-forwarding both field and conflict preemption as a defense to Plaintiff's claims-and do not rely on jurisdictional preemption, as discussed by this Court previously in Hendricks v. Dynergy Power Marketing, Inc., 160 F. Supp. 2d 1155 (S.D. Cal. 2001). In *Hendricks,* the Court dealt with the question of whether Congress intended the Federal Power Act to completely occupy the field of energy production and distribution so as to convert the plaintiff's state law claims to a federal claim for purposes **[**24]** of removal jurisdiction. 160 F. Supp. 2d at 1158. That issue is distinct from the question raised here by Defendants: whether the Federal Power Act functions as a preemption *defense* to Plaintiffs substantive claims.

HN9[] "The Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." **[*1081]** Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23(1824)). Thus, **HN10**[] in regard to a substantive preemption analysis, federal law may pre-empt state law in three different ways. First, Congress may preempt state law by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305(1977). Second, preemption may be inferred when federal regulation in a particular field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." **[**25]** Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146(1947). Third, preemption may be implied when state law actually conflicts with federal law. *Fidelity Fed. Say. & Loan Ass'n v. de la* Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014(1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210(1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399(1941). It is the last two forms of preemption listed-field preemption and conflict preemption-that Defendants raise as grounds for dismissal here.

A. Field Preemption

Defendants maintain that field preemption operates to bar Plaintiff's claims because, through the *Federal Power Act, Congress* occupied the wholesale portion of the field of electricity rate regulation. Accordingly, Defendants assert that Plaintiff's claims **[**26]** are preempted because it seeks state judicial action within this field.

HN11[] Federal courts have held that "through the FPA, Congress preempted states, state courts; and even federal courts from acting in areas reserved exclusively for the FERC." See*Gulf States Utilities Co. v. Alabama Power Co.,* 824 F.2d l465, 1470(5th Cir. 1987). As previously discussed, the FPA gives the FERC exclusive jurisdiction over interstate wholesale electricity rates. *See* *16 U.S.C. §§ 824-824e*. The FPA permits utilities to charge only just and reasonable rates and to file their rates with the FERC. *16 U.S.C. §§ 824d(a-c)*. FERC may review the filed rates and, if it finds a rate to be unjust or unreasonable, it may fix a just and reasonable rate. *16 U.S.C. §§ 824e(a)*. Therefore, under the FPA, a buyer or seller of electricity may not sue in court to change the filed rate for any reason. *See e.g.,* *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 250, 95 L. Ed. 912, 71 S. Ct. 692:(1951)*(under "filed rate doctrine," court may neither adjudicate whether rate is reasonable nor replace filed rate **[**27]** with more reasonable one).

HN12[] If the federal government occupies a field, or an identifiable portion of it, any state regulation or state court action within the same, select area is necessarily preempted. The Supreme Court made this point clear in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.,* stating:

> State … regulation is not preempted only when it conflicts with federal law…. When the federal government completely occupies a given field or *an identiflable portion of it,* as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

461 U.S. 190, 212-213, 75 L. Ed. 2d 752, 103 S. Ct. 1713(1983)(quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236,* ***[*1082]*** *67 S. Ct. 1146(1947, 91 L. Ed. 1447),* (emphasis added). The metaphor "occupy the field" is strongly associated with, and often taken to automatically entail, exclusive federal control. *See* **[**28]** *Public Util. Comm'n of Cal. v. FERC, 283 U.S. App. D.C. 285, 900 F.2d 269, 274(D.C. Cir. 1990)*.

Consequently, the fact that FERC maintains exclusive jurisdiction over interstate wholesale electricity rates indicates Plaintiffs state law claims are barred under the doctrine of field preemption. The only authority granted to the states under the FPA is over intrastate retail electricity sales. Because FERC retains "exclusive jurisdiction" over the regulation of interstate wholesale energy rates, under the "bright line" division of authority contained in the FPA; federal law occupies "an identifiable portion" of the regulated electricity field. Thus, to the extent that state regulation or court action would operate within the exclusive federal 'domain of wholesale energy rates, it is preempted. *Cf* *id.*

Yet, Plaintiff's claims impermissibly seek to act within this field by asking the Court to award damages, restitution, disgorgement, or the like, in order to compensate Plaintiff for the difference between the wholesale rate it paid and what the Court determines to be a reasonable rate. This would equate to direct regulation of interstate wholesale electricity **[**29]** rates, which is preempted by the FPA.

B. Conflict Preemption

HN13[] Even if Congress has not completely occupied a field, preemption exists if enforcement of state law could "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 298, 99 L. Ed. 2d 316, 108 S. Ct. 1145(1988)*. Even if Congress has permitted concurrent regulation within a particular field, state action is preempted if it interferes with, or even potentially interferes with, federal authority. *See* *485 U.S. at 310*("When a state regulation presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.'")(internal citations omitted). Not surprisingly, then, ***HN14***[] the Supreme Court has repeatedly found federal preemption wherever enforcement of state law would encroach on FERC's exclusive jurisdiction over wholesale interstate electricity rates. *See, e.g.,*

[30]** *Mississippi Power & Light v. Mississippi, 487 U.S. 354, 371, 101 L. Ed. 2d 322, 108 S. Ct. 2428(1988)*(holding state proceedings affecting interstate rates were preempted because "FERC has exclusive authority to determine the reasonableness of wholesale rates.")

Additionally, the Ninth Circuit has found preemption in circumstances similar to those present in this case. In *Duke Energy Trading and Marketing, L.L.C. v. Davis, 267 F.3d 1042(9th Cir. 2001)*; the Ninth Circuit dealt specifically with California's deregulated energy markets. In *Davis,* the Ninth Circuit held that executive orders issued by Governor Gray Davis under the *California Emergency Services Act* that commandeered contracts in the PX block forward market were preempted because they directly affected the terms and conditions of wholesale power sales governed by FERC. *267 F.3d at 1057-58*.

In *Transmission Agency of Northern California v. Sierra Pac. Power Co., 295 F.3d 918, 929(9th Cir. 2002)*, the Ninth Circuit found that plaintiff's tort and property claims impermissibly interfered with FERC's exclusive jurisdiction over the transmission and sale **[**31]** of wholesale electric power. In *Transmission,* plaintiff asserted state law tort and property claims based on its claimed right to a certain level **[*1083]** of interstate transmission capacity. The Ninth Circuit held that the state law claims were preempted, because the *Federal Power Act* "delegates to the Federal Energy Commission the *exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *295 F.3d at 928*(emphasis in original).

Similarly, it is clear that here Plaintiff's state law claims that seek repayment of wholesale rates found to be excessive under state law standards would inevitably conflict with FERC's exclusive jurisdiction to determine interstate wholesale rates. The Court would impermissibly interfere with FERC's rate-making authority if it refunds wholesale rates in this action, because in doing so the Court would essentially have to determine what constitutes "just and reasonable" rates. This conclusion is bolstered by the very fact that the same wholesale rates and rate-related practices that Plaintiff attacks here are the subject of several ongoing matters currently proceeding before **[**32]** FERC. Thus, it is difficult to escape the conclusion that any additional or different relief ordered by this Court would necessarily obstruct and frustrate FERC's proper regulatory effort.

C. Plaintiff's Arguments Against Finding Preemption

Plaintiff offers three core arguments supporting its view that its claims are not subject to federal preemption. First, Plaintiff argues that the FPA merely fills gaps in state regulation and therefore cannot preempt its claims. Second, Plaintiff contends that preemption is inapplicable because the FPA allegedly does not preempt antitrust laws. Lastly, Plaintiff asserts that there can be no conflict preemption because conflict preemption requires an "actual" conflict with an agency ruling, as opposed to a "potential future" conflict.

As to Plaintiff's first argument, it contends that Congress limited FERC's jurisdiction to those select areas not subject to existing state regulation, and thus, judicial "conduct" that may incidentally impact rates is not preempted by FERC's jurisdiction. It argues that because utility companies were subject to California antitrust and UCL regulation at the time the FPA was enacted, California retains jurisdiction **[**33]** as to these claims.

Plaintiff's argument, however, ignores the simple fact that the *Federal Power Act* granted FERC exclusive jurisdiction over the "field" at issue here-interstate wholesale energy rates. ***HN15***[] FERC's jurisdiction need not cover the entire power industry, but rather only an "identifiable portion" of the field. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 212-213*. FERC's exclusive jurisdiction over wholesale energy rates constitutes such an "identifiable portion" of the field. Moreover, the D.C. Circuit has rejected an argument similar to Plaintiff's, stating "we must correct California's assumption that FERC's and its jurisdiction are *concurrent*… here if there be [FERC] jurisdiction over some component of the transaction, it is exclusive over that component." *See Public Util. Comm'n of State of Cal. v. F.E.R.C., 283 U.S. App. D.C. 285, 900 F.2d 269, 274 (D.C. Cir. 1990)* (emphasis added). [6] **[**35]** Thus, Plaintiff's claim that state **[*1084]** law can be preempted only if

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[6] In regard to its first argument, Plaintiff also points out that the FPA contains a policy declaration that federal regulation of the transmission and sale of electric energy was "to extend only to those matters which are not subject to regulation by the States."

the specific purpose of a state statute is to regulate in an area reserved to FERC is plainly wrong. **[**34]** The Ninth Circuit's decision in *Duke Energy* makes this point clear. As noted, *Duke Energy* concerned the California Governor's attempt to use his power under the *California Emergency Service Act to* commandeer property associated with the power industry. *See* *267 F.3d at 1047*. *Obviously the California Emergency Power Act* is hardly a statute whose central purpose is to regulate matters Congress intended FERC to regulate, yet the Ninth Circuit still held that the Governor could not use his emergency powers; in a manner that would affect the terms and conditions of wholesale power sales governed by FERC. *267 F.3d at 1057-58*. [7]

Plaintiff's second argument is that the *Federal Power Act* does not preempt antitrust claims. In this regard, Plaintiff notes that Congress preserved application of antitrust laws by adopting a savings clause stating that the EPA, as amended by the *Energy Policy Act,* "shall not be construed to modify, impair, or supercede the antitrust laws." *16 U.S.C. § 824k(e)(2)*. Plaintiff also argues that under the Supreme Court's **[**36]** decision in *Otter Tail Power Co. v. United States, 410 U.S. 366, 373-74, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*, and its progeny, Defendants are not entitled to antitrust immunity and, as such, Plaintiff's antitrust claims are not preempted.

Plaintiff's argument concerning the savings clause contained in *16 U.S.C. § 824k(e)(2)* is a red herring. The savings clause only "saves" a role for federal antitrust laws in connection with certain sections of the EPA. *See* *16 U.S.C. § 824k(e)(2)*(applying clause to *sections 824i, 824j, 824l, and 824m*). *Section 824d*, which deals with interstate wholesale electricity rates; is *not* covered by the savings clause.

Plaintiff's reliance on *Otter Tail;* and its progeny, also is misplaced. In *Otter Tail,* the Department of Justice alleged that Otter Tail had "monopolized" in *Violation of the Sherman Antitrust Act* by refusing to "interconnect" and "wheel" power from other wholesalers to new municipal utilities where Otter Tail had been retailing power. **[**37]** *410 U.S. at 368*. At the time, the FPA did not grant the Federal Power Commission (FERC's predecessor) exclusive jurisdiction over the interconnection and wheeling of power issues. The FPC only had "limited authority" to order interconnections and no authority to order wheeling. *See* *id. at 375*. Ottertail argued that its refusals to deal were not subject to federal anti-trust laws. *Id. at 373*. The Court disagreed, noting that there was no pervasive regulatory scheme and, thus, "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Id. at 374*.

[*1085] *Otter Tail,* thus, relates to a different issue-antitrust immunity-that has little, if any, relation to the case at bar. The issue here is not whether Defendants are entitled to federal antitrust immunity but, rather, whether the *Supremacy Clause* prevents the Plaintiff's from employing state antitrust claims in a manner that intrudes on FERC's exclusive jurisdiction over interstate wholesale electricity rates. *See* **[**38]** *Square D. Co. v. Niagara Frontier Tarif Bureau, 476 U.S. 409, 422, 90 L. Ed. 2d 413, 106 S. Ct. 1922(1986)*(discussing distinction between antitrust immunity and preemption, stating "we disagree…with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation."). Preemption is a function of the *Supremacy Clause*, and controls the interaction between state and federal laws. *Otter Tail* addressed only the interaction of two federal laws-the *EPA and Sherman*

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16 U.S.C. § 824(a). Plaintiff claims that California antitrust and unfair competition regulation of utilities were areas of state regulation contemplated by the policy declaration. The Supreme Court has rejected this contention, however, stating: ***HN16***[] "the policy declaration that federal regulation is 'to extend only to those matters which are not subject to regulation by the States' is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U.S. 515, 527, 89 L. Ed. 1150, 65 S. Ct. 749 (1945)*.

[7] The Supreme Court's decision in *Schneidewind* also dispels Plaintiff's argument that the relief it requests must directly regulate Wholesale rates to be preempted. There, the state statue regulating the issuance of securities did not directly regulate wholesale rates, but was nevertheless preempted because it could force gas companies to raise rates by preventing them from issuing securities. *485 U.S. at 308*("By keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' This is regulation of rates.").

Antitrust Act-and hence is not a preemption case. Defendants are not seeking a broad, blanket repeal of antitrust laws in their motion to dismiss, but rather seek a narrower determination of whether Plaintiff's antitrust claim (and its UCL claim) in this particular action improperly intrude upon Congress's treatment of wholesale electricity rates and conduct. [8] Thus, while as a general proposition it may be true that electric utilities subject to FERC **[**39]** jurisdiction may not enjoy antitrust immunity, it does not imply that Plaintiff may nonetheless invade FERC's jurisdiction by employing a private, state-law antitrust remedy that changes FERC-regulated interstate wholesale electricity rates.

Lastly, Plaintiff's contention that preemption requires an "actual" rather than "potential" conflict also lacks merit. To begin with, Supreme Court precedent holds otherwise. In *Schneidewind,* the Supreme Court held that ***HN17***[] the simply fact that there was an "imminent possibility" that the state regulation at issue would conflict with FERC jurisdiction supported a finding of preemption. **[**40]** *See* *485 U.S. at 310*. Likewise, in *Mississippi Power & Light,* the Court held that the Mississippi Supreme Court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was *actually determined* in the FERC proceedings." *487 U.S. at 373* (emphasis added).

More importantly; it is difficult to characterize this case as only presenting a "potential" conflict, as FERC is currently conducting proceedings directly related to the issues in front of this Court. FERC appears, to be in the process of making changes to the tariff rules and is investigating whether the operation of the tariffs, contracts, *etc.,* of the ISO and PX adversely affected the wholesale power markets in California. Thus, both the monetary and injunctive relief Plaintiff seeks here present direct and specific conflicts with FERC's regulatory authority.

Accordingly, **IT IS HEREBY ORDERED** that Defendant Powerex Corp.'s Motion to Dismiss and Motion to Strike (Ct. Rec. 3) and Defendants' Motion to Dismiss **[*1086]** Complaint (Ct. Rec. 12) are **GRANTED.**

IT IS SO ORDERED. The District Court Executive is hereby **[**41]** directed to enter this order and to furnish copies to counsel.

DATED this 6th day of January, 2003.

ROBERT H. WHALEY

United States District Judge

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[8] Plaintiff also cites several cases that followed *Otter Tail* and concluded electric utilities are not immune from federal antitrust laws. *See, e.g.* *Cantor v. Detroit Edison Co., 428 U.S. 579, 596 n.35, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. These cases do not deal with the issue of federal preemption of state law, however, and also have little bearing here.

Menasha Corp. v. News Am. Mktg. In-Store, Inc.

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

January 7, 2003, Decided ; January 7, 2003, Filed; January 8, 2003, Docketed

Case No. 00 C 1895

Reporter

238 F. Supp. 2d 1024 *; 2003 U.S. Dist. LEXIS 177 **; 2003-1 Trade Cas. (CCH) P73,929

MENASHA CORPORATION, Plaintiff, v. NEWS AMERICA MARKETING IN-STORE, INC. and NEWS AMERICA MARKETING IN-STORE SERVICES, INC., Defendants.

Subsequent History: Costs and fees proceeding at, Petition granted by, in part, Petition denied by, in part *Menasha Corp. v. News Am. Mktg. In-Store, Inc., 2003 U.S. Dist. LEXIS 13405 (N.D. Ill., July 31, 2003)*
Affirmed by Menasha Corp. v. News Am. Mktg. In-Store, Inc., 2004 U.S. App. LEXIS 241 (7th Cir. Ill., Jan. 9, 2004)

Prior History: *Menasha Corp. v. News Am. Mktg. In-Store, Inc., 2002 U.S. Dist. LEXIS 7214 (N.D. Ill., Apr. 22, 2002)*

Disposition: **[**1]** Menasha's Motions In Limine granted in part and denied in part; News America's Motions to Strike Menasha's Responses denied; News America's Motion for Summary Judgment granted and case dismissed.

Core Terms

coupon, relevant market, dispensers, at-shelf, antitrust, consumers, retail, Sherman Act, manufacturers, in-store, Counts, summary judgment, statement of facts, marketing, motion in limine, material fact, products, chains, summary judgment motion, motion to strike, responses, unfair, monopolization, tortious interference, exclusive contract, unreliable, Deceptive, Practices, contends, entitled to summary judgment

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Summary Judgment, Supporting Materials**

Under U.S. Dist. Ct., N.D. Ill., R. 56.1(a)(3), a party moving for summary judgment must submit a statement of material facts in the form of short numbered paragraphs supported by specific references to the factual record. Under U.S. Dist. Ct., N.D. Ill., R. 56.1(b)(3), two types of submissions are permitted in response to a moving party's U.S. Dist. Ct., N.D. Ill., R. 56.1 statement of facts: (1) a response to each numbered paragraph supported by references to the record, and (2) a statement of short numbered paragraphs setting forth additional facts that require denial of summary judgment, supported by citations to the record. U.S. Dist. Ct., N.D. Ill., R. 56.1(b)(3)(A)-(B).

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Summary Judgment, Supporting Materials**

U.S. Dist. Ct., N.D. Ill., R. 56.1 serves the important function of structuring the summary judgment process so as to assist a district court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side proposes to prove a disputed fact with material evidence. By filing an unauthorized alternative statement of facts, a party's counsel seriously hinders the court's ability to perform its task of identifying those facts actually in dispute.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN3[] **Expert Witnesses, Daubert Standard**

Under Daubert, courts must act as gatekeepers to ensure that expert testimony satisfies the admissibility requirements of *Fed. R. Evid. 702*. Reliability is the touchstone for admission of expert testimony based on scientific, technical or other specialized knowledge. Courts have generally found consumer survey evidence admissible under Daubert if a qualified expert testifies that the survey was conducted according to generally-accepted principles of survey research.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN4[] **Admissibility, Expert Witnesses**

Under *Fed. R. Evid. 703*, a party seeking admission of an expert opinion based upon a survey must demonstrate that the expert's reliance on such data is reasonable.

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

HN5[] **Regulated Practices, Market Definition**

A relevant market for antitrust purposes consists of products that are reasonably interchangeable by consumers for the same purposes.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN6[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that a moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. A district court must review the record in the light most favorable to a nonmoving party and draw all reasonable inferences in that party's favor. Nevertheless, the party who bears the burden of proof on an issue may not rest on the pleadings, but must affirmatively demonstrate that there is a genuine issue of material fact that requires trial. While a district court may not resolve genuine factual disputes through summary judgment, weak factual claims can be weeded out through summary judgment motions. Summary judgment may be especially appropriate in the antitrust context because of the chill antitrust litigation can have on legitimate competition. For this reason, an antitrust plaintiff opposing a motion for summary judgment must present evidence that tends to exclude the possibility that the defendant's conduct was as consistent with competition as with illegal conduct.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Sherman Act, Claims**

A successful claim under § 1 of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. There are two standards for evaluating whether an alleged restraint of trade is unreasonable: the per se rule and the Rule of Reason. The per se rule is invoked when surrounding circumstances and/or the nature of the agreements makes the probability that the practices are anticompetitive so high, further inquiry into the particular market context is unnecessary.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN8[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A plaintiff may not amend its complaint through arguments in its brief in opposition to a motion for summary judgment. There must be evidence in the record from which a jury can reasonably find that there exists a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

HN9[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

In the context of an alleged horizontal agreement, a plaintiff must adduce either direct or circumstantial evidence reveling a unity of purpose or a common design and understanding.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Per Se Rule & Rule of Reason, Sherman Act**

Because an antitrust policy divorced from market considerations will lack any objective benchmarks, analysis of claims of monopolization under § 2 of the Sherman Act, as well as § 1 of the Sherman Act claims analyzed under the Rule of Reason, requires the trier of fact to begin by delineating the relevant market. A relevant market is comprised of those commodities reasonably interchangeable by consumers for the same purposes. Because a plaintiff always bears the burden of proving relevant market, to survive summary judgment on its antitrust claims, the plaintiff must offer admissible evidence that is sufficient for a jury to find that the proposed relevant market is accurate.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

It is not required that products be completely fungible to be considered part of the same relevant market under the Sherman Act, only that they are reasonably interchangeable by consumers for the same purposes.

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

HN12[] **Regulated Practices, Market Definition**

When an expert's opinion regarding the relevant market is not supported by sufficient facts, or when the record contradicts or renders the opinion unreasonable, it cannot support a jury's verdict.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN13[] **Regulated Practices, Market Definition**

The Illinois Antitrust Act provides that when the wording of the act is identical or similar to that of a federal ***antitrust law***, the courts of the state shall use the construction of the federal law by the federal courts as a guide in construing the act. *740 Ill. Comp. Stat. 10/11*. The threshold requirement of defining the relevant market is applied with equal force in the context of refusals to deal.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN14[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The Illinois Consumer Fraud and Deceptive Business Practices Act, *815 Ill. Comp. Stat. 505/1, et seq.*, was enacted to create broad protective coverage of consumers from the many types of deceptive or unfair selling and advertising techniques used by businesses. For a competing business to have standing to sue under the act, it must establish by clear and convincing evidence how the complained-of conduct implicates consumer protection concerns. A plaintiff can meet this burden by establishing, inter alia, how the requested relief will serve to protect the interests of consumers.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN15[] **Trade Practices & Unfair Competition, State Regulation**

The Uniform Deceptive Trade Practices Act, *815 Ill. Comp. Stat. 510/1, et seq.*, was designed to address conduct involving either misleading trade identification or false and deceptive advertising. The act is merely a codification of the Illinois common law of unfair competition.

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN16[] **Intentional Interference, Elements**

In Illinois, the elements of a claim for tortious interference with prospective business relations are: (1) a reasonable expectation of entering into a valid business relationship; (2) a defendant's knowledge of a plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. The theory underlying this tort is that some conduct is so odious that it goes beyond the bounds of legitimate competitive practices.

Counsel: For MENASHA CORPORATION, plaintiff: Wayne E. Babler, Quarles & Brady, Milwaukee, WI.

For MENASHA CORPORATION, plaintiff: Richard Clifford Potter, James Terrence Hultquist, Joel A. Brodsky, Quarles & Brady LLC, Chicago, IL.

For NEWS AMERICA MARKETING IN-STORE, INC., NEWS AMERICA MARKETING IN-STORE SERVICES, INC., defendants: Lee N. Abrams, John Matthew Carroll, Priscilla Peterson Weaver, Jonathan Lawrence Lewis, Mayer, Brown, Rowe & Maw, Chicago, IL.

For NEWS AMERICA MARKETING IN-STORE, INC., NEWS AMERICA MARKETING IN-STORE SERVICES, INC., defendants: Tarek Ismail, Bartlit, **[**2]** Beck, Herman, Palenchar & Scott, Chicago, IL.

For NEWS AMERICA MARKETING IN-STORE, INC., NEWS AMERICA MARKETING IN-STORE SERVICES, INC., defendants: Diane Green-Kelly, Mayer Brown & Platt, Chicago, IL.

For INSIGNIA SYSTEMS, INC., intervenor: Robert J Hennessey, Lindquist and Vennum, Minneapolis, MN.

For INSIGNIA SYSTEMS, INC., intervenor: Timothy G. McDermott, Gardner, Carton & Douglas LLC, Chicago, IL.

Judges: Harry D. Leinenweber, Judge, United States District Court.

Opinion by: Harry D. Leinenweber

Opinion

[*1027] **MEMORANDUM OPINION AND ORDER**

Plaintiff Menasha Corporation ("Menasha") brought this action alleging that Defendants News America Marketing In-Store, Inc. and News America Marketing In-Store Services, Inc. (collectively referred to as "News America") violated federal and state antitrust laws by entering into exclusive contracts with retail chains for the placement of at-shelf coupon dispensers and by exercising its monopoly power in the market for at-shelf coupon dispensers to foreclose competition. Now before the Court are News America's Motion for Summary Judgment, Motion In Limine to Exclude the Report and Testimony of James Tenser and the Opinions of Dr. James Langenfeld **[**3]** That Rely on Tenser's Survey Research, Motion to Strike Menasha's Responses to Defendants' Local Rule 56.1 Statement of Facts, and Motion to Strike Menasha's Statement of Facts under Local Rule 56.1. Also, before the Court is Menasha's Motion In Limine to Exclude the Relevant Market Opinions of Drs. Rapp and Stiroh.

BACKGROUND

Manufacturers of packaged goods rely on a variety of mediums to advertise and promote their products to consumers. One of the methods manufacturers sometimes choose to promote their products is the placement of a coupon dispenser next to the product on retail store shelves (referred to as "at-shelf coupon dispensers"). An at-shelf coupon dispenser is not the only method of placing coupons in proximity to product, other methods include "on-pack coupons" attached directly to the product, "tear pad coupons" affixed to the shelf near the product, and in-store demonstrations, at which demonstrators distribute coupons to consumers along with samples of the product. In addition, manufactures may choose from a variety of other in-store marketing vehicles to target consumers - shopping cart ads, shelf signs, manufacturers' displays, and supermarket flyers **[**4]** to name a few. Menasha and News America are both in the business of selling such in-store marketing products to manufacturers of packaged goods.

At issue in this case is one particular in-store marketing product: at-shelf coupon dispensers. News America sells an at-shelf coupon dispenser consisting of a reusable plastic container with a blinking red light that contains manufacturers' coupons for consumer packaged goods. News America sells at-shelf coupon dispensers directly to manufacturers, typically guaranteeing placement in particular retail chains. News America also offers manufacturers the guarantee of "category exclusivity," meaning that the manufacturer is assured that no other at-shelf coupon dispenser in a specific product category will be placed in particular retail stores during an agreed-upon period. News America is able to guarantee category exclusivity to manufacturers by entering into multi-year contracts with retail chains under which News America is granted the exclusive right to place at-shelf coupon dispensers in the chain's stores. In exchange, News America offers the retailers a percentage of the revenues News America derives from the sale of at-shelf coupon dispensers **[**5]** **[*1028]** to manufactures for placement in that chain's stores.

Menasha sells manufacturers a disposable at-shelf coupon dispenser made of paper. However, adhering to a different business model from that of News America, Menasha does not promise manufacturers category exclusivity, nor does Menasha offer to enter into revenue sharing agreements with retail chains in exchange for exclusive access to their store. In recent years, News America has enjoyed great success in expanding its business in at-shelf coupon dispensers, while Menasha's expectations for the growth of its at-shelf coupon business have not been fulfilled.

Menasha believes that News America has violated federal and state antitrust laws by entering into exclusive contracts with retail chains for the placement of at-shelf coupon dispensers. Menasha also contends that News America exercises monopoly power in the market for at-shelf coupon dispensers, and that News America has used its market power to foreclose competition. Accordingly, Menasha brought the present action alleging unreasonable restraint of trade in violation of Section 1 of the Sherman Act (Counts I and II), monopolization and attempted monopolization in violation **[**6]** of Section 2 of the Sherman Act (Counts III and IV), monopolization and attempted monopolization in violation of the Illinois Antitrust Act (Counts V and VI), restraint of trade in violation of the Illinois Antitrust Act (Count VII), "inducing refusals to deal" in violation of the Illinois Antitrust Act (Count VIII), unfair methods of competition (Count IX), and tortious interference with business relationships (Count X). Now before the Court are News America's Motion for Summary Judgment, Motion in Limine to Exclude the Report and Testimony of James Tenser and the Opinions of Dr. James Langenfeld That Rely on Tenser's Survey Research, Motion to Strike Menasha's Responses to Defendants' Local Rule 56.1 Statement of Facts, and Motion to Strike Menasha's Statement of Facts Under Local Rule 56.1. Also, before the Court is Menasha's Motion In Limine to Exclude the Relevant Market Opinions of Drs. Rapp and Stiroh. The Court will begin by addressing the parties' motions to strike and motions in limine.

MOTIONS TO STRIKE

Menasha's Statement of Material Facts

News America requests that the Court strike in its entirety the document entitled "Menasha's Statement of Material **[**7]** Facts Under L.R. 56.1," which Menasha submitted as a response to the Statement of Material Facts accompanying News America's Motion for Summary Judgment. Menasha states that this document was "submitted in reply to [News America's] Statement *as a total replacement*." (emphasis added). But, as News America correctly points out, Local Rule 56.1 in no way authorizes a "total replacement" in response to a movant's statement of facts.

HN1[] Under Local Rule 56.1(a)(3), a party moving for summary judgment must submit a statement of material facts in the form of short numbered paragraphs supported by specific references to the factual record. News America submitted such a statement. Under Local Rule 56.1(b)(3), two types of submissions are permitted in response to a moving party's Rule 56.1 statement of facts: (1) a response to each numbered paragraph supported by references to the record, and (2) a statement of short numbered paragraphs setting forth additional facts that require denial of summary judgment, supported by citations to the record. L.R. 56.1(b)(3)(A)-(B). The "total replacement" submitted by Menasha completely disregards these requirements - it is neither a response to News **[**8]** **[*1029]** America's Statement of Material Facts nor is it a true statement of additional facts as contemplated by Local Rule 56.1.

HN2[] Local Rule 56.1 serves the important function of structuring the summary judgment process so as to "assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side propose[s] to prove a disputed fact with material evidence." *Markham v. White, 172 F.3d 486, 490 (7th Cir. 1999)*. By filing an unauthorized "alternative" statement of facts, Menasha's counsel seriously hindered the Court's ability to perform its task of identifying those facts actually in dispute. *See* *Bordelon v. Chicago School Reform Bd. of Trustees, 233 F.3d 524, 527-28 (7th Cir. 2000)*. However, as News America has already gone to the trouble of responding to this document, the Court will treat this submission a statement of additional facts. Nevertheless, in ruling on News America's Motion for Summary Judgment, the Court will disregard all argumentative, conclusory, unsupported or otherwise non-conforming portions of Menasha's "Statement of Material Facts Under L.R. 56.1."

Menasha's Response to News America's **[**9]** *Statement of Facts*

News America also requests that the Court strike Menasha's Response to News America's Rule 56.1 Statement of Facts. News America has taken great pains to meticulously detail the numerous shortcomings in Menasha's Response. News America correctly points out that Menasha's Response is replete with improper argument, general denials, responses unsupported by citations to the record, and citations to large documents with no guide as to where in the document the purported fact is to be found. Although it is within this Court's discretion to enforce Local Rule 56.1 strictly, *Bordelon, 233 F.3d at 527*, the Court declines to impose the harsh penalty of striking Menasha's Response in its entirety. Nevertheless, in reaching its ruling, the Court will disregard all argumentative, conclusory, or unsupported portions of Menasha's Response to News America's Rule 56.1 Statement of Facts.

MOTIONS IN LIMINE

News America and Menasha have filed dueling motions to exclude the other's expert opinion defining the relevant antitrust market in this case. The Court will begin with News America's Motion to Exclude the Report and Testimony of James Tenser **[**10]** and the Opinions of Dr. James Langenfeld That Rely on Tenser's Survey Research.

Report and Testimony of James Tenser and Dr. James Langenfeld

James Tenser ("Tenser") is a journalist who frequently writes on issues relating to brand marketing of consumer packaged goods. Tenser has had no formal training or education in constructing and administering surveys, but was paid by Menasha to use his industry contacts to conduct a survey of brand and promotional management decision makers regarding their views on the market for in-store promotional services. Tenser's survey results focused on the unique characteristics and benefits of at-shelf coupon dispensers as perceived by brand marketing executives. Dr. James Langenfeld ("Langenfeld") used the results of this survey, along with deposition testimony and various other sources of market data, to form his opinion **[*1030]** that at-shelf coupon dispensers form a relevant market for antitrust purposes.

News America contends that Tenser's survey research suffers from multiple methodological flaws that render it unreliable, and therefore inadmissible under *Federal Rule of Evidence 702*. News America also argues that, because Tenser's results **[**11]** are unreliable, Langenfeld's opinion that at-shelf coupon dispensers constitute the relevant market must also be barred.

HN3[] Under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, courts must act as gatekeepers to ensure that expert testimony satisfies the admissibility requirements of *Federal Rule of Evidence 702*. Reliability is the touchstone for admission of expert testimony based on scientific, technical or other specialized knowledge. *Daubert, 509 U.S. at 599*. Courts have generally found consumer survey evidence admissible under *Daubert* if a qualified expert testifies that the survey was conducted according to generally-accepted principles of survey research. *See* *Simon Property Group, L.P. v. MySimon, Inc., 104 F. Supp. 2d 1033, 1039 (S.D. Ind. 2000)*; Shari Seidman Diamond, "*Reference Guide on Survey Research," in Reference Manual on Scientific Evidence* 233 (2d ed. 2000) ("*Reference Guide*"). In conducting his survey, Tenser deviated from several important principles of survey research.

For survey results to be considered reliable, the design, administration, and interpretation **[**12]** of the survey must be appropriately controlled to ensure objectivity. For a survey to be properly designed, an appropriate target population must be identified, a sample that accurately represents the target population must be selected, and procedures must be taken to reduce the likelihood of a biased sample. *Reference Guide* at 239-46. The evidence shows that none of these standard protocols of survey research were observed by Tenser. Tenser's "universe" of potential respondents consisted entirety of individuals and companies that Tenser knew through his work as journalist. Tenser did not make any attempt to select a sample to approximate the relevant characteristics of the target population. Adding further to the unreliability of his results, Tenser breached a fundamental principle of survey research by being aware of both the sponsor of the survey and its purpose while conducting his interviews. *See Reference Guide* at 266. Finally, when conducting the interviews, Tenser made no audio recording of the interviews and did not record the responses verbatim, relying instead on handwritten notes paraphrasing the responses he received. News America points to several concrete examples **[**13]** of how this failure to record responses verbatim allowed for later transcriptions that skewed the responses to sound more favorable to Menasha's view of the relevant market. Because Tenser failed to observe numerous fundamental protocols necessary to protect the objectivity and reliability of the survey, Tenser's survey report and deposition testimony do not meet the reliability requirement of *Federal Rule of Evidence 702* and must be excluded.

News America also contends that, because the results of Tenser's survey are unreliable, the Court must also exclude the opinions of Dr. Langenfeld concerning the definition of the relevant product market in this case. News America correctly asserts that, ***HN4***[] under *Federal Rule of Evidence 703*, a party seeking admission of an expert opinion based upon a survey must demonstrate that the expert's reliance on such data is reasonable. *See* *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983)*. Although Langenfeld refers to Tenser's survey results several times throughout his report, the Court finds that Langenfeld based his opinion that at-shelf coupon dispensers are the relevant antitrust market in **[**14]** this case on numerous sources of information independent of Tenser's flawed survey. Accordingly, the Court will not grant News America's motion fully and exclude Langenfeld's **[*1031]** opinion in its entirety. However, because Tenser's survey has been found to be unreliable and inadmissible, those portions of the report quoting or otherwise referencing Tenser's survey are excluded pursuant to *Federal Rule of Evidence 703*.

Relevant Market Opinion of Drs. Rapp and Stiroh

Menasha argues that the relevant market opinion offered by News America's experts must be barred because the method they employed to determine the relevant market is unreliable and their analysis ignores "basic market realities." Specifically, Menasha contends that Rapp and Stiroh deviated from generally-accepted principles when they defined the relevant market for this case by simply "counting the number of times products are 'mentioned' in a hand-picked set of documents, and declaring that products 'mentioned' an unidentified number of times must be reasonable substitutes for [News America's] coupon machines." Menasha's motion would be well-taken if this was an accurate description of the methodology employed by **[**15]** Rapp and Stiroh. This description, however, inaccurately characterizes the methodology of Rapp and Stiroh in several significant aspects.

In forming their relevant market opinion, Rapp and Stiroh began their analysis with the Supreme Court's teaching that ***HN5***[] a relevant market for antitrust purposes consists of products that are "reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. Following this standard, Rapp and Stiroh determined the purpose of at-shelf coupon dispensers, generated a universe of substitutes for at-shelf coupon dispensers that could theoretically serve the same purpose, and then examined various sources of market data to winnow this group of theoretical substitutes down to a relevant market containing products that are actually used by consumers of at-shelf coupon dispensers to achieve the same purpose. While Menasha may take issue with Rapp and Stiroh's characterization of the purpose of at-shelf coupon dispensers, or their analysis of how the market is perceived by industry participants, these criticisms do not undermine the essential **[**16]** reliability of the methods employed by News America's experts in reaching their opinion that the relevant market in this case cannot be limited to at-shelf coupon dispensers. Menasha's Motion in Limine to Exclude the Relevant Market Opinions of Drs. Rapp and Stiroh must therefore be DENIED.

MOTION FOR SUMMARY JUDGMENT

Standard

HN6[] Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *FED.R.CIV.P. 56(c)*. A court must "review the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Vanasco v. National-Louis University, 137 F.3d 962, 964 (7th Cir. 1998)*. Nevertheless, the party who bears the burden of proof on an issue may not rest on the pleadings, but must affirmatively demonstrate that there is a genuine issue of material fact that requires trial. *Warsco v. Preferred Technical Group, 258 F.3d 557, 563 (7th Cir. 2001)*. While a district court **[**17]** may not resolve genuine factual disputes through summary judgment, "weak factual claims can be weeded out through summary judgment motions." *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 476* ***[*1032]*** *(7th Cir. 1988)*. Summary judgment may be especially appropriate in the antitrust context because of the chill antitrust litigation can have on legitimate competition. *Id. at 475-76*; *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)*. For this reason, an antitrust plaintiff opposing a motion for summary judgment must present evidence that tends to exclude the possibility that the defendant's conduct was as consistent with competition as with illegal conduct. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

DISCUSSION

Menasha's Antitrust Claims

News America moves for summary judgment on Menasha's Sherman Act Section 1 claims (Counts I and II), Sherman Act Section 2 claims (Counts III and IV), and Illinois Antitrust Act claims (Counts V-VIII). News America contends that all of News America's antitrust claims can be dismissed **[**18]** for Menasha's failure to properly define a relevant market. Before examining News America's arguments, the Court must first address Menasha's assertion that analysis of the relevant market is unnecessary for its Section 1 claims because there is evidence of a horizontal conspiracy based upon exclusive contracts that are illegal per se.

Per Se Illegality under Section 1 of the Sherman Act

As part of its response to News America's criticisms of its relevant market definition, Menasha argues that relevant market analysis is irrelevant to its claims in Counts I and II because News America's contracts with retailers are "per se illegal" under Section 1 of the Sherman Act, thus obviating the need for a defined relevant market.

HN7[] A successful claim under Section 1 of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. *Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*. There are two standards for evaluating whether an alleged restraint of trade is unreasonable: the per se rule and the **[**19]** Rule of Reason. *See* *NCAA v. Board of Regents, 468 U.S. 85, 100-04, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*. The per se rule is invoked when surrounding circumstances and/or the nature of the agreements makes the probability that the practices are anticompetitive so high, further inquiry into the particular market context is unnecessary. *Id. at 100*. Menasha argues that the exclusive contracts News America entered into with retailers fall within the per se rule and were part of a horizontal agreement among retailers, orchestrated by News America, to exclude News America's low-price competitors. Menasha's attempt to have its Section 1 claims analyzed under the per se rule must be rejected.

As a threshold matter, nowhere in its detailed Complaint did Menasha ever allege a News America-engineered horizontal agreement among retailers in violation of Section 1 of the Sherman Act. It is well-settled that ***HN8***[] a plaintiff may not amend its complaint through arguments in its brief in opposition to a motion for summary judgment. *Shanahan v. City of Chicago, 82 F.3d 776, 781*, (7th Cir. 1996) (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984)*. **[**20]** Menasha's new theory for its Section 1 claims could be rejected on this basis alone. More importantly, judged on the merits, Menasha's theory of a horizontal conspiracy simply doesn't hold water. Menasha points to no evidence **[*1033]** in the record from which a jury could reasonably find that there existed a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. The mere fact that large numbers of retailers agreed to News America's exclusive contracts is not sufficient to support an inference of a horizontal agreement among retailers, and is clearly insufficient to allow it to proceed to trial on this theory. *Cf.* *Id. at 768* (holding that ***HN9***[] a plaintiff must adduce either direct or circumstantial evidence reveling a "unity of purpose or a common design and understanding"). Moreover, the agreements at issue in this case do not reflect practices that are so manifestly anticompetitive so as to allow the Court to accept Menasha's invitation to view News America's conduct through the prism of the per se rule. *See* *NCAA, 468 U.S. at 103-04*; **[**21]** *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. The Court will therefore analyze Menasha's Section 1 claims under the Rule of Reason.

Menasha's Sherman Act Claims

HN10[] Because "an antitrust policy divorced from market considerations would lack any objective benchmarks" *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, analysis of claims of monopolization under Section 2 of the Sherman Act, as well as Section 1 claims analyzed under the Rule of Reason, requires the trier of fact to begin by delineating the relevant market. *Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986)*. A relevant market is comprised of those "commodities reasonably interchangeable by consumers for the **[*1034]** same purposes. . . ." *du Pont, 351 U.S. at 395*. Because the plaintiff always bears the burden of proving relevant market, "to survive summary judgment on [its] antitrust claims, the plaintiff[] must offer admissible evidence that is sufficient for a jury to find that the proposed relevant market[] [is] accurate." *Berlyn, Inc. v. Gazette Newspapers, 223 F. Supp. 2d 718, 726-27 (D. Md. 2002)*. **[**22]** Based on the record before the Court, there is no evidence from which a jury could reasonably find that Menasha has met its burden of proving that the relevant market in this case is limited to at-shelf coupon dispensers.

Attempting to provide support for a relevant market limited to at-shelf coupon dispensers, Menasha's expert Dr. Langenfeld points to six ways in which at-shelf coupon dispensers provide benefits that are unique or different than other in-store promotional vehicles. Leaving aside the issues created by Dr. Langenfeld's reliance on the inadmissible survey results generated by James Tenser, the six characteristics selected by Dr. Langenfeld strike the Court as an awkward and forced attempt to "define the elements of the relevant market to suit its desire for high market share, rather than letting the market define itself." *PepsiCo, Inc. v. Coca-Cola Co., 114 F. Supp. 2d 243, 249 (S.D.N.Y. 1995)*. Four of the six characteristics of at-shelf coupon dispensers named by Dr. Langenfeld - providing consumers with a discount, conspicuousness, being "cost effective," and reaching consumers at the point of purchase - are all shared in some degree with many other **[**23]** types of in-store promotional vehicles such as on-pack coupons, tear pad coupons affixed to the shelf near the product, and in-store demonstrations at which demonstrators distribute coupons. Contrary to Menasha's suggestion, ***HN11***[] it is not required that products be completely fungible to be considered part of the same relevant market under the Sherman Act, only that they are "reasonably interchangeable by consumers for the same purposes. . . ." *du Pont, 351 U.S. at 395*. Langenfeld's focus on the relative characteristics and benefits of different in-store marketing products is the very approach to defining relevant markets repudiated by the Supreme Court in *United States v. Continental Can Co., 378 U.S. 441, 449-58, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1956)*(rejecting the plaintiff's attempt to place glass and metal containers in different relevant markets based on different characteristics).

News America points to ample evidence in the record supporting its contention that the consumers of at-shelf coupon dispensers do in fact view at-shelf coupon dispensers as reasonably interchangeable with other in-store marketing vehicles, despite the fact that each in-store **[**24]** marketing vehicle may have its own unique advantages and features. Based on the record presented, the Court cannot accept Menasha's definition of a relevant market limited to at-shelf coupon dispensers. *See* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*(holding that ***HN12***[] when an expert's opinion regarding the relevant market is not supported by sufficient facts, or when the record contradicts or renders the opinion unreasonable, it cannot support a jury's verdict). Because Menasha has failed to provide a factual basis sufficient to justify its delineation of the relevant market, News America is entitled to summary judgment in its favor on the Sherman Act claims in Counts I-IV. *See* *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 2002 U.S. App. LEXIS 27238*, No. 00-9342, 2002 WL 31866172 (2d Cir. Dec. 24, 2002)(affirming a district court's decision to grant summary judgment in defendant's favor based on plaintiff's failure to properly define the relevant market for Sherman Act claims).

Menasha's Illinois Antitrust Act Claims

In addition to its federal antitrust claims, Menasha also alleges four violations of the Illinois **[**25]** Antitrust Act that parallel its Sherman Act claims. ***HN13***[] The Illinois Antitrust Act provides that "when the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." *740 ILCS 10/11*. Menasha's claims under Section 3 of the Illinois Antitrust Act for monopolization (Count V), attempted monopolization (Count VI), and restraint of trade (Count VII) clearly parallel its Sherman Act claims set forth in Counts III, IV and I respectively. Count VIII alleges a claim for "inducing refusals to deal under the Illinois Antitrust Act." Although Menasha did not raise a refusal to deal allegation in its Sherman Act claims, the threshold requirement of defining the relevant market is applied with equal force in the context of refusals to deal. *See* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. Accordingly, for the reasons stated in the Court's discussion of Menasha's Sherman Act claims, News America is entitled to summary judgment on Counts V-VIII of Menasha's Complaint. *See* **[**26]** *A & A Disposal and Recycling, Inc. v. Browning-Ferris Industries of Illinois, Inc., 279 Ill.App.3d 337, 664 N.E.2d 351, 215 Ill. Dec. 954 (1st Dist. 1996)*(holding that a plaintiff's failure to establish a well-defined relevant market entitles a defendant to summary judgment for claims under Section 3 of the Illinois Antitrust Act).

Menasha's Unfair Competition and Tortious Interference Claims

In Counts IX and X, Menasha alleges claims under Illinois law for unfair methods of competition and tortious interference. The Court will address each in turn.

Unfair Methods of Competition

Count IX actually contains three separate causes of action under Illinois law. In **[*1035]** Count IX, Menasha claims that News America's wrongful conduct supports claims under: (1) the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1, et seq.* ("ICFA"); (2) the Uniform Deceptive Trade Practices Act, *815 ILCS 510/1, et seq.* ("DTPA"); and (3) common law unfair competition.

HN14[] ICFA was enacted to create "broad protective coverage of consumers from the many types of deceptive or unfair selling and advertising techniques used by businesses." *Duhl v. Nash Realty, Inc., 102 Ill.App.3d 483, 429 N.E.2d 1267, 1277, 57 Ill. Dec. 904 (1st Dist. 1981)*. **[**27]** For a competing business to have standing to sue under ICFA, it must establish by clear and convincing evidence how the complained-of conduct implicates consumer protection concerns. *Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 868 (7th Cir. 1999)*; *Hartman Co. v. Capital Bank and Trust Co., 296 Ill.App.3d 593, 694 N.E.2d 1108, 1117, 230 Ill. Dec. 830 (1st Dist. 1998)*. The plaintiff can meet this burden by establishing, *inter alia*, how the requested relief would serve to protect the interests of consumers. *Brody v. Finch Univ. of Health Sciences, 298 Ill.App.3d 146, 698 N.E.2d 257, 269, 232 Ill. Dec. 419 (2d Dist. 1998)*. Menasha contends that the required nexus to consumer interests is met by the fact that consumers were given the benefit of News America's coupons but were denied the benefit of coupons from Menasha's dispensers due to News America's exclusive contracts with retailers. This fact, standing alone, is insufficient to support Menasha's contention that its dispute with News America implicates the type of consumer protection concerns contemplated by the Act. *See* *Speakers of Sport, 178 F.3d at 868*. **[**28]** Menasha therefore has no standing to sue under ICFA and News America is entitled to summary judgment on this aspect of Count IX.

Count IX also alleges a claim under the Uniform Deceptive Trade Practices Act (the "DTPA"). ***HN15***[] DTPA was designed to address conduct involving either misleading trade identification or false and deceptive advertising. *See* *Industrial Specialty Chemicals, Inc. v. Cummins Engine Co., 902 F. Supp. 805, 812 (N.D. Ill. 1995)*; *see also* *815 ILCS 510/2*. Even construing the record in the light most favorable to Menasha, this is simply not a case implicating conduct related to consumer confusion or deception, and DTPA therefore does not provide Menasha with a remedy. *See* *Hooker v. Columbia Pictures Indus., Inc., 551 F. Supp. 1060, 1065 (N.D. Ill. 1982)*. Menasha's common law unfair competition claim does not need to be addressed separately, since DTPA is merely a codification of the Illinois common law of unfair competition. *McGraw-Edison Co. v. Walt Disney Productions, 787 F.2d 1163, 1173 n.9 (7th Cir. 1986)*. For the foregoing reasons, News America is entitled to summary judgment on Count IX.

Tortious Interference

[29]** ***HN16***[] In Illinois, the elements of a claim for tortious interference with prospective business relations are: (1) a reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. *Fellhauer v. City of Geneva, 142 Ill.2d 495, 568 N.E.2d 870, 878, 154 Ill. Dec. 649 (1991)*. The theory underlying this tort is that some conduct is so odious that it goes beyond the bounds of legitimate competitive practices. *Aviani v. Sisters of St. Mary, 1987 U.S. Dist. LEXIS 9824, 1987 WL 18934*, at *3 (N.D. Ill. Oct. 22, 1987).

[*1036] Menasha has not, as is its burden, pointed the Court to facts establishing how individual business relationships were directly spoiled by specific acts of News America. Rather, Menasha puts forward a generalized complaint that its at-shelf coupon dispenser business was not as successful as it could have been due to the presence of News America in the market. The record provides no basis for a finding **[**30]** that tortious conduct on the part of News America was the cause of Menasha's difficulties in building business relationships with the retail chains in question. Rather, the record indicates that Menasha made a conscious decision not to compete with News America directly. As one Menasha executive put it, Menasha preferred the "old-fashioned way of doing business," rejected News America's business model, and avoided direct competition with News America when possible. Conversely, a company called FloorGraphics had great success in breaking into the market and establishing relationships with large retail chains by offering financial incentives to retailers similar to those offered by News America. Menasha's difficulties in maintaining and expanding its business for at-shelf coupon dispensers is not attributable to tortious interference by News America, but to Menasha's refusal (or inability) to adapt its business model to new realities. "That is the process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system. *Competition is not a tort."* *Speakers of Sport, 178 F.3d at 865* **[**31]** (Posner, C.J.) (emphasis added). Accordingly, News America is entitled to summary judgment on Count X.

CONCLUSION

For the reasons set forth above, Menasha's Motion In Limine to Exclude the Relevant Market Opinions of Drs. Rapp and Stiroh is **DENIED**, News America's Motion In Limine to Exclude the Report and Testimony of James Tenser and the Opinions of Dr. James Langenfeld That Rely on Tenser's Survey Research is **GRANTED IN PART AND DENIED IN PART**. News America's Motion to Strike Menasha's Responses to Defendants' Local Rule 56.1 Statement is **DENIED**. News America's Motion to Strike Menasha's Statement of Material Facts under Local Rule 56.1 is **DENIED**. News Motion or Summary Judgment is **GRANTED** and the case is **DISMISSED** pursuant to *Federal Rule of Civil Procedure 56*.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge

United States District Court

Date: January 7, 2003

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the motion for Summary Judgment by News America is GRANTED **[**32]** and the case dismissed.

Date: 1/7/2003

Four B Corp. v. Ueno Fine Chems. Indus., Ltd.

United States District Court for the District of Kansas

January 8, 2003, Decided

CIVIL ACTION No. 01-2394-CM

Reporter

241 F. Supp. 2d 1258 *; 2003 U.S. Dist. LEXIS 434 **; 2003-1 Trade Cas. (CCH) P73,942

FOUR B CORP., et al., Plaintiffs, v. UENO FINE CHEMICALS INDUSTRY, LTD., et al., Defendants.

Disposition: [1]** Defendants Ueno Fine Chemicals Industry (USA), Inc., Ueno Fine Chemicals Industry, Ltd., and Chisso Corporation's Motions to Dismiss for Lack of Personal Jurisdiction granted. Defendants Ueno Fine Chemicals Industry (USA), Inc., Ueno Fine Chemicals Industry, Ltd., and Chisso Corporation dismissed from case.

Core Terms

sorbates, allegations, exercise of jurisdiction, personal jurisdiction, plaintiffs', forum state, defendants', products, long-arm, transaction of business, Chemicals, prima facie, purposefully, manufacture, nonresident, stream of commerce, anti trust law, indirect, substantial justice, contends, traditional notions of fair play, minimum contact, due process, purchasers, tortious, weighs, motion to dismiss, product liability, contacts, factors

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **In Rem & Personal Jurisdiction, In Personam Actions**

Plaintiffs bear the burden to establish personal jurisdiction over defendants. In order to demonstrate personal jurisdiction sufficient to defeat a motion to dismiss, plaintiffs need only make a prima facie showing that jurisdiction exists.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2[] **In Rem & Personal Jurisdiction, In Personam Actions**

In ascertaining the facts necessary to establish jurisdiction, the court must accept as true the allegations set forth in the complaint to the extent they are uncontroverted by the defendants' affidavits. However, plaintiffs have the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading. The plaintiffs' complaint and any affidavits submitted are to be construed, and any doubts are to be resolved, in the light most favorable to the plaintiffs. Eventually, of course, plaintiffs must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN3[] **Choice of Law, Forum & Place**

Whether a federal court has personal jurisdiction over nonresident defendants in a diversity action is determined by the law of the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **In Personam Actions, Minimum Contacts**

In analyzing a motion to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2)*, the court applies a two-part test. First, it determines if defendants' conduct falls within one of the provisions of the state long-arm statute. Second, it determines whether defendants had sufficient minimum contacts with the forum state to satisfy the constitutional guarantee of due process.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5[] **In Rem & Personal Jurisdiction, In Personam Actions**

Under the Kansas long-arm statute, a non-resident submits to the jurisdiction of the State of Kansas as to any cause of action arising from the "transaction of any business" within Kansas. *Kan. Stat. Ann. § 60-308(b)(1)*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] **In Rem & Personal Jurisdiction, In Personam Actions**

For purposes of *Kan. Stat. Ann. § 60-308(b)(1)*, "business" is transacted within the state when an individual is within or enters this state in person or by agent and, through dealing with another within the state, effectuates or attempts to effectuate a purpose to improve his economic conditions and satisfy his desires. The transaction of business exists when the nonresident purposefully does some act or consummates some transaction in the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7[] In Rem & Personal Jurisdiction, In Personam Actions

For jurisdiction to exist under *Kan. Stat. Ann. § 60-308(b)(1)* there must be a nexus between the transaction of business and the alleged claim.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN8[] In Rem & Personal Jurisdiction, In Personam Actions

In ascertaining the facts necessary to establish jurisdiction, the district court must accept as true the allegations set forth in the complaint to the extent they are uncontroverted by defendant's affidavits. Only the well pled facts of the complaint, as distinguished from conclusory allegations, must be accepted as true. Therefore, the court's determination of the issue before it involves an application of the law to the facts as set forth in the affidavits and complaints, favoring the plaintiff where a conflict exists, as well as a determination as to the legal sufficiency of plaintiff's jurisdictional allegations in light of the facts presented.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN9[] In Rem & Personal Jurisdiction, Constitutional Limits

Kan. Stat. Ann. § 60-308 should be liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the *Due Process Clause of the Fourteenth Amendment to the U.S. Constitution*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN10[] In Rem & Personal Jurisdiction, In Personam Actions

Kan. Stat. Ann. § 60-308(b)(2) provides that any person submits to the jurisdiction of the Kansas courts as to any cause of action arising from the commission of a tortious act within the state. *Kan. Stat. Ann. § 60-308(b)(2)*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN11[] In Rem & Personal Jurisdiction, In Personam Actions

Kansas courts find that Kansas's long-arm jurisdiction is properly invoked under *Kan. Stat. Ann. § 60-308(b)(2)* where a plaintiff alleges the commission of tortious activity outside the State of Kansas that causes injury within the State of Kansas.

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

HN12[] **Regulated Practices, Private Actions**

In contrast to claims of tortious behavior, a civil antitrust violation brought pursuant to federal ***antitrust law*** may be established without evidence of unlawful intent. A showing of an anticompetitive effect may be sufficient.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN13[] **In Rem & Personal Jurisdiction, In Personam Actions**

See *Kan. Stat. Ann. § 60-308(b)(7)*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN14[] **In Rem & Personal Jurisdiction, In Personam Actions**

The legislative intent of *Kan. Stat. Ann. § 60-308(b)(7)* is to grant in personam jurisdiction to the courts of the state over those who engage in the manufacture, sale, or servicing of products if they receive or can anticipate some direct or indirect financial benefit from the sale, trade, use or servicing of their products within the state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Torts > Products Liability > General Overview

HN15[] **In Rem & Personal Jurisdiction, In Personam Actions**

Kan. Stat. Ann. § 60-308(b)(7) is traditionally been applied in product liability cases and is intended to provide jurisdiction over foreign manufacturers and/or suppliers in products liability cases. A "product liability" case references a legal theory by which liability is imposed on the manufacturer or seller of a defective product.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Torts > Products Liability > General Overview

HN16[] **In Rem & Personal Jurisdiction, In Personam Actions**

Kan. Stat. Ann. § 60-308(b)(7) specifically applies only to product liability injury.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN17[] In Personam Actions, Minimum Contacts

Due process allows a state to exercise personal jurisdiction over a nonresident when the nonresident has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN18[] In Rem & Personal Jurisdiction, In Personam Actions

The Tenth Circuit endorses a three part analysis for use when examining whether a non-resident defendant has sufficient minimum contacts with the forum to satisfy constitutional requirements: (1) the non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws, (2) the claim must be one which arises out of or results from the defendant's forum-related activities, (3) exercise of jurisdiction must be reasonable.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN19[] In Rem & Personal Jurisdiction, In Personam Actions

Jurisdiction must rest on a person's activity deliberately directed toward the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN20[] In Rem & Personal Jurisdiction, In Personam Actions

Even absent a prima facie showing that defendants sold directly to purchasers in the forum state, plaintiffs can establish purposeful availment. Under the "stream of commerce" theory, a defendant's contacts with the forum state need not be direct to satisfy due process requirements. The deliberate, although perhaps indirect, introduction of products into the stream of commerce with the expectation of distribution in particular areas may be enough to satisfy the minimum contacts/purposeful availment test.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN21[] In Personam Actions, Placement of Product in Commerce

Generally, simply placing a product into the stream of commerce, without more, is not sufficient to satisfy the constitutional standard for personal jurisdiction. Instead, "additional conduct" is generally required to indicate an intent or purpose to serve the market in the forum state. A defendant's mere awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN22[] **Jurisdiction, Jurisdictional Sources**

In determining whether the exercise of jurisdiction is so unreasonable as to violate "fair play and substantial justice," the court considers: (1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN23[] **In Rem & Personal Jurisdiction, In Personam Actions**

For purposes of determining personal jurisdiction, the Tenth Circuit recognizes that because modern commercial transactions often involve little contact with the forum beyond that of mail and telephone communications defending a suit in a foreign jurisdiction is not as burdensome as in the past.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN24[] **In Rem & Personal Jurisdiction, In Personam Actions**

For purposes of determining personal jurisdiction, there is a recognized advantage to having a local court determine questions of local law.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN25[] **In Rem & Personal Jurisdiction, In Personam Actions**

For personal jurisdiction determination purposes, the key inquiry in determining whether the forum state is the most efficient place to litigate the dispute is the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN26[] **Conflict of Law, Jurisdiction**

The court's analysis of the fifth factor in determining whether the exercise of jurisdiction is so unreasonable as to violate fair play and substantial justice focuses on whether the exercise of personal jurisdiction by the forum state affects the substantive social policy interests of other states or foreign nations.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN27[] **In Rem & Personal Jurisdiction, In Personam Actions**

There is an "interplay" between the two components of the due process inquiry, 1) the purposeful availment and its relation to the claim and 2) the reasonableness of the exercise of jurisdiction, such that, depending on the strength of the defendant's contacts with the forum state, the reasonableness component of the constitutional test may have a greater or lesser effect on the outcome of the due process inquiry.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN28[] **In Rem & Personal Jurisdiction, In Personam Actions**

The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long-arm of personal jurisdiction over national borders.

Counsel: For FOUR B CORP, plaintiff: Patrick J. Stueve, Amy E. Bauman, Todd E. Hilton, Stueve Helder Siegel LLP, Kansas City, MO. Peggy A. Wilson, Peggy A. Wilson, PA, Leawood, KS.

For CONSENTINO GROUP INC, CONSENTINO ENTERPRISES, INC., MID AM FOOD ENTERPRISES, INC., plaintiffs: Patrick J. Stueve, Amy E. Bauman, Todd E. Hilton, Stueve Helder Siegel LLP, Kansas City, MO. Peggy A. Wilson, Leawood, KS.

For UENO FINE CHEMICALS INDUSTRY, LTD., UENO FINE CHEMICALS INDUSTRY (U.S.A.) INC., MITSUI & CO. (USA), INC., KANEMATSU CORPORATION, KANEMATSU USA INC, CHISSO CORPORATION, defendants: John J. Miller, Kansas City, MO.

For DAICEL CHEMICAL INDUSTRIES, LTD., defendant: Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO. Herbert S Washer, Two Hundred Park Avenue, New York, NY.

For DAICEL (U.S.A), INC., defendant: David E. Everson, Jr., Victoria **[**2]** L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO. Herbert S Washer, Two Hundred Park Avenue, New York, NY.

For NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD, THE, defendant: Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO. James J Garrett, Morrison & Foerster LLP, Walnut Creek, CA.

For HOECHST AKTIENGESELLSCHAFT, NUTRINOVA NUTRITION, SPECIALTIES & FOOD INGREDIENTS GMBH, defendants: Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO. Aton Arbisser, Los Angeles, CA.

For HOECHST CELANESE CORP., CNA HOLDINGS, NUTRINOVA INC, defendants: David E. Everson, Jr., Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO. Aton Arbisser, Los Angeles, CA.

For EASTMAN CHEMICAL COMPANY, defendant: Robert A. Horn, Sarah Yehle Fulkerson, Horn, Aylward & Bandy LLC, Kansas City, MO.

Judges: CARLOS MURGUIA, United States District Judge.

Opinion by: CARLOS MURGUIA

Opinion

[*1259] MEMORANDUM AND ORDER

This purported class action arises out of an alleged international conspiracy to fix the prices of sorbates, including potassium sorbate and sorbic acid, which are chemical preservatives used in food products. Plaintiffs are "indirect purchasers" of sorbates, **[**3]** who allegedly purchased products containing sorbates that were manufactured and sold by defendants. Plaintiffs allege that defendants engaged in the manufacture and sale of sorbates throughout the world and specifically in Kansas. Plaintiffs further allege that defendants' conspiracy to control the prices of sorbates affected over $ 1 billion in U.S. commerce and that they sustained damages due to defendants' actions. Plaintiffs contend that defendants' actions in fixing the prices of sorbates was in violation of Kansas ***antitrust law***, *Kan. Stat. Ann. § 50-101, et seq.*

Pending before the court are defendants Ueno Fine Chemicals Industry (USA), **[*1260]** Inc., Ueno Fine Chemicals Industry, Ltd., and Chisso Corporation's Motions to Dismiss for Lack of Personal Jurisdiction (Docs. 105, 107 & 109). All moving defendants (referenced collectively herein as "defendants") ask the court to dismiss them from the action based upon a finding that the exercise of personal jurisdiction over them is improper. As set forth herein, defendants' motions are granted.

. **Motion to Dismiss for Lack of Personal Jurisdiction Under *Fed. R. Civ. P. 12(b)(2)***

HN1[] Plaintiffs bear the burden to establish **[**4]** personal jurisdiction over defendants. *Fed. Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170, 174 (10th Cir. 1992)*. In order to demonstrate personal jurisdiction sufficient to defeat a motion to dismiss, plaintiffs need only make a prima facie showing that jurisdiction exists. [1] *Ten Mile Indus. Park v. W. Plains Serv. Corp., 810 F.2d 1518, 1524 (10th Cir. 1987)*. ***HN2***[] In ascertaining the facts necessary to establish jurisdiction, the court must accept as true the allegations set forth in the complaint to the extent they are uncontroverted by the defendants' affidavits. *Id.* However, plaintiffs have the "duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading." *Pytlik v. Prof'l Res., Ltd., 887 F.2d 1371, 1376 (10th Cir. 1989)*. The plaintiffs' complaint and any affidavits submitted are to be construed, and any doubts are to be resolved, in the light most favorable to the plaintiffs. *Fed. Deposit, 959 F.2d at 174*.

[5]** ***HN3***[] Whether this federal court has personal jurisdiction over the moving nonresident defendants in this diversity action is determined by the law of Kansas, as it represents "the law of the forum state." *Yarbrought v. Elmer Bunker & Assocs., 669 F.2d 614, 616 (10th Cir. 1982)*; *see also* *Fed. R. Civ. P. 4(e)*. ***HN4***[] In analyzing a motion to dismiss for lack of personal jurisdiction under *Rule 12(b)(2)*, the court applies a two-part test. First, it determines if defendants' conduct falls within one of the provisions of the Kansas long-arm statute. Second, it determines whether defendants had sufficient minimum contacts with Kansas to satisfy the constitutional guarantee of due process. *See* *Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1357 (10th Cir. 1990)*. The court now applies these tests to determine whether plaintiffs have met their burden to make a prima facie showing of this court's personal jurisdiction over each of the moving defendants.

. **Defendant Ueno Fine Chemicals Industry (USA), Inc.'s Motion (Doc. 105)**

[1] Eventually, of course, plaintiffs must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. ***Behagen v. Amateur Basketball Ass'n of U.S.A.*, *744 F.2d 731, 733 (10th Cir. 1984)*; *Wilson v. Olathe Bank, 1998 U.S. Dist. LEXIS 5509*, *1998 WL 184470*,** at *1 (D. Kan. March 2, 1998).

Plaintiffs contend that the exercise of jurisdiction over defendants is appropriate under subsections (b)(1), (b)(2), and (b)(7) **[**6]** of the Kansas long-arm statute. *Kan. Stat. Ann. § 60-308*. Moreover, plaintiffs contend that the exercise of jurisdiction over defendants comports with due process principles. Defendant Ueno Fine Chemicals Industry (USA), Inc. (referenced as "Ueno USA") asserts that it is not subject to personal jurisdiction in this court under either the "transacting business" or the "product liability" provisions of the Kansas long-arm statute. In addition, defendant Ueno USA asserts that the exercise of jurisdiction over it would violate federal due process concepts because **[*1261]** it has not "purposefully directed" activities toward Kansas and further that such exercise of jurisdiction would violate traditional notions of fair play and substantial justice.

. **Kansas Long-Arm Statute**

. ***Section 60-308(b)(1)***

Defendant Ueno USA contends that it has not "purposefully" done any business in Kansas or directed any activity toward Kansas. In addition, defendant Ueno USA contends that plaintiffs' claims do not and cannot arise from any act or transaction by Ueno USA in Kansas.

HN5[] Under the Kansas long-arm statute, a non-resident submits to the jurisdiction of the State of Kansas as to any cause **[**7]** of action arising from the "transaction of any business" within Kansas. *Kan. Stat. Ann. § 60-308(b)(1)*.

HN6[] "Business" is transacted within the state when an individual is within or enters this state in person or by agent and, through dealing with another within the state, effectuates or attempts to effectuate a purpose to improve his economic conditions and satisfy his desires. The transaction of business exists when the nonresident purposefully does some act or consummates some transaction in the forum state.

Volt Delta Res., Inc. v. Devine, 241 Kan. 775, 778, 740 P.2d 1089, 1092 (1987). "The transaction of business exists when the nonresident purposefully does some act or consummates some transaction in the forum state." *Anderson v. Heartland Oil & Gas, Inc., 249 Kan. 458, 467-68, 819 P.2d 1192, 1199 (1991)*. ***HN7***[] For jurisdiction to exist under subsection (b)(1) of *§ 60-308*, there must be a nexus between the transaction of business and the alleged claim. *Kluin v. Am. Suzuki Motor Corp., 56 P.3d 829, 835 (2002)*.

Finding the requisite "transaction of any business" demands an examination of all of the defendants' activities **[**8]** within Kansas which related to the present cause of action. Here, plaintiffs generally allege that defendant Ueno USA "directly or through its affiliates, engaged in the business of the manufacture, distribution and/or sale of sorbates throughout the United States and the world, including Kansas." (Pls.' Compl. at P14). In addition, plaintiffs allege that "through distributors, defendants sold sorbates in Kansas to various indirect purchasers." (*Id.* at P53).

However, defendant Ueno USA presents an affidavit contending that Ueno USA "does not sell any sorbates products to any resident of Kansas" and that it "has not sold any sorbate products to [plaintiffs] Four B Corporation, Cosentino Group, Inc., Cosentino Enterprises, Inc. or Mid Am Food Enterprises, Inc." [2] (Def. Ueno USA's Resp., Ohashi aff. at PP4 & 5). In addition, defendant Ueno USA's affidavit indicates that it has "on some occasions shipped sorbates to factories located in Kansas at the request of only a very few customers, all of whom were located outside of Kansas." (*Id.* P4).

[2] The court notes that this affidavit indicates defendant Ueno USA did not sell sorbates products to four of the five plaintiffs herein. The affidavit does not reference plaintiff Falley's, Inc.

[9]** ***HN8***[] "In ascertaining the facts necessary to establish jurisdiction, the district court must accept as true the allegations set forth in the complaint to the extent they are *uncontroverted* by defendant's affidavits." *Ten Mile Indus. Park, 810 F.2d at 1524* (emphasis added) (citing *Behagen, 744 F.2d at 733*). Only the well pled facts of the complaint, as distinguished from conclusory allegations, must be accepted as true. *Id.* Therefore, the court's determination **[*1262]** of the issue before it "involves an application of the law to the facts as set forth in the affidavits and complaints, favoring the plaintiff where a conflict exists, as well as a determination as to the legal sufficiency of plaintiff's jurisdictional allegations in light of the facts presented." *Id.*

Here, plaintiffs have alleged that defendants distributed or sold sorbates to various indirect purchasers in Kansas. However, defendant Ueno USA has controverted these allegations in a verified affidavit. Although plaintiffs present an affidavit and portions of a court hearing transcript with their response, neither of these sworn documents support the allegation that defendant **[**10]** Ueno USA has "transacted business" in the State of Kansas. Accordingly, the court finds plaintiffs have failed to controvert defendant Ueno USA's affidavit other than by conclusory allegations in their complaint and briefs. Therefore, the court finds plaintiffs' unverified allegations do not establish the "transaction of business" within the meaning of *§ 60-308(b)(1)*, nor do they satisfy the necessary showing of a sufficient nexus between the business transacted, i.e., the defendants' sale of sorbates in Kansas, and the alleged claim, i.e., unlawful price fixing of sorbates sold in Kansas.

Accordingly, although ***HN9***[] the court recognizes that *§ 60-308* should be "liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the *due process clause of the Fourteenth Amendment to the U.S. Constitution*," *Volt Delta Res., Inc., 241 Kan. at 777, 740 P.2d at 1092*, the court finds that plaintiffs have failed to make the threshold prima facie showing that the exercise of jurisdiction under *§ 60-308(b)(1)* is appropriate. Defendant Ueno USA's motion is granted on this basis.

o ***Section 60-308(b)(2)***

Plaintiffs assert **[**11]** that this court may properly assert personal jurisdiction over defendant Ueno USA under *§ 60-308(b)(2)* because plaintiffs' complaint "alleges economic injury resulting from defendant['s] alleged intentional tortious conduct, i.e., breach of Kansas antitrust statutes." (Pls.' Resp. at 5). Defendant Ueno USA does not address the application of *§ 60-308(b)(2)* to the facts in this case, nor does it offer a specific responsive argument to plaintiffs' assertion of jurisdiction under *§ 60-308(b)(2)* in its response brief.

Section 60-308(b)(2) ***HN10***[] provides that any person submits to the jurisdiction of the Kansas courts "as to any cause of action arising from . . . [the] commission of a tortious act within this state." *Kan. Stat. Ann. § 60-308(b)(2)*. ***HN11***[] Kansas courts have found that Kansas's long-arm jurisdiction is properly invoked under *§ 60-308(b)(2)* where a plaintiff alleges the commission of tortious activity outside the State of Kansas that causes injury within the State of Kansas. *Ling v. Jan's Liquors, 237 Kan. 629, 633, 703 P.2d 731, 734 (1985)* ("Although [the defendant] has never done business in Kansas, [its] conduct allegedly caused injury . . . in Kansas **[**12]** and, therefore, the alleged tort is deemed to have occurred in Kansas"); *Dazey Corp. v. Wolfman, 948 F. Supp. 969, 973 (D. Kan. 1996)* (construing *Kan. Stat. Ann. § 60-308(b)(2)*).

Although plaintiffs' responsive brief summarily indicates that "Plaintiffs' Complaint alleges economic injury resulting from defendants' intentional tortious conduct, i.e., breach of Kansas antitrust statute" (Pls.' Resp. at 5), plaintiffs' complaint does not allege a tort claim against defendant Ueno USA. Instead, plaintiffs' complaint alleges that defendant Ueno USA's actions violate Kansas antitrust laws, *Kan.* ***[*1263]*** *Stat. Ann. § 50-101 et seq.* Plaintiffs have provided no legal support for their contention that a violation of Kansas antitrust laws constitutes tortious behavior. [3] Because plaintiffs bear the burden to establish personal jurisdiction over defendants, *Fed. Deposit, 959 F.2d at 174*, and have not presented authority to support their argument, the court declines to find that plaintiffs' allegations of Kansas ***antitrust law*** violations are per se allegations of the commission of tortious activity sufficient to bring defendant Ueno USA's alleged actions within **[**13]** the purview of *§ 60-308(b)(2)*.

Accordingly, the court finds that plaintiffs have failed to make a prima facie showing that the exercise of jurisdiction under *§ 60-308(b)(2)* is appropriate. Defendant Ueno USA's motion is granted on this basis.

o *Section 60-308(b)(7)*

Defendant Ueno USA next asserts that it has not engaged in solicitation or service activities in Kansas nor received or anticipated any direct or indirect financial benefit from the sale, trade, use or servicing of its products in Kansas, as required **[**14]** for application of *§ 60-308(b)(7)*. Moreover, defendant Ueno USA contends it "is not the type of 'product liability' defendant that the Kansas legislature intended to reach" with *§ 60-308(b)(7)*. (Def. Ueno USA's Mot. at 5).

Section 60-308(b) ***HN13***[] provides that any person submits to the jurisdiction of the Kansas courts as to any cause of action arising from . . . (7) [the] causing to persons or property within this state any injury arising out of an act or omission outside of this state by the defendant if, at the time of the injury either (A) the defendant was engaged in solicitation or service activities within this state; or (B) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use.

Kan. Stat. Ann. § 60-308(b)(7). As noted recently by the Kansas Supreme Court, ***HN14***[] "the legislative intent of *K.S.A. 60-308(b)(7)* was to grant in personam jurisdiction to the courts of this state over those who engage in the manufacture, sale, or servicing of products if they receive or can anticipate some direct or indirect financial benefit from the sale, trade, use **[**15]** or servicing of their products within this state." ***Ling, 237 Kan. at 631*****,** ***703 P.2d at 733*** (citing ***Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 648, 438 P.2d 128, 133-34 (1968))*****.**

Section 60-308(b)(7) ***HN15***[] has traditionally been applied in product liability cases and "was intended to provide[] jurisdiction over foreign manufacturers and/or suppliers in products liability cases." ***Johnson v. Goodyear, S.A. Colmar Berg*****,** ***716 F. Supp. 531, 533 (D. Kan. 1989)*** (citing *Tilley, 200 Kan. at 647*). Accordingly, this court must decide whether subsection (b)(7) is appropriately applied in an antitrust case, where the alleged injury does not arise from the malfunction of the product at issue but instead from a conspiracy to control its price.

A "product liability" case references a "legal theory by which liability is imposed on the manufacturer or seller of a defective product." Black's Law Dictionary 1225 (7th ed. 1999). None of the cases cited by plaintiff indicate that subsection **[*1264]** (b)(7) is properly applied outside the typical product liability scenario. Moreover, in ***J.E.M. Corporation v. McClellan*****,** ***462 F. Supp. 1246, 1249 (D. Kan. 1978)*****,** **[**16]** the court noted ***HN16***[] that subsection (b)(7) "specifically applies only to product liability injury." ***Id. at 1250*****.** In addition, this court previously has found that because subsection (b)(7) was designed to apply in "product hazard" cases, it had no application in a malpractice action against attorneys. ***Stonecipher v. Sexton*****,** ***54 F.R.D. 435, 438 (D. Kan. 1972)*****.**

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[3] The court notes that, ***HN12***[] in contrast to claims of tortious behavior, a civil antitrust violation brought pursuant to federal ***antitrust law*** may be established without evidence of unlawful intent. A showing of an anticompetitive effect may be sufficient. ***McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*****;** ***United States v. United States Gypsum Co., 438 U.S. 422, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*****.**

Consequently, the court finds plaintiffs have failed to make a prima facie showing that the exercise of jurisdiction under *§ 60-308(b)(7)* is appropriate in this antitrust violation case. Defendant Ueno USA's motion is granted on this basis.

. Due Process Considerations

Defendant Ueno USA next contends that the exercise of jurisdiction over it in this case would offend traditional notions of fair play and substantial justice and would be inconsistent with due process principles. As noted, to establish personal jurisdiction in a diversity case, plaintiffs must meet the requirements of the forum's long-arm statute and the federal Constitution. ***Williams v. Bowman Livestock Equip. Co.*, *927 F.2d 1128, 1131 (10th Cir. 1991)*.** The court has found that personal **[**17]** jurisdiction is lacking under the provisions of the long-arm statute asserted. However, even where the long-arm statute provided a basis for the exercise of jurisdiction, the court now finds that the exercise of jurisdiction over defendant Ueno USA would violate due process principles.

HN17[] Due process allows a state to exercise personal jurisdiction over a nonresident when the nonresident has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ***Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*. *HN18***[] The Tenth Circuit has endorsed a three part analysis for use when examining whether a non-resident defendant has sufficient minimum contacts with the forum to satisfy constitutional requirements. ***Rambo v. Am. S. Ins. Co.*, *839 F.2d 1415, 1419 n.6 (10th Cir. 1988)*.**

(1) The non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits **[**18]** and protections of its laws.

(2) The claim must be one which arises out of or results from the defendant's forum-related activities.

(3) Exercise of jurisdiction must be reasonable.

Id.

o **Purposeful Availment**

HN19[] Jurisdiction must rest on a person's activity deliberately directed toward the forum state. ***Packerware Corp. v. B & R Plastics, Inc.*, *15 F. Supp. 2d 1074, 1081 (D. Kan. 1998)*.** Examining plaintiffs' allegations in light of defendant Ueno USA's verified affidavit, the court finds that plaintiffs have failed to set forth a sufficient prima facie showing that defendant Ueno USA performed an act "by which [it] purposefully availed [itself] of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws." *Id.*

Here, plaintiffs have failed to set out a prima facie case premised on direct contacts with the forum state. Although plaintiffs have alleged that defendant Ueno USA manufactured or sold sorbates in Kansas either directly or indirectly, these allegations have been controverted. Moreover, **[*1265]** plaintiffs have failed to come forward with "competent proof" **[**19]** of those controverted allegations as set forth by the applicable standard. ***Pytlik, 887 F.2d at 1376*.** Where there is no prima facie showing that defendants directly sold sorbates in Kansas, or directed others to do so on their behalf, purposeful availment is not present.

However, ***HN20***[] even absent a prima facie showing that defendants sold directly to purchasers in Kansas, plaintiffs could establish purposeful availment. Under the "stream of commerce" theory, a defendant's contacts with the forum state need not be direct to satisfy due process requirements. The deliberate, although perhaps indirect, introduction of products into the stream of commerce with the expectation of distribution in particular areas may be enough to satisfy the minimum contacts/purposeful availment test. *See* ***World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)*** (noting purposeful availment may occur by actions or even a single act for which the defendant "should reasonably anticipate being haled into court in the forum state"); ***Fidelity and Cas. Co. of N.Y. v. Philadelphia Resins Corp.***, ***766 F.2d 440, 446 (10th Cir. 1985)***. **[**20]** ***HN21***[] Generally, simply placing a product into the stream of commerce, without more, is not sufficient to satisfy the constitutional standard for personal jurisdiction. ***Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102, 112, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987)*** ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."). Instead, "additional conduct" is generally required to "indicate an intent or purpose to serve the market in the forum State." *Id.* A defendant's mere "awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.; see also* ***Packerware Corp., 15 F. Supp. 2d at 1081*** (recognizing broad approach to stream of commerce theory as set out in *Asahi Metal*).

Plaintiffs allege that "Since 1979, the defendants and their co-conspirators sold and distributed sorbates in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located **[**21]** in states or countries other than the states or countries in which the defendant and its co-conspirators produced sorbates." (Pls.' Compl. at P51). Plaintiffs further allege that the "business activities of the defendant and its co-conspirators that are the subject of this Petition were within the flow of, and substantially affected, interstate and foreign trade and commerce; consequently, these activities have affected and continue to affect trade and commerce in Kansas." (*Id.* at P52). [4] However, plaintiffs have not alleged additional conduct by defendants evidencing an intent by defendant Ueno USA to direct its product to the State of Kansas.

[22]** Even when drawing all reasonable inferences from the record in favor of plaintiffs, the court finds that plaintiffs have failed to **[*1266]** sufficiently allege a prima facie case of purposeful availment under a stream of commerce theory. Plaintiffs' complaint simply alleges defendant Ueno USA placed its product into the stream of commerce and that this placement had an effect on the Kansas economy. Plaintiffs fail to allege any contacts that demonstrate defendant Ueno itself created a substantial connection with the State of Kansas. *See* ***Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*** (noting jurisdiction is proper where contacts "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State").

o **Relation of Claim to Activities in Forum**

Accordingly, without a sufficient allegation of purposeful availment, the court finds that plaintiffs are unable to establish that their claim that defendant Ueno USA unlawfully fixed the price of the sorbates sold in Kansas in violation of Kansas ***antitrust law*** satisfies the second element of the due process analysis, **[**23]** i.e., that the "claim must be one which arises out of or results from the defendant's forum-related activities."

o **Reasonableness**

The court next examines whether plaintiffs have made a sufficient showing that this court's exercise of jurisdiction over the moving defendants would be reasonable. ***HN22***[] In determining whether the exercise of jurisdiction is so unreasonable as to violate "fair play and substantial justice," the court considers:

(1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient

[4] The court finds these allegations are uncontroverted by any of defendant Ueno USA's submittals. Although defendant Ueno USA's affidavit indicates that it does "not sell any sorbates products to any resident of Kansas" and sets out the distribution channels through which it receives and sells its sorbate products, it does not refute plaintiffs' allegations that its business activities of selling and distributing sorbates were placed in the stream of commerce. In fact, defendant Ueno USA's affidavit indicates that, at one point in the distribution chain through which it receives its sorbates, goods are delivered "for sale to customers in the United States." (Def. Ueno USA's Mot., Komatsu aff. at P5).

resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.

OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, *149 F.3d 1086, 1095-96 (10th Cir. 1998) (citing ***Asahi Metals Indus., 480 U.S. at 113*)**.

The first factor weighs in favor of defendant Ueno USA. Defending itself in this forum will be burdensome on defendant Ueno USA. Defendant Ueno USA is a Delaware corporation **[**24]** with its principal place of business in New York. Moreover, defendant Ueno USA has no offices or employees in Kansas. However, this finding is not dispositive because, despite the apparent burden on defendant Ueno USA in defending itself in this forum given its geographical distance from Kansas, ***HN23***[] the Tenth Circuit has recognized that because "modern commercial transactions often involve little contact with the forum beyond that of mail and telephone communications . . . defending a suit in a foreign jurisdiction is not as burdensome as in the past." ***Cont'l Am. Corp. v. Camera Controls Corp.*, *692 F.2d 1309, 1314 (10th Cir. 1982)***.

The second factor weighs in favor of plaintiffs. Plaintiffs allege violations of Kansas ***antitrust law*** based on defendant Ueno USA's alleged distribution or sales of sorbates in Kansas. Moreover, resolution of plaintiffs' claims may require interpretation of novel issues of first impression under Kansas's antitrust laws. ***HN24***[] There is a recognized advantage to "having a local court determine questions of local law." ***Chrysler Credit Corp. v. Country Chrysler, Inc.*, *928 F.2d 1509, 1516 (10th Cir. 1991)***.

The third **[**25]** factor is neutral. Plaintiffs are either Kansas corporations or entities that own and operate grocery stores in Kansas or have purchased products containing sorbates from Kansas grocery **[*1267]** wholesalers. Plaintiffs are suing on behalf of themselves and purportedly on behalf of a class of retail grocers that purchased products in Kansas. Plaintiffs' claims are raised under Kansas law. However, there has been no showing that plaintiffs' "chances for recovery will be greatly diminished by forcing [them] to litigate in another forum because of that forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit." ***OMI Holdings, 149 F.3d at 1097***. The court is unconvinced that plaintiffs could not receive effective relief in an alternate forum.

The fourth factor weighs slightly in favor of plaintiffs. ***HN25***[] The "key inquiry" in determining "whether the forum state is the most efficient place to litigate the dispute . . . [is] the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation." *Id.* **[**26]** (citations omitted). First, there is evidence that witnesses necessary to litigate the present case are located both within and outside the state. Second, the underlying wrongful conduct asserted in this lawsuit occurred in various locations where meetings occurred and agreements were allegedly made regarding the fixing of sorbate prices. Although there is no evidence that these meetings or agreements were entered into in Kansas, plaintiffs' alleged damages arise from the defendants' sale or distribution of sorbates with unlawfully fixed prices in Kansas, either directly or indirectly as alleged in plaintiffs' complaint. Third, Kansas law governs the case. Finally, the court notes that several defendants have filed a motion to transfer this case to the United States District Court for the Northern District of California, contending that piecemeal litigation may be avoided by such transfer. However, at the time of the court's review of the current motion, it appears that the related case has been resolved. Therefore, although the record contains reference to other similar suits either pending or now resolved in other jurisdictions, it does not appear that maintenance of the currently **[**27]** pending action would promote piecemeal litigation.

Finally, as set out by the Tenth Circuit, ***HN26***[] the court's analysis of the fifth factor "focuses on whether the exercise of personal jurisdiction by Kansas affects the substantive social policy interests of other states or foreign nations." *Id.* With respect to defendant Ueno USA, neither party has set forth an analysis of this factor. Accordingly, the court finds that this factor is neutral.

o **Conclusion**

The court finds that, even where a few of the reasonableness factors weigh in favor of plaintiffs, these factors are not strong enough to overcome the lack of sufficient allegations of purposeful direction. ***HN27***[] There is an "interplay" between the two components of the due process inquiry -- 1) the purposeful availment and its relation to the claim and 2) the reasonableness of the exercise of jurisdiction -- "such that, 'depending on the strength of the defendant's contacts with the forum state, the reasonableness component of the constitutional test may have a greater or lesser effect on the outcome of the due process inquiry.'" ***OMI Holdings, 149 F.3d at 1091*** (quoting ***Int'l Shoe, 326 U.S. at 316*****).** **[**28]** Here, recognizing that some of the factors weigh in favor of plaintiffs, the court finds that because no minimum contacts have been established, the burdens placed on the alien defendant are not justified. *See* ***Asahi Metal Indus., 480 U.S. at 114*** (noting where minimum contacts established "often the interests of the plaintiff and the **[*1268]** forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant"). Therefore, the court finds that on the present facts, even when construed in the light most favorable to plaintiffs, the "maintenance of the suit" against defendant Ueno USA would offend "traditional notions of fair play and substantial justice." ***Int'l Shoe, 326 U.S. at 316*****.** Defendant Ueno USA's motion is granted on this additional basis.

. Defendants Ueno Fine Chemicals Industry, Ltd. and Chisso Corporation's Motions (Doc. 107 & 109)

Similar to the arguments set forth by defendant Ueno USA, both defendants Ueno Fine Chemicals Industry Ltd. (referenced as "Ueno Ltd.") and Chisso Corporation's (referenced as "Chisso Corp.") assert that they are not subject to personal jurisdiction in this court under **[**29]** the Kansas long-arm statute. In addition, defendants Ueno Ltd. and Chisso Corp. assert that the exercise of jurisdiction over them would violate federal due process concepts because they have not "purposefully directed" activities toward Kansas and further that such exercise of jurisdiction would violate traditional notions of fair play and substantial justice.

o **Kansas Long-Arm Statute**

Consistent with its analysis above, the court finds the exercise of jurisdiction over defendants Ueno Ltd. and Chisso Corp. is not appropriate under subsections (b)(1), (b)(2), or (b)(7) of *Kan. Stat. Ann. § 60-308*. Similar to the allegations made regarding defendant Ueno USA, plaintiffs allege that "at all relevant times," defendants Ueno Ltd. and Chisso Corp., "directly or through its affiliates, engaged in the business of the manufacture, distribution and/or sale of sorbates throughout the United States and the world, including Kansas." (Pls.' Compl. at PP13 & 19). In addition, consistent with their allegations against defendant Ueno USA, plaintiffs allege that defendants Ueno Ltd. and Chisso Corp. "through distributors . . . sold sorbates in Kansas to various indirect purchasers. **[**30]** " (*Id.* at P53). Defendants Ueno Ltd. and Chisso Corp. have set forth affidavits contending that they have not transacted business in Kansas. Generally, these defendants contend that they do not sell any sorbates products to any resident of Kansas and that they have not sold any sorbate products to the plaintiffs in this action. Moreover, these defendants contend that they have no offices, employees, or ownership interests in Kansas. (Def. Ueno Ltd.'s Resp., Ohashi aff.) (Def. Chisso Corp.'s Resp., Akuzawa aff.).

Similar to its analysis with respect to the insufficiency of the allegations against defendant Ueno USA, the court finds that plaintiffs' unverified allegations that defendants Ueno Ltd. and Chisso Corp. distributed or sold sorbates to various indirect purchasers in Kansas, when considered in light of defendant Ueno Ltd and Chisso Corp.'s verified affidavits, fail to satisfy the necessary showing of the transaction of business in Kansas under subsection (b)(1) of *Kan. Stat. Ann. § 60-308(b)(1)*.

Moreover, because identical claims are made against defendant Ueno Ltd. and Chisso Corp., the court finds, under its analysis set forth above, that plaintiffs' **[**31]** allegations under the Kansas ***antitrust law*** are insufficient to bring their claims against defendants Ueno Ltd. and Chisso Corp. within the purview of subsection (b)(2) or (b)(7) of *Kan. Stat. Ann. § 60-308*. Accordingly, the court finds plaintiffs have failed to make the threshold prima facie showing that the exercise of jurisdiction under *§ 60-308(b)(1)*, *(b)(2)*, or *(b)(7)* is appropriate. Defendants Ueno Ltd. and **[*1269]** Chisso Corp.'s motions are granted on this basis.

o **Due Process Considerations**

The Tenth Circuit's three part standard governs the court's analysis here. ***Rambo, 839 F.2d at 1419 n.6*.** Given the similarity of these defendants' arguments to those asserted by defendant Ueno USA and the similar allegations by plaintiffs against all three moving defendants, [5] the court finds that the analysis set forth above regarding purposeful availment and relation of claim to activities in the forum is dispositive here.

[32]** In addition, the court's analysis of the reasonableness of its exercise of jurisdiction over defendants Ueno Ltd. and Chisso Corp. is also generally dispositive here. However, additional factors must be considered when examining the first factor under the reasonableness inquiry--the burden on defendant. Specifically, defendants Ueno Ltd. and Chisso Corp.'s status as foreign corporations requires the court to examine the additional burden that would be imposed where these defendants are required to defend themselves in this jurisdiction.

As set out by the Supreme Court, ***HN28***[] the "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long-arm of personal jurisdiction over national borders." ***Asahi Metal Indus., 480 U.S. at 114*.** Here, the exercise of jurisdiction over defendants Ueno Ltd. and Chisso Corp. would force them to travel outside their home country and to litigate the present claims in a foreign forum. Given the analysis set forth above regarding the interplay between the two components of the due process analysis, the court finds that this **[**33]** additional factor weighing in favor of defendants Ueno Ltd. and Chisso Corp. bolsters the court's finding that the exercise of jurisdiction over these defendants is not reasonable. The court finds the interests of the plaintiffs and of this forum in asserting jurisdiction over defendants Ueno Ltd. and Chisso Corp. are not sufficient to outweigh the burdens placed on defendants Ueno Ltd. And Chisso Corp. in light of the plaintiffs' failure to establish purposeful availment.

Considering the relevant factors, the court finds that on the present facts construed in the light most favorable to plaintiffs, the "maintenance of the suit would offend 'traditional notions of fair play and substantial justice.'" ***Int'l Shoe, 326 U.S. at 316*.** Defendants Ueno Ltd. and Chisso Corp.'s motions are granted on this additional basis.

. **Order**

IT IS THEREFORE ORDERED that defendants Ueno Fine Chemicals Industry (USA), Inc., Ueno Fine Chemicals Industry, Ltd., and Chisso Corporation's Motions to Dismiss for Lack of Personal Jurisdiction (Docs. 105, 107 & 109) are hereby granted. Defendants Ueno Fine Chemicals Industry (USA), Inc., Ueno Fine **[*1270]** Chemicals Industry, **[**34]** Ltd., and Chisso Corporation are hereby dismissed from this case.

Dated this 8th day of January 2003, at Kansas City, Kansas.

CARLOS MURGUIA

United States District Judge

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[5] The court finds that the plaintiffs' allegations regarding the placement of the defendants' products in the stream of commerce or the effect that their placement had on the Kansas economy have not been controverted by either defendant Chisso Corp. or defendant Ueno Ltd. Defendant Ueno Ltd. made the same showing as noted above for defendant Ueno USA. In addition, defendant Chisso Corp. verified that it "sells sorbates to several Japanese corporations" that then "resell the sorbates to other distributors that sell the product either to still other distributors or to the end users." (Def. Chisso's Mot., Akuzawa aff. at P2). Defendant Chisso also verified that it "does not control the activities of [the corporations] that sell its products."

Miller v. Am. Stock Exch. (in Re Stock Exchs. Options Trading Antitrust Litig.)

United States Court of Appeals for the Second Circuit

February 26, 2002, Argued ; January 9, 2003, Decided

Docket Nos. 01-7371, 01-7580

Reporter

317 F.3d 134 *; 2003 U.S. App. LEXIS 277 **; 2003-1 Trade Cas. (CCH) P73,927

In re: Stock Exchanges Options Trading Antitrust Litigation LYNN S. MILLER, Individually and on behalf of all others similarly situated, MARK STEINBERG, individually and on behalf of all others similarly situated, RAM YARIV, individually and on behalf of all others similarly situated, ALAN HAENEL, individually and on behalf of all others similarly situated, YAKOV PRAGER, individually and on behalf of all others similarly situated, THOMAS P. LYNCH, individually and on behalf of all others similarly situated, MARY CHIU, individually and on behalf of all others similarly situated, HARRY BINDER, individually and on behalf of all others similarly situated, ESTATE OF WANDA GRAHAM, on behalf of itself and all others similarly situated, WILLIAM THEDFORD, individually and on behalf of all others similarly situated, Consolidated-Plaintiffs-Appellants, ROBERT STROUGO, Esq., individually and on behalf of all others similarly situated, LSP PARTNERS L.P., ALAN BORYK, EDWARD MEISEL, BRUCE MCCALL, JEFFREY BRODERICK, ADAM EDELSTEIN, BARRY PINKOWITZ, RACHEL CHUANG, ALAN NUSSBAUM, GEORGE KINNEY, RONALD K. DRUCKER, ROBERT DUNN, WILSON N. KRAHNKE, MARC SEIDBAND, JOHN P. ABBAMONDI, RICHARD T. DEVINCENT, I. SCOTT EDELSTEIN, LONNIE B. REIVER, RONNIE A. YARBOROUGH, JASON SILVER, ELLIOT BRAUN, Plaintiffs-Appellants, v. AMERICAN STOCK EXCHANGE, INC., a New York not for profit Corp., CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware not for profit Corp., PHILADELPHIA STOCK EXCHANGE, INC., A Delaware not for profit Corp., PACIFIC EXCHANGE, INC., a California Corporation., NEW YORK STOCK EXCHANGE, INC., a New York not-for-profit corp., WOLVERINE TRADING,L.P.,SUSQUEHANNA INVESTMENT GROUP INC.,JOHN DOES 1-100, SPEAR, LEEDS & KELLOGG, L.P., a New York Limited Partnership., AMEX, CBOE, PHX, PCX, M.J.T. SECURITIES LLC, COLE, ROESLER TRADING, L.P., ASSETS MONDIAL, LLC., KODIAK CAPITAL MANAGEMENT, LLC., CHIN OPTIONS LLC., OPPENHEIMER, NOONAN, WEISS, L.P., ARBITRADE LLC., TIMBER HILL L.L.C., PROFESSIONAL EDGE FUND, L.P. TAGUE SECURITIES CORP., LAKOTA TRADING INC., REFCO SECURITIES, INC., BRIDGEPORT SECURITIES GROUP CO., JOHNSON TRADING CORP., GROUP ONE TRADING L.P., BEARTOOTH TRADING INC., CRANMER & CRANMER, INC., GOIN & CO., L.L.C., AGS SPECIALIST PARTNERS, LETCO, BEARHUNTER LLC., KALB, VOORHIS & CO., LLC., HIGHLAND SECURITIES CO., GHM, INC., D.A. DAVIDSON & CO., INC., CHARLTON, INC., HULL TRADING CO. L.L.C., BINARY TRADERS, INC., Defendants-Appellees.

Subsequent History: Motion granted by, in part, Motion denied by, in part *In re Stock Exchs. Options Trading Antitrust Litig., 2005 U.S. Dist. LEXIS 13734 (S.D.N.Y., July 8, 2005)*

Prior History: [1]** Appeal from a judgment of the United States District Court for the Southern District of New York, Richard Conway Casey, Judge, dismissing consolidated complaint's antitrust claims against defendants stock exchanges and member firms with respect to equity options trading, ruling that the Securities Exchange Act of 1934, *15 U.S.C. § 78a et seq.*, impliedly repealed the Sherman Antitrust Act, *15 U.S.C. § 1*, with respect to such claims; and appeal from a post judgment order ruling that the court lacked subject matter jurisdiction to entertain prejudgment motions for approval of class 1 action settlement agreements. See *In re Stock Exchanges Options Trading Antitrust Litigation, 2001 U.S. Dist. LEXIS 1381, 2001 WL 128325 (Feb. 15, 2001)*; *171 F.Supp.2d 174 (Apr. 24, 2001)*.

In re Stock Exchs. Options Trading Antitrust Litig., 171 F. Supp. 2d 174, 2001 U.S. Dist. LEXIS 5174 (S.D.N.Y., 2001)
In re Stock Exchs. Options Trading Antitrust Litig., 2001 U.S. Dist. LEXIS 1381 (S.D.N.Y., Feb. 14, 2001)

Disposition: Affirmed in part, and vacated and remanded in part.

Core Terms

options, anti trust law, trading, implied repeal, listing, exchanges, district court, Exchange Act, Sherman Act, antitrust, immunity, motions, regulation, subject matter jurisdiction, antitrust immunity, settlement agreement, regulatory scheme, entertain, practices, impliedly repealed, affirmative defense, proposed settlement, securities exchange, consolidated, plaintiffs', courts, repeal, commission rate, class action, conferred

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Pleadings > Interpleader > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN1[] **Types of Contracts, Settlement Agreements**

Court approval is required for the settlement of a class action. *Fed. R. Civ. P. 23(e)*.

Governments > Legislation > Expiration, Repeal & Suspension

HN2[] **Legislation, Expiration, Repeal & Suspension**

It is a cardinal principle of construction that repeals by implication are not favored.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

HN3[] **Regulated Industries, Financial Institutions**

Repeal of the antitrust laws by the Securities Exchange Act of 1934, *15 U.S.C.S. § 78a et seq.*, is to be implied only if necessary to make that Act work, and even then only to the minimum extent necessary.

Antitrust & Trade Law > Sherman Act > General Overview

Securities Law > Regulators > Self-Regulating Entities > General Overview

Transportation Law > Commercial Vehicles > Traffic Regulation

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN4[] **Antitrust & Trade Law, Sherman Act**

Applicability of the antitrust laws rests on the need for vindication of their positive aim of insuring competitive freedom.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Federal Government > Claims By & Against

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN5[] **Jurisdiction, Jurisdictional Sources**

The United States Supreme Court has implied immunity from the antitrust laws in particular and discrete instances to assure that a federal agency entrusted with regulation in the public interest can carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Communications Law > Regulators > US Federal Communications Commission > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

HN6[] **Authority to Act, Actual Authority**

With respect to the antitrust laws, the implied repeal doctrine has been summarized as operating in two narrowly-defined situations, to wit, first, when an agency, acting pursuant to a specific congressional directive, actively regulates the particular conduct challenged, and second, when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Necessity for Regulation

Business & Corporate Compliance > ... > Labor & Employment Law > Affirmative Action > Program Compliance

HN7[] Regulated Industries, Financial Institutions

Implied immunity exists where allowing an antitrust lawsuit to proceed would conflict with Congress's implicit determination that the Securities and Exchange Commission (SEC) should regulate the alleged anti-competitive conduct. The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it.

Antitrust & Trade Law > Regulated Industries > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

HN8[] Antitrust & Trade Law, Regulated Industries

Antitrust immunity is not to be presumed from the mere existence of overlapping authority; rather the analysis must focus on the "potential" for conflicts between the antitrust laws and an authorized regulatory scheme. The term "plain repugnancy" has been used to describe the tension between statutes that justifies implied repeal. The antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow.

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Necessity for Regulation

Governments > Legislation > Expiration, Repeal & Suspension

Securities Law > Blue Sky Laws > Offers & Sales

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

HN9[] US Securities & Exchange Commission, Necessity for Regulation

The Securities Exchange Act of 1934, 15 U.S.C.S. § 78a et seq., impliedly repeals 15 U.S.C.S. § 1 of the Sherman Act with respect to the listing and trading of equity options, because the implied repeal is necessary to preserve the authority of the Securities and Exchange Commission (SEC) to regulate that conduct. The Exchange Act itself does not prohibit agreements for exclusivity in options listing, and the SEC has taken varied positions with respect to the appropriateness of multiplicity, in part because under the Exchange Act it is concerned with more than just the protection of competition, which is the sole aim of antitrust legislation. The SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Thus, in evaluating the wisdom under the Exchange Act of requiring or prohibiting multiple listings, the SEC has perforce balanced the interest of promoting competition, on the one hand, against undesirable potential effects, on the other hand, such as market fragmentation, financial injury to regional exchanges, and deleterious structural changes in the markets in order to carry out its statutory duty to enhance the economically efficient execution of securities transactions. 15 U.S.C.S. § 78k-1(a)(1)(C)(i).

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > Conduct of Parties

Governments > Legislation > Expiration, Repeal & Suspension

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

HN10[] **Antitrust & Trade Law, Regulated Industries**

The appropriateness of an implied repeal of the antitrust laws does not turn on whether the antitrust laws conflict with the current view of a regulatory agency; rather, it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > Conduct of Parties

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Governments > Legislation > Expiration, Repeal & Suspension

HN11[] **Antitrust & Trade Law, Regulated Industries**

In determining whether the antitrust laws have been impliedly repealed, the proper focus is not on the an agency's current regulatory position but rather on the agency's authority to permit conduct that the antitrust laws would prohibit.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

HN12[] **Standards of Review, Deference to Agency Statutory Interpretation**

A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency to which interpretive authority has been delegated. Although some deference may be accorded to an agency's view on a matter within its particular expertise, the decision as to whether, in a given set of circumstances, one statutory scheme supersedes the other is, "in the end," to be made by the courts.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Necessity for Regulation

HN13[] **Regulated Industries, Financial Institutions**

The determination of whether implied repeal of the antitrust laws is necessary to make the Securities Exchange Act of 1934, *15 U.S.C.S. § 78a et seq.*, provisions work is a matter for the courts.

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Necessity for Regulation

Securities Law > Blue Sky Laws > Types of Securities > Options, Subscription Rights & Warrants

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Civil Liability Considerations > Remedies > Equitable Relief

HN14[] **US Securities & Exchange Commission, Necessity for Regulation**

The Securities and Exchange Commission (SEC) has ample statutory authority, which it has repeatedly exercised, to regulate the listing and trading of equity options. Although the SEC's present stance is that agreements for exclusive listing are forbidden, the SEC has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition. The United States Court of Appeals for the Second Circuit sees no way to reconcile that SEC authority, which may be exercised to permit agreements for exclusive listing of equity options, with the antitrust laws. Accordingly, with respect to the listing and trading of options on securities exchanges, the Securities Exchange Act of 1934, *15 U.S.C.S. § 78a et seq.*, impliedly immunizes defendants against liability under *15 U.S.C.S. § 1* of the Sherman Act.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

Governments > Legislation > Expiration, Repeal & Suspension

HN15[] **Class Actions, Compromise & Settlement**

Although the doctrine of implied repeal of the antitrust laws is sometimes described in terms of the district court's "antitrust jurisdiction," it is more properly viewed as conferring an immunity that is an affirmative defense that does not affect the court's subject matter jurisdiction over the action.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN16[] **Subject Matter Jurisdiction, Federal Questions**

As a general matter, where a complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States, a district court has subject matter jurisdiction unless the federal claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. Thus, the district court has jurisdiction where the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN17[] **Subject Matter Jurisdiction, Federal Questions**

The "inadequacy" of a federal claim is ground for dismissal for lack of subject-matter jurisdiction only when the claim is so insubstantial, implausible, foreclosed by prior decisions of the United States Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy. Once a federal court has determined that a plaintiff's jurisdiction-conferring claims are not insubstantial on their face, no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter. Thus, the district court's subject matter jurisdiction to entertain a suit based on a federal claim that is not wholly insubstantial, frivolous, or foreclosed by prior decisions of the Supreme Court, is not defeated by the defendant's assertion of a position that is properly characterized as an affirmative defense.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN18[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Most immunities are affirmative defenses. In addition to the 19 affirmative defenses set forth in *Fed. R. Civ. P. 8(c)*, that rule requires any other matter constituting an avoidance or an affirmative defense to be pleaded. Affirmative defenses and avoidances other than those specifically referenced in *Rule 8(c)* have been found to include common law immunity, statutory immunity, and exemption under a statute or regulation. Affirmative defenses can be waived; lack of subject matter jurisdiction cannot be waived.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

HN19[] **Antitrust & Trade Law, Exemptions & Immunities**

In discussing whether a given federal securities statute impliedly repeals an ***antitrust law***, the United States Supreme Court has not suggested that the implied repeal deprives a district court of subject matter jurisdiction. It has instead referred to the implied repeal as giving the defendant "immunity" from liability under the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN20[] Antitrust & Trade Law, Exemptions & Immunities

Although an implied antitrust immunity prevents a court from exercising jurisdiction under the antitrust laws, in none of its cases has the United States Supreme Court suggested that that immunity is anything more than an affirmative defense.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Constitutional Law > The Judiciary > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

HN21[] Antitrust & Trade Law, Exemptions & Immunities

There can be no suggestion that the immunity conferred on a private entity on the basis that it is subject to one set of laws that takes precedence over another law is on a par with the immunity enjoyed by a government. The immunity conferred by an implied repeal of the antitrust laws simply prevents the court from imposing liability under those laws.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Governments > Legislation > Expiration, Repeal & Suspension

HN22[] Sherman Act, Jurisdiction

A determination of whether there is an implied repeal requires a thorough analysis of the precise practice that has been challenged and the regulatory scheme with respect to that practice.

Counsel: ARTHUR R. MILLER, Cambridge, Massachusetts (Bruce E. Gerstein, Stephen H. Schwartz, Jeffrey M. Lax, Garwin Bronzaft Gerstein & Fisher, New York, New York, Andrew D. Friedman, Wechsler Harwood Halebian & Feffer, New York, New York, Bernard Persky, Barbara Hart, Goodkind Labaton Rudoff & Sucharow, New York, New York, Joseph **[**2]** C. Kohn, Steven M. Steingard, Kohn, Swift & Graf, Philadelphia, Pennsylvania, on the brief), for Consolidated-Plaintiffs-Appellants and Plaintiffs-Appellants.

JAY N. FASTOW, New York, New York (Irving Scher, Adam P. Strochak, Weil, Gotshal & Manges, on the brief), for Defendant-Appellee New York Stock Exchange, Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, New York, New York (William P. Frank, Peter E. Greene, Shepard Goldfein, New York, New York, of counsel), HOWREY SIMON ARNOLD & WHITE, Washington, D.C. (John W. Nields, Jr., Washington, D.C., of counsel), WILLKIE, FARR & GALLAGHER, New York, New York (William H. Rooney, Ian K. Hochman, New York, New York, of counsel), and WILMER, CUTLER & PICKERING, Washington, D.C. (Bruce E. Coolidge, Washington, D.C., of counsel), filed a joint brief for, respectively, Defendants-

Appellees American Stock Exchange, Inc., Chicago Board Options Exchange, Inc., Philadelphia Stock Exchange, Inc., and Pacific Exchange, Inc.

H. PETER HAVELES, JR., New York, New York (Douglas I. Koff, Adam Masin, Cadwalader, Wickersham & Taft, New York, New York, on the brief), for Defendant-Appellee Timber Hill L.L.C.

DILWORTH PAXSON, Philadelphia, Pennsylvania **[**3]** (James J. Rodgers, Philadelphia, Pennsylvania,of counsel), for Defendant-Appellee Tague Securities Corp., joined the brief of Defendant-Appellee Timber Hill L.L.C.

DAVID BOHAN, Chicago, Illinois (Michael D. Richman, Sachnoff & Weaver, Chicago, Illinois, Scott M. Hines, Michael J. Grudberg, Stillman & Friedman, New York, New York, on the brief) for Defendant-Appellee LETCO.

PIPER MARBURY RUDNICK & WOLFE, New York, New York (Douglas A. Rappaport, New York, New York, Leonard L. Gordon, Washington, D.C., Christopher J. Barber, Nancy L. Hendrickson, Chicago, Illinois, of counsel) filed a brief for Defendant-Appellee D.A. Davidson & Co., Inc.

FINEMAN & BACH, Philadelphia, Pennsylvania (Steven R. Waxman, Philadelphia, Pennsylvania, of counsel), for Defendant-Appellee Binary Traders, Inc., joined the brief of Defendant-Appellee Timber Hill L.L.C.

Charles A. James, Assistant Attorney General, Washington, D.C. (John M. Nannes, Deputy Assistant Attorney General, Catherine G. O'Sullivan, David Seidman, Attorneys, United States Department of Justice, Washington, D.C., of counsel), filed a brief for Amicus Curiae United States in support of Appellants.

Daniel J. Popeo, Washington, **[**4]** D.C. (Richard A. Samp, Washington, D.C., of counsel), filed a brief for Amicus Curiae Washington Legal Foundation in support of Defendants-Appellees.

Judges: Before: KEARSE and JACOBS, Circuit Judges, and JONES, District Judge [*].

Opinion by: KEARSE

Opinion

[*138] KEARSE, *Circuit Judge*:

Plaintiffs in these class action suits, which were consolidated for pretrial purposes in the United States District Court for the Southern District of New York, appeal from a judgment of that court, Richard Conway Casey, *Judge*, dismissing their claims that the conduct of defendants American Stock Exchange, Inc. ("AMEX"), *et al*., in restricting stock-exchange listings of certain securities for options trading violated *§ 1* of the Sherman Antitrust Act, *15 U.S.C. § 1 (2000)* ("Sherman Act"). The district court granted summary judgment in favor of defendants, ruling that the Sherman Act, insofar as it might have applicability to the listing and trading of options on securities exchanges regulated by the Securities and Exchange Commission ("SEC" **[**5]** or "Commission"), has been impliedly repealed by the Securities Exchange Act of 1934, *15 U.S.C. § 78a et seq. (2000)* ("Exchange Act"). Plaintiffs also appeal from a post judgment order of the district court, ruling that the implied repeal of the Sherman Act with respect to plaintiffs' claims deprived the court of subject matter jurisdiction to entertain motions, made under *Fed. R. Civ. P. 23(e)* prior to the court's ruling on the motions for summary judgment, for judicial approval of settlement agreements entered into between plaintiffs and certain of the defendants. On appeal, plaintiffs contend principally that the district court erred (a) in holding that the Sherman Act's application to restrictions on options listing and trading is impliedly repealed by the Exchange Act, and (b) in ruling that the court lacked jurisdiction to approve the proposed settlements of these class actions. For the reasons that follow, we affirm the dismissal of the antitrust claims, but we vacate the post judgment order and remand for further proceedings with respect to the settlement agreements.

I. BACKGROUND

[*] Honorable Barbara S. Jones, of the United States District Court for the Southern District of New York, sitting by designation.

The present litigation involves the trading of equity options on **[**6]** various stock exchanges. The facts material to the district court rulings that are the subject of this appeal are not in dispute.

A. *The Complaints, the Motions To Dismiss, and the History of SEC Regulation of Options Trading*

Plaintiffs are persons who purchased equity options after December 31, 1994. Defendants are AMEX, the Chicago Board Options Exchange, Inc. ("CBOE"), the New York Stock Exchange, Inc. ("NYSE"), the Pacific Stock Exchange, Inc. ("Pacific Exchange"), the Philadelphia Stock Exchange, Inc. ("Philadelphia Exchange") (collectively "the Exchanges"), and members of the Exchanges that acted as market makers and specialists in options trading (the "market maker defendants"). In early 1999, various plaintiffs commenced more than 20 class actions alleging that defendants had conspired to restrict the listing and trading of particular options to one stock exchange at a time, thereby restraining trade in such options in violation of *§ 1* of the Sherman Act.

[*139] The Judicial Panel on Multi district Litigation transferred the actions to the Southern District of New York for consolidated pretrial proceedings. A consolidated complaint was filed, alleging antitrust violations **[**7]** as described above and seeking monetary and injunctive relief. In January 2000, the Exchanges, joined by the market maker defendants, moved pursuant to *Fed. R. Civ. P. 12(b)(6)* for dismissal of the consolidated complaint on the ground, *inter alia*, that Congress had impliedly repealed the antitrust laws with respect to the listing and trading of options by empowering the SEC to regulate those matters.

The history of the SEC's regulation of options trading on securities exchanges is undisputed and is set forth in detail in the Opinion and Order of the district court dated February 14, 2001, which dismissed the antitrust claims, *see* *In re Stock Exchanges Options Trading Antitrust Litigation, 2001 U.S. Dist. LEXIS 1381, 99* Civ. 962, 2001 WL 128325 (S.D.N.Y. Feb. 15, 2001) ("District Court Opinion" or "February 14 Opinion"). The course of that regulation is summarized here.

The trading of options on national exchanges began in 1973 when CBOE became registered as a national exchange; such trading was regulated in Rule 9b-1, promulgated by the Commission under the Exchange Act, *see* SEC Rule 9b-1, *17 C.F.R. § 240.9b-1*. When other exchanges proposed to list options **[**8]** for trading, the SEC commenced a study of the practice, including the question of whether the trading of options on a given class of securities should be allowed to proceed on multiple exchanges. *See* *SEC Release No. 10490, 1973 SEC LEXIS 2349*, at *1, *9-*10 (Nov. 14, 1973). After a public hearing, the Commission concluded in 1974 that additional study was required before allowing, *inter alia*, "multiple exchange option trading." *SEC Release No. 11144, 1974 SEC LEXIS 2108*, at *4 (Dec. 19, 1974). At that time, the SEC authorized AMEX to allow options trading, and it noted that AMEX did not intend to allow dual trading. *See* *1974 SEC LEXIS 2108* at *5.

In 1976, the SEC allowed CBOE to list options that were already traded on another exchange. *See generally* *49 S.E.C. 1158*, *SEC Release No. 26809, 1989 SEC LEXIS 828*, at *5 (May 11, 1989) . It also allowed the Pacific Exchange to commence options trading and noted that that Exchange planned to list options that were being traded on other exchanges. *See* *SEC Release No. 12283, 1976 SEC LEXIS 2040*, at *3 (Mar. 30, 1976). In early 1977, the Commission invited public comment on multiple listing, *see* *SEC Release No. 13325, 1977 SEC LEXIS 2290*, at *1 (Mar. 3, 1977) **[**9]** , and expressed concern that, in the course of trading options listed on more than one exchange, floor members of certain exchanges might be violating the Exchange Act, *see* *SEC Release No. 13433, 1977 SEC LEXIS 2036*, at *1 (Apr. 5, 1977). Later in 1977, the Commission requested that the exchanges voluntarily cease the listing of new options classes pending a comprehensive SEC review of options trading. *See* *SEC Release No. 13760, 1977 SEC LEXIS 1251*, at *1 (July 18, 1977). It proposed to issue a rule temporarily barring such new listings if the exchanges would not suspend them voluntarily; the rule became unnecessary because the exchanges complied voluntarily, *see* *SEC Release No. 15026, 1978 SEC LEXIS 997*, at *3 (Aug. 3, 1978), and continued to comply until the SEC lifted the moratorium in 1980, *see* *SEC Release No. 16701, 1980 SEC LEXIS 1784*, at *1 (Mar. 26, 1980) ("SEC Mar. 26, 1980 Release").

In 1980, the Commission permitted the resumption of new listings and trading **[*140]** generally, but it stated that it needed to consider further whether to continue its current policy of restricting multiple **[**10]** trading in exchange-traded options or whether to permit a more unfettered competitive environment in which an options exchange would be free to trade any eligible options class, subject to the adequacy of its surveillance and other self-regulatory capabilities.

> *1980 SEC LEXIS 1784* at *22-*23. As the district court noted,
>
> the SEC identified a number of possible adverse effects from multiple trading, including (i) market fragmentation; (ii) the likelihood that meaningful competition among market centers may be, at best, transitory because of member firms' automatic order routing practices; and (iii) the potential negative impact on the financial position of the regional exchanges. [SEC Mar. 26, 1980 Release] *1980 SEC LEXIS 1784* at *28-*30. The Commission believed that some of its concerns might be alleviated by the development of market integration facilities, and expressed an inclination toward multiple trading. However, the SEC deferred further action, requesting that the exchanges consider "whether, and to what extent, the development of market integration facilities would minimize concerns regarding market fragmentation and maximize competitive opportunities in the options markets." *1980 SEC LEXIS 1784* at *32. **[**11]**

District Court Opinion, 2001 U.S. Dist. LEXIS 1381, 2001 WL 128325, at *4.

On May 30, 1980, the SEC approved a plan, formulated by the exchanges jointly, for the single, or exclusive, listing of any new equity option. *See* *SEC Release No. 16863, 1980 SEC LEXIS 1378*, at *1-*2 (May 30, 1980). The new listings were to be allocated among the several exchanges on a rotating basis. *See id*. While permitting multiple listings of other types of options and of over-the-counter securities, the Commission remained concerned that "unlimited multiple trading of equity options at this time might result in significant deleterious structural changes in the markets, with a resultant decrease in competition in other areas such as services relating to execution and clearing functions." *SEC Release No. 17577, 1981 SEC LEXIS 1976*, at *17 (Feb. 26, 1981) (footnote omitted).

In 1987, the Commission proposed the adoption of a multiple-trading rule and announced the commencement of a proceeding to consider, *inter alia*, whethertopermit such multiple-market trading. *See* SEC Release No. 34-24613, *1987 SEC LEXIS 4394*, at *5 (June 18, 1987). In 1989, the Commission **[**12]** announced the adoption of Rule 19c-5, which it described as allowing "an exchange unilaterally [to] decide, as a business matter, not to multiply trade any particular option," but prohibiting an exchange from "reaching an agreement with one or more other exchanges to refrain from multiple trading." SEC Release No. 34-26870, *1989 SEC LEXIS 941*, at *39 (May 26, 1989). Multiple listing was to be implemented gradually. Rule 19c-5 provided that, as of January 22, 1990, an exchange was to be prohibited from adopting any rule, policy, or practice that limited its ability to list any equity options that had first been listed on an exchange on or after that date, *see* SEC Rule 19c-5(a)(1), *17 C.F.R. § 240.19c-5(a)(1) (2002)*; from January 22, 1990, to January 21, 1991, an exchange was to be prohibited from adopting such a rule, policy, or practice with respect to 10 classes of options that had been listed on another exchange prior to January 22, 1990, *see* SEC Rule 19c-5(a)(2), *17 C.F.R. § 240.19c-5(a)(2) (2002)*; and effective January 21, 1991, an exchange **[*141]** was to be prohibited from adopting such a rule, policy, or **[**13]** practice with respect to any equity options, *see* SEC Rule 19c-5(a)(3), *17 C.F.R. § 240.19c-5(a)(3) (2002)* ("No rule, stated policy, practice, or interpretation of this exchange shall prohibit or condition, or be construed to prohibit or condition or otherwise limit, directly or indirectly, the ability of this exchange to list any stock options class because that options class is listed on another options exchange.").

Notwithstanding the terms of Rule 19c-5, the SEC, shortly before the Rule was to become effective, asked exchanges to refrain from the multiple listing of such options as had previously been listed only singly. (*See*, *e.g.*, Letter from SEC Chairman Richard C. Breeden to AMEX Chairman James R. Jones, dated January 9, 1990, at 3.) Such requests were renewed over the next 2 1/2 years. (*See*, *e.g.*, Letter from SEC Chairman

Richard C. Breeden to CBOE Chairman Alger B. Chapman, dated July 31, 1991, at 2 ("As you know, I have repeatedly asked the options exchanges not to commence multiple listing under Rule 19c-5" pending the development of a cost-effective linkage mechanism); Letter from SEC Chairman Richard C. Breeden to AMEX **[**14]** Chairman James R. Jones, dated June 30, 1992, at 4 ("Although Rule 19c-5 remains in effect, I would ask you to extend the application of the voluntary moratorium until November 20, 1992, to provide the exchanges adequate time to make any rule changes or operational enhancements necessary to implement [a proposed] Phase-In Plan.").)

The SEC's moratorium on multiple listing was lifted beginning in November 1992. By the end of 1994, all equity options were eligible for multiple listing. The Commission had noted, however, that it retained ultimate authority over such listings:

> Section 19(h) [of the Exchange Act] provides the Commission with the authority to take action against an exchange if the Commission finds that the exchange is in violation of the [Exchange] Act, the rules and regulations thereunder, or its own rules. Accordingly, notwithstanding the [phase-in] Plan, the Commission has the authority to prevent an exchange from listing a new option if the Commission finds that the option does not meet the exchange's initial options listing standards.

SEC Release No. 34-29698, *1991 SEC LEXIS 1864*, at *12 (Sept. 17, 1991) . In 1997, the SEC exercised **[**15]** this authority to approve the sale by NYSE of its options business to CBOE. The SEC rejected assertions that the sale tended to create a monopoly, stating that it "would regard any anticompetitive arrangements in the trading of options to be of very serious concern, but [that] after reviewing the proposed transfer closely, the Commission disagrees with these assertions." SEC Release No. 34-38542, *1997 SEC LEXIS 900*, at *21 (Apr. 23, 1997).

As noted in the District Court Opinion, the Commission since 1997 has

> continued to oversee the options markets and to approve coordinated activity by the exchanges. Pursuant to Rules 12d1-3 and 12d2-2, respectively, the SEC is informed each time an exchange proposes to list or delist an equity options class. The SEC recently authorized the exchanges to act jointly with respect to a number of issues, such as (1) planning strategies for options quote message traffic, (2) developing an inter-market linkage plan for multiply traded options and (3) phasing-in the implementation of decimal pricing.

District Court Opinion, 2001 U.S. Dist. LEXIS 1381, 2001 WL 128325, at *6 (citing SEC Release No. 34-41843, *1999 SEC LEXIS 1807*, at *1 (Sept. 8, **[*142]** 1999); **[**16]** SEC Release No. 34-42029, *1999 SEC LEXIS 2215*, at *1 (Oct. 19, 1999); SEC Release No. 34-42360, [2000] SEC LEXIS 114, at *1 (Jan. 28, 2000). Indeed, the SEC, as well as the United States Department of Justice ("DOJ"), investigated assertions of antitrust violations such as those alleged in the present class actions. In September 2000, the SEC found that certain exchanges had improperly followed a course of conduct that limited multiple listing. *See*, *e.g.*, *SEC Release No. 43268, 2000 SEC LEXIS 1881*, at *8 (Sept. 11, 2000) ("Member firms of certain of the respondent exchanges made proposals to multiply list options. In order to avoid or defe multiple listing, the respondent exchanges rebuffed or denied these proposals without an adequate basis in their rules and, in some instances, threatened or harassed member firms who made the proposals."). The exchanges in question were censured, and they agreed, *inter alia*, to change certain procedures that had facilitated exclusivity of listing. *2000 SEC LEXIS 1881* at *15.

In connection with defendants' motions to dismiss the consolidated complaint on the ground that the SEC's authorized **[**17]** regulation of the listing and trading of options constituted an implied repeal of the Sherman Act with respect to such matters, the DOJ submitted to the district court a brief on behalf of the United States as *amicus curiae*, arguing that implied repeal is not warranted. The DOJ's brief stated that

> the court can, and should, hold that the alleged conduct, which as alleged contravenes both SEC rule and the Sherman Act, is, like other conspiracies in restraint of trade, subject to the federal antitrust laws. To avoid any possible future conflict with SEC regulatory policy, the court should consider including in any injunction language permitting otherwise enjoined conduct should the SEC, acting pursuant to statutory authorization, permit such conduct in the future.

. . . .

> The court should hold that there is no implied repeal of the antitrust laws with respect to alleged conduct prohibited by SEC rule.

(DOJ *amicus curiae* brief to the district court, dated June 1, 2000, at 12-13.)

The district court invited the SEC as well to submit its views as *amicus curiae*. The Commission complied, in a brief in which it concurred in the view of the DOJ "that **[**18]** the federal antitrust laws are not impliedly repealed with respect to the conduct alleged in these cases, if it occurred." (SEC *amicus curiae* brief to the district court, dated June 16, 2000, at 2.) The Commission stated that

> this is an unusual case, in which the Commission has addressed the precise conduct at issue and has decided to prohibit it in order to provide competition among the exchanges. It does not present a situation where, in our view, the antitrust laws are impliedly repealed, such as where the securities laws authorize the conduct or the Commission has approved or permitted it, either expressly or implicitly--for example, by failing to act with respect to conduct 8 subject to the Commission's pervasive regulation.

(*Id*. at 2-3.)

Thereafter, the district court notified the parties that it would convert defendants' *Rule 12(b)(6)* motions, to the extent that they were based on the theory of implied repeal, to motions for summary judgment. The court invited the parties to file additional papers and indicated that it would decide the implied repeal issue first, which might dispose of the entire antitrust dispute. Oral argument of the motions was **[**19]** heard in November 2000.

[*143] B. *The Proposed Settlements*

In the meantime, plaintiffs had reached settlement agreements with certain of the 17 defendants. In May 2000, plaintiffs entered into agreements with the Pacific Exchange and the Philadelphia Exchange. In September 2000, plaintiffs entered into agreements with AMEX, CBOE, and of the market maker defendants. The agreements, with certain caveats, called for the settling defendants to pay the plaintiff class a total of more than $ 84 million. As ***HN1***[] court approval is required for the settlement of a class action, *see* *Fed. R. Civ. P. 22* 23(e), plaintiffs and those defendants promptly moved in the district court for approval of the respective settlement agreements. In October 2000, the court delayed consideration of the approval motions, stating that it would first determine whether the Sherman Act , to theextent it was invoked in these actions, had been impliedly repealed by the Exchange Act. The court indicated that it would consider the requests for preliminary approval of the settlement agreements after it decided the summary judgment motions.

C. *The District Court's Decisions*

In its February 14, 2001 opinion, **[**20]** the district court granted defendants' summary judgment motions on the ground of implied repeal. The court described the above course of SEC regulation and noted that although the Commission's view had varied considerably as to whether or not multiple listing and trading of equity options should be allowed or prohibited, Commission regulation had been pervasive. The court concluded that, based on the principles set out in *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)*, the Exchange Act impliedly repealed the Sherman Act with respect to the listing and trading of equityoptions on securities exchanges regulated by the SEC. *See* *District Court Opinion, 2001 U.S. Dist. LEXIS 1381, 2001 WL 128325*, at *7.

Following issuance of the February Opinion and prior to the entry of a judgment, plaintiffs and some of the settling defendants asked the district court to set a date for argument of the pending *Rule 23(e)* motions for preliminary judicial approval of the settlement agreements. Motions for such approval had first been filed in mid-2000. Without setting a date to hear those motions, the court entered a final judgment dismissing the consolidated **[**21]** complaint on March 2, 2001 ("March 2001 Judgment" or "Judgment").

By order dated March 6, 2001, the court scheduled argument on the motions for approval of the proposed settlements. In connection with those motions, plaintiffs sought clarification of the March 2001 Judgment. Although the Judgment itself indicated merely that summary judgment was granted, the district court in its February 14 Opinion had stated:

> *This Court has no jurisdiction* to determine whether [plaintiffs'] allegations have any substantive merit. Because the listing and trading of options classes falls within the purview of the regulatory scheme devised by Congress to govern the securities industry, and the active exercise of that authority by the Securities and Exchange Commission . . . conflicts with the operation of the antitrust laws, the Court cannot proceed to adjudicate this matter.

District Court Opinion, 2001 U.S. Dist. LEXIS 1381, 2001 WL 128325, at *1 (emphasis added). Accordingly, on March 16, 2001, plaintiffs moved pursuant to *Fed. R. Civ. P. 59(e)* for an amendment of the Judgment, to

> clarify[] whether the March [2001] Judgment was intended by the Court to be 11 a dismissal **[**22]** for lack of subject matter **[*144]** jurisdiction pursuant to *Fed. R. Civ. P. 12* 12(h)(3), or a dismissal on the merits based upon the affirmative defense of the implied repeal doctrine pursuant to *Fed. R. Civ. P. 56(b)*. If it is the latter, plaintiffs respectfully request that the Court also amend the March [2001] Judgment to provide that it shall only apply to those defendants who had not 16 entered into an agreement to settle all claims asserted against them prior to the entry of the judgment on March 2, 2001 . . . unless the Court subsequently enters an Order denying final approval of the proposed settlements pursuant to *Fed. R. Civ. P. 23(e)* which becomes final after the exhaustion of any appeals, in which event, the March [2001] Judgment would then apply to all of the defendants.

(Plaintiffs' Motion To Alter or Amend Judgment Pursuant to *Rule 59(e) of the Federal Rules of Civil Procedure*, at 1.)

In an Opinion and Order dated April 24, 2001, reported at *171 F. Supp. 2d 174 (2001)* ("April Order"), the district court denied the motion to alter or amend the March 2001 Judgment and refused to approve the settlement agreements on the ground that, "by entering summary **[**23]** judgment in favor of the defendants on the implied repeal issue, this Court divested itself of subject matter jurisdiction over plaintiffs' antitrust claims." *171 F. Supp. 2d at 177*. The court concluded that it thus lacked jurisdiction to entertain the motions for approval of the class action settlements:

> Plaintiffs are correct that federal subject matter jurisdiction was appropriate at the outset of the litigation because *at that time* a dispute existed as to whether the antitrust laws applied to plaintiffs' claims. However, through its Summary Judgment Order, the Court resolved this issue by holding that the antitrust laws were impliedly repealed with respect to the defendants' conduct and dismissed the case. At that point, there was no longer any cause of action over which the Court could exercise jurisdiction.

April Order, 171 F. Supp. 2d at 178 (emphasis in original).

These appeals followed.

II. DISCUSSION

On appeal, plaintiffs contend principally that the district court's application of the doctrine of implied repeal to the allegations of this case was erroneous because there is no conflict between the Exchange Act and the **[**24]** Sherman Act since agreements to restrict the listing and trading of equity options to one exchange at a time are prohibited by both the Sherman Act and SEC Rule 14 19c-5. As to their motions for preliminary court approval of the proposed settlement agreements, plaintiffs contend, *inter alia*, that the district court erred in concluding that the Exchange Act's implied repeal of the Sherman Act deprived the court of jurisdiction to entertain the approval motions. For the reasons that follow, we conclude that the district court's ruling of implied appeal was correct; but we disagree with its conclusion that that ruling deprived it of subject matter jurisdiction over the case.

A. *Implied Repeal of the Antitrust Laws*

HN2[] "It is a cardinal principle of construction that repeals by implication are not favored." United States v. Borden Co., 308 U.S. 188, 198, 84 L. Ed. 181, 60 S. Ct. 182 (1939). The basic framework for analysis of whether federal securities laws impliedly repeal § 1 of the Sherman Act with respect to particular conduct, *i.e.*, whether a defendant is entitled to immunity from liability under the antitrust laws for that conduct, has been set out **[**25]** by the Supreme Court in Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. **[*145]** 1246 (1963), Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975) ("*Gordon*"), and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975) ("*NASD*").

In *Silver*, the Court established the baseline principle that HN3[] repeal of the antitrust laws by the Exchange Act is to be "implied only if necessary to make that Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. *Silver* involved an antitrust challenge to an order, issued by NYSE pursuant to its Constitution and existing rules, requiring its members to remove any private direct telephone connections they had with offices of nonmember firms. The Court concluded that the Exchange Act did not impliedly repeal the antitrust laws with respect to that NYSE order because, although the Exchange Act gave the SEC

> the power to request exchanges to make changes in their rules, § 19(b), 15 U.S.C. § 78s(b), and **[**26]** impliedly, therefore, to disapprove any rules adopted by an exchange, see also § 6(a)(4), 15 U.S.C. § 78f(b)(4), it did not give the Commission jurisdiction to review particular instances of enforcement of exchange rules.

Silver, 373 U.S. at 357. Because the SEC lacked the authority to regulate the conduct challenged in the complaint, the Court concluded that there was no potential for the antitrust laws to overlap or conflict with the regulatory power of the SEC. *See* id. at 358. Further, given the absence of SEC authority, there was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable. *See* id. at 358-59. The Court stated that

> HN4[] *applicability of the antitrust laws . . . rests on the need for vindication of their positive aim of insuring competitive freedom*. Denial of their applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act. Should review of exchange self-regulation be provided through a vehicle other than the antitrust **[**27]** laws, a different case as to antitrust exemption would be presented.

Id. at 360 (emphases added).

Such a "'different case'" was presented in *Gordon*, *see*422 U.S. at 685. The conduct challenged there was the practice of securities exchanges and their members of using fixed rates of commission; and unlike the conduct at issue in *Silver*, the fixing of commission rates was subject to ample SEC regulatory authority. The Supreme Court in *Gordon* reiterated the principle enunciated in *Silver* that repeal of the antitrust laws by the Exchange Act is to be "implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary," 422 U.S. at 683 (internal quotation marks omitted), and proceeded to explore the history of the rate agreements, the statutory authority conferred on the SEC to regulate commission-rate practices, and the agency's exercise of that authority. The Court noted that

> the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or requirements, **[**28]** the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because **[*146]** the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities *industry*. Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct

> their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.
> . . . . Although SEC action in the early years appears to have been minimal, it is clear that since 1959 the SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members, and has required major changes in those practices. The ultimate result of this long-term study has been a regulatory decree requiring abolition of the practice of fixed rates of commission as of May 1, 1975, and the institution of full and complete competition.

Gordon, 422 U.S. at 689-90 **[**29]** (footnotes omitted) (emphases added).

The *Gordon* Court also noted that although Congress had subsequently enacted a statutory section adopting the SEC regulatory provision banning fixed rates, Congress also explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, was empowered to allow the resumption of fixed rates. *See* id. at 691. The Court concluded that with respect to commission-rates agreements, the Exchange Act impliedly repealed the Sherman Act:

> In sum, the statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as *per se* violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal **[**30]** of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

Gordon, 422 U.S. at 691.

In *NASD*, the Court was confronted with a Sherman Act suit by the government alleging, *inter alia*, that the National Association of Securities Dealers, along with certain mutual funds, fund underwriters, and broker-dealers, had agreed to restrict the sale, and to fix the resale prices, of mutual fund shares in the secondary market. *See* 422 U.S. at 700. The *NASD* Court, while rejecting the defendants' contention that their conduct was authorized by the language of § 22(f) of the Investment Company Act of 1940 ("1940 Act"), 15 U.S.C. § 80a-22(f), concluded that the "pervasive regulatory scheme," 422 U.S. at 735, established by the 1940 Act and the 1938 Maloney Act amendments to the Exchange Act, *see* 15 U.S.C. § 78o-3, gave the SEC authority to regulate such conduct and that the implied repeal of the Sherman Act **[**31]** with respect to that conduct was necessary in order to preserve the Commission's flexibility to perform its authorized function:

> **[*147]** There can be little question that the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority. To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them.
>
> Here implied repeal of the antitrust laws is "necessary to make the [regulatory scheme] work." Silver v. New York Stock Exchange, 373 U.S., at 357. In generally similar situations, **HN5**[] we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. . . . *In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities* **[**32]** *poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards*. This is hardly a result that Congress would have mandated. We therefore hold that with respect to the activities challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts.

NASD, 422 U.S. at 734-35 (footnotes omitted) (emphasis added); *see also* *id. at 722* (finding "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws").

In light of the Supreme Court's decisions in *Silver*, *Gordon*, and *NASD*, this Court has summarized ***HN6***[] the implied repeal doctrine as operating in "two narrowly-defined situations," to wit, "first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, . . . and second, when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition." *Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981)*, **[**33]** *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*; *see* *id. at 83-84* (finding no implied repeal of the antitrust laws where the Federal Communications Act of 1934, *47 U.S.C. §§ 151-609*, did not expressly authorize the Federal Communications Commission to approve protective coupler designs that unreasonably restricted competition, and application of the Sherman Act would not frustrate that agency's ability to regulate the telecommunication industry); *see also* *Finnegan v. Campeau Corp., 915 F.2d 824, 828 (2d Cir. 1990)* (holding that, with respect to disclosures of price information in the context of a tender offer, the Sherman Act was impliedly repealed by the Williams Act, *15 U.S.C. §§ 78m(d)-(e)* and *78n(d)-(f)*).

These principles have most recently been applied by this Court in *Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796, 2002 U.S. App. LEXIS 26355*, No. 01-7207, 2002 WL 31844676 (2d Cir. Dec. 20, 2002), in which we considered allegations that underwriters and brokerage firms participated in a price-fixing scheme, designed to stabilize the market price of securities sold in initial public **[**34]** offerings, by prohibiting the immediate resale of such securities. We noted that

> ***HN7***[] implied immunity exists where allowing an antitrust lawsuit to proceed would conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct. . . . **[*148]** The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it.

2002 U.S. App. LEXIS 26355, 2002 WL 31844676, at *4. We reviewed the history of the regulation of price stabilization practices in both the distribution and aftermarket phases of public offerings. *313 F.3d 796, 2002 U.S. App. LEXIS 26355*, WL at *5. We noted that the Exchange Act gave the SEC authority to regulate such conduct, that the SEC had repeatedly acknowledged its awareness of such conduct, and that it had exercised its regulatory authority over such conduct even though it had never elected to prohibit it, and that the Exchange Act "allows price stabilization practices that the SEC does not prohibit," *313 F.3d 796, 2002 U.S. App. LEXIS 26355*, WL at *6. We concluded that, given the conflict between the statutory scheme and the antitrust laws, "implied immunity **[**35]** bars plaintiffs' [antitrust] challenge to price stabilization practices in the aftermarket." *Id*.

To be sure, ***HN8***[] antitrust immunity is not to be presumed from the mere existence of overlapping authority; rather the analysis must focus on the "potential" for "*conflicts* between the antitrust laws and an authorized] regulatory scheme," *Strobl v. New York Mercantile Exchange, 768 F.2d 22, 27* (2d Cir.) ("*Strobl*") (emphasis in original), *cert. denied*, *474 U.S. 1006, 88 L. Ed. 2d 459, 106 S. Ct. 527 (1985)*. This Court and the Supreme Court have used the term "plain repugnancy" to describe the tension between statutes that justifies implied repeal. *See* *Gordon, 422 U.S. at 682*; *Strobl, 768 F.2d at 27*. In *Strobl*, we noted that the "antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow," *id*.; but we saw no potential for regulatory permission of the conduct at issue there, to wit, manipulation of commodity prices, because the Commodities Exchange Act itself specifically forbade price manipulation, *see* *id. at 27-28*.

In the present case, we agree with the district court's conclusion **[**36]** that the ***HN9***[] Exchange Act impliedly repeals *§ 1* of the Sherman Act with respect to the listing and trading of equity options, because the implied repeal is necessary to preserve the authority of the SEC to regulate that conduct. The history of the Commission's extensive study and regulation of such matters is set out in Part I.A. above and in the district court's February 14 Opinion, 2001 U.S. Dist. LEXIS 1381, 2001 WL 128325, at *1-*6. The Exchange Act itself does not prohibit agreements for exclusivity in options listing, and, as described, the Commission has taken varied positions with respect to the appropriateness of multiplicity, in part because under the Exchange Act it is concerned with more than just the protection of competition, which is "the sole aim of antitrust legislation," *Gordon, 422 U.S. at 689*. "The SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Id*. Thus, in evaluating the wisdom under the Exchange Act of requiring or prohibiting multiple listings, the Commission has perforce balanced the interest of promoting competition, on the one hand, against undesirable potential effects, on the other hand, such as market **[**37]** fragmentation, *see* SEC Mar. 26, *1980 Release, 1980 SEC LEXIS 1784, at *28*, financial injury to regional exchanges, see *id. at *30 n.47*, and "deleterious structural changes in the markets," *SEC Release No. 17577, 1981 SEC LEXIS 1976*, at *17 (Feb. 26, 1981), in order to carry out its statutory duty to enhance "the 'economically efficient execution of securities transactions,'" SEC Release No. 34-24613, *1987 SEC LEXIS 4394*, at *29-*30 (June 18, 1987) (quoting *15 U.S.C. § 78k-1(a)(1)(C)(i)*).

[*149] Although plaintiffs contend that an implied repeal is not needed to avoid conflicts here because exclusivity agreements are now prohibited by both the antitrust laws and the SEC, that contention misperceives the proper analytical focus. ***HN10***[] The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit. *Accord Friedman v. Salomon/Smith Barney, Inc., 2002 U.S. App. LEXIS 26355, 2002 WL 31844676*, at *4. In *Gordon* **[**38]** , for example, the SEC had "required abolition of the practice of fixed rates of commission as of May 1, 1975, and [required] the institution of full and complete competition." *Gordon, 422 U.S. at 690*. Thus, when the case reached the Supreme Court, the fixing of commission rates was prohibited by both the antitrust laws and the SEC. Yet, the Court did not suggest that an implied repeal had become inappropriate because of that convergence. Rather, noting the potential for a change in the Commission's view, *see* *id. at 691*, the Court stated that "permitting courts throughout the country to conduct their own antitrust proceedings would conflict with *the regulatory scheme* authorized by Congress," *id. at 690* (emphasis added), and that the "implied repeal of the antitrust laws *is*, in fact, necessary to" avoid "rendering nugatory *the legislative provision for regulatory agency supervision*," *id. at 691* (emphases added). Thus, ***HN11***[] the proper focus is not on the Commission's current regulatory position but rather on the Commission's authority to permit conduct that the antitrust laws would prohibit. *See*, *e.g.*, *NASD*, 422 U.S. at 721-22 **[**39]** ("necessarily" concluding that the challenged agreements were "immune from liability under the Sherman Act" where the Court could "see no way to reconcile" that Act with "*the Commission's power* to authorize these restrictions" (emphasis added)).

Plaintiffs also contend, relying on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, that the district court was required to defer to the SEC and DOJ views, submitted to it as *amici curiae*, that there is no need for an implied repeal here. We disagree. *Chevron* dealt with the deference that is due when an agency interprets a statute that it is responsible for enforcing. *See* *467 U.S. at 844* ***HN12***[] ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" to which interpretive authority has been delegated). Although some deference may be accorded to an agency's view on a matter within its particular expertise, the decision as to whether, in a given set of circumstances, one statutory scheme supersedes the other is, "in the end," to be made by the **[**40]** courts. *Gordon, 422 U.S. at 686* ***HN13***[] ("The determination of whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts."); *see also* *Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 306-08, 34 L. Ed. 2d 525, 93 S. Ct. 573 (1973)*.

In the present case, the district court plainly took into account the proffered views of the SEC as to questions within that agency's expertise, to wit, its authority under the Exchange Act to regulate the listing and trading of equity options and the permissibility of the challenged practices under that statute. The court was not required to accept the views expressed to it by the SEC and the DOJ that the implied repeal of the antitrust laws by the **[*150]** Exchange Act with respect to these practices was not needed. We also note, although it is not necessary to our decision, that, in the wake of the district court's ruling of implied repeal, the SEC, unlike the DOJ, has not urged reversal.

In sum, **HN14**[] the SEC has ample statutory authority, which it has repeatedly exercised, to regulate the listing and trading of equity options. It has at times encouraged multiple listing **[**41]** and at times disapproved of that practice. The DOJ has taken the position that the challenged conduct "as alleged contravenes . . . the Sherman Act." (DOJ *amicus curiae* brief to the district court, dated June 1, 2000, at 12.) Although the SEC's present stance is that agreements for exclusive listing are forbidden, the Commission has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition. We see no way to reconcile that SEC authority, which may be exercised to permit agreements for exclusive listing of equity options, with the antitrust laws. Accordingly, we affirm the district court's ruling that, with respect to the challenged conduct, the Exchange Act impliedly immunizes defendants against liability under § 1 of the Sherman Act.

B. *Jurisdiction To Entertain the Preliminary Settlement Motions*

We disagree, however, with the district court's view that its holding of implied repeal deprived it of jurisdiction to consider the parties' pending motions for judicial approval of their proposed settlements of this consolidated class action. **HN15**[] Although the doctrine of implied repeal is sometimes described **[**42]** in terms of the district court's "antitrust jurisdiction," *e.g.*, *Strobl, 768 F.2d at 27*, we think it is more properly viewed as conferring an immunity that is an affirmative defense that does not affect the court's subject matter jurisdiction over the action.

HN16[] As a general matter, where a complaint "is so drawn as to seek recovery directly under the Constitution or laws of the United States," *Bell v. Hood, 327 U.S. 678, 681, 90 L. Ed. 939, 66 S. Ct. 773 (1946)*, the district court has subject matter jurisdiction unless the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," *id. at 682-83*. Thus, the district court has jurisdiction where "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id. at 685*. **HN17**[] The "inadequacy" of a federal claim is ground for "dismissal for lack of subject-matter jurisdiction . . . only when the claim is 'so insubstantial, implausible, **[**43]** foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)* (quoting *Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974))*. Once a federal court has determined that a plaintiff's jurisdiction-conferring claims are not insubstantial on their face, "no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter." *Baker v. Carr, 369 U.S. 186, 199, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)*. Thus, the district court's subject matter jurisdiction to entertain a suit based on a federal claim that is not wholly insubstantial, frivolous, or foreclosed by prior decisions of the Supreme Court, is not defeated by the defendant's **[*151]** assertion of a position that is properly characterized as an affirmative defense.

HN18[] Most immunities are affirmative defenses. *See*, *e.g.*, *Gomez v. Toledo, 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)* (qualified immunity for a public official); **[**44]** *Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 104, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964)* (White, J., concurring) (absolute immunity); *Troxler v. Owens-Illinois, Inc., 717 F.2d 530, 532-33 (11th Cir. 1983)* (statutory immunity); 2 *Moore's Federal Practice § 8.07[5]* (3d ed. 1999) ("In addition to the 19 affirmative defenses set forth[in *Fed. R. Civ. P.] 8(c)*[, that Rule] requires 'any other matter constituting an avoidance or an affirmative defense' to be pleaded. Affirmative defenses and avoidances other than those specifically referenced [in *Rule 8(c)*] have been found to include common law immunity, statutory immunity, [and] exemption under a statute or regulation . . . .") (footnotes omitted). Affirmative defenses can be waived, *see*, *e.g.*, *McCardle v. Haddad, 131 F.3d 43, 51 (2d Cir. 1997)*; *Satchell v. Dilworth, 745 F.2d 781, 784 (2d Cir. 1984)*; lack of subject matter jurisdiction cannot be waived, *see*, *e.g.*, *Bender v. Williamsport Area School District, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)*; *Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908)*; **[**45]** *Fed. R. Civ. P. 12(h)(3)*.

HN19[] In discussing whether a given federal securities statute impliedly repeals an ***antitrust law***, the Supreme Court has not suggested that the implied repeal deprives the district court of subject matter jurisdiction. It has instead referred to the implied repeal as giving the defendant "immunity" from liability under the antitrust laws. Thus, in *Silver*, the Court never referred to federal courts' "antitrust jurisdiction" or used the phrase "subject matter jurisdiction." The *Silver* Court used the term "jurisdiction" only in connection with the power of the SEC to regulate the challenged conduct. *See*, *e.g.*, 373 U.S. at 357 ("Commission jurisdiction"); id. at 358 ("Commission's lack of jurisdiction"). *Silver* was described in *Gordon* as dealing with conduct that would be a *per se* violation of the Sherman Act "absent any *immunity* derived from the regulatory laws." Gordon, 422 U.S. at 683 (emphasis added).

In the earlier stages of the *Gordon* litigation, the opinions of the lower courts, whose rulings of implied repeal were eventually upheld, had spoken not only in terms of antitrust **[**46]** immunity or exemption from the antitrust laws, but also in terms of a "denial of antitrust jurisdiction," Gordon v. New York Stock Exchange, Inc., 498 F.2d 1303, 1305 (2d Cir. 1974), or the "withdrawal of antitrust jurisdiction," id. at 1309 n.8, or the "court['s] lack[of] jurisdiction to entertain an anti-trust attack on the commission structure of the Exchanges," Gordon v. New York Stock Exchange, Inc., 366 F. Supp. 1261, 1264 (S.D.N.Y. 1973). However, no issue in that litigation hinged on whether the implied repeal impacted the court's subject matter jurisdiction, and the Supreme Court in *Gordon* described the lower-court rulings as "utilizing the framework for analysis of antitrust immunity in the regulated securities area that was established a decade ago in *Silver*," 422 U.S. at 662 (describing the district court opinion), and "devoting its opinion to the problem of antitrust immunity," *id*. (describing the court of appeals opinion).

The Supreme Court itself in *Gordon*, except for an analogy drawn to the jurisdiction of the Interstate Commerce Commission, referred to jurisdictiononlyinconnectionwiththe **[**47]** regulatory power of **[*152]** the SEC. Never using the phrases antitrust jurisdiction or subject matter jurisdiction, the Supreme Court in *Gordon* at the outset described its task as "resolution of the issue of antitrust immunity for fixed commission rates," id. at 663, and it thereafter repeatedly referred to the question as whether there was "antitrust immunity" or simply "immunity," *see*, *e.g.*, id. at 686 ("the immunity issue"); id. at 688 ("We are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."); id. at 689 ("We agree with the District Court and the Court of Appeals, and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards.").

Similarly, in *NASD*, the Supreme Court generally spoke of the implied repeal doctrine in terms of antitrust immunity rather than a lack of federal-court **[**48]** jurisdiction. *See*, *e.g.*, 422 U.S. at 705 ("The questions presented require us to determine whether § 22(d) obligates appellees to engage in the practices challenged in Counts II-VIII and thus necessarily confers antitrust immunity on them."); id. at 719 ("implied antitrust immunity is not favored"); id. at 726 (discussing government's "contention that the SEC's exercise of regulatory authority has been insufficient to give rise to an implied immunity for agreements conforming with § 22(f)"); id. at 730 ("the question presented is whether the SEC's exercise of regulatory authority . . . is sufficiently pervasive to confer an implied immunity"). ***HN20***[] Although an implied antitrust immunity prevents a court from "*exercising* jurisdiction under the antitrust laws," id. at 734 (emphasis added), in none of these cases did the Supreme Court suggest that that immunity was anything more than an affirmative defense.

There is, of course, one type of immunity not discussed above--a government's sovereign immunity--that has frequently been referred to as imposing constraints that are jurisdictional. *See* **[**49]** , *e.g.*, United States v. Sherwood, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941) ("the terms of [the] consent [of the United States, as sovereign] to be sued in any court define that court's jurisdiction to entertain the suit"); *but see* Wisconsin Department of Corrections v. Schacht, 524 U.S. 381, 389, 141 L. Ed. 2d 364, 118 S. Ct. 2047 (1998) (a state's immunity under the "Eleventh Amendment . . . does not automatically destroy original jurisdiction"); Calderon v. Ashmus, 523 U.S. 740, 745 n.2, 140 L. Ed. 2d 970, 118 S. Ct. 1694 (1998) ("while the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power . . . we have recognized that it is not coextensive with the limitations on judicial power in Article III"). Whether or not sovereign immunity poses a jurisdictional obstacle is of no moment here, for ***HN21***[] there can be no suggestion that the immunity conferred on a private entity on the basis that it is subject to one set of laws that takes precedence over another law is on a par with the immunity enjoyed by a government. The immunity conferred by an implied repeal of **[**50]** the antitrust laws simply prevents the court from imposing liability under those laws.

In the present case, plaintiffs' claims under the Sherman Act were neither frivolous nor contrived merely to create federal jurisdiction. Nor were their claims foreclosed by prior decisions of the Supreme Court, since ***HN22***[] a determination of whether **[*153]** there is an implied repeal requires a thorough analysis of the precise practice that has been challenged and the regulatory scheme with respect to that practice. *See generally* *Gordon, 422 U.S. at 663*. Thus, the district court, as it indicated in its April Order, had jurisdiction at the outset to decide whether defendants were entitled to immunity from liability under the antitrust laws. Since the parties sought approval of their settlement agreements before the court had adjudicated the immunity defense, and since such a defense may be waived, the court had jurisdiction to entertain and rule on the motions for approval of the proposed settlements. Having entered a final judgment without dealing with those pending motions, the court should have entertained them in conjunction with the subsequent motion to alter or amend the final judgment, **[**51]** and it should have granted the latter motion if it approved the proposed settlements.

Finally, we note that defendant LETCO, which was a party to the September settlement agreement, has argued that plaintiffs' appeal from the district court's April Order is moot as to the parties to that agreement because the agreement was, by its terms, automatically rescinded as a result of the district court's denial of the approval motions. We reject LETCO's mootness contention because the rescission terms of the settlement agreement have no bearing on the question presented for review, namely, the correctness of the April Order's ruling that the district court lacked subject matter jurisdiction to entertain the approval motions after finding implied repeal of the antitrust laws.

We express no view as to the correctness of LETCO's contention that the September settlement agreement became void because of the occurrence of an event specified in that agreement. That question may be considered by the district court on remand.

CONCLUSION

We have considered all of the parties' contentions on this appeal and, except to the extent indicated above, have found them to be without merit. The dismissal **[**52]** of the claims asserted in the consolidated complaint is affirmed; the April Order refusing to entertain the motions for approval of the class action settlement agreements is vacated, and the matter is remanded for further proceedings not inconsistent with this opinion.

Miller's Pond Co., L.L.C. v. City of New London

Superior Court of Connecticut, Judicial District of New London, Complex Litigation Docket At Norwich

January 10, 2003, Decided ; January 10, 2003, Filed

X04CV000121282S

Reporter

2003 Conn. Super. LEXIS 57 *

Miller's Pond Company, L.L.C. et al. v. City of New London et al.

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Reversed by, Remanded by *Miller's Pond Co., LLC v. City of New London, 273 Conn. 786, 873 A.2d 965, 2005 Conn. LEXIS 210 (June 7, 2005)*

Disposition: Court grants the defendants' motion for summary judgment as to all counts of the plaintiffs' complaint.

Core Terms

antitrust, regulations, state action, municipal, immunity, defendants', summary judgment, exempt, immunity provision, subdivision, antitrust liability, water supply, anti-competitive, quotation, parties, marks, Pond

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

See *Conn. Gen. Prac. Book, R. Super. Ct. § 17-45*.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Summary Judgment, Motions for Summary Judgment**

In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] **Summary Judgment, Burdens of Proof**

The party seeking summary judgment has the burden of showing the absence of any genuine issue of material facts. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN4[] **Summary Judgment, Supporting Materials**

See *Conn. Gen. Prac. Book, R. Super. Ct. § 17-45*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Local Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > General Overview

HN5[] **Public Enforcement, State Civil Actions**

See *Conn. Gen. Stat. § 35-31(b)*.

Energy & Utilities Law > Utility Companies > General Overview

HN6[] **Energy & Utilities Law, Utility Companies**

See *Conn. Gen. Stat. § 25-33c*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Torts > Public Entity Liability > Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Scope, Exemptions**

The exception to antitrust liability authorized by *Conn. Gen. Stat. § 35-31(b)* represents a narrowly drawn version of the doctrine of "state action" immunity from antitrust liability. It purports to immunize only activities that are specifically required or directed by state or federal statutes.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

Conn. Gen. Stat. § 35-44b provides that Connecticut courts shall be guided by interpretations given by the federal courts to federal antitrust statutes.

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

HN9[] **Private Actions, Standing**

Plaintiffs have antitrust standing where their claimed injury is causally linked to an antitrust violation.

Judges: McLachlan, J.

Opinion by: McLachlan

Opinion

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

FACTS

The plaintiff, Miller's Pond Company, L.L.C., is a limited liability company located in Waterford, Connecticut and the owner of a seventy-seven acre man-made lake called Miller's Pond. The individual plaintiffs, Gary Saunders and Thomas Schacht, are the founding and managing members of the company, respectively. By complaint dated August 4, 2000, the plaintiffs brought action against the City of New London, the City of New London Water and Water Pollution Control Authority, the Town of Waterford and the Town of Waterford Water Pollution Control Authority, seeking monetary damages, declaratory and injunctive relief pursuant to the Connecticut Antitrust Act for the defendants' alleged anti-competitive conduct.

The plaintiffs claim that since 1988 they have attempted to sell or develop Miller's Pond **[*2]** as a water source to utilities in the communities of New London and Waterford and portions of Montville and East Lyme, and as a private water supply for industrial or recreational facilities in those geographical areas. It is alleged that the defendants own, operate and control every significant source of fresh water and related water supply facilities located within their municipal borders and capable of serving said areas, except for Miller's Pond. Through various contractual and other arrangements, the plaintiffs claim that the defendants have intentionally thwarted the plaintiffs' ability to expand their business.

The four-count complaint alleges violations of *Sections 35-26* (restraint of trade), 35-27 (monopolization), 35-28 (per se unlawful acts) and 35-29 (illegal tying arrangements) of the Connecticut General Statutes, the Connecticut Antitrust Act. By motion dated April 1, 2002, the defendants move for summary judgment as to all four counts of the plaintiffs' complaint claiming that their alleged conduct falls within the state action immunity provision of the Act and that the plaintiffs lack antitrust standing. The court heard oral argument on the defendants' motion for summary **[*3]** judgment on September 23, 2002.

DISCUSSION

Pursuant to *Practice Book Section 17-45*, ***HN1***[] "summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [1] (Internal quotation marks omitted.) *Miles v. Foley, 253 Conn. 381, 385, 752 A.2d 503 (2000)*. ***HN2***[] "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Sherwood v. Danbury Hospital, 252 Conn. 193, 201, 746 A.2d 730 (2000)*. "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Nolan v. Borkowski, 206 Conn. 495, 500, 538 A.2d 1031 (1988)*. ***HN3***[] "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts . . ." (Internal quotation marks omitted.) *Hertz Corp. v. Federal Insurance Co., 245 Conn. 374, 381, 713 A.2d 820 (1998)*. **[*4]** "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and, that excludes any real doubt as to the existence of any genuine issue of material fact." (Internal quotation marks omitted.) *Witt v. St. Vincent's Medical Center, 252 Conn. 363, 372 n.7, 746 A.2d 753 (2000)*.

[*5] *STATE ACTION IMMUNITY*

Section 35-31(b) of the General Statutes, a provision of Connecticut's Antitrust Act setting forth one of the exceptions to the Act, provides as follows: ***HN5***[] "Nothing contained in this chapter shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state, or of the United States." The defendants claim that their activities fall within this exception and that they are entitled to judgment as a matter of law.

For purposes of this motion only, the defendants stated at oral argument that they are admitting the allegations of the complaint. [2] All of the alleged conduct, they argue, falls within the immunity provision of *Section 35-31(b)*. The

[1] *Practice Book Section 17-45* provides in part: ***HN4***[] "A motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and the like." Plaintiffs maintain the motion should be denied because no affidavit was filed. Defendants argue that, since they admit all the allegations of plaintiffs' complaint for purposes of the motion, and defendants do not raise any factual issues, they are entitled to summary judgment in this case as a matter of law as if it were common law motion for judgment on the pleadings. See *Boucher v. Zimmer, 160 Conn. 404, 408, 279 A.2d 540 (1971)*. The court agrees.

[2] The complaint alleges that the following activities violate the provisions of Connecticut's Antitrust Act: provisions in the 1988 Waterford-New London agreement require the parties' best efforts to deter the construction and operation of new water systems in these municipalities and prohibit Waterford from developing and connecting any additional source of water supply available to it unless New London makes the determination that a "water supply emergency" exists; a 1990 agreement between Waterford and Montville restricts Montville's ability to develop its own water sources or water system or to purchase water from other sources; New London and Waterford have identified Miller's Pond as an existing and future component of their water supply systems in various public statements and documents without obtaining plaintiffs' consent, thereby interfering with plaintiffs' ability to develop and market Miller's Pond as a water source; the defendants have refused to respond to plaintiffs' attempts to sell them water and have refused the plaintiffs access to essential water facilities; and New London has misrepresented the capacity of its system to provide water to its customers in order to prevent the development of Miller's Pond as a competitive source of supply. R

basis for their claim is that they operate water utilities pursuant to and in accordance with a very comprehensive scheme of local, regional and state regulation. New London's initial authority originates with a special act adopted by the legislature on July 5, 1871. By the provisions of that act, the city of New London was "authorized and empowered" to "take and convey from . . . [any] . . . ponds, or streams, in the town of Waterford, **[*6]** or any other town, or from any other source of supply, natural or artificial, in said towns, such supply of water as the necessities or convenience of the inhabitants of said city [of New London] may require . . ." A subsequent special act, adopted by the legislature in 1901, further authorized New London to exercise the power of eminent domain in the towns of Salem, Waterford, East Lyme or Montville for the purpose of obtaining an additional water supply.

[*7] At the present time, several statutes and the regulations of several state agencies regulate the development of water resources throughout the state of Connecticut. The defendants enumerated several statutes and regulations which evidence a legislative design for the provision of drinking water to the public. The purpose for such intensive regulation is stated in *Section 25-33c of the General Statutes*:

> ***HN6***[] Legislative finding. The General Assembly finds that an adequate supply of potable water for domestic, commercial and industrial use is vital to the health and well-being of the people of the state. Readily available water for use in public water systems is limited and should be developed with a minimum of loss and waste. In order to maximize efficient and effective development of the state's public water supply systems and to promote public health, safety and welfare, the Department of Public Health shall administer a procedure to coordinate the planning of public water supply systems.

According to the defendants, these special acts, statutes and regulations, as a whole, direct or mandate activities which are encompassed by the state action immunity **[*8]** provision. More specifically, the defendants argue that they are required to provide an adequate supply of safe drinking water to their residents, that New London is authorized to create a municipal water system and that, once it opts to create such a system, it is then required to abide by the numerous statutes and regulations controlling the distribution of the water through its system. The plaintiffs argue that being "authorized" or "empowered" to create a municipal water authority does not equate to activity being "specifically directed or required" by the state. Further, plaintiffs claim that the regulatory scheme is addressed primarily to the retail sale of water and that the plaintiffs are claiming they are being prevented from competing in the wholesale market by conduct clearly outside the scope of the statutes and regulations.

The state action immunity provision of Connecticut's Antitrust Act has been discussed by our Supreme Court in the cases of *Mazzola v. Southern New England Telephone Co., 169 Conn. 344, 363 A.2d 170 (1975)*, and *Westport Taxi Service v. Westport Transit District, 235 Conn. 1, 664 A.2d 719 (1995)*. In *Mazzola*, the **[*9]** Court noted as follows:

> ***HN7***[] The exception authorized by 35-31(b) represents a narrowly drawn version of the doctrine of "state action" immunity from antitrust liability articulated by the United States Supreme Court in *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315*. The court in that case carved out an exemption from Sherman Act liability for activities "commanded" or "directed" by a state legislature. *Id.* *Section 35-31(b)* limits that holding by purporting to immunize only activities which are "specifically" required or directed by state or federal statutes.

Mazzola, supra, at 359. Applying this standard, the Court concluded that the activities of the defendant telephone company, authorized by a tariff which became effective through the implementation of the procedure set forth in *Section 16-19 of the General Statutes*, were not "specifically directed" by the state and, therefore, not exempt from antitrust liability. The Court reached this conclusion because "the role that is statutorily assigned to the PUC [Public Utilities Commission] in rendering effective tariffs proposed by companies such as the **[*10]** defendant amounts to little more than acquiescence in a program originated by the defendant." *Id., at 365-66*.

In the *Westport Taxi* case, the defendant did not specially plead state action immunity and the issue was not raised during the trial of the case. The issue surfaced in the context of post-trial briefs. After citing to and quoting from Mazzola, supra, the Court concluded the record was factually insufficient to permit appellate review. [3]

In addition to the two Connecticut Supreme Court decisions, there is a superior court decision and a federal district court decision addressing the applicability of Section 35-31(b) to certain activities claimed to be monopolistic. In Professional Ambulance Service, Inc. v. Blackstone, 35 Conn.Sup. 136, 400 A.2d 1031 (1978), an ambulance **[*11]** service provider brought suit against the mayor of East Hartford for issuing directives in accordance with certain state health department regulations. The regulations created primary service areas for emergency services and, in following these regulations, the mayor assigned one responder to his area and restricted the advertising of any other emergency services providers. The plaintiff claimed a loss of business as the result of the defendant's activities.

Judge Covello concluded that the defendant's conduct was not in violation of the antitrust statutes because he was simply following the regulations as promulgated, thereby affording him state action immunity. Judge Covello discussed the *Mazzola* and *Parker v. Brown* cases and concluded Section 35-31(b) applied and exempted these activities from antitrust liability. The court first noted that "the parties sought to be enjoined from alleged antitrust activities are not the officers of a private company regulated by a state agency, but are the officials of the state and municipal agencies themselves, pursuing emergency medical service functions directed by the statutes." Id., at 142. After reviewing the statutes **[*12]** and regulations pertaining to the emergency medical care service system, the court concluded as follows:

> It is evident that the totality of the mandate set out in these statutes furnishes an adequate basis and authority for the promulgation of regulations creating the primary service areas, assigning one responder to each such area and limiting or restricting the advertising of those who would provide emergency services or personnel. The court therefore concludes that the activities here in issue represent the product of specifically directed state action.

Id., at 143.

The opinion in the federal district court case, issued in 2000, was also written by Judge Covello. In Wheelabrator Environmental Systems v. Galante, 136 F. Supp. 2d 21, 2000 WL 863029 (D. Conn. 2000), the plaintiff brought a breach of contract suit against the defendant for failure to deliver waste to a designated Wheelabrator facility. Wheelabrator is a private company that operates waste-to-energy resource recovery facilities in Connecticut. The defendant filed a counterclaim alleging Wheelabrator violated certain provisions of Connecticut's Antitrust Act. Wheelabrator moved for judgment **[*13]** on the pleadings as to defendant's counterclaim, claiming it should be dismissed in its entirety on the basis of the state action immunity provision.

All of the alleged conduct of Wheelabrator arose out of its contractual relationship with the Housatonic Resources Recovery Authority (HRRA). Wheelabrator was authorized by statute to enter into the subject waste agreement with HRRA. Judge Covello, after citing *Mazzola* and *Parker v. Brown* and his previously decided case of *Professional Ambulance Service, Inc.,* concluded that the "totality of the mandate set out in [the applicable municipal solid waste management] statutes provides an adequate basis for the court to conclude that Wheelabrator's actions, as alleged in the second amended counterclaim, were specifically directed or required by state statute, and thus, immune from liability under the Connecticut Antitrust Act. (Citation omitted.) The Connecticut legislature has promulgated several laws which direct municipalities in the handling of MSW [municipal solid waste] management and specifically establish a municipal resources recovery authority's power to enter into contracts for the disposal of MSW." (Internal quotation **[*14]** marks omitted.) Id., 5-6.

All of the foregoing cases refer to the *Parker v. Brown* case, a United States Supreme Court decision, as the origin of the state action immunity doctrine. It is interesting to note that this doctrine has evolved through the years; under

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[3] As previously noted, in this case the defendants have admitted as true the factual allegations in the complaint for purposes of this motion only. There are no factual issues in dispute.

federal antitrust laws, the defendants' activities would clearly be exempt from liability. Judge Covello, in the *Wheelabrator* case, provides a summary of federal case law addressing state action immunity.

> "The Supreme Court first articulated what has become known as the state action defense to the Sherman Act" in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. *Automated Salvage Transport, Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 68 (2d Cir. 1998)*. This defense exempts "anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition." *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*. In order for a state's subdivision to qualify for state action immunity, it must "identify **[*15]** a 'clearly expressed state policy' that authorizes its [anticompetitive] actions." *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1043 (2d Cir. 1986)*. This burden is met when the subdivision can show that the anti-competitive action was a "foreseeable consequence of the state delegation" of authority (i.e., "that the 'legislature contemplated the action complained of' "). *Id*. (citing *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978))*.
>
> Once the court determines that a state subdivision is immune from antitrust liability for its "foreseeable" anti-competitive conduct, "the immunity should be extended to include private parties acting under the direction of the [subdivision]." *Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1500 (10th Cir. 1997)*; see also *Cine 42nd Street Theater Corp. v. Nederlander Org., 790 F.2d 1032, 1048 (2d Cir. 1986)* (holding that "the private [parties] acting in concert with the [state subdivision] are also entitled to state immunity" for their "foreseeable action"). "The success of an antitrust **[*16]** action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 58-59, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*. Thus, "where private parties are acting under the compulsion of a municipality or other political subdivision, the same ['foreseeable consequence'] test should apply to determine state action immunity regardless of who the named defendants are." *Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1499-1500 (10th Cir. 1997)*.

Wheelabrator, supra, 136 F. Supp. 2d 21, 6-7.

In 1992, Connecticut's legislature enacted ***HN8***[] *Section 35-44b of the General Statutes*, which provides that Connecticut courts "shall be guided by interpretations given by the federal courts to federal antitrust statutes." As noted in *Mazzola*, and restated in the 1995 *Westport Taxi* case, however, *Section 35-31(b)* of our statutes has no parallel in the federal antitrust statutes. Therefore, although the defendants' activities would clearly be exempt under the federal antitrust laws, this court follows Connecticut case law in its determination.

[*17] The fact that the defendants are municipalities and municipal agencies is an important, although not a determinative, factor. The defendants, being authorized to establish a water supply business, are heavily regulated by the statutory and regulatory scheme pertaining to the distribution of water. The legislature has determined that an adequate supply of potable water is vital to the health and well-being of the public and set forth a comprehensive procedure for the development of the state's public water supply systems. *Section 25-33c, Connecticut General Statutes.* Once New London decided to operate its own public water supply system, it was compelled to comply with a myriad of state requirements.

Providing a safe and adequate supply of water is a legislative mandate. Because New London chose to do so with a municipal system, rather than having a private water company provide the water, does not divest the defendant of the protection afforded by the state action immunity provision of the antitrust statutes. The distribution of water is heavily regulated by the state and New London, being authorized and opting to create a municipal water system, is now directed **[*18]** by the state as to its activities in this area. Although New London is not *required* to have a *municipal* water system, unlike the situations in Judge Covello's cases wherein the designation of a single emergency services provider and the establishment of a comprehensive program for solid waste disposal were mandated, the court finds the difference to be a difference without a distinction. The fact is that a safe water supply is required and, once the municipality undertakes to provide it on its own rather than through a private water company, the distribution of that water and the activities connected therewith are specifically directed by the state. Further, the court finds that the defendants' activities fall within the scheme outlined in those state statutes and regulations. For these reasons, the defendants' activities are exempt from antitrust liability pursuant to *Section 35-31(b) of the General Statutes.*

ANTITRUST STANDING

Defendants' motion is denied as to the claim that plaintiffs do not have antitrust standing. The conduct alleged would be sufficient to bring an antitrust claim absent the exemption described above. Plaintiffs seek **[*19]** to compete in the southeast Connecticut wholesale water market. ***HN9***[] Their claimed injury is causally linked to an antitrust violation and as the allegedly injured parties, they are the proper persons to maintain the action. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*.

CONCLUSION

The court grants the defendants' motion for summary judgment as to all counts of the plaintiffs' complaint. The claims are barred by the doctrine of state action immunity as set forth in *Section 35-31(b) of the General Statutes.*

BY THE COURT

McLachlan, J.

End of Document

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield

United States District Court for the District of Rhode Island

January 10, 2003, Decided

C.A. No. 99-282-T

Reporter

239 F. Supp. 2d 180 *; 2003 U.S. Dist. LEXIS 4111 **; 2003-1 Trade Cas. (CCH) P73,957

STOP & SHOP SUPERMARKET COMPANY, and WALGREEN EASTERN CO., INC., plaintiffs, v. BLUE CROSS & BLUE SHIELD OF RHODE ISLAND, COORDINATED HEALTH PARTNERS, INC. d/b/a BLUECHIP, CVS CORPORATION, THOMAS E. MORRISON, MAXI DRUG, INC., d/b/a BROOKS PHARMACY, C. DANIEL HARON, PHARMACARE MANAGEMENT SERVICES, INC., GREG S. WEISHAR, PROVIDER HEALTH SERVICES, INC., RONALD BOCHNER, and UNITED HEALTHCARE OF NEW ENGLAND, INC., defendants.

Subsequent History: Affirmed by *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 2004 U.S. App. LEXIS 12493 (1st Cir. R.I., June 24, 2004)*

Disposition: Motions for summary judgment were granted in part and denied in part.

Core Terms

pharmacies, network, pharmaceuticals, subscribers, prescription, Antitrust, reimbursed, plans, per se violation, anti trust law, market power, insurers, competitors, plaintiffs', join, challenged practice, restraint of trade, rule of reason, non-network, prices, relevant market, concerted action, effects, prescription drug, anti-competitive, commodities, third-party, sellers, retail, buyer

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Summary judgment is warranted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Evidentiary Considerations**

On a motion for summary judgment, an issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material if it directly relates to the legal elements of a claim or defense to an extent that could affect the outcome of the case. In deciding whether a genuine issue of material fact exists, the court views the evidence in the light most favorable to the nonmovant and draws all reasonable inferences in that party's favor.

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

Evidence > Burdens of Proof > Initial Burden of Persuasion

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

HN3[] **Burdens of Proof, Movant Persuasion & Proof**

When a motion for summary judgment is directed against a party that bears the burden of proof, the movant bears the initial responsibility of informing the district court of the basis of the motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. If that showing is made, the nonmovant, then, has the burden of demonstrating the existence of a genuine issue of material fact requiring a trial. More specifically, the nonmovant is required to establish that it has sufficient evidence to enable a jury to find in its favor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN4[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

An exclusive dealing arrangement is one in which a buyer agrees to purchase all or a significant portion of its requirements of a product or service solely from a particular seller or sellers.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN5[] **Antitrust & Trade Law, Sherman Act**

Section 1 (*15 U.S.C.S. § 1*) of the Sherman Act seeks to accomplish the objective of the protection of competition, not competitors by prohibiting concerted action that unreasonably restrains trade. It provides that every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Clayton Act > Scope

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Contracts Law > Personal Property > Personalty Leases > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

Section 3 (*15 U.S.C.S. § 14*) of the Clayton Act prohibits selling a commodity on the condition that the purchaser refrain from dealing with the seller's competitors. It provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods or other commodities or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *15 U.S.C.S. § 14*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive dealing arrangements that involve commodities may be challenged under either *section 1* (*15 U.S.C.S. § 1*) of the Sherman Act or section 3 (*15 U.S.C.S. § 14*) of the Clayton Act, but those that involve a service or something other than a commodity may be challenged only under *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Antitrust & Trade Law, Sherman Act**

The provisions of the Rhode Island Antitrust Act, *R.I. Gen. Laws §§ 6-36-4*, -6, mirror those of sections 1-2 (*15 U.S.C.S. §§ 1-2*) of the Sherman Act and section 3 (*15 U.S.C.S. § 14*) of the Clayton Act and are construed in the same manner as the federal statutes. *R.I. Gen. Laws § 6-36-2(b)* requires state ***antitrust law*** to be construed in harmony with judicial interpretations of comparable federal antitrust statutes. The only material difference between *R.I. Gen. Laws § 6-36-6* and *15 U.S.C.S. § 14* is that *R.I. Gen. Laws § 6-36-6* applies to agreements for the sale of services as well as commodities.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Sherman Act, Claims**

In order to prevail on a claim under *section 1* (*15 U.S.C.S. § 1*) of the Sherman Act, plaintiffs must establish that: (1) the defendants participated in a conspiracy or some other form of concerted activity; (2) the conspiracy or concerted activity unreasonably restrained trade; and, (3) the restraint affected interstate commerce. Plaintiffs also must demonstrate an injury of a type that the antitrust laws were intended to prevent (i.e., an "antitrust injury"); a causal relationship between the violation and the resulting injury and standing to assert the claim.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Admissibility > Circumstantial & Direct Evidence

HN10[] **Antitrust & Trade Law, Sherman Act**

For purposes of a claim under *section 1* (*15 U.S.C.S. § 1*) of the Sherman Act, the defendants' participation in a conspiracy or some other form of concerted action may be proven either by direct evidence or by circumstantial evidence. However, circumstantial evidence, alone, will not support a finding of conspiracy if that evidence is equally consistent with a finding that the defendants did not conspire.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

For purposes of a claim under *section 1* (*15 U.S.C.S. § 1*) of the Sherman Act, circumstantial evidence of concerted action may include proof of consciously parallel behavior, but parallel behavior, by itself, is not sufficient to distinguish concerted action from independent acts that, coincidentally, are similar. That is especially true when the alleged conduct is consistent with a legitimate business purpose. Accordingly, additional evidence is required to establish "plus" factors that tend to exclude the possibility that the defendants acted independently.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

For purposes of a claim under *section 1* (*15 U.S.C.S. § 1*) of the Sherman Act, the principal "plus" factors are: (1) that the defendants had a motive and an opportunity to conspire; and (2) that the defendants acted contrary to their economic self-interest so that their conduct cannot be explained on legitimate business grounds. Proof of these plus factors may include evidence of meetings attended by the defendants followed shortly thereafter by parallel behavior that goes beyond what would be expected absent an agreement. It also may include evidence that the defendants acted contrary to their self-interest.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Not all concerted action that, in some way, restrains trade is illegal. Courts recognize that some business combinations or agreements that adversely affect a particular competitor may have pro-competitive effects that outweigh their anti-competitive effects. Therefore, the Sherman Act focuses on the net effect of a challenged practice and prohibits only conduct that unreasonably restrains trade. Since the antitrust laws were enacted for the "protection of competition, not competitors," a restraint is not deemed unreasonable unless it harms competition.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

While motive is a relevant consideration in determining whether concerted actions violate the Sherman Act, the ultimate question is whether the challenged conduct unreasonably restrains trade. Some restraints may be deemed unreasonable per se and some may be found unreasonable under the "rule of reason."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Restraints that are inherently anti-competitive because they have a pernicious effect on competition and lack any redeeming virtue are deemed unreasonable per se. In order to be classified as a per se violation, a restraint must be one that a court can predict with confidence will be condemned by the "rule of reason."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the case of a per se violation, the plaintiff is not required to prove an actual anti-competitive effect. Nor is the plaintiff required to prove the defendants' market power or any other indicia that the challenged conduct is likely to harm competition. Rather, anti-competitive effects are presumed.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN17[] **Practices Governed by Per Se Rule, Boycotts**

Because the per se rule condemns conduct without inquiring into market conditions or the actual impact of the conduct on competition, the per se rule is applied sparingly and only where the adverse impact on competition is obvious and substantial. Thus, the designation of per se violation generally is limited to agreements to fix prices, limit production, and engage in certain types of group boycotts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN18[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A horizontal agreement is an agreement between firms occupying the same level of the market structure. A "group boycott" exists where competitors agree with each other not to deal with a supplier or distributor if it continues to serve a competitor whom they seek to injure.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN19[] **Practices Governed by Per Se Rule, Boycotts**

An arrangement under which a distributor agrees to deal exclusively with one manufacturer is described as a vertical arrangement that does not constitute a per se violation of the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN20[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Courts generally hold that exclusive dealing arrangements provide potential competitive benefits that make it inappropriate to treat them as per se violations of the antitrust laws. Indeed, at least one court holds, specifically, that an exclusive pharmacy network does not run afoul of the Sherman Act as a per se violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN21[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

The United States Supreme Court is reluctant to adopt rules designating restraints imposed in the context of business relationships as per se violations where the economic impact of certain practices is not immediately obvious. The validity of exclusive dealing arrangements, instead is determined under the "rule of reason" which requires proof of actual or threatened anti-competitive effects in the relevant market. Furthermore, such agreements are held to pass muster even under "rule of reason" analysis absent evidence that the price of the goods in question has increased; the quality has decreased, or the choices available to consumers have been diminished in some way other than preventing them from selecting the plaintiff.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN22[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The lawfulness of practices that are not per se violations of the antitrust laws is determined by applying the "rule of reason." The test prescribed by the "rule of reason" is whether, under all of the circumstances, the challenged practice is unreasonably restrictive of competitive conditions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In contrast to cases involving per se violations, plaintiffs in cases where the "rule of reason" is applied must prove that the challenged practice causes an antitrust injury. In other words, they must prove that the practice harms competition. The plaintiffs also must prove that the harm caused by the challenged practice outweighs any beneficial effects on competition. Generally, restraints that are ancillary to legitimate business goals and are not seriously anti-competitive will pass muster under "rule of reason" analysis.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

HN24[] **Regulated Industries, Higher Education & Professional Associations**

Antitrust injury may be demonstrated in either of two ways. It may be proven directly by presenting evidence of actual injury to competition in the relevant market or it may be proven indirectly by showing the likelihood of serious injury to competition. An actual injury to competition may be shown by demonstrating that the challenged practice has increased prices or reduced output. A potential injury to competition may be shown by presenting evidence that the defendants possess sufficient market power in the relevant market to significantly threaten competition.

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

HN25[] **Private Actions, Remedies**

For purposes of demonstrating antitrust injury, market power is defined as the power to raise prices above competitive levels or to exclude competition. Market share is only one of the factors to be considered in determining whether a particular defendant has market power and there is no talismanic test for ascertaining what share of the relevant market a defendant must have in order to possess sufficient market power to threaten competition.

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

HN26[] **Private Actions, Remedies**

Since market power is merely a "surrogate" for determining the likelihood of actual injury to competition, it need not be established where proof of actual injury exists. Moreover, even in cases where market power is relevant, market power, alone, does not establish an antitrust violation. Rather, market power is described as a filter for separating those practices that pose a sufficient threat to competition to warrant further analysis from those that do not. Thus, once market power is proven, the nature, purpose, and duration of the restraint and its effect on competition in the relevant market must be assessed.

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

HN27[] **Private Actions, Remedies**

For purposes of demonstrating antitrust injury, when actual harm to competition is demonstrated, the issue becomes whether that harm is justified or outweighed by some pro-competitive benefit. If there is no legitimate pro-competitive benefit the challenged practice will be held unlawful.

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

HN28[] **Private Actions, Remedies**

For purposes of demonstrating antitrust injury, when potential harm to competition is alleged, analysis is a two-step process. The first step is to identify the relevant market which includes both the market for the product or service and the geographic market. The second step is to assess the effect of the challenged practice on competition in the relevant market and on consumers. Among the factors to be considered in making that assessment are the degree of market power possessed by the defendants, the extent of market foreclosure resulting from the challenged practice; the impact on competitors and competitive justifications for the practice. Other factors include the duration of the exclusive arrangement and the height of entry barriers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN29[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

The test for determining whether an exclusive dealing arrangement violates the antitrust laws is essentially the same under section 3 (*15 U.S.C.S. § 14*) of the Clayton Act and under the Rhode Island Antitrust Act, *R.I. Gen. Laws §§ 6-36-4*, -6, as it is under *section 1* (*15 U.S.C.S. § 1*) of the Sherman Act, except that *15 U.S.C.S. § 14* applies only to agreements relating to the sale of goods or commodities.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN30[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

The United States Supreme Court has held that, in a network pharmacy arrangement, the agreements between health insurers and participating pharmacies are merely arrangements for the purchase of goods and services by the health insurer.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN31[] **Intentional Interference, Elements**

Under Rhode Island law, in order to prevail on a claim of intentional interference with business relationships, a plaintiff must prove: 1) the existence of a business relationship or expectancy, 2) that the defendants knew of that relationship or expectancy, 3) that the defendants intentionally interfered with that relationship or expectancy, and 4) that the interference caused the plaintiff to sustain the harm in question.

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN32[] **Intentional Interference, Defenses**

On a claim of intentional interference with business relationships, a defendant is not liable simply for committing an intentional act that interferes with a plaintiff's business relationships. The interference also must be impermissible or unjustified. Otherwise, a defendant would be liable for legitimately competing with a plaintiff for business. The plaintiff bears the initial burden of showing that the interference was not legally privileged or justified. If that showing is made, the burden shifts to the defendant to prove justification.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

HN33[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act applies only to parties to agreements for the "sale of goods." *15 U.S.C.S. § 14*.

Counsel: **[**1]** For The Stop & Shop Supermarket Company, PLAINTIFF: William M Dolan, III, Brown Rudnick Berlack Israels LLP, Providence, RI USA. Robert D Paul, Esq, Gregg A Hand, Peter J Carney, White & Case LLP, Washington, DC USA.

For Walgreen Eastern Co, Inc, PLAINTIFF: William M Dolan, Brown Rudnick Berlack Israels LLP, Providence, RI USA.

For Blue Cross & Blue Shield of Rhode Island, Defendant: Steven E Snow, Partridge, Snow & Hahn LLP, Providence, RI USA. Bruce D Sokler, Mintz, Levin, Cohn, Ferris, Glocsky and Popeo, PC, Washington, DC USA.

For Coordinated Health Partners, Inc, DEFENDANT: Steven E. Snow, Partridge, Snow & Hahn LLP, Providence, RI USA.

For CVS Corporation, PharmaCare Management Services, Inc, DEFENDANTS: James A Ruggieri, Providence, RI USA. Bruce D Sokler, David T Shapiro, Thomas G Krattenmaker, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, Washington, DC USA.

For Provider Health Services, Inc, Maxi Drug, Inc, C Daniel Haron, Ronald Bochner, DEFENDANTS: Robert Clarke Corrente, Christopher R Bush, Hinckley, Allen & Snyder, Providence, RI USA.

For United Healthcare Corporation, DEFENDANT: R Kelly Sheridan, Jr, Roberts, Carroll, Feldstein & Peirce, **[**2]** Inc, Providence, RI USA. Barbara H Ryland, Arthur N Lerner, Crowell & Moring, LLP, Washington, DC USA.

For Thomas E Morrison, Greg S Weishar, DEFENDANTS: James A Ruggieri, Providence, RI USA.

Judges: Ernest C. Torres, Chief United States District Judge.

Opinion by: Ernest C. Torres

Opinion

[*182] **MEMORANDUM AND ORDER**

ERNEST C. TORRES, Chief United States District Judge.

Stop and Shop Supermarket Company ("Stop & Shop") and Walgreen Eastern Co., Inc. ("Walgreens") brought this action pursuant to Section 1 of the Sherman Act, *15 U.S.C. § 1*; Section 3 of the Clayton Act, *15 U.S.C. § 14*; and sections 4 and 6 of the Rhode Island Antitrust Act, *R.I. Gen. Laws §§ 6-36-4*, *-6*. The plaintiffs claim that the defendants have restrained trade and limited competition in the Rhode Island market for the sale of prescription pharmaceuticals covered by health insurance plans and that they have tortiously interfered with the plaintiffs' business relationships by creating a "closed network" of pharmacies at which plan subscribers are required to fill their prescriptions in order to obtain maximum reimbursement.

The claims against United Healthcare of New **[**3]** England, Inc. ("UHC"), Provider Health Services, Inc. ("PHS"), Maxi-Drug, Inc., d/b/a Brooks Pharmacy ("Brooks"), C. Daniel Haron and Ronald Bochner have been dismissed pursuant to the terms of a settlement agreement allowing the plaintiffs' pharmacies to join the network that serves UHC and is managed by PHS. The remaining defendants have filed two summary judgment motions, one by Blue Cross and Blue Shield of Rhode Island and Coordinated Health Partners, Inc., d/b/a Blue Chip (collectively referred to as "Blue Cross") and one by CVS Corporation ("CVS") PharmaCare Management Services, Inc. ("PharmaCare"), Thomas E. Morrison and Greg Weishar.

Because this Court finds that the exclusive dealing arrangement at issue is not a *per se* violation of the antitrust laws and does not tortiously interfere with the plaintiffs' business relationships; and, because this Court further finds that there are disputed factual issues that must be resolved in order to determine whether the arrangement unreasonably restrains trade, the motions for summary judgment are granted in part and denied in part.

Facts

The record reveals the undisputed facts to be as follows. Blue Cross and UHC offer **[**4]** a variety of health insurance and HMO plans that pay the major portion of the cost of prescription pharmaceuticals obtained by their subscribers. Approximately **[*183]** 60% of Rhode Islanders covered by such plans are Blue Cross customers. An additional 25% are UHC customers.

Until 1997, Blue Cross had a mostly "open" pharmacy system in which subscribers could purchase prescription drugs at any pharmacy. Blue Cross also self managed the pharmacy benefits programs under its plans. Thus, Blue Cross, itself, determined what pharmaceuticals were covered; negotiated with individual pharmacies to establish the prices for pharmaceuticals purchased pursuant to the plans; and processed claims by subscribers.

In the fall of 1997, Blue Cross decided to hire a pharmacy benefits manager ("PBM") to administer the pharmacy benefits programs under its plans. Typically, a PBM establishes a "closed network" of participating pharmacies that agree to discount the prices that they charge for prescription pharmaceuticals purchased pursuant to a particular insurer's health insurance plans. The network pharmacies further agree not to join any other PBM network that competes with the PBM for that insurer's business. **[**5]** Pharmacies are induced to join such a network by the expectation that they will receive a greater volume of business because the insurer whose plans are administered by the PBM provides plan subscribers with an incentive to patronize network pharmacies by offering more generous reimbursement for pharmaceuticals purchased at those pharmacies than for pharmaceuticals purchased at non-network pharmacies and because the PBM agrees to limit the number of pharmacies in its network.

In September 1997, Blue Cross sent out a request for proposals and received competing bids from three PBM's: PharmaCare, PCS and WellPoint. PCS's bid was rejected because PCS was unwilling to share in the risk that the program would lose money.

PharmaCare, a subsidiary of CVS, proposed a closed network consisting of all of the CVS pharmacies and most of the independent pharmacies in Rhode Island. CVS's fifty-two pharmacies in Rhode Island account for roughly forty-one percent of the third-party reimbursed purchases of prescription drugs in the state.

WellPoint proposed a closed network consisting of pharmacies operated by plaintiffs Stop & Shop and Walgreens. Stop & Shop operates eighteen pharmacies and Walgreens **[**6]** operates fifteen pharmacies in Rhode Island.

WellPoint's bid was lower than PharmaCare's but Blue Cross expressed some dissatisfaction with both bids and gave the two PBMs an opportunity to submit modified bids. In December 1997, after receiving the modified bids, Blue Cross decided to select PharmaCare as its PBM but no agreement was signed at that time. The plaintiffs allege that WellPoint's bid was superior to PharmaCare's and that PharmaCare was selected for unspecified ulterior motives.

At the time that Blue Cross selected PharmaCare, UHC already had a "closed" network consisting primarily of Brooks pharmacies and managed by PHS (the "UHC/PHS network"). Brooks is the second largest retail pharmacy chain in Rhode Island with forty-two retail outlets and approximately nineteen percent of Rhode Island's third-party reimbursed pharmaceutical sales.

Blue Cross's selection of PharmaCare came on the heels of discussions among representatives of UHC, PHS and CVS about expanding the UHC/PHS network and including CVS in it. During those discussions, UHC officials told PHS officials that UHC wanted to include more pharmacies in the UHC/PHS network. Stop & Shop, Walgreens, and CVS all **[**7]** expressed **[*184]** an interest in joining the network, but Ronald Bochner, PHS's president, rejected the overtures by Stop & Shop and Walgreens.

In January 1998, Thomas Morrison, CVS's vice president of pharmacy services, contacted Bochner, and the two men discussed CVS's interest in joining the UHC/PHS network. Around that same time, Greg Weishar, the president of PharmaCare, wrote to Bochner offering to admit the PHS pharmacies into the Blue Cross/PharmaCare network if CVS was admitted into the UHC/PHS network. Weishar, also, rebuffed requests by Stop & Shop and Walgreens to join the Blue Cross/PharmaCare network.

On February 19, 1998, PHS agreed to allow CVS to join the UHC/PHS network. However, negotiations between PharmaCare, PHS and Brooks continued and it was not until May 18, 1998, that contracts were executed between PharmaCare and PHS and between PharmaCare and Brooks allowing Brooks and the other PHS pharmacies to join the Blue Cross/PharmaCare network. Those contracts prohibited Brooks and PHS's other member pharmacies from participating in other networks competing for Blue Cross's business and they prohibited PharmaCare from admitting into the Blue Cross/PharmaCare network pharmacies **[**8]** other than the existing members of that network and the members of the PHS network. Blue Cross ultimately approved admission of the PHS pharmacies into the Blue Cross/PharmaCare network pursuant to a provision in the agreement between Blue cross and PharmaCare requiring that such approval be obtained.

On November 19, 1998, Blue Cross and PharmaCare executed the agreement making PharmaCare Blue Cross's PBM for a period of three years beginning on January 1, 1999.

Blue Cross plans create a financial incentive for subscribers to patronize network pharmacies by providing subscribers with a higher level of reimbursement for prescription pharmaceuticals purchased at network pharmacies than for those purchased at non-network pharmacies. However, from the facts presented thus far, it is impossible to determine the precise nature or extent of that incentive. Blue Cross offers an array of plans in which the methods of reimbursement for the purchase of prescription pharmaceutical products vary greatly and the parties have failed to explain the relevant provisions of those plans or the differences, if any, in the amounts that subscribers are required to pay for prescription pharmaceuticals at **[**9]** network pharmacies as opposed to non-network pharmacies.

The plaintiffs have presented evidence that, since the establishment of Blue Cross's closed network, their sales of prescription pharmaceuticals to Blue Cross subscribers have declined; they have been forced to curtail plans to expand; the retail price of prescription pharmaceuticals at network pharmacies has increased and the level of services provided to consumers has been reduced.

The Plaintiffs' Claims

Count I of the amended complaint alleges that the defendants conspired to unreasonably restrain trade in violation of *§ 1 of the Sherman Act* by excluding the plaintiffs from competing in the Rhode Island market for the retail sale of prescription pharmaceutical products that are reimbursed by insurance. [1]

[10]** **[*185]** Count II alleges that the defendants established an exclusive dealing arrangement that violates *§ 3 of the Clayton Act* and *§ 1 of the Sherman Act* because it reduces competition and tends to create a monopoly for the defendants in the Rhode Island market for the retail sale of prescription pharmaceutical products that are reimbursed by insurance.

Count III alleges that the conduct that is the subject of the claims in Counts I and II also violates the Rhode Island Antitrust Act.

Count IV alleges that, by excluding the plaintiffs from their network, the defendants intentionally interfered with the business relationships between the plaintiffs and their present and future pharmacy customers.

As already noted, the plaintiffs have settled their claims against the UHC and PHS defendants; and, pursuant to the terms of that settlement agreement, they have been allowed to join the UHC/PHS network.

Summary Judgment Standard

HN1[] Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled **[**11]** to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN2***[] An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. A fact is material if it directly relates to the legal elements of a claim or defense to an extent that could affect the outcome of the case. *Id.* In deciding whether a genuine issue of material fact exists, the Court views the evidence in the light most favorable to the nonmovant and draws all reasonable inferences in that party's favor. *Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991)*.

HN3[] When a motion for summary judgment is directed against a party that bears the burden of proof, the movant bears the "initial responsibility of informing the district court of the basis of the motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. If that showing is made, the nonmovant, then, has the burden of demonstrating the existence of a genuine issue of material fact requiring **[**12]** a trial. *Dow v. United Bhd. of Carpenters and Joiners of Am., 1 F.3d 56, 58 (1st Cir. 1993)*. More specifically, the nonmovant is required to establish that it has sufficient evidence to enable a jury to find in its favor. See *DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997)*.

Analysis

I. The Anti-Trust Claims

The gravamen of the plaintiffs' antitrust claims is that the combined Blue Cross/PharmaCare and UHC/PHS network creates an exclusive dealing arrangement that violates the antitrust laws.

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[1] Count I also alleges that the defendants "conspired . . . to allocate markets and to artificially raise, fix, maintain or stabilize pharmaceutical reimbursement rates and co-payment levels, resulting in higher prices for prescription pharmaceutical products . . . restraint of competition among providers . . . and an unlawful increase in market power by Defendants" but those allegations are neither explained in the plaintiffs' memoranda nor supported by any proffered evidence. Am. Compl. P 72.

HN4[] An exclusive dealing arrangement is one in which a buyer agrees to purchase all or a significant portion of its requirements of a product or service solely from a particular seller or sellers. William C. Holmes, **[*186]** ***Antitrust Law*** Handbook § 2:23, at 352 (2001) (the "Antitrust Handbook").

Here, it appears that Blue Cross provides incentives for its subscribers to patronize network pharmacies by providing greater reimbursement for prescription pharmaceuticals purchased from network pharmacies than for those purchased at non-network pharmacies. In exchange, network pharmacies have agreed not to join any competing network and to discount **[**13]** the price of prescription pharmaceuticals sold to Blue Cross and its subscribers. At this juncture, it is difficult to determine whether such an arrangement amounts to an exclusive dealing agreement because, as already noted, the exact nature and extent of the differing reimbursements provided by Blue Cross are unknown.

Moreover, the plaintiffs' claim that the arrangement runs afoul of the antitrust laws is undermined by the fact that the plaintiffs, themselves, were part of WellPoint's network that unsuccessfully sought a similar arrangement with Blue Cross and by the fact that one of the conditions of the agreement settling the plaintiffs' claims against UHC and PHS was that the plaintiffs be permitted to join the UHC/PHS network.

A. The Relevant Statutes

Both *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act* are aimed at activities that interfere with competitive markets and their ability to provide adequate supplies of quality goods at reasonable prices. *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. The objective of those statutes is the "protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).* ***[**14]***

HN5[] *Section 1 of the Sherman Act* seeks to accomplish that objective by prohibiting concerted action that unreasonably restrains trade. It provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

HN6[] *Section 3 of the Clayton Act* prohibits selling a commodity on the condition that the purchaser refrain from dealing with the seller's competitors. It provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line **[**15]** of commerce.

15 U.S.C. § 14.

HN7[] Exclusive dealing arrangements that involve commodities may be challenged under either statute but those that involve a service or something other than a commodity may be challenged only under *Section 1 of the Sherman Act*. Antitrust Handbook § 5:3, at 528-29.

HN8[] The provisions of the *Rhode Island Antitrust Act* mirror those of §§ *1-2 of the Sherman Act* and *§ 3 of the Clayton Act* and are construed in the same manner as **[*187]** the federal statutes. [2] *Greater Providence MRI Ltd. P'ship v. Medical Imaging Network of Southern New England. Inc., 32 F. Supp. 2d 491, 493 (D.R.I. 1998)*; *ERI Max*

[2] The only material difference between *R.I. Gen. Laws § 6-36-6* and *§ 3* of the clayton Act is that *§ 6-36-6* applies to agreements for the sale of services as well as commodities.

Entm't. Inc. v. Streisand, 690 A.2d 1351, 1353 n.l (R.I. 1997) (*Rhode Island General Laws § 6-36-2(b)* requires state ***antitrust law*** to be "construed in harmony with judicial interpretations of comparable federal antitrust statutes").

[16]** B. The Sherman Act Claim

HN9[] In order to prevail on their *Sherman Act* claim, the plaintiffs must establish that:

(1) The defendants participated in a conspiracy or some other form of concerted activity;

(2) The conspiracy or concerted activity unreasonably restrained trade; and,

(3) The restraint affected interstate commerce.

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 632-33 (9th Cir. 1987); see also *DM Research v. College of Am. Pathologists, 2 F. Supp. 2d 226, 228 (D.R.I. 1998)*.

The plaintiffs also must demonstrate an injury of a type that the antitrust laws were intended to prevent (i.e., an "antitrust injury"); a causal relationship between the violation and the resulting injury and standing to assert the claim. Antitrust Handbook § 2:2, at 151.

1. Concerted Action

HN10[] The defendants' participation in a conspiracy or some other form of concerted action may be proven either by direct evidence or by circumstantial evidence. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. However, circumstantial evidence, alone, will not support a finding of **[**17]** conspiracy if that evidence is equally consistent with a finding that the defendants did not conspire. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

HN11[] Circumstantial evidence of concerted action may include proof of consciously parallel behavior, but parallel behavior, by itself, is not sufficient to distinguish concerted action from independent acts that, coincidentally, are similar. That is especially true when the alleged conduct is consistent with a legitimate business purpose. Antitrust Handbook § 2:4, at 153-56. Accordingly, additional evidence is required to establish "plus" factors that "tend to exclude the possibility that the defendants acted independently." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1232 (3rd Cir. 1993)*.

HN12[] The principal "plus" factors are:

(1) That the defendants had a motive and an opportunity to conspire; and

(2) That the defendants acted contrary to their economic self-interest so that their conduct cannot be explained on legitimate business grounds.

Id. at 1242.

Proof of these plus factors may include evidence **[**18]** of meetings attended by the defendants followed shortly thereafter by parallel behavior that goes beyond what would be expected absent an agreement. It also may include evidence that the defendants acted contrary to their self-interest. Antitrust Handbook §§ 2:6, at 174-75.

Here, there is evidence that the defendants engaged in parallel behavior by con **[*188]** temporaneously expanding the Blue Cross/PharmaCare and the UHC/PHS networks to include the same pharmacies and to exclude the plaintiffs. There also is evidence that the expansion was preceded by a series of meetings, telephone calls, and correspondence in which representatives of PharmaCare, CVS, PHS, and Brooks discussed the possibility of admitting CVS into the UHC/PHS network; admitting Brooks and the PHS pharmacies into the Blue

Cross/PharmaCare network and establishing a uniform reimbursement plan. Furthermore, there is evidence that the admission of Brooks into the Blue Cross/PharmaCare network was contingent upon the admission of CVS into the UHC/PHS network and vice versa. In addition, there is evidence that Blue Cross was aware of those discussions and that its approval was necessary to allow Brooks into the Blue Cross/PharmaCare **[**19]** network. Finally, there is evidence that the decisions to admit CVS into the UHC/PHS network and Brooks into the Blue Cross/PharmaCare network were made shortly after those discussions and within a few months of each other.

That evidence is sufficient to support an inference that the defendants engaged in concerted action to expand the two networks, but is sheds no light on whether the purpose or effect of that action was to unreasonably restrain trade in connection with the retail sale of prescription pharmaceutical products.

2. Unreasonable Restraint

HN13[] Not all concerted action that, in some way, restrains trade is illegal. Courts have recognized that some business combinations or agreements that adversely affect a particular competitor may have pro-competitive effects that outweigh their anti-competitive effects. See, e.g., *Standard Oil Co. of California v. United States, 337 U.S. 293, 306-307, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)* (describing the potential pro-competitive virtues of exclusive dealing arrangements). Therefore, the *Sherman Act* focuses on the net effect of a challenged practice and prohibits only conduct that unreasonably restrains trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997).* ***[**20]*** Since the antitrust laws were enacted for the "protection of competition, not competitors," a restraint is not deemed unreasonable unless it harms competition. *Brown Shoe Co., 370 U.S. at 320*.

The plaintiffs' assertion that the "mutual expansion" of the two networks was designed to lessen competition between Blue Cross and UHC is neither plausible nor supported by any evidence. If anything, it appears more likely that the expansion increased competition between Blue Cross and UHC because it permitted their potential customers to choose between the insurers based on a comparison of the plans that they offered rather than on a preference for doing business with a particular pharmacy.

Nor is it rational to infer that Blue Cross agreed to expand the two networks in order to lessen competition among pharmacies selling prescription pharmaceuticals. The rationale for a closed network is that limiting the number of pharmacies enables the insurer to negotiate lower prices for the prescription pharmaceuticals that it purchases by holding out the prospect that network pharmacies will receive a larger volume of business from the insurer's subscribers. Increasing the number of **[**21]** network pharmacies decreases the volume of business that each pharmacy is likely to get; and, therefore, diminishes the pharmacies' incentive to discount the prices charged to the insurer and its subscribers.

[*189] The plaintiffs' failure to explain how the expansion of the two networks lessened competition between Blue Cross and UHC or why Blue Cross would want to lessen competition among pharmacies lends credence to the evidence presented by Blue Cross that its purpose was to accommodate the desire of CVS to gain access to the PHS network. In any event, ***HN14***[] while motive is a relevant consideration in determining whether concerted actions violate the *Sherman Act*, the ultimate question is whether the challenged conduct unreasonably restrains trade. *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993)* ("Motive can . . . be a guide to expected effects, but effects are still the central concern of the antitrust laws, and motive is mainly a clue.").

Some restraints may be deemed unreasonable *per se* and some may be found unreasonable under the "rule of reason." See *Khan, 522 U.S. at 10*. Here, the plaintiffs claim the defendants' exclusive **[**22]** dealing arrangement is unlawful under either method of analysis.

3. The Alleged *Per Se* Violation

HN15[] Restraints that are inherently anti-competitive because they have a "'pernicious effect on competition and lack any redeeming virtue'" are deemed unreasonable *per se. Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)* (quoting *Northern Pacific, 356 U.S. at 5*) In order to be classified as a *per se* violation, a restraint must be one that a court can "predict with confidence" will be condemned by the "rule of reason." *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*.

HN16[] In the case of a *per se* violation, the plaintiff is not required to prove an actual anti-competitive effect. Nor is the plaintiff required to prove the defendants' market power or any other indicia that the challenged conduct is likely to harm competition. Rather, anti-competitive effects are presumed. *U.S. Healthcare, 986 F.2d at 593*.

HN17[] Because the *per se* rule condemns conduct without inquiring into market conditions or the actual impact of the conduct on competition, **[**23]** the *per se* rule is applied sparingly and only where the adverse impact on competition is obvious and substantial. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; *Drug Emporium, Inc. v. Blue cross of Western New York, Inc., 104 F. Supp. 2d 184, 188 (W.D.N.Y. 2000)*. Thus, the designation of *per se* violation generally is limited to agreements to fix prices, limit production, and engage in certain types of group boycotts. *U.S. Healthcare, 986 F.2d at 593*; *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998)* (citations omitted).

The plaintiffs concede that some exclusive dealing arrangements do not run afoul of the antitrust laws but they assert that the one at issue in this case is unlawful *per se* because it is a "horizontal agreement[] among competitors to eliminate competition" from the market for third-party reimbursed prescription drugs that amounts to a "group boycott." Pls.' Mem. in Opp'n to CVS's Mot. for Summ. J. at 10. This Court rejects that argument for several reasons.

First, the challenged arrangement is neither a horizontal agreement among **[**24]** competitors nor a group boycott. ***HN18***[] A horizontal agreement is an agreement between firms occupying the same level of the market structure. *Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. A "group boycott" exists where "competitors **[*190]** agree with each other not to deal with a supplier or distributor if it continues to serve a competitor whom they seek to injure." *U.S. Healthcare, 986 F.2d at 593*. Here, Blue Cross, PharmaCare, CVS and their counterparts in the UHC/PHS network occupy different levels of the market for third-party reimbursed prescription drugs. Blue Cross and UHC, in effect, are buyers; CVS and Brooks are sellers; and PharmaCare and PHS administer the prescription benefits programs of the two insurers and negotiate the prices to be paid by the insurers to participating pharmacies. Thus, any agreement between the insurers and/or the PBMs, on the one hand, and the pharmacies, on the other hand, is not a group boycott. Rather, it is more akin to ***HN19***[] an arrangement under which a distributor agrees to deal exclusively with one manufacturer which has been described as a vertical arrangement that does not constitute a *per se* violation **[**25]** of the antitrust laws. *Id. at 594*. Nor is there even an allegation that the network pharmacies with which the plaintiffs compete for the sale of third-party reimbursed prescription drugs, have agreed among themselves not to deal with Blue Cross or UHC if the insurers do business with the plaintiffs.

Second, it is not "obvious" that the plaintiffs have been excluded from the relevant market. Even assuming, *arguendo,* that the relevant market is the market for third-party reimbursed prescription drugs, it is far from clear that expansion of the PharmaCare and PHS networks has precluded the plaintiffs or any other pharmacies from competing in that market. The exclusion claim rests on the premise that the challenged arrangement prevents Blue Cross and UHC subscribers from purchasing prescription drugs from non-network pharmacies. However, there is no evidence that subscribers are prohibited from patronizing non-network pharmacies. There is some evidence that subscribers may receive higher levels of reimbursement for prescription pharmaceuticals purchased at network pharmacies than for those purchased at non-network pharmacies. Nevertheless, from the facts presented, **[**26]** it is impossible to determine precisely what financial incentives those differences may create for subscribers to patronize network pharmacies, or whether such incentives impair the plaintiffs' ability to compete for subscribers' business by lowering their prices to the levels charged by network pharmacies. In any event, it appears that the plaintiffs and other non-network pharmacies can compete for the business of Blue Cross and its subscribers every three years when the exclusive dealing agreements expire.

Third, to the extent that Blue Cross and UHC subscribers are deterred from patronizing non-network pharmacies because their plans might require them to pay less for prescription pharmaceuticals at network pharmacies, the reduction in price may be a redeeming virtue that makes *per se* treatment inappropriate.

Fourth, it is difficult to see how expansion of the two networks has harmed competition or the plaintiffs. If anything, it has increased competition among the network pharmacies by enabling them to vie for the business of both Blue Cross and UHC subscribers. Nor can the plaintiffs point to any injury they have sustained as a result of the expansion. On the contrary, prior **[**27]** to the expansion, the plaintiffs were excluded from both the PharmaCare and PHS networks; but since their settlement with PHS, they, now, are excluded only from Blue Cross's portion of the market. Furthermore, expansion of the networks has increased the pharmacy choices available to consumers by making it easier for Blue Cross subscribers to select pharmacies **[*191]** in the PHS network and for UHC subscribers to select pharmacies in the PharmaCare network.

Finally, ***HN20***[] courts, generally, have held that exclusive dealing arrangements similar to the one at issue in this case provide potential competitive benefits that make it inappropriate to treat them as *per se* violations of the antitrust laws. See e.g., *Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 545 (2d Cir. 1993)* (rejecting *per se* challenge to exclusive dealing arrangement between an HMO and an independent practice association of member physicians given Supreme Court's reluctance to extend *per se* doctrine and because of recognized pro-competitive virtues of independent practice association forms of HMOs);*Jefferson Parish, 466 U.S. 2, 26-29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (exclusive **[**28]** dealing agreement requiring that all anesthesiology services required by a hospital's patients be performed by a particular group of doctors is not a *per se* violations of the *Sherman Act*) ;*U.S. Healthcare, 986 F.2d at 593-97* (exclusive dealing agreement between an HMO and its panel doctors does not constitute a group boycott that would justify treating it as a *per se* violation). Indeed, at least one court has held, specifically, that an exclusive pharmacy network virtually identical to the one in this case did not run afoul of the *Sherman Act* as a *per se* violation. *Drug Emporium, 104 F. Supp. 2d at 188-190*. That court noted ***HN21***[] the Supreme Court's reluctance "to adopt rules designating 'restraints imposed in the context of business relationships' as *per se* violations 'where the economic impact of certain practices is not immediately obvious.'" *Id. at 188* (quoting *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-459, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986))*.

The validity of exclusive dealing arrangements, instead has been determined under the "rule of reason" which requires proof of actual or threatened anti-competitive effects in the **[**29]** relevant market. Antitrust Handbook §§ 1:4, at 40-42. Furthermore, such agreements have been held to pass muster even under "rule of reason" analysis absent evidence that the price of the goods in question has increased; the quality has decreased, or the choices available to consumers have been diminished in some way other than preventing them from selecting the plaintiff. *Capital Imaging, 996 F.2d at 547*; see also *U.S. Healthcare, 986 F.2d at 595-97*.

4. Rule of Reason Analysis

HN22[] The lawfulness of practices that are not *per se* violations of the antitrust laws is determined by applying the "rule of reason." The test prescribed by the "rule of reason" is "whether, under 'all of the circumstances,' the challenged practice is 'unreasonably restrictive of competitive conditions.'" Antitrust Handbook § 2:10, at 193.

HN23[] In contrast to cases involving *per se* violations, plaintiffs in cases where the "rule of reason" is applied must prove that the challenged practice causes an antitrust injury. In other words, they must prove that the practice harms competition. *Drug Emporium, 104 F. Supp. 2d at 189*. The plaintiffs also **[**30]** must prove that the harm caused by the challenged practice outweighs any beneficial effects on competition. *U.S. Healthcare, 986 F.2d at 595*.

Generally, restraints that are ancillary to legitimate business goals and are not seriously anti-competitive will pass muster under "rule of reason" analysis. See *Tower Air, Inc. v. Federal Express Corp., 956 F. Supp. 270, 283 (E.D.N.Y. 1996)* (ancillary restraints are lawful if they are subordinate to a separate, legitimate transaction **[*192]** and they serve to make the transaction more effective).

HN24[] Antitrust injury may be demonstrated in either of two ways. It may be proven directly by presenting evidence of actual injury to competition in the relevant market or it may be proven indirectly by showing the likelihood of serious injury to competition. *Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998)*; *Drug Emporium, 104 F. Supp. 2d at 189*. An actual injury to competition may be shown by demonstrating that the challenged practice has increased prices or reduced output. *Law, 134 F.3d at 1019*. A potential injury to competition **[**31]** may be shown by presenting evidence that the defendants possess sufficient market power in the relevant market to significantly threaten competition. *Id.*; Antitrust Handbook § 2:10, at 198.

HN25[] Market power has been defined as the power to raise prices above competitive levels or to exclude competition. *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 966 (10th Cir. 1990)* (citation omitted). Market share is only one of the factors to be considered in determining whether a particular defendant has market power and there is no talismanic test for ascertaining what share of the relevant market a defendant must have in order to possess sufficient market power to threaten competition. *Id. at 967*.

HN26[] Since market power is merely a "surrogate" for determining the likelihood of actual injury to competition, it need not be established where proof of actual injury exists. *Indiana Fed'n of Dentists, 476 U.S. at 460-61*. Moreover, even in cases where market power is relevant, market power, alone, does not establish an antitrust violation. *CDC Technologies, Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 81 (2d Cir. 1999)* **[**32]** (citations omitted). Rather, market power has been described as a filter for separating those practices "that pose a sufficient threat to competition to warrant further analysis" from those that do not. Antitrust Handbook § 2:10, at 198. Thus, once market power is proven, the nature, purpose, and duration of the restraint and its effect on competition in the relevant market must be assessed. *Id. CDC Technologies, 186 F.3d at 81* (market power, alone, is insufficient; plaintiff also must set forth other grounds to believe that the defendant's behavior will harm competition market-wide); *Greater Providence MRI, 32 F. Supp. 2d at 494* (the "court must consider the extent of the foreclosure, the relative strength of the party, the relative value of the commerce at issue, and the buyer's and seller's business justifications for the arrangement") (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961))*.

HN27[] When actual harm to competition is demonstrated, the issue becomes whether that harm is justified or outweighed by some pro-competitive benefit. *CDC Technologies, 186 F.3d at 80 n.4*; see also, **[**33]** *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 100-101, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* (though agreement had actual anti-competitive effect of fixing prices, the restraint was not unreasonable because without it, competition, itself, would not be possible). If there is no legitimate pro-competitive benefit the challenged practice will be held unlawful. *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)*.

HN28[] When potential harm to competition is alleged, analysis is a two-step process. The first step is to identify the relevant market which includes both the market for the product or service and the **[*193]** geographic market. *Levine v. Central Florida Med. Affiliates, Inc., 72 F.3d 1538, 1552 (11th Cir. 1996)*. The second step is to assess the effect of the challenged practice on competition in the relevant market and on consumers. See *id. at 1552-53*. Among the factors to be considered in making that assessment are the degree of market power possessed by the defendants, the extent of market foreclosure resulting from the challenged practice; the impact on competitors and competitive justifications for **[**34]** the practice. Antitrust Handbook § 2:23, at 353; *Greater Providence MRI, 32 F. Supp. 2d at 494*. Other factors include the duration of the exclusive arrangement and the height of entry barriers. *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000)*

Here, there is some evidence that sixty percent of Rhode Island residents covered by health care plans are insured by Blue Cross; [3] that the plaintiffs have curtailed their plans to, expand their pharmacy operations; that the retail

[3] It appears that an additional twenty-five percent are insured by UHC, but that statistic is of questionable relevance given the fact that the plaintiffs are no longer excluded from the UHC/PHS network.

prices charged at network pharmacies exceed the prices charged at non-network pharmacies [4] and that the level of service provided at network pharmacies has been reduced.

[35]** Whether the plaintiffs can prove these things; whether they can prove that these things are attributable to the challenged practice; and whether they can prove that the expanded networks have harmed or threaten to harm competition to a degree that is not outweighed by legitimate business justifications or a reduction in the amount paid for prescription pharmaceuticals by Blue Cross subscribers, are questions that cannot be answered on a motion for summary judgment because those answers turn on the resolution of disputed facts and the subtly nuanced inferences to be drawn from those facts.

C. The Clayton Act and Rhode Island Anti-Trust Act Claims

HN29[] The test for determining whether an exclusive dealing arrangement violates the antitrust laws is essentially the same under *§ 3 of the Clayton Act* and under the *Rhode Island Anti-Trust Act as it is under § 1* of the Sherman Act, *Greater Providence MRI, 32 F. Supp. 2d at 493*, except that *§ 3 of the Clayton Act* applies only to agreements relating to the sale of goods or commodities, *Norte Car Corp. v. FirstBank Corp., 25 F. Supp. 2d 9, 18 (D.P.R. 1998)* (*Clayton Act* applies to commodities, not services). **[**36]**

Blue Cross argues that the *Clayton Act* is inapplicable because its agreement with PharmaCare was an agreement for PharmaCare to provide PBM services to Blue Cross and its members. This Court is not persuaded by that argument. The alleged antitrust violation focuses on the plaintiff's exclusion from the defendants' closed pharmacy network; and, consequently, from the market for third-party reimbursed prescription pharmaceuticals. The Blue Cross-PharmaCare agreement was an integral part of that arrangement. Therefore if the plaintiffs are able to prove that the exclusive dealing arrangement violated the antitrust laws, Blue Cross would **[*194]** not be insulated from liability simply because it did not contract directly with the pharmacies. See *Greater Providence MRI, 32 F. Supp. 2d at 495*. Indeed, ***HN30***[] the Supreme Court has held that, in a network pharmacy arrangement similar to the one in this case, the agreements between health insurers and participating pharmacies are "merely arrangements for the purchase of goods and services by Blue Shield." *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 214, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*.

Because the test for determining whether **[**37]** an exclusive dealing arrangement violates the *Clayton Act* and/or the *Rhode Island Anti-Trust Act* is the same as the test under the *Sherman Act*, the analysis is the same. Accordingly, for reasons previously stated, the challenged practice does not constitute a *per se* violation and whether it withstands scrutiny under the rule of reason is a factual question to be determined at trial.

II. The Intentional Interference Claim

HN31[] Under Rhode Island law, in order to prevail on a claim of intentional interference with business relationships, a plaintiff must prove:

1. The existence of a business relationship or expectancy.
2. That the defendants knew of that relationship or expectancy.
3. That the defendants intentionally interfered with that relationship or expectancy.
4. That the interference caused the plaintiff to sustain the harm in question.

Mesolella v. City of Providence, 508 A.2d 661, 669 (R.I. 1986)

HN32[] That does not mean that a defendant is liable simply for committing an intentional act that interferes with a plaintiff's business relationships. The interference also must be impermissible or unjustified. *Id. at 669-670.* ***[**38]*** Otherwise, a defendant would be liable for legitimately competing with a plaintiff for business. See *Nadel v.*

[4] To the extent that the alleged increase in retail prices refers to prices paid by consumers who are not covered by health care plans, it is difficult to see what bearing the alleged price disparity would have on the plaintiffs' claim since the plaintiffs have defined the relevant market as the market for reimbursed prescription pharmaceuticals.

Play-By-Play Toys & Novelties, Inc., 208 F.3d 368, 382 (2d Cir. 2000) (requiring proof that the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means). The plaintiff bears the initial burden of showing that the interference was not legally privileged or justified. *Belliveau Bldg. Corp. v. O'Coin, 763 A.2d 622, 627 (R.I. 2000)*; see also *Mesolella, 508 A.2d at 669-70*. If that showing is made, the burden shifts to the defendant to prove justification. *Belliveau, 763 A.2d at 627*.

Here, the plaintiffs claim that the closed pharmacy network interferes with the relationship or prospective relationship between them as sellers of prescription pharmaceuticals and Blue Cross's subscribers as buyers. That claim rests on the premise that Blue Cross's subscribers are the buyers of reimbursed prescription pharmaceuticals.

However, that premise is inconsistent with the plaintiffs' claim that Blue Cross is liable under the *Clayton Act*. ***HN33***[ ] The Clayton Act applies only to parties **[**39]** to agreements for the "sale of goods." *15 U.S.C. § 14*. Since the only goods at issue in this case are the prescription pharmaceuticals sold by the various pharmacies, Blue Cross cannot be viewed as a party to an agreement for the sale of goods unless it is deemed the buyer of those goods.

Blue Cross also must be viewed as the buyer of the prescription pharmaceuticals obtained by its subscribers because it pays the lion's share of their cost. *Drug Emporium, 104 F. Supp. 2d at 191*; see also *Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 926 (1st Cir. 1984)* (Blue **[*195]** Shield "bought" health care services from physicians for its insureds because it paid a large part of the bill and set the amount of the charge). In fact, as already noted, the Supreme Court has described similar agreements as "merely arrangements" under which the pharmaceuticals are purchased by the health insurer. *Royal Drug, 440 U.S. at 214*.

Conclusion

For all of the foregoing reasons, the defendants' motions for summary judgment are granted in part and denied in part as follows:

1. The motions are granted with **[**40]** respect to Counts I - III to the extent that those counts allege *per se* violations. Otherwise, the motions with respect to those counts are denied.
2. The motions are granted with respect to Count IV.

ENTER:

Ernest C. Torres

Chief United States District Judge

Date: January 10, 2003

End of Document

Morales-Villalobos v. Garcia-Llorens

United States Court of Appeals for the First Circuit

January 14, 2003, Decided

No. 02-1499

Reporter

316 F.3d 51 *; 2003 U.S. App. LEXIS 464 **; 2003-1 Trade Cas. (CCH) P73,924

ALGA MORALES-VILLALOBOS, Plaintiff, Appellant, v. MIGUEL GARCIA-LLORENS; JOSE ARTURO GARCIA-LLORENS; MANUEL MATOS; HOSPITAL DR. SUSONI, INC.; DR. SUSONI HEALTH COMMUNITY SERVICES, INC.; ARECIBO RESPIRATORY CARE, INC., Defendants, Appellees.

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Hector M. Laffitte, U.S. District Judge.

Morales-Villalobos v. Garcia-Llorens, 193 F. Supp. 2d 401, 2002 U.S. Dist. LEXIS 5657 (D.P.R. 2002).

Disposition: Reversed. Costs awarded to plaintiff-appellant.

Core Terms

antitrust, alleges, anesthesiologist, Regional, exclusive contract, patients, anesthesiology, privileges

LexisNexis® Headnotes

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

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

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's dismissal of a complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. The court accepts as true the well-pleaded factual allegations of the complaint, draws all reasonable inferences therefrom in the plaintiff's favor and determines whether the complaint, so read, may justify recovery on any cognizable theory.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

With regard to ***antitrust law***, substantial foreclosure in a relevant market is not necessarily unlawful, but whether the restraint is horizontal or vertical, substantial foreclosure is ordinarily a requirement for a seller arguing that she or he has been unreasonably excluded from opportunities to sell.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN3[] **Private Actions, Standing**

The doctrine of antitrust standing is occasionally used to describe but-for causation, and perhaps more often to exclude indirectly injured parties who have suffered actual injury but as a result of violations that directly injured intermediate entities. Perhaps the most common use of the phrase is to describe cases where there is actual injury from an antitrust violation but the impact on the would-be plaintiff results from what closer analysis reveals to be a pro-competitive transaction.

Counsel: Alvaro R. Calderon, Jr., with whom John E. Mudd was on the brief, for appellant.

Luis A. Oliver, with whom Fiddler Gonzalez & Rodriguez LLP, McConnell Valdes, and Roberto C. Quinones Rivera were on the brief, for appellees.

Judges: Before Lynch, Circuit Judge, Howard, Circuit Judge, and Shadur, * Senior District Judge.

Opinion by: LYNCH

Opinion

[*52] LYNCH, *Circuit Judge*. Dr. Alga Morales-Villalobos, an anesthesiologist, brought antitrust claims under *15 U.S.C. § 1 (2000)* (*Section 1* of the Sherman Anti-Trust Act) and pendent state law claims against her former employers, the overlapping directors of an anesthesiology group and two hospitals. She alleged that the exclusive dealing arrangement between the hospitals and the group prevented her from competing to offer her services. She also alleged that the defendants engaged in a group boycott to exclude her from the anesthesiology group, which had an exclusive contract at local hospitals, and subsequently denied **[**2]** her certification to practice at those hospitals.

The defendants moved to dismiss for failure to state a claim, which the court allowed, with leave to amend. Morales-Villalobos then filed an amended complaint amplifying her allegations. The district court granted the motion to dismiss the amended complaint, holding that Morales-Villalobos had failed to sufficiently allege the relevant geographic market and an antitrust injury. *Morales-Villalobos v. Garcia-Llorens, 193 F. Supp. 2d 401, 405-09 (D.P.R. 2002)*(opinion and order). We reverse, though sympathetic to the difficulties posed by this area of law.

I.

HN1[] We review de novo a district court's dismissal of a complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. *Chute v. Walker, 281 F.3d 314, 318 (1st Cir. 2002)*. "We accept as true the well-pleaded factual allegations of the complaint, **[*53]** draw all reasonable inferences therefrom in the plaintiff's favor and determine whether the complaint, so read, [may] justify recovery on any cognizable theory." *Martin v. Applied Cellular Tech., Inc., 284 F.3d 1, 6 (1st Cir. 2002)*. "The issue is whether the complaint states a claim **[**3]** under the Sherman Act,

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* Of the Northern District of Illinois, sitting by designation.

assuming the factual allegations to be true and indulging to a reasonable degree a plaintiff who has not yet had an opportunity to conduct discovery." *DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999)*.

The facts as described in plaintiff's complaint are as follows. Morales-Villalobos is an anesthesiologist living in the town of Arecibo, approximately 56 miles west of San Juan. In July 1995 she became an employee of Arecibo Respiratory Care, Inc., ("ARC") one of the co-defendants. ARC provided anesthesiology services under an exclusive contract to the two hospitals in Arecibo performing surgeries: Hospital Dr. Susoni ("HDS") and Hospital Regional de Arecibo Cayetano Coll y Toste, which was managed by a subsidiary of HDS, Dr. Susoni Health Community Services. This subsidiary later purchased that hospital outright. The complaint provides no information on the length of the exclusive contract. The co-defendants -- Miguel Garcia-Llorens, Jose Arturo Garcia-Llorens, and Manuel Matos -- are the sole shareholders of ARC and members of the Board of Directors of HDS. ARC is, in turn, the majority shareholder of HDS. Jose **[**4]** Arturo Garcia-Llorens and Manuel Matos are themselves certified anesthesiologists.

Morales-Villalobos alleges that Jose Arturo Garcia-Llorens, Miguel Garcia-Llorens, and Manuel Matos were all involved -- as HDS directors -- in the decision to award an exclusive contract to ARC; indeed, no other HDS board members participated in the decision. The complaint alleges that the exclusive contract between ARC and HDS was motivated by corrupt self-dealing between the directors and stockholders of the two corporations, several of whom are themselves anesthesiologists and presumably benefitted from the exclusive agreement. The inference may be drawn that the reasons for the arrangement, accordingly, were not competitive. Morales-Villalobos received medical privileges as a physician at HDS in September 1995, which appear to have extended to the Hospital Regional de Arecibo as well. In September 1997, her privileges were renewed at HDS and the Hospital Regional de Arecibo for a further two years.

On December 1, 1998, Morales-Villalobos was fired from her position at ARC by Miguel Garcia-Llorens, the President of ARC, despite the absence of patient complaints (as alleged in the complaint, which **[**5]** we must take to be true). The following year, Morales-Villalobos was not recertified for privileges at HDS. Because of ARC's exclusive arrangement with HDS, once plaintiff was fired by ARC, she could not find work as an anesthesiologist at either hospital in Arecibo. HDS also rejected a request by Dr. Ramos Escoda, Morales-Villalobos's former husband and a surgeon who practices in Arecibo, to have her administer anesthesia to his private surgery patients at HDS. Other physicians in the area have also indicated their willingness to use Morales-Villalobos's services, but are prevented from doing so at these hospitals. Moreover, HDS prevented Morales-Villalobos from entering the medical facility by placing fliers on the walls and posting security guards at the hospital doors.

Morales-Villalobos alleges that HDS and the Hospital Regional de Arecibo have "complete market power" in the Arecibo region, because they are able to offer a **[*54]** complete line of medical services, and because they are the only hospitals approved as Medicare providers. They are the only hospitals within the Health Region of Arecibo, as defined by the Health Reform Program of the Government of Puerto Rico, which provides **[**6]** medical care for indigent patients. Patients covered under the Health Reform Program are not allowed to seek services in San Juan or other cities in Puerto Rico. Morales-Villalobos alleges she provides Medicare services to patients of Dr. Escoda. Half of the total revenue received by the Arecibo hospitals comes from Medicare, which provides health coverage for individuals 65 years old or older, *42 U.S.C. § 1395c (2002)*. An inference may be drawn that such patients are less likely to be able to make a 56-mile trip to hospitals in San Juan.

The other health region relatively near Arecibo is the Manati Health Region, which encompasses the city of Manati, in which there are three hospitals at which surgery is performed. Morales-Villalobos says it would be impossible for her to practice in Manati, because all of these hospitals have exclusive contracts with anesthesiology groups. Perhaps more importantly, her referring physicians in the Arecibo region do not have privileges in Manati.

Morales-Villalobos also alleges that the quality of patient care has worsened as a result of ARC's exclusive contract. She cites understaffing, with one anesthesiologist routinely **[**7]** expected to cover two geographically-separated hospitals, and nurses administering anesthesia without the supervision of an anesthesiologist. She also alleges an increase in cost relative to other sectors of the market.

Morales-Villalobos alleges that she has been blocked from practicing anesthesiology in Arecibo, her hometown, and that she has also suffered damages to her professional reputation as a result of her termination by ARC. She alleges there are doctors who wish to use her as an anesthesiologist but cannot because she has been denied privileges at the only hospitals in Arecibo. She characterizes herself as a competitor of ARC. She requests either renewal of her medical privileges at HDS facilities and an order requiring defendants to allow her to administer to elective private patients, or a declaration that the exclusive contract is illegal, economic damages, and an order to open HDS to Medicare providers.

II.

The district court dismissed Morales-Villalobos's complaint on two bases: first, that she failed to adequately define the geographic market; and second, that she lacked antitrust standing. Neither issue can be evaluated without reference to plaintiff's theories **[**8]** of recovery. At this most preliminary stage, the bare bones of two different theories are suggested by plaintiff's complaint. The first is that, as an anesthesiologist in Arecibo, she is a direct competitor of ARC and is precluded by the exclusive dealing arrangement from offering her services to the only two hospitals in Arecibo. The second is that the defendants have engaged in a group boycott, in a horizontal arrangement excluding her through expulsion, which precludes her from offering her services. Neither theory is actionable as a per se violation.

The district court dismissed the claim first for lack of a proper geographic market. Here, the plaintiff's claim is that, as a seller of services, she was foreclosed from the outlets reasonably available. For an anesthesiologist, the primary outlets for her services are ordinarily hospitals and clinics. Of course, ***HN2***[] even substantial foreclosure in a relevant market is not necessarily unlawful, *see* *Tampa Elec. Co. v. [*55] Nashville Coal Co., 365 U.S. 320, 328-29, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*, but whether the restraint is horizontal or vertical, substantial foreclosure is ordinarily a *requirement* for a seller **[**9]** arguing that she or he has been unreasonably excluded from opportunities to sell. *Id.*

In this instance, the *extent* of foreclosure depends greatly on whether the plaintiff's market is anesthesiology services within Arecibo, or whether the market encompasses the neighboring town of Manati, or whether it includes other parts or all of Puerto Rico, or whether it also includes part or all of the continental United States. Depending on the circumstances, foreclosure might range from nearly complete (in Arecibo) to a trivial percentage (if the market is the entire United States). There is no mechanical rule -- the issue depends on circumstances, *see* 2A P.E. Areeda & H. Hovenkamp, ***Antitrust Law*** P 570, at 342-44 (2d ed. 2002) -- and while there are arguments for a larger market, the matter cannot be resolved on the face of the complaint.

The district court also dismissed on grounds that the plaintiff lacked antitrust standing. ***HN3***[] The doctrine of antitrust standing is occasionally used to describe but-for causation, *see* *SAS of P.R., Inc. v. P.R. Tel. Co., 48 F.3d 39, 43 (1st Cir. 1995)*, and perhaps more often to exclude indirectly injured parties who have suffered **[**10]** actual injury but as a result of violations that directly injured intermediate entities, *e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)* (excluding indirect purchasers). Perhaps the most common use of the phrase is to describe cases where there is actual injury from an antitrust violation but the impact on the would-be plaintiff results from what closer analysis reveals to be a pro-competitive transaction. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

Here it is not apparent, on a motion to dismiss, why Morales-Villalobos lacks antitrust standing. She claims to be directly injured by exclusion from ARC and, in consequence of that exclusion and the exclusive dealing arrangement, by exclusion from the two Arecibo hospitals. There is thus alleged but-for causation, a direct injury to plaintiff as a supplier, and no obvious reason why -- if the exclusive dealing or group boycott charges amount to a violation -- the injury to her would not be of the kind that antitrust laws are intended to address. If some reason does **[**11]** exist, defendants can develop it on remand.

Of course, the defendants may be expected to argue that quality control and other legitimate concerns justify whatever exclusive dealing arrangements exist, as well as the exclusion of the plaintiff from ARC. [1] But these are matters that go to the question of whether the arrangements are violations of the antitrust laws and not whether the plaintiff is a proper party to vindicate those claims. As to whether the arrangements are anti-competitive, this is obviously a factual matter that -- given the allegations -- can hardly be resolved on the face of the complaint.

[12]** It is true that many of these antitrust cases brought by excluded medical care providers are ultimately decided against plaintiffs, usually after summary judgment or trial. *See, e.g.*, *Mathews v. Lancaster **[*56]** Gen. Hosp., 87 F.3d 624 (3d Cir. 1996)*; *Oksanen v. Page Mem'l Hosp., 945 F.2d 696 (4th Cir. 1991)*; *Benjamin v. Aroostook Med. Ctr., 937 F. Supp. 957 (D. Me. 1996)*; *Leak v. Grant Med. Ctr., 893 F. Supp. 757 (S.D. Ohio 1995)*. But that does not mean all such claims are hopeless and should be resolved by motion to dismiss the complaint.

Reversed. Costs are awarded to Morales-Villalobos.

End of Document

[1] Going beyond the allegations of the complaint, defendants' memorandum in support of their motion to dismiss states that plaintiff was fired because "in [ARC's] principals' considered view, she was not performing her duties adequately." Yet defendants chose to test the complaint by *Rule 12(b)(6)* motion, and the district court judge quite appropriately considered the motion under the *Rule 12(b)(6)* standards.

Big Island Candies, Inc. v. Cookie Corner

United States District Court for the District of Hawaii

January 15, 2003, Decided ; January 15, 2003, Date Opinion Filed

CIV. NO. 01-00449 SOM/LEK

Reporter
244 F. Supp. 2d 1086 *; 2003 U.S. Dist. LEXIS 1746 **

BIG ISLAND CANDIES, INC., a Hawaii Corporation, Plaintiff, vs. THE COOKIE CORNER, a Hawaii General Partnership, JAMES McARTHUR and ANGUS McKIBBIN, THE COOKIE MASTERS OF HAWAII aka HAWAII COOKIE MASTERS aka MASTER OF HAWAIIAN COOKIES, a Hawaii General Partnership, Defendants.

Subsequent History: Partial summary judgment granted by, Partial summary judgment denied by *Big Island Candies, Inc. v. Cookie Corner, 2003 U.S. Dist. LEXIS 11290 (D. Haw., May 30, 2003)*

Disposition: [1]** PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED IN PART AND DENIED IN PART AND DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED.

Core Terms

Corner, summary judgment, functionality, trade dress, dip, diagonally, interstate commerce, utilitarian, Cross-Mot, chocolate, defenses, aesthetic, Lanham Act, trademark, argues, partial summary judgment, manufacture, shortbread, asserts, parties, cases, hand-dipping, abandonment, rectangular, infringers, packaging, consumer, generic, offers, rights

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Supporting Materials, Discovery Materials**

Summary judgment shall be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Evidence > Burdens of Proof > Allocation

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Governments > Courts > Judges

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Summary Judgment, Evidentiary Considerations**

All evidence and inferences must be construed in the light most favorable to the nonmoving party. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN4[] **Motion Practice, Content & Form**

Under U.S. Dist. Ct., D. Haw., R. 7.9, a cross-motion must raise the same subject matter as the original motion.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN5[] **Federal Unfair Competition Law, Trade Dress Protection**

Trade dress protection extends only to design features that are nonfunctional. The party claiming protectable trade dress has the burden at trial of demonstrating that the design is nonfunctional.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN6[] **Federal Unfair Competition Law, Trade Dress Protection**

In evaluating the functionality of a design, the court focuses not on the individual elements, but rather on the overall visual impression that the combination and arrangement of those elements create. However, in a product configuration case in which each of the individual elements of the product configuration is functional, the "overall appearance" of the product cannot be the basis for a finding of nonfunctionality.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN7[] **Federal Unfair Competition Law, Trade Dress Protection**

Functionality denotes utility. The court considers multiple factors to determine whether the design is functional: (1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of the design, and (4) whether the particular design results from a comparatively simple or inexpensive method of manufacture. No single factor is dispositive; all should be weighed collectively.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > Conveyances > General Overview

HN8[] **Federal Unfair Competition Law, Trade Dress Protection**

A design feature is not functional by definition if it increases appeal and sales of the product.

Trademark Law > ... > Infringement Actions > Defenses > General Overview

HN9[] **Infringement Actions, Defenses**

Acquiescence, like laches, is a personal defense that relates to a plaintiff's conduct with respect to a particular defendant.

Business & Corporate Compliance > ... > Registration Procedures > Federal Registration > Principal Register

HN10[] **Federal Registration, Principal Register**

See 15 U.S.C.S. § 1052(e)(5).

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Registration Procedures > Federal Registration > Degree of Protection

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

Business & Corporate Compliance > ... > Registration Procedures > Federal Registration > Principal Register

HN11[] **Trade Dress Protection, Causes of Action**

The general principles qualifying a mark for registration under § 2 (15 U.S.C.S. § 1052) of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a) (15 U.S.C.S. § 1125(a)) of the Lanham Act.

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

HN12[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) permits dismissal for failure to state a claim upon which relief can be granted. On a motion to dismiss pursuant to Rule 12(b)(6), review is limited to the contents of the complaint, and all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.

Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Trademark Law > Trademark Cancellation & Establishment > Priority > General Overview

HN13[] **Subject Matter of Trademarks, Labels, Packaging & Trade Dress**

In trademark law, ownership rights in a trademark may be acquired through continuous prior use.

Business & Corporate Compliance > ... > Abandonment > Unintentional Abandonment > Loss of Significance

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Trademark Law > Abandonment > General Overview

HN14[] Unintentional Abandonment, Loss of Significance

Abandonment of a mark causes the mark to fall into the public domain. Under the Lanham Act, a mark may be deemed "abandoned" in one of two situations: (1) when its use has been discontinued with intent not to resume such use, and (2) when any course of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. *15 U.S.C.S. § 1127*.

Trademark Law > Abandonment > General Overview

HN15[] Trademark Law, Abandonment

In the Ninth Circuit, failure to sue other potential infringers does not constitute abandonment.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN16[] Trade Dress Protection, Causes of Action

To prevail on a defense of unclean hands in a Lanham Act suit, the defendant must demonstrate that the plaintiff's conduct is inequitable and that the conduct relates to the subject matter of its claims. Equity requires that those seeking its protection shall have acted fairly and without fraud or deceit as to the controversy in issue.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Transportation Law > ... > Federal Powers > Powers of Congress > Channels of Commerce

Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress

Transportation Law > Interstate Commerce > Definition of Commerce

Transportation Law > ... > Federal Powers > Powers of Congress > Instrumentalities of Commerce

Transportation Law > Intrastate Commerce

HN17[] Infringement Actions, Determinations

As defined in the Lanham Act, "commerce" refers to all commerce which may lawfully be regulated by Congress. *15 U.S.C.S. § 1127*. The definition of interstate commerce is fairly broad, encompassing (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threats may come only from intrastate activities; and (3) those activities that substantially affect interstate commerce. Under that definition, even a defendant who is engaged solely in intrastate commerce may be held liable under the Lanham Act if the plaintiff uses the asserted mark in interstate commerce, as even the "local use" of the challenged product design or packaging may substantially affect the strength of the plaintiff's mark.

Antitrust & Trade Law > Clayton Act > Defenses

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Remedies

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Trademark Law > ... > Remedies > Damages > General Overview

HN18[] **Clayton Act, Defenses**

Good faith is no defense to liability under § 43(a) (*15 U.S.C.S. § 1125(a)*) of the Lanham Act. However, the defendant's intent is relevant to the question of damages.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Remedies > Damages > General Overview

HN19[] **Trade Dress Protection, Causes of Action**

If willful intent is proven, additional remedies are available to the owner of a mark. *15 U.S.C.S. § 1125(c)(2)*.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > ... > Names > Generic Names > General Overview

Trademark Law > ... > Names > Generic Names > Tests for Genericness

HN20[] **Federal Unfair Competition Law, Trade Dress Protection**

Genericness is a bar to a finding that a particular alleged trade dress is protected.

Counsel: For Plaintiff: Richard J. Groos (argued), Fulbright & Jaworski LLP, Austin, TX.

For Plaintiff: Anna M. Elento-Sneed (argued), Carlsmith Ball LLP, Honolulu, HI.

For The Cookie Corner, James McArthur, Angus McKibbin, and The Cookie Masters of Hawaii, Defendants: William G. Meyer, III (argued), Paul A. Schraff (appeared, but did not argue), Dwyer Schraff Meyer Jossem & Bushnell, Honolulu, HI.

Judges: SUSAN OKI MOLLWAY, UNITED STATES DISTRICT JUDGE.

Opinion by: SUSAN OKI MOLLWAY

Opinion

[*1087] *ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT*

1. *INTRODUCTION.*

Plaintiff Big Island Candies, Inc. ("BIC"), has sued Defendants The Cookie Corner, James McArthur, Angus McKibbin, and Cookie Masters of Hawaii (collectively "Cookie Corner") for misappropriation of trade dress in connection with Cookie Corner's manufacture and sale of a shortbread cookie dipped diagonally in chocolate (a "diagonally dipped shortbread cookie"). BIC alleges **[**2]** that it has protectable unregistered trade dress rights in (1) the design of BIC's diagonally dipped **[*1088]** shortbread cookie ("the BIC Cookie") and (2) the packaging of the BIC Cookie.

On October 30, 2002, BIC moved for partial summary judgment on the issues of distinctiveness, functionality, and likelihood of confusion (Part I of BIC's motion), and on twenty-one of Cookie Corner's numbered defenses (Part II of BIC's motion) (the "Oct. 30 motion"). The parties stipulated to the bifurcation of that motion on December 5, 2002. Only (1) the functionality of the BIC Cookie design absent the packaging (Section I.B. of BIC's motion) and (2) certain defenses raised by Cookie Corner (Part II of BIC's motion) are presently before this court. While BIC seeks a judgment that the BIC Cookie design is nonfunctional, Cookie Corner has filed a cross-motion for partial summary judgment, arguing that the BIC Cookie design is functional.

Because there are genuine issues of fact as to whether BIC's product design is functional, the court DENIES summary judgment to both parties on the issue of functionality. For the reasons stated below, the court GRANTS in part and DENIES in part BIC's motion with respect **[**3]** to certain defenses raised by Cookie Corner.

2. *BACKGROUND FACTS.*

BIC began selling the BIC Cookie in 1985. The BIC Cookie is a rectangular shortbread cookie with "bull-nose" corners, [1] dipped diagonally in chocolate. The chocolate covers approximately one-half of the cookie. BIC has advertised and sold the BIC Cookie continuously since 1985.

[1] "Bull-nose" corners are rounded corners. There are at least two different methods that can be used to create rectangular shortbread cookies. One method is to bake a sheet of shortbread and then cut the shortbread into rectangles, which gives the resulting cookies squared-off, crumbly corners. The second method, used by both BIC and Cookie Corner, is to cut the dough into rectangles before baking the shortbread; the baked cookies have rounded, smooth corners.

Sometime in 2000 or 2001, Cookie Corner began selling its own rectangular shortbread cookie with "bull-nose" corners, dipped diagonally in chocolate (the "Cookie Corner Cookie"). Like the BIC Cookie, the **[**4]** Cookie Corner Cookie is also approximately half-covered in chocolate.

3. *STANDARD OF REVIEW.*

HN1[] Summary judgment shall be granted when:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *see also* *Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000)*. One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*.

HN2[] Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See* *id. at 323*. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000)*. **[**5]**

HN3[] All evidence and inferences must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Service, Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987)*. Inferences may **[*1089]** be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *Id.* When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id.*

4. *ANALYSIS.*

1. The Cross-Motion Is Disregarded to the Extent That Cookie Corner Seeks Summary Judgment on the Issue *of Whether the BIC Cookie Design Is Generic.*

Cookie Corner devotes a large portion of its "cross-motion" to arguing that the design of the BIC Cookie is generic. ***HN4***[] Under Local Rule 7.9, a cross-motion must raise the "same subject matter" as the "original motion." The "original motion" in this case is BIC's motion for partial summary judgment on the issue of functionality and with respect to certain numbered defenses.

The question of **[**6]** whether the BIC Cookie is generic relates to the issue of distinctiveness, not functionality. *See, e.g.,* *Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768, 120 L. Ed. 2d 615, 112 S. Ct. 2753 (1992)*. Distinctiveness is addressed in Section I.A. of the Oct. 30 motion. [2] Pursuant to the stipulated bifurcation of the Oct. 30 motion, Section I.A., i.e., the question of distinctiveness, is not presently before this court. Accordingly, the court disregards the portion of Cookie Corner's cross-motion that seeks summary judgment with respect to the question of whether the BIC Cookie design is distinctive or generic.

2. *Both the Motion* **[**7]** *and the Cross-Motion for Partial Summary Judgment on the Issue of Functionality Are Denied.*

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[2] BIC itself confuses the questions of functionality and distinctiveness in the Oct. 30 motion. In Section I.A. of the Oct. 30 motion, which argues that the BIC Cookie design and packaging are nonfunctional, BIC states: "[The BIC Cookie] trade dress does not serve any utilitarian function. The trade dress is distinctive and identifies BIC." Oct. 30 Mot. at 12.

Both BIC and Cookie Corner have moved for partial summary judgment on the issue of the functionality of the BIC Cookie design. Because there is a genuine issue of material fact as to whether the design of the BIC Cookie is functional, neither party is entitled to summary judgment with respect to the question of functionality.

HN5[] Trade dress protection extends "only to design features that are nonfunctional." *Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1258 (9th Cir. 2001)*. As the party claiming protectable trade dress, BIC has the burden at trial of demonstrating that the design of the BIC Cookie is nonfunctional. *TrafFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 32, 149 L. Ed. 2d 164, 121 S. Ct. 1255 (2001)*.

HN6[] In evaluating the functionality of the BIC Cookie design, the court focuses "not on the individual elements, but rather on the overall visual impression that the combination and arrangement of those elements create." *Clicks, 251 F.3d at 1259*. However, the Ninth Circuit has cautioned that, in a product configuration case in which each of the **[**8]** individual elements of the product configuration is functional, the "overall appearance" of the product cannot be the basis for a finding of nonfunctionality. *Tie Tech, Inc. v. Kinedyne Corp., 296 F.3d 778, 786 (9th Cir. 2002)* (citing *Leatherman Tool Group v. Cooper Indus., Inc, 199 F.3d 1009, 1013 (9th Cir. 1999)*, *vacated in part on other grounds, 532 U.S. 424, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001))*. **[*1090]**

The Ninth Circuit shares the common view that ***HN7***[] "functionality denotes utility." *Clicks, 251 F.3d at 1260*. The court considers multiple factors to determine whether the BIC Cookie design is functional: "(1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of the design, and (4) whether the particular design results from a comparatively simple or inexpensive method of manufacture." *Disc Golf Ass'n, Inc. v. Champion Discs, Inc., 158 F.3d 1002, 1006 (9th Cir. 1998)* (citations omitted). No single factor is dispositive; "all should be weighed collectively." *Id.*

On the present record, genuine issues of fact remain with respect to **[**9]** each factor of the test, precluding summary judgment as to the functionality of the design.

Before discussing the four factors of the *Disc Golf* test for functionality, however, the court addresses Cookie Corner's contention that, in the Ninth Circuit, "two standards of functionality" exist, a utilitarian standard and an "aesthetic functionality" standard. Defs.' Mem. in Supp. Of Defs.' Cross-Mot. for Partial Summ. J. & in Opp. to Pl.'s Mot. for Partial Summ. J. at 24 ("Defs.' Cross-Mot. & Opp."). Some circuits, relying on the Ninth Circuit's decision in *Pagliero v. Wallace China Co., 198 F.2d 339, 344 (9th Cir. 1952)* (holding that hotel china patterns were not protected in part because the patterns "satisfied [the purchaser's] demand for the aesthetic as well as for the utilitarian"), have adopted a theory termed "aesthetic functionality" under which purely aesthetic product features are deemed functional. *But see* 1 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:81 (4th ed. 2002) (arguing that "aesthetic functionality" is an oxymoron). The Ninth Circuit, however, "has consistently retreated from the position taken in [*Pagliero* **[**10]**]." *Id.* § 7:80. *Clicks* noted that the Ninth Circuit has not adopted the theory of "aesthetic functionality." *251 F.3d at 1260* ("Nor has this circuit adopted the 'aesthetic functionality' theory, that is, the notion that a purely aesthetic feature can be functional.").

Cookie Corner argues that, nonetheless, "'aesthetic functionality' is alive and well in the Ninth Circuit," Defs.' Reply at 15, because *Pagliero* has not been overruled and is still applicable to product features. *See Fabrica Inc. v. El Dorado Corp., 697 F.2d 890, 895 (9th Cir. 1983)* (noting that "this court has specifically limited application of the *Pagliero* functionality test to product features and has refused to apply the test to cases involving trade dress [3] and packaging").

While *Pagliero* has not been explicitly **[**11]** overruled, subsequent cases have narrowed Pagliero's effect. Those cases have noted that a literal reading of Pagliero's statement that a product feature that is "an important ingredient in the commercial success of the product" is not protectable would defeat the purpose of trademark law, as "a trademark is always functional in the sense that it helps sell goods by identifying their manufacturer." *Vuitton et Fils*

3 Fabrica's distinction between "trade dress" and "product features" is somewhat confusing given that "trade dress" includes product shape and configuration. *See* 1 McCarthy § 7:54.

S.A. v. J. Young Enterprises, Inc., 644 F.2d 769, 774 (9th Cir. 1981). Rather, "the policy expressed in *Pagliero* and the cases decided under it is aimed at avoiding the use of a trademark to monopolize a design feature which, in itself and apart from its identification of source, improves the usefulness or appeal of the object it adorns." *Id.* However, ***HN8***[] the Ninth Circuit "has specifically rejected the notion that a **[*1091]** design feature is functional by definition if it increases appeal and sales of the product." *Fabrica, 697 F.2d at 895-96*. The thrust of these cases, as Ninth Circuit law on the subject has developed, suggests that the aesthetic appeal of the BIC Cookie design should not be considered in the functionality analysis. [4]

[12]** Even if, under Ninth Circuit law, the aesthetic appeal of the BIC Cookie should be considered in the court's analysis of functionality, there is no evidence that customers demand the BIC Cookie because of the aesthetic features of its design, apart from the design's identification of source. *See Vuitton,* 644 F.2d at 774. Nor can the court conclude, given the present record, that BIC designed the BIC Cookie to satisfy consumers' "demand for the aesthetic."

Given the above, the court applies the four-factor "utilitarian functionality" test in *Disc Golf.*

1. *Utilitarian Advantage.*

Cookie Corner argues that the design of the BIC Cookie offers multiple utilitarian advantages. First, it argues that the rectangular BIC Cookie uses one of only three basic cookie shapes--round, square, and rectangular--that are less likely to break in transit and easier to manufacture than other shapes. It then argues that "it is a common practice" to coat one-half of the cookie in chocolate, and that there are three ways to half-dip a rectangular cookie: a "vertical" dip, a "horizontal" dip, and a "diagonal" dip. Cookie Corner contends that only the vertical dip and the diagonal **[**13]** dip offer the "functional feature" of giving the consumer "chocolate in every bite," and that the diagonal dip offers a larger undipped "handle" for the consumer to hold while eating the cookie.

Cookie Corner further argues that the larger handle also makes the dipping process more convenient for the cookie dippers during cookie production, and that the diagonal dip, in contrast to the vertical and horizontal dips, provides the dipper with two reference points (the corners) so that the cookies will be consistently covered one-half in chocolate.

BIC argues that the design of the BIC Cookie offers no utilitarian advantage to either BIC itself or customers. BIC argues that (1) at least eight shapes of shortbread cookies are commonly used; (2) consumers do not necessarily demand half-dipped cookies with "chocolate in every bite"; (3) even if some consumers do demand half-dipped cookies with "chocolate in every bite," a diagonally dipped cookie does not necessarily provide "chocolate in every bite," as a consumer could eat the end with little to no chocolate without biting into the dipped portion of the cookie; (4) the diagonal dip is not necessarily more efficient for dippers; and (5) **[**14]** consumers may not actually use the undipped portion as a handle, and, even if they do, an undipped handle can be achieved using other dip patterns.

There is a genuine issue of fact as to whether the BIC Cookie design offers any utilitarian advantage. BIC has not established that the BIC Cookie design is nonfunctional. Cookie Corner, for its part, has **[*1092]** not established that it is entitled to summary judgment.

The court notes that some of Cookie Corner's arguments relate to the manufacturing process, which should more appropriately be addressed in connection with the fourth factor of the functionality test. Therefore, the court leaves the question of whether the design is more efficient for dippers to its analysis of the fourth factor.

2. *Availability of Alternative Designs.*

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[4] Cookie Corner contends that *Clicks* and *Pagliero* can be reconciled by equating a "purely aesthetic feature" (which is nonfunctional according to *Clicks*) with a "mere arbitrary embellishment, a form of dress … primarily adopted for the purposes of identification and individuality" (which is nonfunctional under *Pagliero*). Presumably, Cookie Corner then intends to argue that the BIC Cookie design is neither "purely aesthetic" nor "mere arbitrary embellishment." It is not entirely clear to the court how, under these circumstances, reliance on *Pagliero* would help Cookie Corner establish that the BIC Cookie design was functional.

It is undisputed that alternative cookie designs are available. Both parties have presented evidence that shortbread cookies may be produced in a wide variety of shapes, including oval and pineapple shapes, and that multiple dipping patterns are available. The parties disagree, however, on the number of alternative designs that are relevant, with Cookie Corner arguing, for instance, that only there are only **[**15]** three common cookie shapes (round, square, and rectangular) that provide the same types of utilitarian advantages, and with BIC contending that there are at least eight.

3. *Advertising.*

BIC denies that it has ever advertised that the BIC Cookie offers any utilitarian advantage.

In support of its contention that BIC has "touted … the utilitarian advantages of the design," Defs.' Cross-Mot. & Opp. at 27, Cookie Corner offers a number of articles from the press, including articles from magazines *Candy Industry* and *Hawaii Business.*

Most of the articles offered by Cookie Corner do not tout any utilitarian advantage of the BIC Cookie design. For instance, a May 2002 *Candy Industry* article features statements attributed to BIC's founder and President, Allan Ikawa ("Ikawa"), explaining BIC's production process. [5] If anything is indeed "touted" in the *Candy Industry* articles, it is the complexity of BIC's production process.

[16]** Cookie Corner does offer one article, however, that suggests that BIC may have touted a utilitarian advantage of the BIC Cookie design, although not in advertising. An article in the August 2000 issue of *Hawaii Business* describes the process that led to the BIC Cookie's design. According to that article, Ikawa developed the BIC Cookie in response to Maui hoteliers' specifications for a cookie to include in their hotels' mini-bars. The article's author wrote: "The snack food had to fit nicely in a box. It had to be crumble-proof …. The Maui Marriott's food and beverage manager also had a suggestion: How about a diagonal dip of chocolate so that the cookie could be inserted into a scoop of ice cream?" [6]

Cookie Corner has not highlighted that particular paragraph **[**17]** of the *Hawaii Business* article as evidence that BIC has touted the utilitarian advantages of the BIC Cookie design. However, this court finds that the paragraph raises a genuine issue of fact as to the third factor of the test for functionality.

[*1093] 4. *Whether the BIC Cookie Design Results from a Comparatively Simple or Inexpensive Method of Manufacture.*

It is unclear whether the BIC Cookie design results from "a comparatively simple or inexpensive method of manufacture." The parties agree that the only way to achieve the precise diagonal dip pattern of the BIC Cookie, given a shape and size similar to that of the BIC Cookie, is by dipping the cookie by hand. Cookie Corner argues that it is easier to hand-dip diagonally than horizontally because of the natural endpoints created by the opposite corners and because of the larger undipped "handle" for the dippers to hold.

Neither party has offered evidence as to whether machine-dipping is simpler than hand-dipping, or vice versa. BIC asks this court to assume that hand-dipping is a more complex process, but it offers no evidence to that effect. Cookie Corner appears to be contending that hand-dipping is a "simple method of manufacture, **[**18]** " but Cookie Corner does not claim or offer evidence that hand-dipping is simpler than machine manufacturing. Defs.' Cross-Mot. & Opp. at 27. Instead, Cookie Corner argues that, *if* one wants to hand-dip a rectangular shortbread cookie so that half of the cookie is covered, a diagonal dip is the most efficient method. That argument is not

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[5] The statements highlighted by Cookie Corner include Ikawa's statements that BIC "couldn't find a machine that could provide the proper angle of chocolate," and that the dipping line is efficient because production switches between shortbreads and dipped products to chocolate batches. The article also explains how BIC Cookies are manufactured.

[6] The court considers the articles offered by Cookie Corner, because statements directly or indirectly attributed to BIC's President are not hearsay, and the articles themselves are offered as evidence of touting rather than as assertions of truth.

persuasive, even assuming that a rectangular cookie dipped half in chocolate is otherwise functional, as it is not clear that hand-dipping is simpler or less expensive than using a machine. Moreover, BIC disputes Cookie Corner's contention that it is easier for those doing the dipping to dip cookies diagonally, taking into account the four corners of the cookie, than to dip the cookies vertically.

3. *Defenses.*

1. Summary Judgment Is Granted With Respect to the Eighth Defense (Laches), Tenth Defense (Acquiescence), Eleventh Defense (Estoppel), Twenty-Ninth Defense (Section 2 of the Lanham Act), Thirty-Second Defense (Statute of Limitations), Thirty-Fourth Defense (*First Amendment*), Forty-Fourth Defense (Standing), and Forty-Ninth Defense (Copyright *Masquerading as Trademark*).

Cookie Corner does not oppose summary judgment on its Eighth **[**19]** Defense (laches), Eleventh Defense (estoppel), Thirty-Second Defense (statute of limitations), Thirty-Fourth Defense (*First Amendment*), Forty-Fourth Defense (standing), and Forty-Ninth Defense (copyright masquerading as trademark). Summary judgment is granted as to those six defenses asserted in Cookie Corner's Answer to Second Amended Complaint.

Summary judgment is granted as to the Tenth Defense. The Tenth Defense ***HN9***[] (acquiescence by BIC), like the Eighth Defense (laches), is a personal defense that relates to a plaintiff's conduct with respect to a particular defendant. [7] *See* 2 McCarthy § 17:17; 5 *id.* §§ 31:41-43. Cookie Corner concedes that BIC's suit against Cookie Corner is timely, as BIC filed suit shortly after Cookie Corner began selling its own diagonally dipped shortbread cookie ("Cookie Corner Cookie"). Cookie Corner has not alleged that BIC has ever engaged in any affirmative conduct that would convey its implied consent to Cookie Corner's use of the asserted trade dress.

[20]** Summary judgment is granted as to the Twenty-Ninth Defense, which states, "Defendants intend to rely upon all **[*1094]** § 2 bars." Section 2(e)(5) of the Lanham Act provides, ***HN10***[] "No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it … consists of a mark which … comprises any matter that, as a whole, is functional." *15 U.S.C. § 1052(e)(5)*. BIC seeks protection of its trade dress under section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*, not registration under section 2. It is true that ***HN11***[] "the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a)." *Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768, 120 L. Ed. 2d 615, 112 S. Ct. 2753 (1992)*. However, section 2 of the Lanham Act does not become applicable to the instant case and provide Cookie Corner with a defense just because functionality may, if Cookie Corner is correct, bar both registration and **[**21]** claims under section 43(a) of the Lanham Act.

2. *Summary Judgment Is Denied on the First Defense (Failure to State a Claim).*

Cookie Corner's First Defense asserts that BIC fails to state a claim upon which relief can be granted. ***HN12***[] *Rule 12(b)(6)* permits dismissal on that ground. On a motion to dismiss pursuant to *Rule 12(b)(6)*, review is limited to the contents of the complaint, and all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See* *Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996)* (citations omitted).

Cookie Corner contends that the three "design" elements of the BIC Cookie design are "generic and functional on their face." As this court has determined that genuine issues of material fact remain as to the question of functionality, and as the parties and the court have addressed neither the question of genericness nor the question of the packaging of the BIC Cookie, summary judgment is denied on the First Defense.

3. *Summary Judgment Is Granted on the Seventh Defense (Continuous Prior Use).*

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[7] McCarthy notes that there is a great deal of "semantic confusion" in the case law with respect to "acquiescence," "laches," and "estoppel by laches." 5 McCarthy § 31:41.

The Seventh Defense states, "Defendants intend to rely on **[**22]** the defense of continuous prior use." ***HN13***[] In trademark law, ownership rights in a trademark may be acquired through continuous prior use. Cookie Corner has not claimed that it is a prior user of the BIC Cookie design or packaging. Cookie Corner contends only that BIC is "neither the first nor the exclusive user of the alleged trade dress." Defs.' Cross-Mot. & Opp. at 28.

It is undisputed that, as between BIC and Cookie Corner, BIC is the prior user of the trade dress at issue. Cookie Corner has not alleged that any specific third party has priority over BIC based on that third party's continuous prior use. At the hearing on the present motions, Cookie Corner admitted that it had not identified any such party. Even if Cookie Corner were able to identify such a third party, that would not affect Cookie Corner's rights in relation to BIC. *See* *Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 820-21 (9th Cir. 1996)*.

4. *Summary Judgment Is Granted on the Ninth Defense (Abandonment/ Waiver).*

In its Ninth Defense, Cookie Corner states that it is relying on "the defense of abandonment and/ or waiver." ***HN14***[] Abandonment of a mark causes the mark to fall into the public **[**23]** domain. Under the Lanham Act, a mark may be deemed "abandoned" in one of two situations: (1) "when its use has been discontinued with intent not to resume such use," and (2) "when any course of the owner, including **[*1095]** acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark." *15 U.S.C. § 1127*.

Cookie Corner does not allege that BIC has ever discontinued its use of the trade dress in issue. Rather, Cookie Corner's assertion of the Ninth Defense is based on the allegation that "numerous other parties use Plaintiff's alleged trade dress and Plaintiff has failed to enforce its alleged rights against said parties." Defs.' Cross-Mot. & Opp. at 28. Cookie Corner says that, as a result, BIC has lost any rights to the claimed trade dress.

Some cases speak of the plaintiff's failure to sue other potential infringers in terms of "abandonment." 2 McCarthy § 17:17. ***HN15***[] In the Ninth Circuit, however, failure to sue other potential infringers does not constitute abandonment. *See* *Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1181 (9th Cir. 1988)* **[**24]** (stating that "discovery that revealed other potential infringers would be irrelevant under the law of this circuit"); *U.S. Jaycees v. San Francisco Junior Chamber of Commerce, 354 F. Supp. 61, 73-74 (N.D. Cal. 1972)*, *aff'd* 513 F.2d 1226 (9th Cir. 1975) (noting that "numerous cases" have held that "the existence of infringers other than the defendant was irrelevant to a determination of whether the defendant should be enjoined from continuing in its infringement of plaintiffs' trademarks and in its unfair competition").

Accordingly, BIC is granted summary judgment on Cookie Corner's Tenth Defense. The court notes, however, that the existence of other potential infringers may well be relevant to other issues in this case, including whether or not the alleged trade dress is generic or distinctive. *See* 2 McCarthy § 17:17 (noting that "failure to prosecute others" is relevant only to "the possible impact such failure may have on the strength of the plaintiff's mark").

5. *Summary Judgment Is Granted on the Twelfth Defense (Unclean Hands).*

The Twelfth Defense asserts that BIC has "unclean hands." ***HN16***[] To prevail on a defense of unclean hands in a **[**25]** Lanham Act suit, Cookie Corner must "demonstrate that [BIC's] conduct is inequitable and that the conduct relates to the subject matter of its claims." *Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 847 (9th Cir. 1987)*. "Equity requires that those seeking its protection shall have acted fairly and without fraud or deceit as to the controversy in issue." *Id.* (citation and emphasis omitted). Cookie Corner has not alleged any basis for the defense of "unclean hands" other than its claim that BIC failed to enforce its alleged rights in the disputed trade dress against persons other than Cookie Corner. Cookie Corner has not identified anything suggesting that BIC acted with fraud or deceit or unfairness. Without more, a reasonable factfinder could not find inequitable conduct by BIC that would serve as a defense for Cookie Corner. If future discovery yields a basis for this defense, Cookie Corner's remedy is to seek an extension of the deadline to amend pleadings, if the amendment deadline has passed by then. If an extension is granted, Cookie Corner may then seek leave to file an amended answer.

6. *Summary Judgment Is Granted on the Sixteenth Defense* **[**26]** *(Federal Preemption of State Law) and the Seventeenth Defense (Sears-Compco).*

The Sixteenth Defense asserts that "Plaintiff's state-based claims are preempted by federal law." The Seventeenth Defense asserts that "Plaintiff's asserted rights in the facts of this case undermine the objectives of U.S. patent and **[*1096]** U.S. copyright laws and are, therefore, preempted by said laws. (Sears-Compco)." Cookie Corner does not allege that any specific provision of Hawaii state law or any specific "asserted right" is preempted by federal law. Rather, Cookie Corner acknowledged at the hearing that the Sixteenth and Seventeenth Defenses were premised on what it speculates might be a ruling by this court that the alleged trade dress was functional, but nevertheless protected by Hawaii state law, allegedly in violation of the principles set forth in the *Sears-Compco* lines of cases. *See* 1 McCarthy §§ 7:55-58. *See* *Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 11 L. Ed. 2d 669, 84 S. Ct. 779, 1964 Dec. Comm'r Pat. 421, 1964 Dec. Comm'r Pat. 432 (1964)*; *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 11 L. Ed. 2d 661, 84 S. Ct. 784, 1964 Dec. Comm'r Pat. 425 (1964)*. *See also* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 103 L. Ed. 2d 118, 109 S. Ct. 971 (1989)*. **[**27]** Although Cookie Corner's arguments regarding federal preemption of state law could be raised in the appeal of a future ruling, speculation that this court may commit alleged errors of law does not provide a valid defense against BIC's claims. Accordingly, summary judgment is granted on the Sixteenth and Seventeenth Defenses.

7. *Summary Judgment Is Granted on the Twenty-First Defense (Interstate Commerce) and the Fifty-Fifth Defense (Rule 12).*

Cookie Corner asserts in its Twenty-First Defense that "Plaintiff's alleged mark and/ or Defendants' allegedly infringing mark are not used in, nor do they have a significant impact upon, interstate or international commerce." For purposes of this motion, the court construes the reference to a "mark" to be a reference to the trade dress of the BIC Cookie design. The Fifty-Fifth Defense is a vague assertion that "Plaintiff is barred from obtaining any of the relief it seeks herein by the defenses identified in *Rule 12 of the Federal Rules of Civil Procedure*." Cookie Corner has clarified this assertion by saying that the Fifty-Fifth Defense was intended to assert a lack of subject matter jurisdiction given the absence of interstate commerce.

[28]** Cookie Corner argues that this court lacks subject matter jurisdiction over BIC's claims because Cookie Corner has not used in interstate commerce the trade dress in issue. Cookie Corner does not dispute that BIC is engaged in interstate commerce and that BIC uses its asserted trade dress in interstate commerce.

Cookie Corner admits that it solicits and accepts telephone and facsimile orders, and that it has sent the Cookie Corner Cookie to customers in various states across the mainland. It does not allege or offer any evidence that these sales are isolated or that Cookie Corner does not intend to continue to ship these cookies to other states.

HN17[] As defined in the Lanham Act, "commerce" refers to "all commerce which may lawfully be regulated by Congress." *15 U.S.C. § 1127*. The definition of interstate commerce is fairly broad, encompassing (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, "even though the threats may come only from intrastate activities"; and (3) those activities that substantially affect interstate commerce. *United States v. Lopez, 514 U.S. 549, 558-59, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*. **[**29]** Under that definition, even a defendant who is engaged solely in intrastate commerce may be held liable under the Lanham Act if the plaintiff uses the asserted mark in interstate commerce, as even the "local use" of the challenged product design or packaging may substantially affect the strength of the plaintiff's mark. *See, e.g.,* *Thompson Tank & Mfg. Co. v. Thompson, 693 F.2d 991, 993 (9th Cir. 1982)*; *Maier Brewing* ***[*1097]*** *Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 119-20 (9th Cir. 1968)*. [8] As Cookie Corner concedes that it ships the Cookie Corner Cookie to other states, its activities clearly meet the "commerce" requirement of section 43(a). [9] Morever, even if Cookie Corner advertised and sold the Cookie Corner Cookie only

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[8] While some of these cases indicate that local use may "affect," rather than "substantially affect," interstate commerce, the common view is clearly that intrastate infringement of a mark substantially affects interstate commerce when the trademark owner's reputation and goodwill have been "built up by use in interstate commerce." *Franchised Stores of N.Y., Inc. v. Winter, 394 F.2d 664 (2d Cir. 1968)*; 4 McCarthy § 25:56. *See also* *Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 427 (9th Cir. 1977)* (citing *Franchised Stores* and stating that "purely intrastate infringing activities which [have] a substantial adverse impact on the reputation and good will of of a registrant whose products [are] sold in interstate commerce [are] actionable").

in Hawaii, its activities would have a substantial effect on interstate commerce through its effect on the strength of BIC's alleged trade dress, which BIC uses in interstate commerce. The Twenty-First Defense (interstate commerce) would therefore remain unavailable even in that event. Summary judgment is granted on the Twenty-First Defense. As the Fifty-Fifth Defense is premised on a lack of subject matter jurisdiction given **[**30]** Cookie Corner's claimed noninvolvement in interstate commerce, summary judgment is also granted as to the Fifty-Fifth Defense.

[31]** 8. *Summary Judgment Is Denied on the Thirtieth Defense (Good Faith) and the Fifty-Sixth Defense (Advice of Others).*

The Thirtieth Defense asserts that "Defendants have acted in good faith." The Fifty-Sixth Defense asserts a defense of "lack of requisite intent by virtue of the reasonable reliance of Defendants upon the advice and/ or expertise of others." On the present record, the court cannot conclude that there is an absence of disputes as to material facts relating to these two defenses. BIC states, correctly, that ***HN18***[] good faith is no defense to liability under section 43(a) of the Lanham Act. However, Cookie Corner's intent is relevant to the question of damages. For example, BIC has a dilution claim under *15 U.S.C. § 1125(c)*. While there may well be questions as to whether BIC can establish all the elements of a dilution claim, the claim, at this point, is pending, and dilution damages, should BIC establish dilution, are expressly affected by willfulness. *See* *§ 1125(c)(2)* (stating that, ***HN19***[] if willful intent is proven, additional remedies are available to the owner of a mark).

9. *Summary Judgment Is Granted on the Thirty-First Defense (Antitrust* **[**32]** *Violations) and the Thirty-Seventh Defense (Public Policy).*

There is no evidence that BIC has violated federal or state ***antitrust law***, as asserted in the Thirty-First Defense. Nor is there any evidence supporting the Thirty-Seventh Defense.

There is no evidence that BIC's claims are barred on public policy grounds beyond the policies underlying the statutes under which BIC seeks relief and the policies to which Cookie Corner's other defenses relate. In considering BIC's claims, the court will consider the public policy underlying the relevant statutes, but Cookie Corner has no independent "public policy" defense.

[*1098] Summary judgment is granted on both the Thirty-First and the Thirty-Seventh Defenses.

10. *Summary Judgment Is Denied on the Thirty-Ninth Defense.*

The Thirty-Ninth Defense states that "[BIC] is barred from obtaining any of the relief it seeks herein because [BIC] has failed to establish facts sufficient to subject Defendants to liability under applicable law." Although BIC states in its motion that it seeks summary judgment on this defense, BIC provided no argument as to the Thirty-Ninth Defense. Summary judgment on this defense is denied.

11. *Summary Judgment* **[**33]** *Is Denied on the Forty-Third Defense (Public Domain).*

The Forty-Third Defense asserts that "the allegedly protectable interests of Plaintiff are in the public domain and/ or are standard in the relevant industry." ***HN20***[] Genericness is a bar to a finding that a particular alleged trade dress is protected. The rationale underlying this rule is that a finding of genericness signifies that the generic "thing" is in the public domain and therefore may not be appropriated as a trademark. *See* 2 McCarthy § 12:2 (noting that "generic names are regarded by the law as free for all to use" and that "they are in the public domain"). This court has not yet addressed the question of genericness with respect to either the BIC Cookie design or the BIC Cookie packaging.

5. *CONCLUSION.*

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[9] *See also* 4 McCarthy § 25:57 (noting that "modern decisions interpreting the 'use in commerce' requirement for infringement of federally registered marks have virtually eliminated the 'local use' defense").

For the foregoing reasons, both the motion and the cross-motion for partial summary judgment are denied with respect to the issue of functionality. BIC's motion for partial summary judgment is granted in part and denied in part with respect to Cookie Corner's defenses. Summary judgment is granted to BIC as to Cookie Corner's Seventh Defense (continuous prior use), Eighth Defense (laches), Ninth Defense (abandonment/ **[**34]** waiver), Tenth Defense (acquiescence), Eleventh Defense (estoppel), Twelfth Defense (unclean hands), Sixteenth Defense (federal preemption of state law), Seventeenth Defense *(Sears-Compco),* Twenty-First Defense (interstate commerce), Twenty-Ninth Defense (section 2 of the Lanham Act), Thirty-First Defense (antitrust violations), Thirty-Second Defense (statute of limitations), Thirty-Fourth Defense (*First Amendment*), Thirty-Seventh Defense (public policy), Forty-Fourth Defense (standing), Forty-Ninth Defense (copyright masquerading as trademark), and Fifty-Fifth Defense (*Rule 12*). Summary judgment is denied as to the First Defense (failure to state a claim), Thirtieth Defense (good faith), Thirty-Ninth Defense (failure to establish facts sufficient to subject Cookie Corner to liability), Forty-Third Defense (public domain), and Fifty-Sixth Defense (advice of others).

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 15, 2003.

SUSAN OKI MOLLWAY

UNITED STATES DISTRICT JUDGE

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BAXTER INT'L, INC. v. ABBOTT LABS.

United States Court of Appeals for the Seventh Circuit

October 29, 2002, Argued ; January 16, 2003, Decided

No. 02-2039

Reporter

315 F.3d 829 *; 2003 U.S. App. LEXIS 590 **; 2003-1 Trade Cas. (CCH) P73,930

BAXTER INTERNATIONAL, INCORPORATED, Plaintiff-Appellant, v. ABBOTT LABORATORIES, Defendant-Appellee.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Baxter Int'l, Inc. v. Abbott Labs., 325 F.3d 954, 2003 U.S. App. LEXIS 6896 (7th Cir. Ill., Apr. 10, 2003)*

US Supreme Court certiorari denied by *Baxter Int'l, Inc. v. Abbott Labs., 540 U.S. 963, 124 S. Ct. 387, 157 L. Ed. 2d 305, 2003 U.S. LEXIS 7674 (Oct. 14, 2003)*

Related proceeding at *Abbott Labs. v. Baxter Healthcare Corp., 2004 U.S. Dist. LEXIS 16383 (N.D. Ill., Aug. 13, 2004)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 01 C 4809 & 01 C 4839. Ronald A. Guzman, Judge.

Abbott Labs. v. Baxter Int'l, Inc., 2002 U.S. Dist. LEXIS 5475 (N.D. Ill., Mar. 26, 2002)

Disposition: Affirmed

Core Terms

arbitration, sevoflurane, license, parties, antitrust, patents, one-step, Sherman Act, consumers, tribunal, courts, commanded, monopoly, arbitration award, antitrust claim, manufacturing, covenant, compete, generic, negotiations, anticipated, rights, anti trust law, anesthetic, sales

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

HN1[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

A mistake of law is not a ground on which to set aside an arbitration award.

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

HN2[] International Trade, International Commercial Arbitration

See *9 U.S.C.S. § 207*.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

International Law > Dispute Resolution > Arbitration & Mediation > Arbitration Awards

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > Judicial Review

International Trade Law > Dispute Resolution > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

HN3[] Arbitration, Foreign Arbitral Awards

Legal errors are not among the grounds that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, implemented by *9 U.S.C.S. §§ 201-08*, gives for refusing to enforce international arbitration awards. Under domestic law, as well as under the Convention, arbitrators have completely free rein to decide the law as well as the facts and are not subject to appellate review. Courts thus do not sit to hear claims of factual or legal error by an arbitrator.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

International Law > Dispute Resolution > General Overview

International Trade Law > Dispute Resolution > General Overview

HN4[] Alternative Dispute Resolution, Mandatory ADR

Arbitrators regularly handle claims under federal statutes. The United States Court of Appeals for the Seventh Circuit does not see any reason why things should be otherwise for antitrust issues--nor, more importantly, does the United States Supreme Court, which has held that international arbitration of antitrust disputes is appropriate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

HN5[] **Arbitration, Foreign Arbitral Awards**

Congress may specify categories of claims it wishes to reserve for decision by United States courts without contravening the Nation's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, implemented by *9 U.S.C.S. §§ 201-08*. But the United States Supreme Court declines to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN6[] **Alternative Dispute Resolution, Mandatory ADR**

Arbitrators are not allowed to command the parties to violate rules of positive law.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

HN7[] **Alternative Dispute Resolution, Judicial Review**

While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it does not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

Counsel: For BAXTER INTERNATIONAL, INCORPORATED, Plaintiff - Appellant: Constantine L. Trela, SIDLEY AUSTIN BROWN & WOOD, Chicago, IL USA.

For ABBOTT LABORATORIES, Defendant - Appellee: R. Mark McCareins, WINSTON & STRAWN, Chicago, IL USA.

Judges: Before CUDAHY, COFFEY, and EASTERBROOK, Circuit Judges. CUDAHY, Circuit Judge, dissenting.

Opinion by: EASTERBROOK

Opinion

[*830] EASTERBROOK, *Circuit Judge*. Baxter International invented sevoflurane in the 1960s. This substance, a gas at room temperature, has good anesthetic properties. But it was too difficult and costly to produce commercially until the early 1980s, when Baxter devised an efficient process for its manufacture. Baxter obtained two process patents, the latter of which expires in December 2005. But the anesthetic gas still could not be sold in the United States unless it first received the FDA's approval, and Baxter was not willing to bear the costs of the required medical testing. So in 1988 it granted to Maruishi Pharmaceutical Company, of Japan, an exclusive worldwide license to practice the sevoflurane process patents Baxter owned or was pursuing. Maruishi obtained approval to sell the anesthetic in Japan, where it was a great success, as it has become in other nations since. This suggested that it would be **[**2]** worth obtaining the FDA's approval to sell in the United States. Abbott Laboratories took a sublicense from Maruishi in 1992, obtained the FDA's approval after spending approximately $ 60 million on testing, and in 1995 began selling sevoflurane in the United States. Maruishi remains the sole manufacturer under the Baxter patents; Abbott resells sevoflurane that it purchases from Maruishi, which pays Baxter a royalty based on its total sales. Today sevoflurane is the best-selling gas used for anesthesia in the United States, with approximately 58% of sales. Desflurane holds 35% of this market, and isoflurane accounts for almost all of the remaining sales. Isoflurane is not protected by any patent and sells for less, but it is slower in both onset and recovery and has an irritating taste and smell. Desflurane likewise has an annoying smell and aftertaste, though its properties otherwise are comparable to sevoflurane--which therefore has become the anesthetic of choice and commands a premium price.

Sevoflurane's success gave rivals an incentive to invent around Baxter's process patents. Ohio Medical Associates (now known as Ohmeda) set out in 1997 to do just this. In 1999 Ohmeda obtained **[**3]** a patent for a new way of making sevoflurane, distinct from Baxter's process but equivalently cheap and effective. It planned to introduce a rival sevoflurane anesthetic, which it could do by filing a "me too" application with the FDA. Ohmeda could receive approval without costly tests just by showing that the finished product is identical to Abbott's.

Before Ohmeda could bring sevoflurane to market, it was acquired (in 1998) by Baxter--which decided to proceed with Ohmeda's plans and compete with the sevoflurane made by Maruishi and sold in the United States by Abbott. Baxter concluded that it would make more from selling Ohmeda-process sevoflurane than it would lose in reduced royalties from Maruishi for Baxter-process sevoflurane. **[*831]** Abbott, which contends that it has spent more than $ 1 billion to commercialize sevoflurane (including distribution of equipment for administering the drug and marketing to alert anesthesiologists to its benefits) did not welcome competition before the expiration of the Baxter patents. Abbott initiated arbitration under the Baxter-Maruishi agreement (to which it had become a party in 1992) and the Convention on the Recognition and Enforcement of Foreign **[**4]** Arbitral Awards, [1970] 21 U.S.T. 2517, , implemented by T.I.A.S. No. 69979 U.S.C. §§ 201-08. The agreement specifies a multi-national tribunal, which consisted of a U.S. attorney, a Spanish attorney, and a Japanese law professor.

Abbott contended that Baxter's sale of Ohmeda-process sevoflurane before the Baxter patents expired would violate the exclusivity term of the license; Baxter replied, first, that the license does not explicitly forbid Baxter itself from competing with Maruishi (in other words, that exclusivity means only that Baxter can not issue any other licenses), and, second, that if the license does forbid Baxter from competing, then it violates U.S. ***antitrust law***, particularly *§ 1* of the Sherman Act, *15 U.S.C. § 1*, and is unenforceable. The arbitrators ruled against Baxter on both issues. The tribunal held that the license is exclusive in the strong sense and that any reduction in competition is attributable to Baxter's decision to purchase the competing Ohmeda process while bound by this promise not to compete with its licensee. On cross suits filed by Abbott and Baxter, the district judge then directed Baxter **[**5]** to comply with the award, rejecting its contention that the license, as construed by the tribunal, violates the Sherman Act or the public policy of the United States. The judge observed that competition from desflurane, isoflurane, and sevoflurane made by any other process (for the sevoflurane molecule is unpatented)is unaffected. *2002 U.S. Dist. LEXIS 5475* (N.D. Ill. Mar. 26,2002).

Baxter argues at length in this court that the Baxter-Maruishi license, construed to keep Ohmeda-process sevoflurane off the U.S. market until 2006, is a territorial allocation unlawful *per se* under *§ 1* of the Sherman Act. But the initial question is whether Baxter is entitled to reargue an issue that was resolved by the arbitral tribunal. We think not; ***HN1***[] a mistake of law is not a ground on which to set aside an award. See *George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001)*. *Section 207* ***HN2***[] says that "the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." ***HN3***[] Legal errors are not among the grounds that the Convention gives for refusing to enforce **[**6]** international awards. Under domestic law, as well as under the Convention, arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149, 21 L. Ed. 2d 301, 89 S. Ct. 337 (1968)*. "Courts thus do not sit to hear claims of factual or legal error by an arbitrator". *Paperworkers v. Misco, Inc., 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987)*.

HN4[] Arbitrators regularly handle claims under federal statutes. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)* (claims under the Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)* (claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act); *Scherk v. Alberto-Culver Co., 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)* (international arbitration of claims under the Securities **[*832]** Exchange Act of 1934). We do not see any reason why things **[**7]** should be otherwise for antitrust issues--nor, more importantly, does the Supreme Court, which held in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)*, that international arbitration of antitrust disputes is appropriate.

Mitsubishi did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable. Yet this is Baxter's position. It wants us to disregard the panel's award and make our own decision. The Supreme Court's approach in *Mitsubishi* was different. It observed (*473 U.S. at 639 n.21*):

> The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, ***HN5***[] Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline to subvert the spirit of the United **[**8]** States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

Starting from scratch in court, as Baxter proposes, would subvert the promises the United States made by acceding to the Convention.

According to Baxter, there is a difference between arbitrating an antitrust issue (the subject of *Mitsubishi*) and *creating* one--which it accuses these arbitrators of doing. If the tribunal had construed the Baxter-Maruishi agreement differently, there would have been no antitrust problem. Baxter relies on the observation in *George Watts* that ***HN6***[] arbitrators are not allowed to command the parties to violate rules of positive law. That's true enough, but *whether* the tribunal's construction of the Baxter-Maruishi agreement has that effect was a question put to, and resolved by, the arbitrators. They answered no, and as between Baxter and Abbott their answer is conclusive. This is a point anticipated in *Mitsubishi*, which observed (*id. at 638*): ***HN7***[] "While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not **[**9]** require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." The arbitral tribunal in this case "took cognizance of the antitrust claims and actually decided them." Ensuring this is as far as our review legitimately goes.

Treating Baxter as bound (*vis-a-vis* Abbott) by the tribunal's conclusion that the license (as construed to provide strong exclusivity) is lawful does not condemn the public to tolerate a monopoly. If the three-corner arrangement among Baxter, Maruishi, and Abbott really does offend the Sherman Act, then the United States, the FTC, or any purchaser of sevoflurane is free to sue and obtain relief. None of them would be bound by the award. As far as we can see, however, only Baxter is distressed by the award--and Baxter, as a producer, is a poor champion of consumers. See *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*; *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. **[**10]**

What relief the Antitrust Division, the FTC, or a consumer would obtain, if there is an antitrust problem, is an interesting **[*833]** question. Baxter thinks that the solution should be an order allowing it to sell Ohmeda-process sevoflurane. It wants to take its acquisition of Ohmeda as given and ask what consequences it has for exclusivity under the Baxter-Maruishi agreement. Yet this is anachronistic. The Baxter-Maruishi agreement came first, and its exclusivity rule was a lawful ancillary agreement designed to induce Maruishi and its sublicensees to make the investments needed to bring the new drug to market. See generally *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985)*; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210 (D.C. Cir. 1986)* (Bork, J.). At the time Baxter acquired Ohmeda it was obliged by contract to refrain from producing sevoflurane until 2006. (This is how the tribunal understood the Baxter-Maruishi agreement, and a court must accept this interpretation.) So if there is an antitrust problem, it lies in the acquisition--and the remedy would be divestiture of the Ohmeda **[**11]** process patent. Baxter can achieve that outcome on its own. Baxter, which can solve unilaterally any antitrust problem, is in no position to insist that the burden of solution fall on Abbott by depriving it of the benefit of the exclusive Baxter-Maruishi license. Why should a decision Baxter made in 1998 reduce the rights Abbott enjoys under a promise Baxter made to Maruishi in 1988? But it is unnecessary to pursue this line of argument. All that matters today is that the arbitrators have concluded that the antitrust laws (and Baxter's related arguments, which we need not address) do not diminish Abbott's contractual rights--and that decision is conclusive between these parties.

AFFIRMED

Dissent by: CUDAHY

Dissent

CUDAHY, *Circuit Judge,* dissenting. To understand fully why the majority's enforcement of this dubious arbitration award is misguided, a brief synopsis of the background material not fully described by the majority is essential. In 1983 and in 1988 Baxter gave options to Maruishi to license patents covering the one-step process of manufacturing sevoflurane. By 1992, when negotiations with Abbott concerning the introduction of sevoflurane in the United States were undertaken, Baxter's **[**12]** product and method-of-use patents for sevoflurane had expired. Arbitration Transcript at 675-83 ("Arb. Tr."). Hence, the only patents that Baxter could license to Maruishi and that Maruishi could in turn sublicense to Abbott were those covering the one-step manufacturing *process*, which were still in effect. In its negotiations with Baxter, Maruishi considered attempting to obtain a covenant not to compete not only with respect to the one-step process but also as to sevoflurane itself, but instead turned its attention elsewhere. Maruishi concluded that the exclusive license for the one-step process and related intellectual property was "sufficient protection." *See* Arb. Tr. at 523-24. The 1992 negotiations with Abbott dealt only with the one-step process. Arb. Tr. at 386-91.

In 1992, when sublicensing to Abbott was negotiated, two distinct sets of agreements were involved in the negotiations. First, there were the Sevoflurane Agreements establishing the terms of the licenses, and granting exclusive rights to Maruishi and to Abbott to manufacture sevoflurane under the one-step patent, to all improvements on the one-step patents and to all technology and confidential proprietary **[**13]** information ("know-how") acquired during the development of the one-step process. Next, all the parties entered into a Dispute Resolution Agreement (DRA), first, to ensure that in the event of a dispute commercialization of sevoflurane would go forward and, second, to provide a mechanism (arbitration) for **[*834]** resolving disputes arising from the Sevoflurane Agreements that would arguably impair what the parties referred to as the "Original Commercial Relationship" (OCR). The arbitrators were instructed by the DRA to attempt to maintain this Original Commercial Relationship--an "unusual" concept. Appellant's Br. at 9.

By the late 1990s, Ohmeda had developed and patented a different, *three-step* process to make sevoflurane suitable to be marketed as a generic drug. Subsequently, Baxter acquired Ohmeda. Faced with the threat of generic competition--always anticipated, but now apparently to be undertaken by Baxter--Abbott sought arbitration. The arbitration panel conceded that the Baxter-Maruishi *licensing* agreement would not preclude Baxter's offering generic competition because this licensing agreement covered only the one-step manufacturing process, which bore no relation to the **[**14]** three-step process. But a two-member majority of the panel found that, under the Dispute Resolution Agreement invoking the Original Commercial Relationship, Baxter's proposed sales of generic sevoflurane could be enjoined because they would reduce Abbott's revenues below monopoly levels, even though the expectation of generic competition was nothing new. The third member of the arbitral panel (the only American) dissented since he concluded that the arbitrators were not authorized to act independent of the licensing agreement itself. The majority also found a breach of an Illinois state duty of good faith, which the dissenting arbitrator thought specious.

The majority upholds the arbitration award here by declaring that, once the arbitrators have spoken to the antitrust issues and in effect commanded the parties to violate the Sherman Act, the courts have no business intervening. Of course, the doctrine that requires extreme deference by the courts to arbitration awards is based on the theory that the parties to a contract may cede broad, almost unlimited, power to an arbitration panel to interpret their agreement. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995); **[**15]** *see also* IDS Life Ins. Co. v. Royal Alliance Assoc., Inc., 266 F.3d 645, 649 (7th Cir. 2001) ("Within exceedingly broad limits, the parties to an arbitration agreement choose their method of dispute resolution and are bound by it however bad their choice appears to be either ex ante or ex post."). In fact, the arbitrators function almost as agents of the parties to extend their deal to cover unforeseen circumstances. *See* E. Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462 (2000) (telling courts to "treat the arbitrator's award as if it represented an agreement between [the parties] as to the proper meaning of the contract's words."); EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 522 (7th Cir. 2001) ("The arbitrator acts on their (joint) behalf, with whatever authority the contract bestows. The resulting award is effectively the parties' joint decision."). All this rests on the proposition that the parties are free to adjust rights and liabilities *among themselves* as they see fit and through the instrumentality of arbitration to follow wherever the situation may demand. In this bilateral context a commitment **[**16]** to deference cannot be questioned.

But other considerations enter the mix when the issue becomes a matter of the arbitrators', in interpreting a statute, commanding the parties to break the law or to violate clearly established norms of public policy. [1] **[**17]** In the case before us, the arbitrators have instructed Abbott and Baxter (by imposing on Baxter a broad covenant not to compete with respect to sales of **[*835]** sevoflurane itself) to effect a horizontal allocation of markets, a clear violation of the Sherman Act. Under the arbitral decision, Abbott is granted a monopoly [2] in the sale of sevoflurane in the United States.

For some considerable time not long in the past, the law of the land was that antitrust disputes were not arbitrable. *See* Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); Applied Digital Tech., Inc. v. Continental Cas. Co., 576 F.2d 116 (7th Cir. 1978). Claims made under the Sherman Act were not merely private claims, but were quasi-public claims designed to protect the rights of consumers and the public at large. Applied Digital Tech., 576 F.2d at 117. Since more than merely the rights of the parties were at issue, the agreement of the parties to arbitrate could not supersede the public's presumed interest in a judicial resolution of antitrust claims.

The growing fondness for arbitration, however, eventually **[**18]** eliminated the prohibition on submitting antitrust matters to arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), did not purport to directly overturn the doctrine that domestic antitrust claims could not be arbitrated, but subsequently, the Supreme Court in dicta and most of the Courts of Appeal considering the issue have interpreted *Mitsubishi* as placing antitrust and other statutory claims within the ambit of arbitration. *See*, *e.g.*,

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[1] As the majority notes, the present case is governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6996, implemented by 9 U.S.C. §§ 201 et seq. ("Convention"). 9 U.S.C. § 207 commands a court to enforce an arbitration award under the Convention unless one of the grounds for refusal to enforce found in the Convention is present. Article V(2)(b) of the Convention allows a court to refuse to enforce an arbitration award when "recognition or enforcement of the award would be contrary to the public policy of that country."

[2] There is no dispute that Baxter's Ohmeda is the only generic competitor in the sevoflurane market for the foreseeable future, nor is there a dispute that the arbitral decision's prohibition on the sale of generic sevoflurane by Baxter preserves monopoly prices and levels of output of Abbott's sevoflurane product.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) ("The Sherman Act, the Securities Exchange Act of 1934, RICO, and the

Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration."); Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6 (1st Cir. 2001); Kotam Elecs., Inc. v. JBL Consumer Prods., Inc., 93 F.3d 724 (11th Cir. 1996); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247 (7th Cir. 1994); **[**19]** Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994); Swensen's Ice Cream Co. v. Corsair Corp., 942 F.2d 1307 (8th Cir. 1991).

The present case is a good example of the extent to which arbitration has come to pervade the legal culture. First, the parties here constructed an elaborate, pre-dispute arbitration agreement that not only served to regulate the licensing agreement itself, but also, in an extraordinary spasm of creativity during the arbitration, generated a new and seemingly boundless cause of action, entirely separate from the license itself, under which the parties could presumably proceed. Then, during the arbitral process, Baxter submitted to the arbitrators the supplemental argument [3] that, if the arbitrators pursued what eventually did become their **[*836]** line of decision, they would be commanding unlawful conduct under the Sherman Act. And finally, neither Baxter nor Abbott contend that arbitration was inappropriate for resolution of the antitrust claim.

[20]** Now, the majority has taken the process one giant step further and has found that *Mitsubishi* not only allows submission of statutory and antitrust claims to arbitration, but denies our prerogative to refuse to enforce awards that command unlawful conduct. [4] The deciding circumstance, according to the majority, is that the question was put to, and decided by, the arbitrators themselves. Maj. Op. at 5-6 ("That's true enough, [that arbitrators are not allowed to command unlawful conduct,] but *whether* the construction of the Baxter-Maruishi agreement has that effect was a question put to, and resolved by, the arbitrators. . . . As between Baxter and Abbott, their answer is conclusive."). Therefore, under the majority's analysis, the rule that unlawful conduct cannot be commanded by arbitrators is consumed by the exception that, if the arbitrators themselves say that what they have commanded is not unlawful, then "their answer is conclusive."

[21]** This cannot be correct. While *Mitsubishi* and its progeny make clear that the choice of the arbitral forum is to be respected, they do not confer on the arbitrators a prerogative to preemptively review their own decisions and receive deference on that review in subsequent judicial evaluations. [5] The majority is way off-base when it says that Baxter seeks merely to have us disregard the panel's decision and "throw the result in the waste basket." Maj. Op. at 5. Instead, we are performing exactly the traditional function of judicial review properly assigned only to us.

Therefore, I do not think we can simply note the arbitration panel's resolution of the **[**22]** antitrust issue and consider our work done. Instead, we must fulfill our judicial responsibilities and examine the effect of the outcome

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[3] It is an important distinction that this rather meta-juridical antitrust claim "decided" by the arbitrators was not a simple claim by Baxter against Abbott, but rather a request by Baxter that the arbitrators step back and consider the larger implications of their underlying decision. This distinction becomes clear when one recognizes that this issue could simply have been ignored by the arbitrators and considered for the first time in the district court--the arbitrators' interpretation of the license and the DRA did not involve antitrust issues. But, if Baxter had not raised the antitrust issue during arbitration, it would have risked being met with a defense of waiver to consideration of the issue here. Yet, on the other hand, Baxter's position here might well have been strengthened if it had chosen not to bring the question forward during arbitration and thereby armed Abbott with the (dispositive, as it turns out) argument for deference to the arbitration award.

[4] The Convention itself provides grounds for refusing to confirm an award under "public policy" principles. This circuit has recognized grounds (under the Federal Arbitration Act) for refusing to confirm if an arbitration panel acts in manifest disregard of the law, or, as otherwise viewed, if the arbitrators' decision commands a party to act unlawfully. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001). Rather than repeatedly referring to the applicable tests, I will simply refer to "unlawful conduct."

[5] It is clear that the arbitrators were doing exactly that-- reviewing their own decision--and not deciding issues of law necessary to interpret the various agreements. The panel's "decision" on the antitrust issues is that "it considers that no illegality results from the interpretation of the Sevoflurane Agreements in this Award." Supp. App. at 18-19.

commanded by the arbitral award. [6] This means that we have to determine **[*837]** whether, going forward, the horizontal restraint on Baxter's competing with Abbott in the sevoflurane market violates the Sherman Act.

Sometimes, of course, a horizontal restraint is a necessary part of an endeavor that, in the whole, benefits consumers. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 101, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*. **[**23]** That is the claim here--that Abbott would not have undertaken to launch sevoflurane commercially had it not been guaranteed against all competition by Baxter. Yet it is conceded that there was no express covenant not to compete. [7] Baxter gave an exclusive license to the one-step process but no guarantee against competition in sevoflurane produced by some other process. The absence of an express covenant not to compete strongly suggests that such a covenant could not have been the *sine qua non* of Abbott's launching sevoflurane in the United States market.

[24]** The majority unquestioningly accepts the contrary proposition of Abbott, that this broad implied noncompete covenant was "a lawful ancillary agreement designed to induce Maruishi and its sublicensees to make the investments needed to bring the new drug to market." Maj. Op. at 5. First, as I have already noted, Maruishi has never argued that it needed, or believed it had received, the broad noncompete found by the arbitrators. Second, this statement begs the question of what possible added incentive Abbott could have received from this additional guarantee of monopoly above and beyond the scope of the one-step patent. [8] **[**26]** By agreeing to completely exclude itself from any activity in the sevoflurane market that involved the one-step process, the know-how related to the one-step process or any "improvement" on the technology or know-how of the one-step process patents, Baxter relegated itself to a position identical to that of the other potential competitors that were **[*838]** anticipated by Abbott. Abbott had the incentive to commercialize sevoflurane in the United States with the knowledge that competitors like Ohmeda were lying in wait to "free-ride" on Abbot's regulatory approval and commercialization **[**25]** efforts. There is no reason why Abbott would lose any of its incentive if Baxter were added to the list of potential competitors (or would gain incentive if Baxter were excluded from the list), so long as Baxter remained excluded from one-step competition and was barred from using any of the knowhow and

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[6] My analysis takes place in the context that the meaning of the Sevoflurane Agreements, as interpreted by the arbitrators, is not contested by Baxter. Therefore, although the arbitrators' findings seem a bit far-fetched to me, I take as a given that the DRA contains a broad, if implied, covenant not to compete that prohibits Baxter from competing with Abbott in any way in the sevoflurane market. This, of course, does not respond to the issue of lawfulness, which is the subject of my substantive analysis.

[7] The majority bolsters its deference argument by glossing over some significant nuances in the various Baxter-Maruishi-Abbott agreements and the arbitral decision. The arbitrators did not hold "that the license is exclusive in the strong sense. "Maj. Op. at 3. In fact, the arbitrators found that the license, which is limited solely to the one-step process and all associated know-how and technology, was not violated in any way by Baxter's actions regarding the three-step process. Supp. App. at 13-14. The "strong" noncompete was *implied from the DRA*, which the arbitration panel found contained its own independent cause of action and provided relief to Abbott for *any* conduct by Baxter that reduced the monopoly revenue Abbott would otherwise receive under the one-step licenses. In theory, under the broad language of the arbitral award, even if Baxter invented and brought to market (before 2005) a completely new and different inhalable anesthetic that competed with sevoflurane and reduced Abbott's revenues from it, Baxter would be in violation of the DRA and enjoined from any manufacture and sale. See Supp. App. at 15, PP 25, 26.

[8] I note briefly the questions raised by the Fourth Circuit's decision in *Compton v. Metal Products, Inc., 453 F.2d 38 (4th Cir. 1971)*. In that case, a patentee licensed its patented technology together with a broad (express) noncompete that went far beyond the scope of the patented technology. The court found this agreement not to compete an unlawful restraint of trade. I am unconvinced by the district court's efforts to distinguish *Compton* from the present case on the basis of the degree to which Baxter was restricted. *Abbott Labs. v. Baxter Intern., Inc., 2002 U.S. Dist. LEXIS 5475, 2002 WL 467147*, *9 (N.D. Ill March 27, 2002). The point of *Compton* is that restraints on competition beyond the scope of the licensed patented technology are unlawful. *453 F.2d at 45* ("We think that by agreeing to restrictions on his own competition which he could not compel of others, the patentee has extended the monopoly granted by the patent laws beyond its legal bounds."). This agreement to restrictions that extend and enhance the scope of the patent monopoly is also what is objectionable here.

technology associated with its development of the one-step process. [9] I do not think that there could rationally have been any pro-competitive effect from the enhanced noncompete implied by the arbitrators.

Arbitration proceedings aside, and given that a covenant not to compete was not essential to Abbott's market development, Abbott and Baxter could not lawfully agree to this arrangement without violating the Sherman Act, and I fail to see why a panel of arbitrators, on behalf of the parties, can interpret a prior agreement of these parties to reach the same unlawful result.

It is, of course, not the interests of the parties themselves that are primarily at stake in the outcome of this arbitration. Instead the interest of the consuming public is at stake. That public faces higher prices and a constrained supply of sevoflurane as a result of Abbott's monopoly, conferred by the arbitrators. **[**27]** When public rights are at stake, there is good reason to be more reluctant to defer totally to the arbitrators, since they are acting as delegates of the private parties, not of the consuming public. Too deferential an attitude by the courts when the rights of the consuming public are at stake can severely undermine the foundations of our economy. For there can be little doubt that granting Abbott a monopoly to produce sevoflurane in the United States will raise prices and restrict supply. And applying the analysis of the majority to arbitration awards yet to come will open a royal detour around the antitrust laws.

Nor would a denial of the remedy imposed by the arbitrators result in a real loss to Abbott, since Abbott admitted at the arbitration hearing that it had anticipated and planned for generic competition and had specifically anticipated competition from Ohmeda. Arb. Tr. at 323-25; Supp. App. at 19. In fact, Abbott negotiated with Maruishi provisions that would "account[] for the downsides of generic competition." Arb. Tr. at 323. The purchase of Ohmeda by Baxter produced a windfall for Abbott whereby Abbott was able to manipulate the arbitration to its advantage and escape **[**28]** the competition it had earlier anticipated.

It is not my role to critique the arbitration decision--however flawed--except in this case to object to its anticompetitive outcome, which orders the parties to violate the antitrust laws. The interest of consumers was not represented on the arbitration panel and the panel's decision ignored consumer interests. Defense of public interests is sometimes better fulfilled by courts than by arbitration panels.

Nor am I much reassured by the substitute antitrust enforcement possibilities mentioned by the majority. It is conceivable that the Federal Trade Commission **[*839]** or the Justice Department might attack Abbott's monopoly conferred by the arbitrators or that another competitor might surface to provide competition from a generic sevoflurane manufactured by some process yet to be invented, but these possible sources of law enforcement or of competition are all hypothetical. I know of no authority for the theory that the existence of hypothetical sources of antitrust enforcement or of competition can be a defense to an agreement violative of the antitrust laws or to an arbitration award imposing such an agreement.

So while I agree with the majority **[**29]** that antitrust claims are arbitrable, and I also agree that the grounds for refusing to enforce an arbitration award are limited, I do not agree that there is support in the law for the majority's excision of antitrust arbitration from the general framework of judicial review that prohibits an arbitration panel's award from commanding illegal conduct. And in the case before us, the arbitration panel's ruling granting Abbott a monopoly in the United States sevoflurane market commands illegal conduct on the part both of Baxter and Abbott and is unenforceable.

I would remand with instructions not to enforce the arbitral award, and I therefore respectfully DISSENT.

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[9] In fact, an argument can be made that Baxter was disadvantaged compared to other competitors by virtue of its agreement with Abbott and association with the one-step process. Baxter would face, as it did in the arbitration in the present case, the hurdle of showing that it did not succumb to the temptation to use any of its existing knowledge and technology base, a hurdle not faced by an outside competitor.

Bronx Legal Servs. v. Legal Servs.

United States District Court for the Southern District of New York

January 17, 2003, Decided ; January 17, 2003, Filed

02 Civ. 6199 (GBD)

Reporter

2003 U.S. Dist. LEXIS 695 *; 2003-1 Trade Cas. (CCH) P73,954

BRONX LEGAL SERVICES, Plaintiff, -against- LEGAL SERVICES FOR NEW YORK CITY and LEGAL SERVICES CORPORATION, Defendants.

Subsequent History: *Affirmed by Bronx Legal Servs. v. Legal Servs., 2003 U.S. App. LEXIS 22280 (2d Cir. N.Y., Oct. 29, 2003)*

Disposition: [*1] Defendants' motions to dismiss complaint and for judgment on pleadings granted in their entirety.

Core Terms

legal services, organizations, lawsuit, funds, defendants', reorganization plan, motion to dismiss, Sherman Act, consolidation, argues, retaliation, contracts, fiduciary, exemption, commerce, allegations, regulations, city-wide, indigent, violates, business relationship, tortious interference, anti-trust, grantee, legal assistance, set of facts, LSC Act, reorganize, contends, bidding

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) allows a party to move to dismiss a complaint where the complaint fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss, a district court accepts the allegations in the complaint as true and draws all reasonable inferences in favor of a non-moving party. A motion to dismiss will only be granted if a plaintiff can prove no set of facts in support of its claim that will entitle it to relief. A court may look at the complaint and any documents attached to, or incorporated by reference in, the complaint.

Legal Ethics > Public Service

Public Contracts Law > Bids & Formation > Competitive Proposals

Public Health & Welfare Law > Social Services > Legal Aid

HN2[] Legal Ethics, Public Service

In the context of a lack of competitive bidding process claim, *45 C.F.R. § 1634.1* only indicates that a competitive system will be used to award grants and contracts to applicants.

Public Contracts Law > Bids & Formation > Authority of Government Officers > General Overview

Public Health & Welfare Law > Social Services > Legal Aid

HN3[] Bids & Formation, Authority of Government Officers

The powers, duties, and limitations section of the Legal Services Corporation Act authorizes a legal services corporation to provide financial assistance to qualified programs furnishing legal assistance to eligible clients, and to make grants to and contracts with a variety of legal service providers. *42 U.S.C.S. § 2996e(1)(A)*. Pursuant to the grants and contracts section, the legal services corporation is required to insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas. *42 U.S.C.S. § 2996f(a)(3)*.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Antitrust & Trade Law, Sherman Act

Under *15 U.S.C.S. § 1* of the Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is unlawful. Under *15 U.S.C.S. § 2* of the Sherman Act, any person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a felony. In both sections of the statute, therefore, the unlawful activity must affect trade or commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Although the Sherman Act does not define what activity constitutes "trade or commerce," Congress identified restraints and barriers in business competition as the problem the statute was intended to address. The Sherman Act was intended to prevent restraints to free competition in business and commercial transactions because those restraints tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. "Trade or commerce," as used in the Sherman Act, therefore, necessarily relates to the business of the exchange of goods in the marketplace. Consequently, the "trade or commerce" element of the Sherman Act does not apply to all transactions, but rather to those transactions that can be characterized as business or commercial.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN6[] Higher Education & Professional Associations, Colleges & Universities

Non-profit organizations are not per se entitled to exemption from the Sherman Act. However, when these organizations perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation. The legislative history of the Sherman Act reveals that it was not intended to reach noncommercial activities that are intended to promote social causes. A district court will examine the nature of the conduct of the non-profit organization and the totality of the circumstances in determining if a transaction is business or commercial, and thus subject to Sherman Act liability. The exchange of money for services is the hallmark of a commercial transaction.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

HN7[] Fundamental Freedoms, Freedom of Speech

A plaintiff asserting a *First Amendment* retaliation claim must put forth non-conclusory allegations: (1) that the speech or conduct at issue was protected, (2) that a defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.

Legal Ethics > Professional Conduct > Nonlawyers

Legal Ethics > Public Service

Legal Ethics > Unauthorized Practice of Law

HN8[] Professional Conduct, Nonlawyers

The New York Judiciary Act prohibits any corporation from practicing or appearing as an attorney-at-law for any person in any court in the state or before any judicial body. N.Y. Jud. Cts. Acts Law § 495(1) (2002). However, N.Y. Jud. Cts. Acts Law § 495(7) provides an exemption for organizations which have as their primary purpose the furnishing of legal services to indigent persons.

Legal Ethics > Unauthorized Practice of Law

HN9[] Legal Ethics, Unauthorized Practice of Law

N.Y. Jud. Cts. Acts Law § 476-a states that only the Attorney General or a bar association formed in accordance with state law are authorized to bring a civil action for unlawful practice of law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Governments > Fiduciaries

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Estate, Gift & Trust Law > Trusts > General Overview

HN10[] Types of Contracts, Joint Contracts

Parties to a joint venture owe one another a fiduciary duty. In determining if a joint venture exists, a court will consider the intent of the parties (express or implied), whether there is joint control and management of the company, whether there is a sharing of the profits as well as a sharing of the losses and whether there is a combination of property, skill or knowledge. If the contract does not expressly impose fiduciary duties, a plaintiff bears the burden of alleging extraordinary circumstances that create a fiduciary relationship.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN11[] Intentional Interference, Elements

To prove tortious interference with business relations, a plaintiff must show, inter alia, the existence of a business relationship between the plaintiff and a third party. The plaintiff must allege that a defendant interfered with a specific contract, rather than generally with the plaintiff's business opportunities.

Counsel: For Bronx Legal Services, PLAINTIFF: Robert M Kelly, White & Case, LLP, New York, NY USA.

For Legal Services for New York City, DEFENDANT: Richard C Pepperman, II, Sullivan & Cromwell, LLP, New York, NY USA.

Judges: GEORGE B. DANIELS, United States District Judge.

Opinion by: GEORGE B. DANIELS

Opinion

MEMORANDUM OPINION AND ORDER

GEORGE B. DANIELS, DISTRICT JUDGE:

Plaintiff Bronx Legal Services ("BLS") brought suit against defendants alleging violations of the Legal Services Corporation Act, federal and state anti-trust violations, retaliation in violation of the *First Amendment*, violations of the New York Judiciary Law, and state tort claims. Defendant Legal Services Corporation ("LSC") filed a motion to dismiss and defendant Legal Services for New York City ("LSNY") filed a motion for judgment on the pleadings. For the reasons stated below, defendants' motions are granted. [1]

[*2] ***HN1***[] *Federal Rule of Civil Procedure 12(b)(6)* allows a party to move to dismiss a Complaint where the Complaint "fails … to state a claim upon which relief can be granted[.]" *FED. R. CIV. P. 12(b)(6)*. In reviewing a motion to dismiss, this Court accepts the allegations in the Complaint as true and draws all reasonable inferences in favor of the non-moving party. See *Patel v. Searles, 305 F.3d 130, 134-35 (2d Cir. 2002)*. Here, a motion to dismiss will only be granted if the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. See *Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1494 (2d Cir. 1992)*. A court may look at the Complaint and any documents attached to, or incorporated by reference in, the Complaint. See Dangler v. New York City off *Track Betting Corp., 193 F.3d 130, 138 (2d Cir. 1999)*.

The Legal Services Act Claim

Plaintiff argues that the concerted actions of LSC and LSNY to "force" BLS to reorganize itself as a wholly-owned subsidiary of LSNY or else lose federal LSC funding violates the Legal Services Corporation Act ("LSC Act"). Plaintiff argues that the statute and regulations **[*3]** require that LSC award funds based on competitive bidding among legal service providers, and that the reorganization plan violates that mandate.

LSC is a non-profit corporation established in 1974 by the LSC Act for the purpose of "providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *42 U.S.C. § 2996b(a)*. LSC itself does not directly provide any legal services to clients. It provides grant money and contracts with various other legal services organizations. Those organizations either provide legal services, or in turn sub-contract out to another organization. LSNY currently is the only legal services organization in New York City that receives grant money directly from LSC. LSNY, in turn, sub-contracts out to seven county-wide legal services organizations to provide legal services to indigent clients. Plaintiff is one of LSNY's sub-grantee organizations that directly service clients. [2] The regulations adopted by LSC require that legal services

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[1] This Court will treat LSNY's motion for judgment on the pleadings as a motion to dismiss as the same standard applies to both motions. See *Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999)*.

organizations seeking to obtain LSC funds go through a competitive bidding process, whereby qualified applicants submit applications **[*4]** to LSC for grants and contracts. See *45 C.F.R. § 1634.1*.

In support of its argument that the reorganization plan violates the competitive bidding mandate, plaintiff argues that since 1998 the number of LSC-funded legal services organizations has decreased nationwide from 262 to 207. Plaintiff contends that that decrease is a direct result of LSC's nationwide initiative to reorganize and consolidate legal services organizations.

However, even if this is true, this does not lead to the conclusion that the competitive bidding mandate has been violated. ***HN2***[] The regulations only indicate that a "competitive system" will be used to award grants and contracts to applicants. **[*5]** See *45 C.F.R. § 1634.1*. Neither the LSC Act nor the regulations mandate a specific number of grants that must be awarded each year, and plaintiff does not contend that they do. Nor does plaintiff allege that LSC has refused to take applications, or is utilizing some other means to prevent county-wide legal services organizations, like BLS, from independently applying directly and competing for LSC funds. In fact, if plaintiff chooses to reject LSNY's reorganization plan, and LSNY does not renew its funding contract with BLS, plaintiff has alleged nothing in its Complaint that would lead to the conclusion that it could not apply directly on its own for LSC funding. Plaintiff simply has not alleged any facts sufficient to state a claim that defendants' actions have violated the competitive bidding requirement.

Plaintiff further argues that LSC's actions are arbitrary and capricious, and not authorized by the "Powers, duties, and limitations" section or by the "Grants and contracts" section of the Act. [3] ***HN3***[] The "Powers, duties, and limitations" section authorizes LSC to "provide financial assistance to qualified programs furnishing legal assistance to eligible **[*6]** clients, and to make grants to and contracts with" a variety of legal service providers. *42 U.S.C. § 2996e(a)(1)(A)*. Pursuant to the "Grants and contracts" section, LSC is required to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas[.]" *42 U.S.C. § 2996f(a)(3)*.

By the plain language of the "Powers, duties, and limitations" section, LSC is not required to give out money to every applicant, rather only those that are "qualified." Further, the "Grants and contracts" section mandates that LSC only give out money in a manner that is economical and that effectively delivers legal assistance. Therefore, the Act necessarily empowers LSC to make a determination, in light of the goals and mandates of the Act, as to what criteria constitutes a successful **[*7]** application, and turn down those applicants that do not meet that criteria. LSC has determined that if LSNY, a grantee legal services organization, wants to continue to receive LSC funds, it must better structure itself so as to more efficiently and effectively meet the needs of the indigent in New York City. In response, LSNY made the determination that city-wide consolidation of sub-grantee legal services organizations, like plaintiff, was the best method of achieving this goal. Although plaintiff may not agree with defendants' determination, it is not arbitrary or capricious. Plaintiff simply has not alleged any facts that, even if taken as true, would lead to the conclusion that defendants' actions violated the LSC Act. Therefore, defendants' motions to dismiss the LSC Act claim are granted.

The Anti-Trust Claims

Plaintiff argues that defendants' actions violate three anti-trust provisions. First, plaintiff argues that defendants actions constitute an unlawful conspiracy in restraint of trade, in violation of *§ 1* of the Sherman Act. Second,

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[2] The six other sub-grantee organizations are: Brooklyn Legal Services Corporation A, Brooklyn Legal Services Corporation B, Bedford-Stuyvesant Legal Services, Harlem Legal Services, MFY Legal Services, and Queens Legal Services. LSNY seeks to reorganize all seven of its sub-grantee organizations into wholly-owned subsidiaries.

[3] Plaintiff made this argument for the first time at oral argument. Nonetheless, this Court will address it.

plaintiff argues that defendants violated *§ 2* of the Sherman Act by conspiring to monopolize the relevant market. Lastly, plaintiff **[*8]** argues that defendants conduct violates the Donnelly Act, New York's ***antitrust law***. [4]

HN4[] *Section 1* of the Sherman Act makes unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of *trade or commerce* among the several States[.]" *15 U.S.C. § 1 (2002)* (emphasis added). *Section 2* of the Sherman Act provides that "any person who shall monopolize, or attempt to monopolize, or combine or conspire … to monopolize any part of the *trade or commerce* among the several States … shall be deemed guilty of a felony[.]" *15 U.S.C. § 2(2002)* **[*9]** (emphasis added). In both sections of the statute, therefore, the unlawful activity must affect "trade or commerce."

HN5[] Although the Sherman Act does not define what activity constitutes "trade or commerce," the Supreme Court has noted that the legislative history of the Act reveals that Congress identified restraints and barriers in *business competition* as the problem the statute was intended to address. See *Apex Hoisery Co. v. Leader, 310 U.S. 469, 493 n.15, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)* ("'Business competition' was the problem considered and … the act was designed to prevent restraints of trade which had a significant effect on such competition.") The Act was intended to prevent "restraints to free competition in business and commercial transactions" because those restraints tend "to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." *Hamilton Chapter of Alpha Delta Phi v. Hamilton College, 128 F.3d 59, 63 (2d Cir. 1997)*, quoting *Apex Hosiery, 310 U.S. at 493*. "Trade or commerce," as used in the Act, therefore, necessarily relates **[*10]** to the business of the exchange of goods in the marketplace. See e.g., *Dedication and Everlasting Love to Animals v. Humane Soc'y of the United States, Inc., 50 F.3d 710, 712 (9th Cir. 1995)* (hereinafter "D.E.L.T.A.") (noting that the Supreme Court has spoken of the term "commerce" in the Act as relating to the purchase, sale, or exchange of commodities.) Consequently, the "trade or commerce" element of the Act does not apply to all transactions, but rather to those transactions that can be characterized as "business" or "commercial." See e.g., *United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993)* (analyzing a *§ 1* claim and finding that "it is axiomatic that section one of the Sherman Act regulates only transactions that are commercial in nature.")

HN6[] Non-profit organizations are not per se entitled to exemption from the Sherman Act. However, when these organizations "perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation." Id. "The legislative history of the Sherman Act reveals that it was not intended to reach noncommercial activities that are intended to promote social causes." *Hamilton College, 128 F.3d at 63*; **[*11]** see also D.E.L.T.A., 50 F.3d at 713.

A court will examine the nature of the conduct of the non-profit organization and the totality of the circumstances in determining if a transaction is business or commercial, and thus subject to Sherman Act liability. See *Brown Univ., 5 F.3d at 666*. The exchange of money for services is the hallmark of a commercial transaction. See id. Consequently, in Brown Univ., the Third Circuit found that when a non-profit university offers a student financial aid, the university has engaged in commercial activity, as the student by accepting the financial aid package, must make a complementary payment to the university of the remaining balance of the tuition not covered by financial aid. See id.

In this case, even taking plaintiff's allegations as true, which this Court must on a motion to dismiss, plaintiff still does not allege any facts that could support its anti-trust claims. Defendants' actions, as alleged, are purely non-commercial. There is no exchange of money for services here, or anything else akin to a business or commercial transaction. Although LSC provides federal funds to LSNY, LSC does not receive **[*12]** anything in return from LSNY. Likewise, when LSNY passes those funds down to BLS, LSNY does not receive anything in return from plaintiff for this money. Rather, BLS uses the money to provide free legal services to the indigent population in the

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[4] With the exception of the effect on interstate commerce, the Donnelly Act was patterned after the Sherman Act. Therefore, the Donnelly Act is generally interpreted consistently with the Sherman Act. See *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 98 n.4 (2d Cir. 1987)*; *Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 254 (S.D.N.Y. 1995)*.

Bronx. Rather than a business or commercial exchange, this situation is more akin to a series of charitable gifts from one party to another.

Further, plaintiff has not alleged, and could not possibly allege, that anything about the relationship between the parties or the reorganization plan will cause any of the harms the Sherman Act was intended to prevent, such as restriction of the product (here, legal services), a raise in prices, or other controls on the market that are to the detriment of the consumer (here, the indigent Bronx population). There has been no allegation that, if BLS becomes a wholly-owned subsidiary of LSNY, it will adversely affect the availability of attorneys or that the legal services will no longer remain free to the indigent. In short, LSNY's plan to reorganize the provision of free legal services to the indigent in New York City is not "trade or commerce" within the meaning of the Sherman Act as the plan fits squarely **[*13]** within the type of social causes that are exempt from regulation by the Act. Therefore, defendants' motions to dismiss plaintiff's *§ 1* and *§ 2* Sherman Act claims, as well as plaintiff's Donnelly Act claim are granted.

First Amendment **Retaliation Claim**

Plaintiff argues that LSNY, as the result of pressure from LSC, instituted its reorganization plan to retaliate against BLS for filing a previous lawsuit against defendants in May 2000. In that lawsuit, brought by both BLS and Queens Legal Services, the plaintiffs there sought injunctive relief preventing defendants from requiring them to disclose the full names of their clients and the nature of the representation on the grounds that such disclosure would violate their ethical and professional responsibilities. Plaintiffs in that suit further sought to enjoin defendants from terminating their LSC funds as the result of their refusal to provide such information. [5]

[*14] ***HN7***[] A plaintiff asserting a *First Amendment* retaliation claim must put forth non-conclusory allegations: "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Garcia v. S.U.N.Y. Health Sciences Cntr., 280 F.3d 98, 106-07 (2d Cir. 2001)*; *Diesel v. Town of Lewisboro, 232 F.3d 92, 107 (2d Cir. 2000)*.

With respect to LSC, plaintiff has failed to allege a set of facts sufficient to meet the third element of the test for retaliation, namely a causal connection between plaintiff's filing of the May 2000 lawsuit and LSNY's adoption of the reorganization plan. The Complaint states that as early as 1998, LSC had embarked on a program to coordinate and integrate the provision of legal services on a unified statewide basis throughout the country. In fact, in the summer of 1998, the Complaint alleges that LSC had met with LSNY to discuss LSC's initiative to consolidate legal services in New York City. The Complaint further states that between 1998 and 2001, the number of legal services organizations nationwide **[*15]** receiving LSC funds dropped from 262 to 207. Thus, it is clear from the Complaint that LSC began the consolidation initiative long before BLS had filed the May 2000 lawsuit. It is just as clear that the consolidation initiative is nationwide, rather than an effort to target BLS or Queens Legal Services for bringing the May 2000 lawsuit.

Further, the September 5, 2000 letter from LSC to LSNY that plaintiff relies upon does not add support to plaintiff's argument. That letter, written by an LSC representative, neither mandates nor directs LSNY to consolidate on a city-wide basis. Rather, the letter proposes to LSNY at least four possible options so as to improve the quality of legal services to New York City indigent clients. The proposed options LSC gave to LSNY were: 1) create separate LSC-funded grantee programs; 2) transform LSNY into one city-wide program with offices as opposed to grantee agencies; 3) "make a compelling case" to continue with LSNY's current structure; or 4) develop "something else" to achieve the desired goal. LSC Br., Exh. B. The letter concludes by stating that LSNY must submit a proposal to LSC as to how it plans to restructure itself by March 1, 2001, and **[*16]** that if LSC is not satisfied with that proposal, LSC may choose to find some other mechanism to disperse grant funds in New York City. Id. It is clear

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[5] In an order dated August 8, 2002, this Court granted defendants' motions for summary judgment in that case and dismissed that Complaint in its entirety. See *Bronx Legal Servs. v. Legal Servs. Corp., No. 00 CIV. 3423, 2002 U.S. Dist. LEXIS 14674 , 2002 WL 1835597* (S.D.N.Y. Aug. 8, 2002).

that the possible city-wide consolidation discussed in the LSC letter was never in mandatory terms, and that LSC left it to the discretion of LSNY as to how to implement internal changes. Thus, even drawing all reasonable inferences in favor of plaintiff, there is no set of facts alleged in the Complaint which could support plaintiff's claim that LSC "coerced" LSNY into adopting its reorganization plan in order to retaliate against BLS for filing the May 2000 lawsuit.

With respect to LSNY, plaintiff has also failed to allege sufficient facts to establish a causal connection between the May 2000 lawsuit and the alleged retaliatory conduct. As noted above, plaintiff's Complaint alleges that LSC and LSNY began discussing reorganization and consolidation as early as 1998, a full two years before BLS filed the May 2000 lawsuit.

Furthermore, the history of the May 2000 lawsuit is inconsistent with plaintiff's contention that LSNY retaliated against BLS for filing that suit. In early January 2000, as part of an internal audit, LSC's Office **[*17]** of the Inspector General ("OIG") randomly selected thirty grantee organizations and asked them to provide certain information regarding the cases they handled, including client names. LSNY was one of the thirty randomly selected grantee organizations. Since LSNY has no clients, this information would have to come from its seven sub-grantee organizations. LSNY opposed this request as did another grantee organization that had been selected, the Legal Aid Bureau located in Baltimore, Maryland. BLS and Queens Legal Services, as two of LSNY's sub-grantee organizations, also opposed this request. On March 22, 2000, the OIG issued two administrative subpoenas requiring LSNY and the Baltimore Legal Aid Bureau to produce the information. On April 25, 2000, the OIG filed a petition in United States District Court for the District of Columbia for summary enforcement of those subpoenas. [6]

[*18] BLS and Queens Legal Services feared that if LSC terminated LSNY's funding over this issue, they in turn would lose their funding. They then filed the May 2000 suit in this Court against both LSNY and LSC. As noted earlier, BLS and Queens Legal Services requested injunctive relief in that suit preventing defendants from requiring them from disclosing the full names of their clients and the nature of the representation. They also sought an injunction preventing defendants from terminating their LSC funds as a result of their refusal to provide such information. See *Bronx Legal Serv. v. Legal Serv. Corp., No. 00 CIV. 3423, 2002 U.S. Dist. LEXIS 14674, 2002 WL 1835597*, (S.D.N.Y. Aug. 8, 2002). One month after BLS filed the May 2000 suit, the D.C. District Court ruled on the OIG's petition, finding in favor of the OIG. See *United States v. Legal Serv. for New York City, 100 F. Supp.2d 42 (D.D.C. 2000)*. LSNY appealed to the D.C. Circuit. [7] The district court's decision was affirmed on appeal on May 25, 2001. See *United States v. Legal Serv. for New York City, 346 U.S. App. D.C. 83, 249 F.3d 1077 (D.C. Cir. 2001)*.

[*19] The history of the May 2000 lawsuit reveals that, at least until the D.C. Circuit's adverse ruling against LSNY in May 2001, LSNY had taken the same position as BLS on the issues relating to BLS's May 2000 lawsuit. Therefore, when LSNY received the September 5, 2000 letter, and when the LSNY Board of Directors voted in favor of city-wide consolidation in March 2001, [8] LSNY still favored plaintiff's position with respect to the issues BLS raised in the May 2000 lawsuit. In fact, LSNY did not give up its fight against the OIG with regard to the issue of disclosure until the D.C. Circuit ruled against LSNY, a full year after BLS had filed the May 2000 lawsuit. Therefore, the history of the May 2000 lawsuit belies plaintiff's contention that LSNY enacted the reorganization plan so as to retaliate against BLS for filing the May 2000 lawsuit.

Plaintiff further contends that the timing of LSNY's announcement in November 2001 of the reorganization plan to **[*20]** consolidate on a city-wide basis is evidence of retaliation against BLS for filing the May 2000 lawsuit. Although this announcement came after the D.C. Circuit's adverse ruling, the LSNY Board of Directors had voted eight months earlier in March 2001 to adopt the consolidation plan. That vote occurred while LSNY was still in active litigation against the OIG, and thus, while LSNY was still litigating in favor of plaintiff's position with regard to

[6] Neither BLS nor Queens Legal Services were served with subpoenas, nor named as respondents in the enforcement proceeding in D.C. District Court.

[7] The Legal Aid Bureau was not a party to the appeal.

[8] See Thompson Aff. P 73, Pl's Mot. for a Prelim. Inj.

the issues raised in plaintiff's May 2000 lawsuit. The timing of the November 2001 announcement, therefore, fails to support plaintiff's argument. Plaintiff simply has not alleged any set of facts in the Complaint which could reasonably lead to a causal connection between plaintiff's filing of the May 2000 lawsuit and LSNY's decision to institute the reorganization plan. Therefore, defendants' motions to dismiss the *First Amendment* retaliation claim are granted.

The New York Judiciary Act Claim

Plaintiff argues that if it acquiesces to LSNY's reorganization plan, the plan will cause BLS to engage in the unauthorized practice of law, in violation of § 495(1) of the New York Judiciary Act. ***HN8***[] The New York Judiciary Act prohibits any **[*21]** corporation from "practicing or appearing as an attorney-at-law for any person in any court in this state or before any judicial body[.]" N.Y. JUDICIARY ACT § 495(1) (McKinney 2002). However, § 495(7) of the Act provides an exemption for "organizations which have as their primary purpose the furnishing of legal services to indigent persons." Id. § 495(7). Plaintiff concedes that it, as well as LSNY, currently fall under the Act's exemption. Plaintiff claims, however, that if it is forced to become a wholly-owned subsidiary of LSNY, both BLS and LSNY would lose their exemption status.

Plaintiff's argument fails to state a claim for two reasons. First, ***HN9***[] § 476-a of the Act states that only the Attorney General or a bar association formed in accordance with New York law are authorized to bring a civil action for unlawful practice of law. See Id. at § 476-a; *Lawrence v. Houston, 172 A.D.2d 923, 567 N.Y.S.2d 962, 964 (N.Y. App. Div. 1991)*. Plaintiff, therefore, does not have standing to bring this cause of action. Second, even if plaintiff did have standing, plaintiff's contention that both BLS and LSNY would lose their exemption status because plaintiff would **[*22]** now be subject to the "corporate control" of LSNY is insufficient to state a claim. Even if BLS becomes a wholly-owned subsidiary of LSNY, the primary purpose of both organizations will remain the same, namely to furnish legal services to indigent persons. Thus the exemption under § 495(7) will still apply. Plaintiff has not alleged any set of facts that would cause BLS or LSNY to fall outside of § 495(7) exemption. Therefore, defendants' motions to dismiss the New York Judiciary Act claim are granted.

The Breach of Fiduciary Duty Claim

Plaintiff contends that LSNY owes BLS a fiduciary duty, and that LSNY and LSC conspired to breach that fiduciary duty. Plaintiff contends that the fiduciary relationship arose because BLS and LSNY are parties to a joint venture.

HN10[] Parties to a joint venture owe one another a fiduciary duty. See *Gover v. Escudo Constr. Corp., 288 A.D.2d 435, 733 N.Y.S.2d 894 (N.Y. App. Div. 2001)*. In determining if a joint venture exists, a court will consider "the intent of the parties (express or implied), whether there was joint control and management of the company, whether there was a sharing of the profits as well as a sharing of the **[*23]** losses and whether there was a combination of property, skill or knowledge." *Mendelson v. Feinman, 143 A.D.2d 76, 531 N.Y.S.2d 326, 328 (N.Y. App. Div. 1988)*. If the contract does not expressly impose fiduciary duties, plaintiff bears the burden of alleging extraordinary circumstances that create a fiduciary relationship. See *Calvin Klein Trademark Trust v. Wachner, 123 F. Supp.2d 731, 733-34 (S.D.N.Y. 2000)*.

The Complaint fails to allege any facts that would establish a joint venture between BLS and LSNY. The governing 2001 contract between BLS and LSNY explicitly disavows any partnership relationship, stating that "nothing herein shall constitute a partnership between the OLSC [9] and LSNY or any relationship of principal and agent between the OLSC and LSNY." LSNY Br., Exh. B at § 14.9. The contract also provides LSNY with the "authority in its discretion either independently or in consultation with representatives of the OLSC" to institute "program modification and reorganization on a city-wide basis or otherwise[.]" Id. at § 11.1. The contract further states that the contract "constitutes the entire agreement of the parties relating to **[*24]** the subject matter hereof." Id. at § 14.12. The

[9] "OLSC" stands for Operating Legal Services Corporation. This is the term given to the seven legal services organizations in New York City (including BLS) that sub-contracted with LSNY to receive LSC funds.

terms of the contract do not create a fiduciary relationship, and plaintiff has not alleged any extraordinary circumstances to overcome the language in the contract. Therefore, defendants' motions to dismiss the breach of fiduciary duty claim are granted as LSNY had no fiduciary relationship with BLS in the first instance. [10]

[*25] The Tortious Interference with Business Relations Claim

Plaintiff argues that LSNY's reorganization plan constitutes tortious interference with plaintiff's business relations, and that LSC conspired with LSNY to implement this plan. Plaintiff contends that by adopting this plan, LSNY intends to appropriate for itself all of plaintiff's funding opportunities and contracts, as well as hire away all of BLS's employees.

HN11[] To prove tortious interference with business relations, a plaintiff must show, *inter alia,* the existence of a business relationship between the plaintiff and a third party. See *Boule v. Hutton, 138 F. Supp.2d 491, 510 (S.D.N.Y. 2001)*. Plaintiff must allege that the defendant interfered with a *specific* contract, rather than generally with the plaintiff's business opportunities. See *Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 258 (S.D.N.Y. 1995)*; see e.g., *Lesesne v. Lesesne, 292 A.D.2d 507, 740 N.Y.S.2d 352, 354 (N.Y. App. Div. 2002)* (affirming dismissal of tortious interference claim because plaintiff failed to allege breach of a specific contract between the plaintiff and a third party).

[*26] In this case, plaintiff has failed to allege that LSNY interfered with a specific contract it had with a third party. Rather, the Complaint only generally alleges that LSNY intends to appropriate for itself all of plaintiff's current funding opportunities and contracts, and hire away all of plaintiff's employees. Such generalized allegations are insufficient as a matter of law to sustain a tortious interference of business relations claim. Therefore, defendants' motions to dismiss the tortious interference with business relations claim are granted.

Conclusion

Defendants' motions to dismiss the Complaint and for judgment on the pleadings are granted in their entirety for the reasons stated above. [11]

[*27] Dated: January 17, 2003

SO ORDERED:

GEORGE B. DANIELS

United States District Judge

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[10] Plaintiff's breach of fiduciary duty claim against LSC is based upon its allegation that LSC "conspired" with LSNY to breach LSNY's fiduciary duties to plaintiff. However, conspiracy to commit a tort is not in itself a cause of action under New York law. See *Alexander & Alexander v. Fritzen, 68 N.Y.2d 968, 503 N.E.2d 102, 510 N.Y.S.2d 546 (N.Y. 1986)*. Therefore, the claim against LSC for conspiracy to breach the fiduciary relationship must also fail for this separate and independent reason. For the same reasons, plaintiff's "conspiracy" claim against LSC for tortious interference with business relations must also fail.

[11] Plaintiff's request for leave to amend the Complaint in the event any of its claims are found deficient is denied. Plaintiff has also filed a motion for Preliminary Injunction enjoining LSNY from withholding grant funding from BLS after January 1, 2003. That motion is based solely upon plaintiff's claims for breach of fiduciary duty and tortious interference with business relations. As today's decision disposes of all claims in favor of defendants, plaintiff's motion for a Preliminary Injunction is also denied.

Empagran S.A. v. F. Hoffman-Laroche

United States Court of Appeals for the District of Columbia Circuit

September 9, 2002, Argued ; January 17, 2003, Decided

No. 01-7115

Reporter

315 F.3d 338 *; 2003 U.S. App. LEXIS 647 **; 354 U.S. App. D.C. 257; 2003-1 Trade Cas. (CCH) P73,934

EMPAGRAN S.A., ET AL., APPELLANTS v. F. HOFFMAN-LAROCHE, LTD., ET AL., APPELLEES

Subsequent History: Rehearing, en banc, denied by *Empagran S.A. v. F. Hoffmann-Laroche, Ltd., 2003 U.S. App. LEXIS 19021 (D.C. Cir., Sept. 11, 2003)*

Rehearing denied by *Empagran S.A. v. F. Hoffmann-Laroche, Ltd., 2003 U.S. App. LEXIS 19042 (D.C. Cir., Sept. 11, 2003)*

US Supreme Court certiorari granted by, Motion granted by *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A., 540 U.S. 1088, 157 L. Ed. 2d 793, 124 S. Ct. 966, 2003 U.S. LEXIS 9206 (2003)*
Vacated by, Remanded by F. Hoffmann-La Roche Ltd v. Empagran S. A., 159 L. Ed. 2d 226, 124 S. Ct. 2359, 2004 U.S. LEXIS 4174 (U.S., 2004)

Prior History: **[**1]** Appeal from the United States District Court for the District of Columbia. (No. 00cv01686).

Empagran S.A. v. F. Hoffman La Roche, Ltd., 2001 U.S. Dist. LEXIS 20910 (D.D.C., June 7, 2001)

Disposition: District court decision reversed, judgment vacated and remanded.

Core Terms

domestic, Sherman Act, give rise, commerce, anti trust law, conspiracy, effects, district court, vitamin, purchasers, antitrust, plaintiffs', anticompetitive conduct, advertising, global, subject matter jurisdiction, export, prices, abroad, Clayton Act, supplemental jurisdiction, plaintiff's claim, reasonably foreseeable, legislative history, suits, violations, defendants', cartel, prong, words

LexisNexis® Headnotes

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Federal Legislation

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

International Trade Law > General Overview

HN1[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act (FTAIA), *15 U.S.C.S. § 6a*, which amends the Sherman Act, provides that the Sherman Act shall not apply to conduct involving trade or commerce with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce in the United States, and such effect gives rise to a claim under the provisions of the Sherman Act. *15 U.S.C.S. § 6a(1)* of the FTAIA makes it clear that our federal antitrust laws regulate foreign conduct only where that conduct has the proscribed effects on domestic or foreign United States' commerce. And *15 U.S.C.S. § 6a(2)* of the FTAIA provides that the antitrust laws are inapplicable unless the effect of extraterritorial conduct on the United States' commerce gives rise to a claim under the Sherman Act.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Federal Legislation

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN2[] International Aspects, Foreign Trade Antitrust Improvements Act

The United States Court of Appeals for the District of Columbia Circuit holds that where the anticompetitive conduct has the requisite harm on the United States' commerce, the Foreign Trade Antitrust Improvements Act, *15 U.S.C.S. § 6a*, permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on the United States' commerce must give rise to a claim by someone, even if not the foreign plaintiff who is before the court.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] Antitrust & Trade Law, Sherman Act

Under *15 U.S.C.S. § 1* of the Sherman Act, every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is unlawful.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN4[] Clayton Act, Claims

Under § 4 of the Clayton Act, a cause of action is conferred on any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. The Act also provides for treble damages. 15 U.S.C.S. § 15(a).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN5[] Remedies, Damages

Under § 16 of the Clayton Act, any person, firm, corporation, or association is entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. 15 U.S.C.S. § 26.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Federal Legislation

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN6[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act, 15 U.S.C.S. § 6a, amends the Sherman Act to make the Sherman Act inapplicable to non-import foreign commerce unless the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and such effect gives rise to a claim under the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > International Commerce & Trade > Federal Legislation

International Trade Law > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 6a.

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN8[] **Standards of Review, De Novo Review**

The appellate court reviews de novo the district court's dismissal of a complaint for lack of subject matter jurisdiction. A complaint may be dismissed for lack of subject matter jurisdiction only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In its review, the appellate court assumes the truth of the allegations made and construes them favorably to the pleader.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Federal Legislation

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN9[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The United States Court of Appeals for the District of Columbia Circuit holds that, where the anticompetitive conduct has the requisite effect on the United States' commerce, the Foreign Trade Antitrust Improvements Act, *15 U.S.C.S. § 6a*, permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on the United States' commerce must give rise to a claim by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Business & Corporate Law > Foreign Corporations > General Overview

International Trade Law > International Commerce & Trade > Federal Legislation

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

International Trade Law > General Overview

HN10[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The United States Court of Appeals for the District of Columbia Circuit holds that the words "a claim" in *15 U.S.C.S. 6a(2)* of the Foreign Trade Antitrust Improvements Act, *15 U.S.C.S. § 6a*, refer to a private action, not merely a government action to enforce the Sherman Act. In other words, "giving rise to a claim" means giving rise to someone's private claim for damages or equitable relief. To satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the United States' effect of the defendant's violation of the Sherman Act.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN11[] **Justiciability, Standing**

The United States Courts of Appeals are instructed to decide for themselves whether the party seeking judicial review has standing, even if the issue was not decided below. The appellate courts are thus required to address the issue of standing even if the courts below have not passed on it. Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

HN12[] **Clayton Act, Claims**

To meet the constitutional requirements of standing under the Clayton Act, an antitrust plaintiff must establish injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing.

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

HN13[] **Private Actions, Standing**

To establish standing, an antitrust plaintiff must establish antitrust injury, that is, injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Trade Law > General Overview

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

The antitrust laws do not merely forbid price-fixing in United States' commerce, but rather forbid price-fixing that harms United States' commerce. Thus, the antitrust laws forbid the fixing of prices in foreign markets where that conduct harms United States' commerce.

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

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN15[] **Private Actions, Standing**

To establish antitrust injury for purposes of standing, the injury should be the type of loss that the claimed violations of the Sherman Act would be likely to cause.

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

HN16[] **Private Actions, Standing**

To determine whether antitrust plaintiffs have standing, the court must consider the following factors: the directness of the injury, whether the claim for damages is speculative, the existence of more direct victims, the potential for duplicative recovery, and the complexity of apportioning damages.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN17[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the district court's decision not to exercise supplemental jurisdiction for abuse of discretion.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN18[] **Justiciability, Case & Controversy Requirements**

See *28 U.S.C.S. § 1367*.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN19[] **Jurisdiction, Jurisdictional Sources**

Under *28 U.S.C.S. § 1367*, the district court has supplemental jurisdiction over related claims when it has original jurisdiction over the initial claim. When the district court has dismissed claims properly before it, it retains discretion to decide whether or not to dismiss other claims as to which it may exercise supplemental jurisdiction. The district court may decline to exercise supplemental jurisdiction over a claim if, for example, the district court has dismissed all claims over which it has original jurisdiction. *28 U.S.C.S. § 1367(c)(3)*. But if the district court dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction.

Counsel: Paul T. Gallagher argued the cause for appellants. With him on the briefs was Michael D. Hausfeld. Ann C. Yahner entered an appearance.

Charles S. Duggan argued the cause for appellees. With him on the brief were Arthur F. Golden, Bruce L. Montgomery, Stephen Fishbein, Tyrone C. Fahner, Andrew S. Marovitz, John M. Majoras, Lawrence Byrne, Michael L. Denger, D. Stuart Meiklejohn, Laurence T. Sorkin, Roy L. Regozin, Paul P. Eyre, Marcia E. Marsteller, Donald I. Baker, W. Todd Miller, Alice G. Glass, Peter E. Halle, Thomas J. Lang, James R. Weiss, Elizabeth W. Fleming, Craig M. Walker, Fred W. Reinke, Thomas M. Mueller, Michael O. Ware, Aileen Meyer, Sutton Keany, Bryan Dunlap, Martin Frederic Evans, Karen N. Walker, Moses Silverman, Kevin R. Sullivan, and Jeffrey S. Bucholtz. Thomas S. Martin, Kate Usdrowski, Matthew Solum, Carl W. Riehl and John S. Kiernan entered appearances.

Judges: Before: EDWARDS, HENDERSON, and ROGERS, Circuit Judges. Opinion for the Court filed by Circuit Judge EDWARDS. Dissenting opinion filed by Circuit Judge HENDERSON.

Opinion by: EDWARDS

Opinion

[*340] EDWARDS, *Circuit Judge:* **[**2]** The action in this case was filed under *section 1* of the Sherman Act, *15 U.S.C. § 1*, *sections 4* and *16* of the Clayton Act, *15 U.S.C. § 15* and *26*, the antitrust laws of foreign nations, and international law, on behalf of all foreign purchasers of certain vitamins, vitamin premixes, and bulk vitamin products and precursors, against a number of corporations, both foreign and domestic, who distribute and sell these vitamin products around the world. Appellants contend that appellees engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins; that this cartel operated on a global basis and affected virtually every market where appellees operated worldwide; and that appellees' unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to appellants in connection with their foreign purchases of vitamin products. Appellees moved to dismiss the action in the District Court, asserting that the court lacked subject matter jurisdiction under the federal antitrust laws, because the injuries plaintiffs sought to redress were allegedly sustained in transactions **[**3]** that lack any direct connection to United States commerce. The District Court granted the motion to dismiss and appellants now appeal.

This appeal requires us to interpret the Foreign Trade Antitrust Improvements Act ("FTAIA"), *15 U.S.C. § 6a*, to determine the jurisdictional reach of the federal antitrust laws. ***HN1***[] FTAIA, which amended the Sherman Act, provides that the Sherman Act "shall not apply to conduct" involving trade or commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States, and "such effect gives rise to a claim" under the provisions of the Sherman Act. *Section 6a(1)* of FTAIA makes it clear that our federal antitrust laws regulate foreign conduct only where that conduct has the proscribed "effects" on domestic or foreign United States commerce. And *§ 6a(2)* of FTAIA provides that the antitrust laws are inapplicable unless the effect of extraterritorial conduct on United States commerce "gives rise to a claim" under the Sherman Act. The District Court held that, under FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from **[**4]** the anticompetitive effects of the defendants' conduct on United States commerce. In other words, it is not enough for a plaintiff to show that other persons were injured by such United States effects; the United States effects themselves must give rise to plaintiff's claim. This *restrictive view* of FTAIA's jurisdictional reach finds support in the Fifth Circuit. *See* *Den Norske Stats Oljeselskap As v. Heeremac Vof, 241 F.3d 420 (5th Cir. 2001)*.

Appellants contend that the District Court misconstrued FTAIA. According to appellants, FTAIA applies to "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on United States commerce, *if* - not merely to the extent that - the requisite United States effects are found. Thus, according to appellants, Congress did not limit jurisdiction to "the same claim" as that on which the jurisdictional effects are based. Rather, Congress provided only that "a" claim cognizable under the Sherman Act must exist. Once a jurisdictional nexus exists, FTAIA does not limit the types of plaintiffs who may seek relief. Thus, according to appellants, it does not matter that the transactions in **[*341]** which they purchased **[**5]** vitamins took place outside of United States commerce. This *less restrictive view* of FTAIA's jurisdictional reach finds support in the Second Circuit. *See* *Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002)*.

In the alternative, appellants claim that their complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. Appellants contend that appellees caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, appellants say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to appellants, the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, appellants claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad. The District Court did not address **[**6]** this alternative theory of jurisdiction. Neither the Second Circuit nor the Fifth Circuit embrace this view of FTAIA's jurisdictional reach, nor do we. In light of our disposition in favor of appellant on other grounds, we find it unnecessary to address this "alternative" theory of subject matter jurisdiction.

We can find no "plain meaning" in *§ 6a(2)* of FTAIA. Nor do we find any easy resolution of this case by reference to the decisions of the Second and Fifth Circuits. The majority opinion in *Den Norske Stats Oljeselskap As v. Heeremac Vof* seems to us to endorse a view of FTAIA that is overly rigid, in light of the words of the statute and relevant portions of the legislative history. And, as we explain below, the opinion in *Kruman v. Christie's International PLC* seems to reach too far in its view of subject matter jurisdiction. Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.

HN2[] We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. **[**7]** The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Although the language of *§ 6a(2)* does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence emanating from the Supreme Court's decision in *Pfizer, Inc. v. Government of India, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*.

Because the foreign plaintiffs here have alleged that the United States effects of appellees' cartel give rise to antitrust claims by parties injured in the United States from transactions occurring in the United States, we hold that subject matter jurisdiction is proper. We also find that appellants have standing to sue under the antitrust laws. We therefore reverse the District Court's decision, vacate the judgment against appellants, and remand the case **[**8]** for further proceedings consistent with this opinion.

I. BACKGROUND

HN3[] *Section 1* of the Sherman Act makes unlawful "every contract, combination … **[*342]** or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations…." *15 U.S.C. § 1*. ***HN4***[] *Section 4* of the Clayton Act confers a cause of action on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble damages. *Id. § 15(a)*. ***HN5***[] *Section 16* of the Clayton Act entitles "any person, firm, corporation or association … to sue for and have injunctive relief … against threatened loss or damage by a violation of the antitrust laws…." *Id. § 26*. In 1982, Congress enacted ***HN6***[] FTAIA, which amended the Sherman Act to make the Sherman Act inapplicable to non-import foreign commerce unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and "such effect gives rise to a claim under" the Sherman Act. *Id. § 6a*. The text of FTAIA provides, in full:

> ***HN7***[] *Sections 1 to 7* of this title shall not apply to conduct involving trade or commerce (other than import trade **[**9]** or import commerce) with foreign nations unless-
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect-
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.
>
> If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(B), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States.

Id.

Appellees ("vitamin companies") are manufacturers and distributors of vitamins and vitamin products. Appellants ("foreign purchasers" or "foreign plaintiffs") are foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies or their alleged co-conspirators from January 1, 1988 to February 1999, for delivery outside the United States. The plaintiffs in this case originally **[**10]** filed a class action suit on behalf of foreign and domestic purchasers of vitamins, alleging "a massive and long-running conspiracy" among the vitamin companies and their co-conspirators "with the purpose and effect of fixing prices, allocating market share, and committing other unlawful practices designed to inflate the prices of various vitamins … sold to the Plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at P 1, Joint Appendix ("J.A.") 15-16. The plaintiffs sought injunctive relief and damages under *§ 1* of the Sherman Act; *§§ 4* and *16* of the Clayton Act; the antitrust laws of relevant foreign nations; and international law. *Id.* at P 7, J.A. 19.

The vitamin companies moved to dismiss the suit as to the foreign plaintiffs pursuant to *FED. R. CIV. P. 12(b)(1)* for lack of subject matter jurisdiction under the federal antitrust laws, and for lack of standing under the federal antitrust laws. They also urged the District Court to decline to exercise supplemental jurisdiction over the foreign law claims, and to dismiss the international law claims for failure to state a claim upon which relief may be granted. The District Court held that **[**11]** it lacked subject matter jurisdiction under FTAIA over the foreign plaintiffs' claims. *See* **[*343]** *Empagran S.A. v. F. Hoffman-La Roche, Ltd., 2001 U.S. Dist. LEXIS 20910, 2001 WL 761360, at 2-4* (D.D.C. June 7, 2001). The "critical question in this case," the District Court stated, "is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *2001 U.S. Dist. LEXIS 20910, [WL] at 2.* The District Court held that, because the conspiracy's effect on U.S.

commerce did not cause the foreign purchasers' injury, the court did not have jurisdiction over the foreign purchasers' claims. *See* *2001 U.S. Dist. LEXIS 20910, [WL] at 2-4* .

Because the District Court dismissed the foreign purchaser's federal claims for lack of subject matter jurisdiction, it found that it did not need to reach the issue of standing with respect to the foreign plaintiffs. *See* *2001 U.S. Dist. LEXIS 20910, [WL] at 5* . The District Court declined to exercise supplemental jurisdiction over the foreign purchasers' foreign law claims, because "these foreign law claims raise novel and complex issues of foreign law, the court has already **[**12]** dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction," and because of "comity and efficiency reasons." *2001 U.S. Dist. LEXIS 20910, [WL] at 8* . Finally, the District Court dismissed the foreign purchasers' claims under customary international law for failure to state a claim, because the court could not find the existence of a customary international law proscribing the conduct alleged. *See* *2001 U.S. Dist. LEXIS 20910, [WL] at 9* . The foreign purchasers filed an interlocutory appeal.

At the time of its decision, the District Court deferred ruling on the defendants' motion to dismiss the domestic plaintiffs' federal antitrust claims, and directed the domestic plaintiffs to supplement their complaint to provide more detailed factual allegations. *2001 U.S. Dist. LEXIS 20810, [WL] at 4, 6* . At the suggestion of the District Court, for practicality, *see* *2001 U.S. Dist. LEXIS 20910, [WL] at 7 n.5* , the domestic plaintiffs in the case subsequently entered into a court-approved stipulation that transferred their claims to another action pending before the District Court, *Procter & Gamble Co. v. BASF AG*, No. 99-3046 (M.D.L. No. 1285), which involved similar claims against substantially the same defendants. The parties thereby agreed that the **[**13]** domestic plaintiffs had no pending claims in the instant case. On September 10, 2001, the District Court granted the defendants' motion for an order directing entry of final judgment, and on April 26, 2002, the District Court entered final judgment for the defendants in the instant case. The foreign plaintiffs' appeal is therefore no longer interlocutory.

II. ANALYSIS

A. Subject Matter Jurisdiction

HN8[🡅] This court reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction. *Nat'l Taxpayers Union, Inc. v. United States, 314 U.S. App. D.C. 377, 68 F.3d 1428, 1432 (D.C. Cir. 1995)*. A complaint may be dismissed for lack of subject matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sinclair v. Kleindienst, 229 U.S. App. D.C. 13, 711 F.2d 291, 293 (D.C. Cir. 1983)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))*. In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. **[**14]**

In this case, the foreign purchasers, who bought vitamins exclusively outside the United States, allege that the vitamin companies conspired to fix vitamin prices around the world, and that the foreign purchasers paid inflated prices for vitamins abroad as a result of the global conspiracy. FTAIA makes the Sherman Act **[*344]** inapplicable to conduct in foreign commerce unless the conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and "such effect gives rise to a claim under" the Sherman Act. *See* *15 U.S.C. § 6a(1)*.

As an initial matter, the parties appear to dispute the scope of the "conduct" that should be considered for our FTAIA analysis. Essentially, appellants argue that the relevant conduct is the "massive international cartel, exercising global market power." Appellants' Br. 19. Appellees argue that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas. Appellees' Br. 20-21. Both the Second and Fifth Circuits have adopted appellants' approach, and appellants' approach is correct. *See* *Kruman, 284 F.3d at 398*; *Den Norske, 241 F.3d at 426*. **[**15]** Indeed, the *Kruman* court rejected a narrow definition of "conduct" as "the precise acts that caused injury," and instead adopted a broader definition of "conduct" as "acts that are illegal under the Sherman Act," that is, the international price-fixing conspiracy. *Kruman, 284 F.3d at 398*. The complaint in this case alleges an international price-fixing conspiracy among the vitamin companies, and appellees "do not contest that the vitamin cartel produced substantial effects in the United States" for the purpose of this appeal. Oral

Argument Transcript, at 30-31. In light of this concession by appellees, it is unnecessary for us to explore further the precise parameters of the definition of "conduct," since there is no real dispute that the vitamin companies' conduct had "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. We therefore accept that the "direct, substantial, and reasonably foreseeable effect" requirement under *§ 6a(1)* of FTAIA is met. Additionally, in light of appellees' concession that the vitamin cartel produced substantial effects on U.S. commerce, it is unnecessary for us to address appellees' argument that regulating foreign **[**16]** business transactions would exceed the powers granted to Congress under the *Commerce Clause*. *See* Appellees' Br. 16-17.

The precise issue presented in this appeal is whether the "gives rise to a claim" requirement under *§ 6a(2)* of FTAIA authorizes subject matter jurisdiction where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's claim arises only from the conduct's foreign effect. In other words, the question is whether FTAIA precludes actions under the Sherman Act unless a plaintiff shows that the injuries it seeks to remedy arise from the anticompetitive effects of the defendant's conduct on U.S. commerce; or, alternatively, is it enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court.

The Supreme Court first addressed the foreign reach of the Sherman Act in *American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909)* (Holmes, J.), which held that the Sherman Act did not apply to conduct occurring outside the United States. **[**17]** Eighteen years later, the Court moderated this approach, and held that the Sherman Act authorized jurisdiction over foreign defendants, as long as some of the defendants' conduct occurred within the United States and the conduct affected domestic commerce. *See* *United States v. Sisal Sales Corp., 274 U.S. 268, 275-76, 71 L. Ed. 1042, 47 S. Ct. 592 (1927)*.

In 1945, in an important opinion by Judge Learned Hand, the Second Circuit held that a federal court has jurisdiction over foreign conduct as long as the conduct was intended to, and actually did, **[*345]** affect U.S. commerce. *See* *United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945)* ("*Alcoa*"). Judge Hand said that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id. at 443*. Under *Alcoa*, jurisdiction depends upon whether the conduct had an effect on domestic commerce, not where the conduct took place. "Conduct which has no consequences within the United States" does not come within the reach of U.S. antitrust laws. *Id. Alcoa's* "effects **[**18]** test" is now well accepted. *See, e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909, 922 (D.C. Cir. 1984)* ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *see also* IA PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTI- TRUST LAW P 270, at 336 (2d ed. 2000) ("The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States."). The Supreme Court expressly embraced the "effects test" in *Hartford Fire Insurance Co. v. California, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)*, stating that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id. at 796* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Alcoa*, 148 F.2d at 444). **[**19]**

In 1982, Congress enacted FTAIA, to "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services." H.R. REP. NO. 97-686, at 2 (1982). As the Supreme Court has noted, "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins., 509 U.S. at 796-97 n.23* (citations omitted). FTAIA was also passed to enact a "single, objective test - the 'direct, substantial, and reasonably foreseeable effect' test" that "will serve as a simple and straightforward clarification of existing American law…." H.R. REP. NO. 97-686, at 2. FTAIA thus endorsed *Alcoa*'s "effects test." *See id.* at 5 ("Since Judge Learned Hand's opinion in [*Alcoa*], it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States ***antitrust law*** applies.").

Since the enactment of FTAIA, the D.C. Circuit has had one occasion to apply the statute. In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1086-87 (D.C. Cir.*

1998), the court **[**20]** considered whether FTAIA authorizes subject matter jurisdiction over a Caribbean radio station's claim that a competing Caribbean radio station violated the Sherman Act by falsely telling U.S. advertisers that its own radio signal reached the entire Eastern Caribbean so that the advertisers would believe that it alone could fulfill their advertising needs. The precise question was whether the complaint by a foreign plaintiff against a foreign defendant adequately alleged that the latter's anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by FTAIA's first prong. This court found that the anticompetitive conduct of the defendant radio station harmed the U.S. advertisers who had to pay higher prices because of it. We stated: "In this context it appears that antitrust injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising. By keeping [the plaintiff] out of the market, [the defendant] **[*346]** denied such purchasers the benefit of competition." *Id.* Thus, we held that FTAIA authorized subject matter jurisdiction in that case.

The decision in *Caribbean* did not expressly address FTAIA's **[**21]** second prong - requiring that the effects of the anticompetitive conduct on U.S. commerce "give[] rise to a claim under" the antitrust laws - which is at issue in the instant appeal. However, in the course of addressing the first prong's "direct, substantial, and reasonably foreseeable effect" requirement, the *Caribbean* decision noted that the foreign radio station's "antitrust injury … is ultimately a harm to U.S. purchasers of radio advertising." *Id.* This conclusion followed from the facts of that case, in which the foreign company's injury and the U.S. purchasers' injury were two sides of the same coin: the defendant radio station's false representations to its U.S. advertisers had the effect of misleading the U.S. advertisers, and causing them to buy advertising from the false advertiser at inflated prices; these purchases based on false information were what shut the plaintiff radio station out of the advertising market. Thus, it is possible to read *Caribbean* to have assumed, on the facts of that case, that the effect of the conduct on U.S. commerce gave rise to the plaintiff's claim. If so, *Caribbean* simply did not address the question at issue in the instant **[**22]** case, where the effect of the vitamin companies' conduct on U.S. commerce does not give rise to the plaintiffs' claim for redress.

There is another equally plausible way to read the *Caribbean* decision. Although the foreign plaintiff's loss of opportunity to sell advertising and the higher prices paid by U.S. advertisers were clearly interrelated, the higher prices paid by U.S. advertisers did not cause or give rise to the foreign plaintiff's loss of opportunity to sell advertising. One then could not say that the U.S. effect "gave rise **[*347]** to" the plaintiff's claim. It is thus possible that *Caribbean* impliedly interpreted the "gives rise to a claim" prong of FTAIA to be satisfied even where the U.S. effect does not "give rise to" the foreign plaintiff's claim.

We need not determine which of these two readings of FTAIA's second prong is implied by *Caribbean*. Both interpretations appear plausible. *Compare, e.g.,* Den Norske, 241 F.3d at 430 ("The effect on United States commerce in [*Caribbean*] … gave rise to the injury suffered by the plaintiff, a competing radio station - that is, exclusion of the plaintiff from the market for United States advertising **[**23]** dollars."), *with id.*, 241 F.3d at 436-37 (Higginbotham J, dissenting) ("[*Caribbean*] did not require that the injury to American advertisers 'give[] rise to' the plaintiff's cause of action; its determination that the injury gave rise to 'a' claim was sufficient."). In any event, because *Caribbean* only addressed FTAIA's "direct, substantial, and reasonably foreseeable effect" prong, we hesitate to derive a firm interpretation of the "gives rise to a claim" prong from that case. The law of the circuit thus leaves unanswered the question whether FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct. This is an issue of first impression in this circuit.

1. Circuit Split

As noted above, the Second and Fifth Circuits have split on this very question of statutory interpretation. The District Court in the instant case followed the Fifth Circuit's *Den Norske* decision, which held that the federal antitrust laws do not apply to claims in which the plaintiff's injury does not arise from the conspiracy's anticompetitive domestic effect. Den Norske, 241 F.3d at 427. That is, even if a conspiracy **[**24]** results in higher prices in the United States, that domestic effect must "give rise to" the plaintiff's injury. By contrast, the Second Circuit in *Kruman* held that FTAIA allows suit by a plaintiff whose injury does not arise from the conduct's harm to domestic commerce, as long as that conduct's "domestic effect violated the substantive provisions of the Sherman

Act." *Kruman, 284 F.3d at 400*. As in the instant case, the "direct, substantial, and reasonably foreseeable effect" prong of *§ 6a(1)* was satisfied in those two cases, and the question at issue was whether the "gives rise to a claim" prong of *§ 6a(2)* was satisfied where the U.S. effect of the conduct did not give rise to the plaintiff's claim.

In the Fifth Circuit's *Den Norske* case, a Norwegian oil corporation conducting business exclusively in the North Sea brought an antitrust conspiracy claim against providers of heavy-lift barge services, alleging that the defendants' conduct inflated the plaintiff's operating costs in the North Sea and also inflated oil prices in the U.S. market. The majority opinion in *Den Norske* interpreted the "gives rise to a claim" prong as demanding that the domestic **[**25]** effect give rise to the plaintiff's claim, not merely to someone's claim. *Den Norske, 241 F.3d at 427*. Because the plaintiff's injury arose solely from the foreign effect, and not from the domestic effect of the defendant's conduct, the Fifth Circuit found subject matter jurisdiction lacking.

Judge Patrick Higginbotham dissented, writing that he was "not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct." *Id. at 431* (Higginbotham J., dissenting). Judge Higginbotham found that the literal text of the words "gives rise to a claim" supported jurisdiction: "The word 'a' has a simple and universally understood meaning. It is the indefinite article.... If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have." *Id. at 432*. In light of the purpose of FTAIA "to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce," Judge Higginbotham worried that the majority's "interpretation of the **[**26]** FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States." *Id. at 433, 434*. Judge Higginbotham emphasized the deterrence rationale animating the Sherman and Clayton Acts, and feared that global conspiracies that affect U.S. commerce could be inadequately deterred in the absence of suits by foreign plaintiffs:

> Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

Id. at 435.

In the Second Circuit's *Kruman* case, buyers and sellers at foreign auctions filed suit against the two largest auction houses, Christie's and Sotheby's, alleging that the auction houses had conspired **[**27]** to fix prices in the United States and abroad for their services as auctioneers, and had inflated commissions. In addressing this claim, the Second Circuit explained that FTAIA is an amendment to the Sherman Act, rather than to the Clayton Act, and, as **[*348]** such, focuses only on the prohibition of a defendant's anticompetitive conduct, rather than on what injury a plaintiff must suffer to bring suit. Thus, the court reasoned, the argument that FTAIA limits liability to injury arising out of the conduct's domestic effect conflates the Clayton Act, to which a plaintiff's injury is relevant, and the Sherman Act, to which only a defendant's conduct is relevant. *See* *Kruman, 284 F.3d at 397-99*. The court then interpreted the "gives rise to a claim" language as requiring only "that the domestic effect violate the substantive provisions of the Sherman Act," rather than "that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action." *Id. at 400*. The Second Circuit read Congress' use of the indefinite article in "gives rise to a claim" to mean that "the 'effect' on domestic commerce need not be the basis for a plaintiff's **[**28]** injury, it only must violate the substantive provisions of the Sherman Act." *Id.*

The Second Circuit also relied on policy considerations in interpreting FTAIA. In line with its view that FTAIA governs what conduct by a defendant is regulated by the Sherman Act, rather than which plaintiffs can bring suit, the court reasoned that

> when anticompetitive conduct is directed at both foreign and domestic markets, the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market. When a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme rather than the domestic scheme alone.

> Our markets suffer when the foreign scheme is not deterred because the domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme.

Id. at 403. Thus, the Second Circuit found that "our markets can benefit from the additional deterrence of conduct affecting foreign **[**29]** markets." *Id.* (citing *Pfizer, 434 U.S. at 313-15*).

2. FTAIA's Language: "Effect" that "Gives Rise to a Claim"

Appellants' and appellees' arguments regarding the meaning of FTAIA's "gives rise to a claim" language largely correspond to the reasoning adopted in the Second Circuit's and the Fifth Circuit's opinions, respectively. On the Fifth Circuit's restrictive view of FTAIA, the statute allows suit only where the plaintiff is injured by the U.S. effects of the anticompetitive conduct. *Den Norske, 241 F.3d at 427*. On the Second Circuit's less restrictive view, the statute also allows suit where the plaintiff is injured in foreign commerce by anticompetitive conduct whose "domestic effect … violates the Sherman Act," even if the domestic effect of the conduct does not injure the plaintiff. *Kruman, 284 F.3d at 401*.

Appellants make two arguments about the language of FTAIA that we reject. First, echoing the Second Circuit, appellants argue that the Fifth Circuit's restrictive interpretation of "gives rise to a claim" renders superfluous the concluding provision of FTAIA, which states that, if the Sherman Act applies only **[**30]** because the conduct affects "export commerce or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States," *15 U.S.C. § 6a(1)(B)*, then it applies "to such conduct only for injury to export business in the United States," *id. § 6a*. *See* Appellants' Br. 22-23; *Kruman, 284 F.3d at 396*; *Den Norske, 241 F.3d at 432 n.5* (Higginbotham, J., dissenting). In other **[*349]** words, if subsections 1 and 2 of FTAIA already provide that the Sherman Act applies only where the U.S. effect gives rise to the plaintiff's injury, why would Congress need to add the final proviso that, regarding injury to export commerce, the Sherman Act only applies to injury to U.S. export commerce?

We think that there is a reading of the final proviso of FTAIA that would not render it superfluous, even if one were to adopt the Fifth Circuit's and the District Court's restrictive interpretation of "gives rise to a claim." The final proviso could be intended to clarify that, although subsection 1(B) speaks of a "person engaged in" export commerce, the Sherman Act does not extend to *all* injury sustained by such a person **[**31]** as a result of the defendant's anticompetitive conduct, but, rather, only to injury to his export business sustained within the United States. In other words, the proviso precludes an exporter from suing for injury to some aspect of his export business suffered outside the United States. *See* IA AREEDA & HOVENKAMP, *supra, P 262,* at 360 (explaining that the final proviso "is designed to make clear that a foreign firm operating an export business in the United States continues to be protected by the antitrust laws with respect to that business but not with respect to its operations outside the United States"). This limitation would not render the final proviso superfluous under an interpretation of subsection 2 requiring that the plaintiff be injured by the conduct's domestic effect to be able to sue.

Second, appellants place significance on the fact that, in providing that the Sherman Act shall not apply to foreign commerce "unless … such conduct" has a U.S. effect that "gives rise to a claim," Congress chose the word "unless" rather than the phrase "except to the extent that." Appellants contend that "unless" enables the conduct itself to be actionable so long as the U.S. **[**32]** effect is present, whereas "except to the extent that" would make the Sherman Act apply only to the extent that the conduct that causes the U.S. effect also gives rise to the plaintiffs' claim. *See* Appellants' Br. 17-19. This is overreading. Like the District Court, we are unconvinced that "unless" and "to the extent that" would have such different meanings in this statute.

At bottom, however, we agree with appellants that *§ 6a(2)* supports subject matter jurisdiction in this case. Although both the Second Circuit and the Fifth Circuit found the "gives rise to a claim" language of *§ 6a(2)* to be plain in opposite ways, we find that the language does not clearly resolve the question whether "a claim" means the plaintiff's claim. The Fifth Circuit's view that "a claim" plainly refers to the plaintiff's claim must depart from the literal language - "gives rise to a claim" - and substitute the words "gives rise to the plaintiff's claim" in order to reach the *plain meaning* to which the court subscribes. The Second Circuit construes broadly Congress' use of the indefinite article in "a claim," such that "a claim" really means "civil action … by the federal government to enforce **[**33]** or prevent a substantive violation of the Sherman Act pursuant to *15 U.S.C. § 4*"; hence, the words "gives rise to a claim" mean that the conduct's domestic effect "only must violate the substantive provisions of the Sherman Act." *Kruman, 284 F.3d at 399-400*. We think that this interpretation of the words "a claim" gives short shrift to *§ 6a(2)*'s explicit requirement that the domestic effect "give[] rise to a claim" - in other words, the language is far from clear as to whether that requirement can be satisfied merely by a violation of the Sherman Act, rather than by antitrust injury to the plaintiffs or others who could bring a claim under the provisions of the Clayton **[*350]** Act that create a cause of action for Sherman Act violations.

Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former. ***HN9***[] We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act **[**34]** and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim. This interpretation has the appeal of literalism. *Cf. Den Norske, 241 F.3d at 432* (Higginbotham, J., dissenting) ("The word 'a' has a simple and universally understood meaning…. If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have.").

Although the language of *§ 6a(2)* does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is a faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence, which we address in parts A.4. and A.5., *infra*. We first consider the Second Circuit's structural argument in support of its less restrictive view of *§ 6a(2)*.

[**35] 3. FTAIA's Structure

Appellants adopt the Second Circuit's structural argument - namely that, because FTAIA amended the Sherman Act rather than the Clayton Act, FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue. *See* Appellants' Reply Br. 6-7; *Kruman, 284 F.3d at 397-400*. Because FTAIA is an amendment to the Sherman Act, this structural argument deems Congress in FTAIA to have addressed only the Sherman Act's prohibition of anticompetitive conduct, putting out of view the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. Appellants argue: "Since the focus of the FTAIA is on the defendants' conduct, which is regulated by the Sherman Act, it is this conduct alone that violates the Sherman Act. To require that the injury of domestic purchasers be the basis for the injury suffered by Plaintiffs … improperly imports a concept applicable to *Section 4* of the Clayton Act." Appellants' Reply Br. 6-7.

This argument is plausible but ultimately unconvincing. The Clayton Act, which gives plaintiffs a cause of action under the Sherman Act, was in effect at the time that FTAIA was enacted, **[**36]** and FTAIA speaks explicitly of "giving rise to a claim under" the Sherman Act. The concept of a claim arising under the Sherman Act is clearly one that is present in the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. It is thus equally plausible to think that Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of "conduct," "effect," and "claim" the key to FTAIA. The view that FTAIA must be taken to refer only to defendants' conduct tends to ignore the fact that FTAIA does refer on its face to the conduct's effect giving rise to a claim, which arguably refers to a plaintiff's injury. Congress may well have imported a concept from the Clayton Act in amending the Sherman Act, notwithstanding appellants' **[*351]** and the Second Circuit's assumption of categorical precision on Congress' part.

The Second Circuit's heavy reliance on this argument led to its rather expansive holding to the effect that: "Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only **[**37]** requires that the domestic effect violate the substantive provisions of the

Sherman Act." *Kruman, 284 F.3d at 400*. According to the Second Circuit, "a violation of the Sherman Act is not predicated on the existence of an injury to a plaintiff. In fact, the only civil action that can be brought directly under the Sherman Act is one by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to *15 U.S.C. § 4*." *Id. at 399*. The Second Circuit thereby held that violation of the Sherman Act is sufficient to meet the "gives rise to a claim" requirement of subsection 2. In the Second Circuit's view, the words "a claim" in FTAIA mean an action by the government, not a private claim. The Second Circuit justified this view in a footnote, with three arguments: that the definition of the words "a claim" does not exclude this meaning, *id. at 400* (citing BLACK'S LAW DICTIONARY 240 (7th ed. 1999)); that FTAIA's specific reference to "a claim under the provisions of *sections 1 to 7* of this title" means a claim brought *directly* pursuant to the Sherman Act, *id.*; and that Congress has **[**38]** not exclusively used the word "claim" to refer to a private action for damages, *id.* (citing the Federal Trade Commission Act, *15 U.S.C. § 45(a)(3)*, which gives the FTC "the power to enforce the substantive provisions of the FTCA regardless of whether a plaintiff has suffered injury").

While we acknowledge that the words "a claim" do not necessarily exclude a government action, the usual meaning of "a claim" is a private action. Thus, unlike the Second Circuit, we do not think that violation of the Sherman Act is necessarily the same thing as "giving rise to a claim" under it. Furthermore, the concept of "giving rise to a claim" may well be a concept from the Clayton Act, which creates a private cause of action for Sherman Act violations. As noted above, we believe that, in order to satisfy FTAIA, a plaintiff must show that the anticompetitive conduct violates the Sherman Act and that the conduct's U.S. effect gives rise to someone's claim under it. As the Second Circuit itself noted, "the existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury. Conduct may violate the Sherman Act but not be actionable under *section **[**39]** 4* of the Clayton Act because it did not cause injury." *Kruman, 284 F.3d at 397* (citing *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1419 (7th Cir. 1989))*. "The 'mere presence' of a per se violation under Sherman Act *§ 1* 'does not by itself bestow on any plaintiff a private right of action for damages,' which is a 'gift of *section 4* of the Clayton Act.'" II AREEDA & HOVENKAMP, *supra*, § 337c, at 313 (quoting *Indiana Grocery, 864 F.2d at 1419*). And "while actual injury is required to seek treble damages under *section 4* of the Clayton Act, *15 U.S.C. § 15*, a plaintiff may bring an antitrust action seeking prospective injunctive relief under *section 16* of the Clayton Act for conduct violating the Sherman Act without suffering an actual injury." *Kruman, 284 F.3d at 397* (citing *15 U.S.C. § 26*; *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 243, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))*. But the **[**40]** Sherman Act may be enforced by the government even when no private plaintiff claims actual or threatened injury. *See* *15 U.S.C. § 4* ("The several **[*352]** district courts of the United States are invested with jurisdiction to prevent and restrain violations of *sections 1 to 7* of this title; and it shall be the duty of the several United States attorneys … to institute proceedings in equity to prevent and restrain such violations.").

HN10[] We hold that the words "a claim" in subsection 2 of FTAIA refer to a private action, not merely a government action to enforce the Sherman Act. In other words, "giving rise to a claim" means giving rise to someone's private claim for damages or equitable relief. To satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act. In the instant case, the conspiracy's U.S. effects did allegedly injure and did give rise to the claim of some private entities - namely the domestic plaintiffs who filed suit along with the foreign plaintiffs against the vitamin companies.

4. Legislative History

Both appellants **[**41]** and appellees argue that FTAIA's legislative history supports their respective readings of the statute. Parts of the report from the House Committee that drafted FTAIA suggest that plaintiffs injured by the U.S. effects of the anticompetitive conduct may sue, which of course is consistent with the restrictive view of FTAIA's jurisdictional reach. However, there is much in the legislative history to suggest that foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce. This legislative history supports the less restrictive view of FTAIA's jurisdictional reach, consistent with the position advanced by appellants and endorsed by the Second Circuit. What is most noteworthy is that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue. This leads us to conclude that the legislative history as a whole supports the less restrictive interpretation of FTAIA that would allow plaintiffs injured **[**42]** by the conduct's foreign effects to bring suit even where the conduct's U.S. effects do not give rise to the plaintiff's claim.

Appellees argue that the following passage from the House Report demonstrates that Congress intended for the Sherman Act to apply only in cases where the plaintiff's injury arose from anticompetitive effect on U.S. commerce:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language … to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States…. It is **[*353]** sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States….

H.R. REP. NO. 97-686, at 11-12. This passage states that the U.S. "'effect' providing the jurisdictional **[**43]** nexus must also be the basis for the injury alleged under the antitrust laws," which is consistent with appellees' restrictive view that the plaintiffs' injury must arise from the conduct's U.S. effect. However, the sentences that immediately follow make clear that "it is sufficient that the conduct providing the basis of the claim has had the requisite impact on" U.S. commerce, which supports appellants' broader view of the statute's "gives rise to a claim" requirement. Indeed, the "this does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States" language, which follows immediately after the discussion of the restrictive view, strongly suggests that Congress did not intend to exclude the less restrictive basis for subject matter jurisdiction under FTAIA.

Under the heading "Imports and Purely Foreign Transactions," the House Report states:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws…. There should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable **[**44]** effect on domestic commerce or a domestic competitor…. It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 9-10. This passage also suggests that the restrictive view of the statute does not exclude the less restrictive interpretation. On the one hand, the antitrust laws do not extend to "wholly foreign transactions," such as a transaction between two foreign firms. On the other hand, when the passage is read as a whole, this restriction seems to be contemplated only where there is no "direct, substantial and reasonably foreseeable effect on domestic commerce." This implies that where there *is* such an effect, jurisdiction over foreign transactions is proper. This surely does not support appellees' view of the statute.

Parts of FTAIA's legislative history plainly support the broader view of the statute. For example, the House Report states that

> the domestic "effect" that may serve as the predicate for antitrust jurisdiction … must be of the type that the antitrust laws prohibit…. For example, a plaintiff would not be able to establish United States **[**45]** antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

H.R. REP. NO. 97-686, at 11. The focus here seems to be on whether the conduct's domestic effect violates the antitrust laws, rather than on whether the conduct's domestic effect gives rise to the plaintiff's claim. This passage suggests that the plaintiff need only allege that the defendant's conduct actually had an effect on the domestic market and that such effect violated the antitrust laws. But more tellingly, in the course of explaining that a plaintiff whose "damage claim is based on an extraterritorial effect" cannot establish jurisdiction where the conduct has a "*beneficial* effect within the United States," the passage implicitly assumes that a plaintiff whose claim is based on a foreign effect *can* establish jurisdiction where the conduct has a *harmful* effect within the United States. This example addresses the situation in which the same conduct has both domestic and foreign effects, **[**46]** and clearly assumes that the plaintiff's claim does not arise from the conduct's U.S. effect. It specifies that the hypothetical beneficial U.S. effect could be "increased profitability of some other company or increased domestic employment," which obviously could not give rise to a claim under the antitrust laws. But significantly, this example does not assume that the fact that the claim arises from something other than **[*354]** the U.S. effect precludes subject matter jurisdiction. Rather, it is clearly the fact of the U.S. effect being beneficial - and therefore the absence of harmful effect under the "effect" prong - that would render jurisdiction improper. This passage thus suggests that the plaintiff can invoke jurisdiction where the anticompetitive conduct's U.S. effect does not give rise to the plaintiff's claim, as long as the conduct has a harmful, not beneficial, effect on U.S. commerce.

In another passage, the House Report states:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" **[**47]** effect on commerce within this country - by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices - the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

H.R. REP. NO. 97-686, at 13. This suggests that Congress intended for subject matter jurisdiction to exist over the conduct of an international cartel that had an effect on domestic commerce, even if the plaintiff's claim does not arise from that domestic effect. Again, the focus for subject matter jurisdiction purposes here is on whether the defendant's conduct has "the requisite impact on United States commerce," rather than whether the plaintiff in particular was injured by that impact. This passage's example of a domestic export cartel, which presumably directs its anticompetitive conduct to foreign markets, but whose conduct also has a "'spillover' effect on commerce within this country" exemplifies this point, because such a cartel's conduct would give rise to claims by foreign and domestic plaintiffs. **[**48]** In understanding the conduct of such a cartel to be likely to "fall within the reach of our antitrust laws," nothing in this passage restricts that reach to suits *only* by the domestic plaintiffs injured by the conduct's spillover effects. Admittedly, nothing in this passage explicitly allows suits by plaintiffs injured abroad by a "world-wide shortage or artificially inflated world-wide price" rather than by the domestic spillover effects. But we think that given the clear concern here with the *conduct* that creates the world-wide shortage or price inflation that in turn creates domestic spillover effects, it would be counter-intuitive and arbitrary to read Congress to intend to limit jurisdiction to only the subset of claims brought by plaintiffs injured by the spillover effects of the conduct at issue. Since the same conduct injures both foreign plaintiffs and domestic plaintiffs, and it is clearly the conduct that Congress aims to reach with our antitrust laws, it is reasonable to read Congress as envisioning suits by any plaintiffs who would enable our antitrust laws to reach and deter that conduct.

The House Report makes this point explicit:

> The intent of the Sherman **[**49]** and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States - *e.g.*, price fixing not limited to the export market - would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g.*, *Pfizer Inc., et al. v.* ***[*355]*** *Government of India, et al., 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

Id. at 10. Explicitly envisioning recovery for plaintiffs who "suffer economic injury abroad," this passage seems to support appellants' less restrictive reading of the statute. But appellees point out that this passage, which seems to allow recovery by foreign plaintiffs injured abroad as long as the conduct has **[**50]** the "requisite domestic effects," also expressly states that "foreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace" (emphasis added). This sentence suggests that foreign plaintiffs can sue under the antitrust laws for injury suffered in the domestic market. Arguably, this statement lends some support to appellees' restrictive view of the statute, but not much.

In sum, there is much in the legislative history that supports the *less restrictive view* of FTAIA's jurisdictional reach. There are isolated statements that are consistent with the restrictive view, but they are never offered to denigrate or exclude the less restrictive view of the statute. This is telling, we think, for if Congress intended to reject the less restrictive view of FTAIA's jurisdictional reach, there was absolutely no reason to discuss this possible basis for subject matter jurisdiction along with the restrictive view. We therefore conclude that the less restrictive view of jurisdiction is consistent with a literal interpretation of *§ 6a(2)*, and this interpretation is perfectly consistent with the legislative history.

5. Deterrence

The Supreme Court's **[**51]** decision in *Pfizer, Inc. v. Government of India, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*, which was issued before Congress enacted FTAIA, is cited approvingly in the legislative history to FTAIA. *See* H.R. REP. NO. 97-686, at 10. *Pfizer* therefore may offer some clues as to Congress' intent in enacting FTAIA.

In *Pfizer*, the Supreme Court articulated policy reasons for holding that a foreign plaintiff was entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Noting that one purpose of *§ 4* of the Clayton Act is "to deter violators and deprive them of 'the fruits of their illegality,'" the Supreme Court reasoned that denying a foreign plaintiff injured by an antitrust violation the right to sue "would permit a price fixer or a monopolist to escape full liability for his illegal actions" and "would lessen the deterrent effect" of the antitrust laws. *See* *Pfizer, 434 U.S. at 314-15* (citations omitted). Moreover,

> if foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter **[**52]** into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefitted by the maximum deterrent effect of treble damages upon all potential violators.

Id. at 315.

On this deterrence logic, the Second Circuit in *Kruman* refuted the view that suits by domestic plaintiffs injured by a global conspiracy's domestic effects could adequately enforce our antitrust laws. The Second Circuit noted that, when a foreign anticompetitive scheme enhances the success of a domestic scheme, the perpetrator would have a greater incentive to pursue **[*356]** the global scheme, which would ultimately harm U.S. consumers if a plaintiff harmed only by the foreign effect of a global scheme had no U.S. remedy. *See* *Kruman, 284 F.3d at 403* (citing *Pfizer, 434 U.S. at 313-15*). Judge Patrick Higginbotham's dissent in *Den Norske* similarly emphasized that allowing foreign plaintiffs to sue would protect **[**53]** U.S. consumers by deterring perpetrators from engaging in global conspiracies that harm U.S. markets. *See* *Den Norske, 241 F.3d at 435* (Higginbotham, J., dissenting). Judge Higginbotham, following *Pfizer*, reasoned that a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations. "Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred." *Id.*

We find this deterrence reasoning, drawn from *Pfizer*, and amplified in Judge Higginbotham's opinion in *Den Norske*, most compelling. The less restrictive interpretation of the "gives rise to a claim" language of FTAIA, allowing suits by foreign plaintiffs injured by the foreign effects of a global conspiracy, serves "the United States' narrow interest in vigorous domestic competition" better than the restrictive interpretation disallowing such suits. *Id.*

at 438-39. *Pfizer*'s concern was that denying a foreign plaintiff injured by an antitrust violation **[**54]** a remedy under our antitrust laws would permit a price fixer to escape full liability for his conduct, which would lessen the deterrent effect of the antitrust laws. This concern applies squarely to this case. Disallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce. Suits only by those injured by the U.S. effects of a conspiracy may not provide sufficient deterrence; a conspirator could expect that illegal profits abroad would offset his liability in the U.S., leaving the conspirator with an incentive to engage in global conspiracy. Allowing suits by those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct.

Even assuming, *arguendo,* that the antitrust laws are only intended to protect selfish national interests, suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies. This reasoning is also supported **[**55]** by FTAIA's legislative history, which notes: "As the Supreme Court pointed out in *Pfizer*, … to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States ***antitrust law*** that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. REP. NO. 97-686, at 10.

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be underdeterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability. In any case, the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement. The U.S. consumer would only gain, and would not lose, **[*357]** by enlisting enforcement by those harmed by the foreign effects of a global conspiracy. We think **[**56]** that *Pfizer* supports this view and that the citation to *Pfizer* in the legislative history of FTAIA suggests that Congress meant to endorse it as well.

6. Conclusion on Subject Matter Jurisdiction

On the basis of the foregoing, we conclude that the less restrictive view of FTAIA's jurisdictional reach, allowing subject matter jurisdiction in this case, is what Congress meant to achieve. The District Court erred in dismissing the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, since under the less restrictive interpretation, the foreign plaintiffs can establish that the global conspiracy's "direct, substantial, and reasonably foreseeable effect" on domestic commerce "gives rise to a claim" under the antitrust laws.

B. Standing

Appellees contend that, even if subject matter jurisdiction is proper, the case should nonetheless be dismissed because the foreign purchasers lack standing. Because the District Court concluded that it lacked subject matter jurisdiction over the foreign plaintiffs' claims, it declined to address the standing issue. Although the District Court did not rule on the issue, it was fully presented below, **[**57]** as well as before this court. Appellants ask this court to remand the case so that the District Court may examine the issue in the first instance, or alternatively, to find that they have standing.

While the District Court's failure to rule on the issue of standing "might be thought to warrant a remand, so that the district court [may] consider the matter in the first instance, the Supreme Court has instructed ***HN11***[] the courts of appeals to decide for themselves whether the party seeking judicial review has standing, even if the issue was not decided below…." *Found. on* *Econ. Trends v. Lyng, 291 U.S. App. D.C. 365, 943 F.2d 79, 82 (D.C. Cir. 1991)* (citing *FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990))*. We are thus "required to address the issue [of standing] even if the courts below have not passed on it…." *FW/PBS, 493 U.S. at 230* (citing *Jenkins v. McKeithen, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969))*. "Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under **[**58]** review'…." _FW/PBS, 493 U.S. at 231_ (citing _Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)_ (citing _Mitchell v. Maurer, 293 U.S. 237, 244, 79 L. Ed. 338, 55 S. Ct. 162 (1934)))_.

_HN12_[] To meet the constitutional requirements of standing under the Clayton Act, an antitrust plaintiff must establish "injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing." _Andrx Pharms., Inc. v. Biovail Corp. Int'l, 347 U.S. App. D.C. 178, 256 F.3d 799, 806 (D.C. Cir. 2001)_ (citing _Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))_. The foreign purchasers have constitutional standing. They allege that they suffered injury-in-fact when they paid inflated prices for vitamins directly to the defendants. This injury was allegedly caused by defendants' conspiracy to fix vitamin prices around the world. There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.

In addition, **_HN13_**[] an antitrust plaintiff must **[**59]** establish "antitrust injury," that is, "'injury of the type the antitrust laws were intended to prevent and that flows from **[*358]** that which makes defendants' acts unlawful." _Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)_ (quoting _Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))_. Appellees argue that the plaintiffs' injuries "are not 'injury of the type the antitrust laws were intended to prevent,' because those laws do not forbid the fixing of prices in the markets in which Plaintiffs purchased vitamins, but only in U.S. commerce." Appellees' Br. 42 (citation omitted). We disagree.

In this case, plaintiffs allege that the defendants engaged in a global conspiracy that had an effect on U.S. and foreign commerce. **_HN14_**[] The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce. _See, e.g._, _Laker Airways, 731 F.2d at 922_ ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory. **[**60]** "); _Alcoa_, 148 F.2d at 443-44; _cf._ _Pfizer, 434 U.S. at 314_ ("The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations."). Thus, the antitrust laws forbid the fixing of prices in foreign markets where that conduct harms U.S. commerce. Where defendants' global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue.

In _Brunswick_, the Supreme Court explained that, **_HN15_**[] to establish "antitrust injury," the injury should be "'the type of loss that the claimed violations'" of the Sherman Act "'would be likely to cause.'" _Brunswick, 429 U.S. at 489_ (quoting _Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))_. The foreign purchasers of vitamins here were injured by conduct that violated the Sherman Act - a global price-fixing conspiracy. The foreign plaintiffs' paying of inflated prices in foreign commerce **[**61]** was loss of the type that violation of the Sherman Act would be likely to cause. Moreover, the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here. The foreign purchasers' injury therefore must be deemed to be "of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's conduct unlawful." _Brunswick, 429 U.S. at 489_. Appellants can therefore establish "antitrust injury."

In addition, **_HN16_**[] we must consider the following additional _Associated General Contractors_ factors to determine whether appellants are "proper plaintiffs": "the directness of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." _Andrx Pharms., 256 F.3d at 806_ (citing _Associated Gen. Contractors, 459 U.S. at 542-45_). The foreign **[**62]** plaintiffs allegedly purchased vitamins at inflated prices directly from the defendants, and their injury arose from defendants' alleged conspiracy to inflate prices. The injury is direct and the claim for damages is not speculative. Allowing the foreign plaintiffs to sue does not risk duplicative recovery or complex damage apportionment.

[*359] Appellees finally argue that "there is a large body of 'more appropriate plaintiffs,'" namely the "hundreds of U.S. plaintiffs, as well as a class of domestic purchasers," who have sued the defendants. Appellees' Br. 44. But these domestic plaintiffs have not been harmed more directly by the foreign effects of the conspiracy than the foreign purchasers, and appellees do not suggest that the domestic plaintiffs can seek to recover for the same injury that the foreign plaintiffs suffered. The domestic plaintiffs are not more direct victims of defendants' conduct than the foreign plaintiffs, since the foreign plaintiffs have been injured just as directly as the domestic plaintiffs as a result of the defendants' conduct. Furthermore, for the reasons already explained, the foreign plaintiffs play an important role in the deterrence of the global conspiracy, **[**63]** a role that cannot be filled adequately by the domestic plaintiffs alone. Therefore, the foreign plaintiffs are proper plaintiffs to bring suit in this case.

We conclude that the foreign plaintiffs in this case have standing to bring their federal antitrust claims.

C. Supplemental Jurisdiction

Appellants contend that, after the District Court dismissed the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, it erred in declining to exercise supplemental jurisdiction over the foreign plaintiffs' foreign law claims pursuant to *28 U.S.C. § 1367*. Appellants argue that "the district court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act, and consequently, should have exercised supplemental jurisdiction over the claims of the foreign plaintiffs." Appellants' Br. 27-28.

HN17[] This court reviews the District Court's decision not to exercise supplemental jurisdiction for abuse of discretion. *See* *Diven v. Amalgamated Transit Union Int'l & Local 689, 309 U.S. App. D.C. 23, 38 F.3d 598, 601 (D.C. Cir. 1994)*. *28 U.S.C. § 1367* provides **[**64]** that, ***HN18***[] "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." *28 U.S.C. § 1367*. ***HN19***[] Under *28 U.S.C. § 1367*, "the District Court has supplemental jurisdiction over related claims when it has original jurisdiction over the initial claim." *Harris v. Sec'y, U.S. Dep't of Veterans Affairs, 326 U.S. App. D.C. 362, 126 F.3d 339, 346 (D.C. Cir. 1997)*. "When the District Court has dismissed claims properly before it, it retains discretion to decide whether or not to dismiss other claims as to which it may exercise supplemental jurisdiction." *Id.* The District Court "may decline to exercise supplemental jurisdiction over a claim" if, for example, "the district court has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)*. But "if the district court dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction. **[**65]** " *Saksenasingh v. Sec'y of Educ., 326 U.S. App. D.C. 370, 126 F.3d 347, 351 (D.C. Cir. 1997)*.

When the District Court dismissed the foreign plaintiffs' underlying federal antitrust claim on jurisdictional grounds, it had no discretion to exercise supplemental jurisdiction at all over the foreign plaintiffs' foreign law claims. Appellants' assumption that the District Court's remaining jurisdiction over the *domestic* plaintiffs' claims can serve as the basis of supplemental jurisdiction over the foreign plaintiffs' foreign law claims is implausible, and appellants cite no cases to support this assumption. When the District Court dismissed the foreign plaintiffs' claims on jurisdictional grounds, the remaining original jurisdiction over the domestic plaintiffs' claims was irrelevant to **[*360]** the exercise of supplemental jurisdiction over the foreign plaintiffs' foreign law claims. The dismissal of the foreign plaintiffs' federal antitrust claims on jurisdictional grounds precluded the District Court from exercising supplemental jurisdiction over any of the foreign plaintiffs' additional claims over which the court did not have original jurisdiction.

We recognize that the District Court has already **[**66]** articulated reasons that counsel against exercising supplemental jurisdiction, such as comity, efficiency, and the novelty and complexity of the issues of foreign law involved. The posture of the case has now changed, however, because we reverse the District Court's decision on subject matter jurisdiction and vacate its judgment against appellants. On remand, the District Court will have original jurisdiction over the foreign plaintiffs' federal antitrust claims. Therefore, the District Court must consider anew whether to exercise its discretion to accept supplemental jurisdiction over the foreign plaintiffs' foreign law claims. But the District Court still retains discretion to decline to exercise supplemental jurisdiction over the foreign law claims pursuant to *28 U.S.C. § 1367*.

III. CONCLUSION

For the reasons stated above, we reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

Dissent by: KAREN LECRAFT HENDERSON

Dissent

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

I disagree with the majority's interpretation of the Foreign Trade Antitrust Improvements **[**67]** Act (FTAIA), *15 U.S.C. § 6a*, and, consequently, with its disposition of this appeal. [1] The majority decides whether a court has jurisdiction over claims asserted by a plaintiff in one action by reference to a hypothetical claim another party could, perhaps, raise in some other proceeding. This seems a peculiar notion. The more natural reading of the statutory language, I believe, is the narrower one adopted by the district court below and by the Fifth Circuit in *Den Norske Stats Oljeselskap AS v. HeereMac VOF, 241 F.3d 420 (5th Cir. 2001)*, under which the phrase "gives rise to a claim" refers to the claim advanced by the plaintiff in the action before the court. This reading, to me, reflects the Congress's "unambiguously expressed intent" under *Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. It is also consistent with the legislative history that the majority cites.

[68]** The Fifth Circuit's narrower construction is unambiguously supported by the House Report's declaration that "the 'effect' providing the jurisdictional nexus must also be the basis *for the injury alleged* under the antitrust laws." H.R. Rep. 97-686, at 11-12 (emphasis added); *see* maj. op. at 23-24. The plain meaning of this statement is not undercut, as the majority contends, by the two sentences that follow; they simply explain that, so long as "the basis of the claim has had the requisite impact on the domestic or import commerce of the United States," [2] the claim does not fail simply **[*361]** because "the impact of the illegal conduct" is not "experienced by the injured party within the United States." H.R. Rep. No. 97-686, at 12; *see* maj. op. at 24. Another excerpt the majority quotes similarly explains that "foreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace, just as our citizens do" so long as "the conduct has the requisite effects within the United States, even if some purchasers *take title* abroad or *suffer economic injury* abroad." *See* H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 27) (emphasis added). Taken **[**69]** together, these two excerpts make clear that neither the situs of the injury nor the nationality of the claimant is jurisdictionally dispositive so long as there is a sufficient domestic impact or effect to satisfy subsection (1) of the FTAIA. Neither excerpt purports to eliminate the requirement in subsection (2) that such domestic impact give rise to the claimed injury wherever and by whomever felt. Other of the majority's citations likewise relate to the first prong of the jurisdictional test, in subsection (1), and so are of no assistance in construing the second prong of the test set out in subsection (2). *See* maj. op. at 24-26 (quoting H.R. Rep. No. 97-686, at 9-10, 11, 13). Finally, the Report expressly relies, as the majority observes, on the United States Supreme Court's decision in *Pfizer v. Government of India, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*, but only for the broad proposition that "to deny foreigners a recovery could *under some circumstances* so limit the deterrent effect of United States ***antitrust law*** that defendants would continue to violate our laws, willingly risking the smaller

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[1] I nonetheless agree with the majority's determination that the district court lacked discretion to exercise supplemental jurisdiction once it had dismissed all of the appellants' claims under United States law. *See* maj. op. at 34-36.

[2] Notably, the word "claim" in the quoted language refers to the specific claim asserted by the injured party.

amount of damages payable only to injured **[**70]** domestic persons." H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 30) (emphasis added). The Report does not suggest the deterrence policy discussed in *Pfizer* justifies expanding jurisdiction beyond the limits expressed in subsection (2) of the FTAIA.

Finally, I believe that our decision in *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080 (D.C. Cir. 1998)*, cannot be construed to support the majority's interpretation of the FTAIA. As a textual matter, the court in *Caribbean* addressed only subsection (1) of the FTAIA, with nary a mention of subsection (2). Even were we to presume that the court *sub silentio* considered the second prong of the jurisdictional test, the plaintiffs' allegations plainly show that, notwithstanding the majority's contrary assertion, *see* maj. op. at 14, the alleged domestic effect did in fact give **[**71]** rise to the foreign plaintiff's anti-trust claim. In *Caribbean Broadcasting* the court found the foreign plaintiff had adequately alleged that (1) the defendants engaged in "anticompetitive conduct"--"namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order to protect their monopoly" over FM radio advertising in "the market for English-language radio broadcast advertising in the Eastern Caribbean"; (2) "U.S. customers in the relevant market suffered antitrust injury, to wit, they paid excessive prices for advertising because of the unlawful actions of [the defendants]"; and (3) the foreign plaintiff "was and remains foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from [the defendant radio broadcaster]." *148 F.3d at 1087*. Thus it is clear that the defendants' fraudulent anticompetitive conduct had the effect of causing U.S. companies to advertise only with the defendants and that this effect gave rise to the foreign plaintiff's claim for lost customers.

In sum, because I believe that the plain language in subsection (2) of the **[**72]** FTAIA **[*362]** expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under subsection (1) of the statute, I respectfully dissent.

End of Document

Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.

United States District Court for the District of Oregon

January 21, 2003, Decided ; December 08, 2003, Filed

CV 00-1693-PA

Reporter

2003 U.S. Dist. LEXIS 25829 *; 2003 WL 23715981

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, SMOKEY POINT HARDWOODS, INC., and ROSS -- SIMMONS HARDWOOD LUMBER COMPANY, INC., Plaintiffs, v. WEYERHAEUSER COMPANY, Defendant.

Subsequent History: **[*1]** Motion denied by, Motion for new trial denied by *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 2003 U.S. Dist. LEXIS 27214 (D. Or., July 5, 2003)*

Motion granted by, in part, Motion denied by, in part *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 340 F. Supp. 2d 1118, 2003 U.S. Dist. LEXIS 25982 (D. Or., 2003)*

Core Terms

alder, relevant market, competitors, summary judgment, anti-competitive, consumers, costs, antitrust, sawmills, prices, logs, monopoly, lumber, rival, anti trust law, predatory, hardwood, sawlogs, purposes, argues, input, expert opinion, destroy the competition, expert testimony, Sherman Act, monopolization, practices, finished, raises, region

Counsel: For Confederated Tribes of Siletz Indians of Oregon, Plaintiff: Julie A. Weis, Haglund Kirtley Kelley & Horngren, LLP, Portland, OR. LeRoy Wayne Wilder, LeRoy Wilder, P.C., Portland, OR. William K. Barquin, Portland, OR. Michael E. Haglund, Haglund Kirtley Kelley Horngren & Jones, LLP, Portland, OR. Michael K. Kelley, Haglund Kirtley Kelley Horngren & Jones, Portland, OR. Timothy J. Jones, Haglund Kirtley Kelley Horngren & Jones, LLP, Portland, OR.

For Smokey Point Hardwoods Inc, Plaintiff: Julie A. Weis, Haglund Kirtley Kelley & Horngren, LLP, Portland, OR. LeRoy Wayne Wilder, LeRoy Wilder, P.C., Portland, OR. William K. Barquin, Portland, OR. Michael E. Haglund, Haglund Kirtley Kelley Horngren & Jones, LLP, Portland, OR. Michael K. Kelley, Haglund Kirtley Kelley Horngren & Jones, Portland, OR. Timothy J. Jones, Haglund Kirtley Kelley Horngren **[*2]** & Jones, LLP, Portland, OR.

For Ross-Simmons Hardwood Lumber Company, Inc, Plaintiff: Julie A. Weis, Haglund Kirtley Kelley & Horngren, LLP, Portland, OR. LeRoy Wayne Wilder, LeRoy Wilder, P.C., Portland, OR. William K. Barquin, Portland, OR. Michael E. Haglund, Haglund Kirtley Kelley Horngren & Jones, LLP, Portland, OR. Michael K. Kelley, Haglund Kirtley Kelley Horngren & Jones, Portland, OR. Timothy J. Jones, Haglund Kirtley Kelley Horngren & Jones, LLP, Portland, OR.

For Weyerhaeuser Company, Defendant: Christopher L. Garrett, Perkins Coie, LLP, Portland, OR. Jeffrey C. Dobbins, Perkins Coie, LLP, Portland, OR. Julia E. Markley, Perkins Coie, LLP, Portland, OR. Thomas R. Johnson, Perkins Coie, LLP, Portland, OR. Michael H. Simon, Perkins Coie, LLP, Portland, OR. Susan E Foster, Perkins Coie LLP, Seattle, WA. Thomas L Boeder, Perkins Coie, Seattle, WA.

Judges: OWEN M. PANNER, U.S. DISTRICT JUDGE.

Opinion by: OWEN M. PANNER

Opinion

PANNER, J.

Plaintiffs Confederated Tribes of Siletz Indians of Oregon, Smokey Point Hardwoods, Inc., and Ross-Simmons Hardwood Lumber Co., bring this antitrust action against Defendant Weyerhaeuser Company. The Third Amended Complaint alleges that "Plaintiffs are the owners and operators **[*3]** of three alder sawmills in Oregon and Washington that were forced out of business in 1998-2001 as a result of defendant's illegal anti-competitive actions." Plaintiffs seek a total of $ 36.6 million in compensatory damages, before trebling, plus attorney fees and costs.

Defendant has moved for summary judgment. Also pending are Defendant's Motion to Exclude Plaintiffs' Experts' Testimony, and Defendant's Motion to Strike Plaintiffs' New Expert Testimony. Defendant's reply brief also requests that certain of Plaintiffs' exhibits be stricken. All of the foregoing motions are denied.

Defendant's Motions to Exclude and to Strike

1. Defendant's Motion to Exclude (Rasmussen, Tedder, and Zerbe)

This motion seeks to exclude the testimony of Plaintiffs' expert witnesses on Daubert, grounds. *Rule 702* provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product **[*4]** of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant argues that economists Mark Rasmussen, Dr. Philip Tedder, and Dr. Richard Zerbe failed to use what Defendant believes to be the only proper methodology for defining the relevant market and showing that the Defendant possesses monopoly power. Although the Supreme Court has expanded Daubert to other expert fields, this does not appear to be what the Court had in mind when it authorized the trial courts to exclude "junk science." Rather, Defendant is arguing the merits of this antitrust case under the cloak of a Daubert motion. In deciding whether to grant summary judgment, this court is free to look beyond the expert's bottom-line conclusions. See *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1435-36 (9th Cir. 1995)*. If the expert opinions fail to establish the essential elements of Plaintiffs' case, then the remedy would be to grant summary judgment, not to exclude those opinions as "unreliable."

2. Defendant's Motion to Exclude (Nelson)

Defendant moves to exclude the expert opinion of William Nelson on the ground he is unqualified to **[*5]** offer an opinion because he is not an economist by training. Nelson has over 25 years of experience managing alder sawmills in the Pacific Northwest. Knowledge of the local lumber market, the suppliers, their purchasing practices, historical prices, plus an understanding of the reasons why customers purchase alder (rather than some other hardwood) for a particular application, are all useful in defining the relevant market and understanding whether Weyerhaeuser possesses, or has attempted to acquire, monopoly power.

Defendant also contends this opinion should be excluded because Nelson failed to fully disclose the "methodology" underlying his conclusions, or provide the "quantitive data supporting that opinion." Instead of books and academic theories, Nelson based his opinion upon his extensive personal experience and knowledge of the timber market in this region. Under the circumstances of this case, that does not justify excluding his opinion. Cf. *Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 768 n.3 (9th Cir. 2001)*. The opinion of an expert derived from real world experience can be as valid as the opinion of an economist whose only knowledge of a sawmill **[*6]** comes from reading National Geographic. [1] Defendant may cross-examine Nelson and offer its own expert opinions. The jury will decide how much weight to give to their respective conclusions.

3. Defendant's Motion to Strike New Expert Testimony (Rasmussen, Zerbe, and Ehinger)

After Defendant moved to strike Plaintiffs' expert testimony because the experts did not analyze the data in the manner that Defendant contends is legally required, Plaintiffs instructed their experts to perform the analysis that Defendant said was missing. Defendant now moves to strike the expert affidavits of Rasmussen and Zerbe on the ground that these additional conclusions were not disclosed to Defendant until November 12, 2002. Defendant argues that any expert studies had to be completed by October 24, 2002, when expert discovery closed.

I deny the motion. The supplemental expert testimony was generated in direct response to Defendant's attack upon the original expert reports. Plaintiffs first learned **[*7]** of Defendant's contentions after the discovery deadline, and acted promptly to remedy the alleged deficiency. Some courts have granted a motion to strike in similar circumstances, reasoning that a Plaintiff may not wait until the Defendant files for summary judgment, and points to the holes in the Plaintiff's case, before belatedly plugging those holes with a new expert opinion. However, that rationale places undo emphasis on law as a contest of skill between rival lawyers, at the expense of doing justice. At this stage of the proceedings, if there is sufficient evidence to support the Plaintiffs' case, I will not exclude that evidence simply because Plaintiffs failed to anticipate the need for it until the defect was pointed out by their opponent. The court is not grading a law school moot court exercise. Nor is this a situation in, which the Plaintiff has completely changed the version of events he told at deposition in order to forestall defeat, *i.e.*, a "sham" affidavit. Finally, trial is not until April 2003, so there is little risk of unfair prejudice.

Defendant also moves to strike the expert testimony of Paul Ehinger, on the ground his report was not disclosed until November **[*8]** 11, 2002, and because it allegedly addresses a "new" issue. Plaintiffs counter that this report simply responds to Defendant's motion for summary judgment, which asserts that Plaintiffs cannot show significant barriers to entry of the relevant market, which is an essential element of their antitrust claim.

Plaintiffs should have anticipated the need for testimony on this issue, and not waited until a summary judgment motion was pending before obtaining an expert report that was necessary to establish an essential element of their case. However, I will not preclude Plaintiffs from presenting that evidence now that the deficiency has been called to their attention. In addition, Plaintiffs told Defendant on Oct. 24 that they were in the process of obtaining an expert affidavit from Ehinger, and disclosed the subject matter (though not the substance) of his testimony. Defendant was on notice that Ehinger had been retained and the general scope and purpose of his report.

Given the time remaining until trial (Defendant received this report in early November and the trial is not until April), there is little unfair prejudice in allowing this testimony. Having to go to trial, instead of prevailing **[*9]** on summary judgment, is not unfair prejudice. If Defendant requests, I will allow Defendant to depose any new experts (or on any new opinions) and file any responsive expert disclosure reports.

4. Defendant's Motion (in footnote 11 of its Reply Brief) to Strike Various Documents

Defendant seeks to strike various deposition excerpts because Plaintiffs' counsel neglected to attach the court reporter's certification. That defect can easily be remedied (and, in fact, was cured almost two months before oral

[1] That is a general principle, not a characterization of the particular expert retained by Defendant. Dr. Pozdena's report indicates that he has more than 20 years of experience researching the forest products industry.

argument). Defendant also complains that Plaintiffs didn't cite the specific line numbers of the testimony they rely upon, citing the page numbers instead. Again, the defect (if any) is readily curable.

Next, Defendant seeks to strike evidence concerning conduct that pre-dates the 4-year limitations period. However, evidence of events occurring more than four years prior to-the filing of an antitrust complaint may still be admissible for various purposes, *e.g.*, to establish the wrongful nature and character of the defendant's conduct during the limitations period. See *Reid Brothers Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1305-06 (9th Cir. 1983)*. Therefore, I deny that request.

Defendant **[*10]** raises other arguments, none of which have merit. All of Defendant's motions to strike and to exclude testimony are denied.

Defendant's Motion for Summary Judgment

Plaintiffs cite a handful of musty cases for the proposition that summary judgment is disfavored in antitrust cases. That is no longer true. The usual summary judgment standards apply. See, e.g., *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs., 201 F. Supp.2d 236, 266 (S.D.N.Y. 2002)* (rejecting identical argument).

The elements of a claim for monopolization under *Section 2* of the Sherman Act are "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. "Monopoly power" is "the power to control prices or exclude competition" from the relevant market. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The plaintiff must also show that it suffered a "causal antitrust injury." *Smilecare Dental Group v. Delta Dental Plan of Calif., Inc., 88 F.3d 780, 783 (9th Cir. 1996)*. **[*11]** [2]

A claim for attempted monopolization under *Section 2* of the Sherman Act requires proof of the following: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of successfully achieving market power in the relevant market; and (4) causal antitrust injury. *Id.*

The Third Amended Complaint, simply stated, alleges that the Plaintiffs owned alder sawmills in Oregon and Washington, but did not have their own timber supply (or at least not enough logs to keep their mills running). The plaintiffs had to buy logs on the open market. Weyerhaeuser allegedly took various wrongful actions aimed at tying up the available alder timber, intentionally **[*12]** raising the price that Plaintiffs had to pay for logs, and otherwise preventing the Plaintiffs from obtaining an adequate supply of red alder logs, at a reasonable price, to operate their sawmills. The net effect (and intent) was to destroy competition, leaving Weyerhaeuser with a monopoly in the alder market in this region, able to dictate both the price paid to alder producers for their logs and the price paid by consumers for finished alder lumber.

For purposes of this motion only, Weyerhaeuser concedes that its intentions are a disputed factual question. Assuming the truth of the evidence proffered by Plaintiffs, a jury could find that Defendant has engaged in wrongful conduct aimed at destroying competition, and which might be viewed as economically irrational but for its adverse effect on competition. [3] The record also suggests that the number of non-Weyerhaeuser alder sawmills in this

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[2] "Causal antitrust injury" means an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield v. USA Petroleum, 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Id. at 344*.

region has declined precipitously in recent years, though the parties dispute the reasons for (and legal significance of) that decline.

Weyerhaeuser's principal argument for summary judgment is that it does not possess a monopoly in the relevant market, properly defined. The relevant market for antitrust purposes is generally defined in terms of the "product market" and "geographic market." "[A] product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*. See also *E. I. du Pont de Nemours, 351 U.S. at 394-95* (commodities reasonably interchangeable by consumers for the same purposes constitute the product market). But cf. *Rebel Oil, 51 F.3d at 1436* (court must consider elasticity of supply as well as that of demand).

"Cross-elasticity of demand" between products is "the extent to which consumers will change their consumption of one product in response to a price change in another." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 469, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. **[*14]** For instance, if consumers would simply shift to Chevrolet cars in the event that Ford cars become too expensive, then the relevant market may be "cars" in a particular price range and not just the universe of "Ford cars." "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999)*.

The "geographic market" is the area of effective competition where buyers can turn for alternate sources of supply. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)*. If small changes in the price of a product in one location will cause customers to turn to alternatives available in another location, then these sources are part of the same relevant market.

The definition of the relevant market is, ultimately, a mixed question of fact and law for the jury. See *Forsyth, 114 F.3d at 1476*. Unless the Plaintiffs' market definition is wrong as a matter of law, or unsupported by the record, it is an issue for the jury to decide. *Id. at 1477* (denial of summary judgment proper even though the court thought the **[*15]** defendant's evidence was more persuasive).

Defendant contends the relevant market is all finished hardwood lumber, nationwide (or perhaps even internationally), and that Weyerhaeuser controls just over two percent of this market. Plaintiffs point to two relevant markets: [4] (1) the market for finished alder, lumber, of which Weyerhaeuser allegedly has a 75 percent share, and (2) the market for alder sawlogs in the Pacific Northwest, of which Weyerhaeuse allegedly has a 65 percent share.

Red alder is harvested in commercial quantities **[*16]** almost exclusively in the Pacific Northwest. According to Plaintiffs' experts, sawlogs must be processed soon after cutting, and cannot feasibly be transported long distances or stockpiled indefinitely. There are special sawmills dedicated to producing alder lumber, as opposed to other species. Those mills cannot readily utilize other varieties of timber, nor are sufficient quantities of other hardwood sawlogs available in this region to keep a mill running, and it is not feasible to import sawlogs from other regions even if they were available. Alder is distinct from other hardwoods, both in uses, grading, and pricing. See, e.g., Wheeler Declaration. Defendant's expert disputes many of these assertions, but the court cannot resolve that dispute on summary judgment.

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[3] I recognize that Defendant has evidence it believes depicts a very different picture of Weyerhaeuser's actions, and the reasons why the Plaintiffs' sawmills are **[*13]** now out of business. However, on a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party.

[4] Plaintiffs repeatedly use the term "submarket," as do some Ninth Circuit opinions. See, e.g., *Morgan, Strand, Wheeler & Biggs, 924 F.2d at 1490* ("A submarket exists if it is sufficiently insulated from the larger market so that supply and demand are inelastic with the larger market.") However, the concept of a "submarket" adds little to the analysis. See, e.g., Phillip Areeda, ***ANTITRUST LAW***, P 533 (2d. ed 2002) ("[s]peaking of 'submarkets' merely confuses the issue"). The task is to define the relevant market in a given case, which is a fact-based inquiry. That the relevant market may be defined more narrowly in a given case does not change the ultimate inquiry.

Defendant also relies upon Plaintiff Smokey Point's response to Request for Admission No. 5, [5] but the question was ambiguous. It is unclear whether Smokey Point was admitting that red alder lumber can serve as a substitute for other hardwoods--because of alder's superior qualities--or admitting that other hardwoods can readily replace alder. In addition, there are varying degrees of substitutability. See Pozdena Report, **[*17]** p. 11; Wheeler Decl. See also *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir. 1975)* ("where there is a *high degree* of substitutability . . . two [products] should be considered in the same market") (emphasis added). Finally, the record indicates that particular grades of alder are used for very different purposes. It may be that other hardwood species are readily substituted for the low grade alder used to make pallets, but not for the high grade alder used to make furniture or guitars. On this record, I cannot say. The requested admission lacks essential details and cannot bear the great weight Defendant places upon it.

Defendant next argues that sawlogs are not the end product, and the antitrust laws exist to protect consumers, so the only relevant market is finished lumber. However, the antitrust laws apply to inputs as well as outputs. See *Telcor, Communications, Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1132-36 (10th Cir. 2002)* (relevant market from perspective of those Plaintiffs was pay phone locations, **[*18]** rejecting contention that relevant market must be viewed from perspective of retail end-users, for whom cell phones could be a substitute product).

The protections of the Sherman Act are not limited to individual retail consumers. "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (citations omitted). [6] See also *American Ad Management, Inc. v. General Tel. Co. of Calif., 190 F.3d 1051, 1057-58 (9th Cir. 1999)* (a plaintiff need not be a consumer to establish antitrust injury).

Much of the finished alder lumber is itself an "input" that will be purchased by other businesses and transformed into furniture, guitars, and other products. Nevertheless, **[*19]** the antitrust laws guard against a monopoly in the sale of those inputs. Cf. *R.C. Dick Geothermal Corp., 890 F.2d 139, 143-44 (9th Cir. 1989)* (en banc) (relevant market was steam, which is not a final retail consumer product but merely an input to be used by other businesses); *Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 457 (9th Cir. 1966)* (relevant market was oranges available at a reasonable price to orange juice manufacturer, even though oranges was not the final product but only an input), reversed on other grounds, *389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*. Likewise, a business can also be a "consumer." If Weyerhaeuser has monopolized the market for alder sawmill logs, it is immaterial that the victims are other mills. Cf. *Case-Swayne, 369 F.2d at 457* (immaterial that plaintiff was rival juice manufacturer rather than ultimate consumer, and market monopolized was the input and not the retail juice market).

Defendant argues that such an antitrust claim has to be asserted by a seller of timber, not a rival buyer of logs. However, the Plaintiffs in *Telcor* were not sellers of pay phone locations, but would-be competitors of Southwestern Bell unable to gain a **[*20]** toehold in the market because of Southwestern Bell's alleged stranglehold over pay phone locations that was perpetuated by anti-competitive practices. Likewise, the plaintiff in *Case-Swayne* was a rival juice manufacturer unable to obtain oranges due to Sunkist's alleged anti-competitive practices. Plaintiffs make analogous allegations here.

It also seems appropriate to limit the sawlog market geographically. From the Plaintiffs' perspective, it is of little solace that cherry sawlogs may be available in the southeastern United States, if--as a result of anti-competitive conduct--no logs are available, at a reasonable cost, to feed their mills here in the Pacific Northwest. Cf. *Mandeville*

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[5] The identical question and answer are in the requests for admissions posed to the other Plaintiffs (though numbered differently).

[6] The continuing validity of this principle was restated in *Blue Shield v. McCready, 457 U.S. 465, 472, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*.

Island Farms, 334 U.S. at 236 ("Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned.")

As Defendant acknowledges, this is an area of ***antitrust law*** on which even experts disagree. For purposes of this summary judgment motion, it is not necessary to resolve all those disagreements or to articulate a grand theory of ***antitrust law***. I am satisfied that Plaintiffs have stated a claim upon which they **[*21]** may be entitled to relief, assuming the jury finds that the evidence at trial supports Plaintiffs' contentions.

Defendant next argues that there are no significant barriers to entry, [7] based upon the cost of opening a sawmill, and the alleged entrance of other competitors. Some of these facts are disputed. See, e.g., Ehinger Decl., P 10. A jury could also find other barriers to entry beyond the mere cost to outfit a sawmill, including the alleged monopolization of inputs (*i.e.*, alder sawlogs) and a history of alleged anti-competitive conduct. Cf. *Telcor Communications, 305 F.3d 1124* (prospective competitors unable to obtain suitable locations for their pay phones, coupled with history of anti-competitive conduct by Southwestern Bell).

Defendant also asserts that "'raising rivals' costs,' at least in the form that Plaintiffs present in this case, has never been accepted by any court as the basis for the predatory conduct element of a *Section 2* claim, especially in the absence of proof that such conduct caused the defendant to operate at a loss or that such conduct raised the costs of the defendant's rivals disproportionately greater than it raised the defendant's own costs." Defendant further argues that "even if predatory pricing may be considered to be predatory conduct in violation of *Section 2*, merely reducing one's profit margins to gain a competitive advantage while still selling at a profitable level can never be predatory conduct as a matter of law."

In Forsyth v. Humana, the Ninth Circuit held that a hospital's "alleged policy of funneling indigent and low-paying patients to competitors raises a factual question whether such conduct *increased the operating costs of those competitors* by imposing on them the costs of caring for indigent patients." *114 F.3d at 1478* (emphasis added). "[T]hese anticompetitive practices enabled Sunrise to, and it did, **[*23]** charge higher prices for hospital services. These higher prices translated into higher copayments and premium payments. Such an increase in consumer prices caused by the asserted conduct would constitute antitrust injury of the type the antitrust laws were designed to prevent." Id.

Forsyth may be distinguishable because the plaintiffs were employees and employers complaining about high health care premiums, rather than competitors of Humana. However, Forsyth cited other authorities. See, e.g., *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc., 63 F.3d 1540, 1553 (10th Cir. 1995)* (monopolist's practice of scheduling courses to conflict with competitor's course could raise competitor's costs, and therefore, "would qualify as anticompetitive conduct"); *Premier Electrical Const. Co. v. Nat'l Electrical Contractor's Ass'n, 814 F.2d 358, 368 (7th Cir. 1987)* (when defendant raised its rivals' costs, it raised the market price to its own advantage); T. Krattenmaker & S. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, *96 YALE L.J. 209, 235-62 (1986)*. [8] Purposely inflating a competitor's costs can, in some **[*24]** instances, be anti-competitive.

Defendant is correct that, at least in the foregoing instances, the increase in costs disproportionately favored the Defendant. However, when competitors lack deep pockets, a monopolist may be willing to raise both its

[7] Entry barriers are "additional long-run costs that were not incurred by the incumbent firms but must be incurred by new entrants." *Rebel Oil, 51 F.3d at 1439*, citing *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir. 1993)*. Examples of such barriers include: (1) license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher **[*22]** capital costs on new entrants; and (5) economies of scale. Id.

[8] Cf. *Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 368-69 (9th Cir. 1988)* (discussing when a monopolist's refusal to aid a competitor violates the antitrust laws). Clearly antitrust liability may be premised upon theories other than mere predatory retail pricing.

competitor's costs, and its own costs, in the short run, to be rid of those competitors in the long run. That is little different from predatory pricing aimed at putting the competition out of business.

In addition, Weyerhaeuser allegedly would have earned a much greater profit on alder sales, at least in the short run, but for the anti-competitive conduct complained of. I see no practical difference between predatory pricing that results in a company purposely selling a product at a loss of one cent per unit, versus selling the same product at a profit of only one cent per unit when the company would have earned a larger profit but for its anti-competitive conduct. **[*25]** Assuming the truth of the Plaintiffs' contentions, a jury could find that the conduct Weyerhaeuser allegedly engaged in would have been "economically irrational but for its adverse effect on competition." Some courts have deemed this sufficient to constitute anti-competitive or predatory conduct for purposes of proving a *Section 2* violation. See also Pozdena Depo. at 33-34 (such conduct might be proscribed by the antitrust laws if it "had no legitimate purpose" and was aimed at destroying competition).

Of course, there is a critical distinction between deliberately driving up costs for the purpose of destroying competition and letting logs rot in the yard just to keep competitors from obtaining those logs for their own mills, versus outbidding rivals for scarce resources that both companies require with any price increase resulting from normal market forces when demand exceeds supply. The former may be unlawful anti-competitive behavior, while the latter is simply business. The antitrust laws exist to protect competition, not to protect specific companies from the effects of legitimate competition. A firm may also acquire and maintain a monopoly simply by being a better competitor or **[*26]** having better production methods; the Sherman Act does not outlaw such monopolies nor is it intended to shield inefficient competitors from competition. See *Alaska, Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547 (9th Cir. 1991)*. However, at this stage in the proceedings the court is unable to say, as a matter of law, that Weyerhaeuser's conduct did not violate the Sherman Act.

Defendant also argues that Plaintiffs' theory of the case is irrational, because Defendant could have bought the Plaintiffs' mills for less than it allegedly spent to drive them out of business through other means. Even assuming those figures are accurate, it does not mandate a grant of summary judgment. For one thing, this argument assumes that Defendant knew the eventual cost from the start. That is not always the case, as many a car owner has discovered after spending more money to repeatedly repair the car than it would have cost to simply replace it at the outset. A jury might ultimately find Defendant's argument persuasive, but it does not carry the day here.

Defendant advances several other arguments, but they do not alter the result. Plaintiffs have made a sufficient showing to survive a motion **[*27]** for summary judgment. There are conflicting expert opinions, theories of the case, and explanations for Weyerhaeuser's conduct and the reasons why the Plaintiff sawmills went out of business. The parties also are far apart on the issue of damages, if Plaintiffs do prevail on liability.

Conclusion

Defendant's Motion (# 46) to Exclude Plaintiffs' Experts' Testimony is DENIED. Defendants' Motion (# 67) to Strike Plaintiffs' New Expert Opinions is DENIED. Defendant's additional Motions to Strike (contained in footnote 11 of its Reply brief, # 66) are DENIED. Defendants' Motion (# 42) for Summary Judgment is DENIED.

DATED this 21st day of January, 2003.

/s/ Owen M. Panner

OWEN M. PANNER

U.S. DISTRICT JUDGE

End of Document

Trueposition, Inc. v. Allen Telecom

United States District Court for the District of Delaware

January 21, 2003, Decided

C.A. No. 01-823 GMS

Reporter
2003 U.S. Dist. LEXIS 881 *; 2003 WL 151227

TRUEPOSITION, INC. and KSI, INC., Plaintiffs/ Counterclaim Defendants v. ALLEN TELECOM, INC. Defendant/ Counterclaim Plaintiff.

Subsequent History: As Amended September 4, 2003.

Prior History: *TruePosition, Inc. v. Allen Telecom, Inc., 2002 U.S. Dist. LEXIS 12848 (D. Del., July 16, 2002)*

Disposition: **[*1]** Motion to dismiss and/ or strike granted in part and denied in part. Claim dismissed.

Core Terms

counterclaim, sham, tortious interference, affirmative defense, business opportunity, abuse of process, patent infringement, antitrust, immunity, inequitable conduct, motion to dismiss, alleges, patents, grounds, lawsuit, cases, terms, pled

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

Dismissal is appropriate pursuant to *Fed. R. Civ. P. 12(b)(6)* if the complaint fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In this inquiry, the court must accept as true and view in the light most favorable to the non-movant the well-pleaded allegations of the complaint. The court need not accept as true unsupported conclusions and unwarranted inferences. However, it is the duty of the court to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Responses, Defenses, Demurrers & Objections**

Fed. R. Civ. P. 8 requires a "short and plain" statement of a claim or defense. *Fed. R. Civ. P. 8(a)* and *(b)*. It is well settled that the Federal Rules intend a liberal pleading standard. Federal courts may not impose a more demanding standard of pleading beyond the liberal system of notice pleading set up by the Federal Rules. Indeed, *Rule 8* expressly mandates that each averment of a pleading shall be simple, concise, and direct. *Fed. R. Civ. P. 8(e)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN3[] **Defenses, Demurrers & Objections, Motions to Strike**

Fed. R. Civ. P. 12(f) allows a court to strike "any insufficient defense" from any pleading. Motions to strike affirmative defenses are disfavored. When ruling on such a motion, the court must construe all facts in favor of the nonmoving party and deny the motion if the defense is sufficient under the law.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN4[] **Contracts Law, Breach**

The tort of interference with a contract requires an intentional act that is a significant factor in causing the breach of the contract. Without a breach, there is no viable tortious interference claim. As to this point, Delaware law is well-settled.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN5[] **Contracts Law, Breach**

It would be a novel holding for the court to rule that a breach of contract action can be maintained against a person who is not a party to the contract being sued upon. A party to a contract cannot sue a person who is not a party to that contract for breach of contract.

Contracts Law > Contract Modifications > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN6[] **Contracts Law, Contract Modifications**

A mutual modification of a contract certainly is not a breach.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

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

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN7[] **Pleadings, Counterclaims**

The elements of the tort of tortious interference with prospective business opportunities are: (a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages, all of which must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner.

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN8[] **Intentional Interference, Elements**

The tort of tortious interference with prospective business opportunities requires a valid business relationship or expectancy.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN9[] **Commercial Interference, Prospective Advantage**

To sustain the tort of interference with a business opportunity, the interference must have been improper.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN10[] **Commercial Interference, Contracts**

Normally, lawful actions cannot form the basis of a claim of tortious interference; however, in the sham litigation context, the mere initiation of a lawsuit may be wrongful if it constitutes unlawful antitrust activity.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN11[] **Antitrust & Trade Law, Exemptions & Immunities**

The term "sham litigation" refers to an exception to the doctrine of antitrust immunity. Immunity to certain antitrust suits was established by the United States Supreme Court. The cases established that the Sherman Act does not prohibit persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. The Supreme Court refused to impute to Congress an intent to invade the *First Amendment* right to petition. Thus, the Noerr-Pennington doctrine protects those who petition the government from antitrust liability. Later caselaw extended Noerr antitrust immunity to the approach of citizens to administrative agencies and to courts. However, such immunity is not afforded to "sham" petitioning that is only an attempt to interfere directly with the business relationships of a competitor. Litigation is a mere "sham" if it is objectively baseless and subjectively motivated to interfere with business competition by using a governmental process as an anticompetitive weapon. A counterclaim of sham litigation is, essentially, an assertion that ***antitrust law*** has been violated.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Infringement Actions > General Overview

HN12[] **Scope, Exemptions**

The sham litigation exception applies to the National Labor Relations Act in the same way it applies to the Sherman Act. Other courts have applied the immunity principles of Noerr-Pennington to other contexts. It follows that if the Noerr-Pennington immunity principles apply in these contexts, the sham litigation exception to immunity applies as well. Other cases have explicitly or implicitly accepted the sham exception in the patent infringement context.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN13[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9 requires that all pleadings of fraud or mistake be stated with particularity. *Fed. R. Civ. P. 9(b)*. These averments, however, remain subject to the liberal pleading standard of *Fed. R. Civ. P. 8*, which requires only a "short and plain" statement of a claim or defense.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN14[] Heightened Pleading Requirements, Fraud Claims

In the context of alleged inequitable conduct before the Patent and Trademark Office during a patent prosecution, pleadings that disclose the name of the allegedly withheld relevant prior art and disclose the acts of the alleged fraud fulfill the requirements of *Fed. R. Civ. P. 9(b)*.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Failure to Fulfill Duties

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN15[] Inequitable Conduct, Failure to Fulfill Duties

It is the court's duty for purposes of a motion to dismiss only to test the sufficiency of the pleading, not to resolve disputed facts or decide the merits of the case.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN16[] Pleadings, Heightened Pleading Requirements

The United States Court of Appeals for the Third Circuit has made clear that, although it is certainly true that allegations of date, place or time satisfy the pleading requirements, nothing in *Fed. R. Civ. P. 9* requires them.

Patent Law > Infringement Actions > Defenses > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN17[] Infringement Actions, Defenses

Abuse of process is not a defense to a patent infringement action. Rather, it is a tort.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Mistaken Designations

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN18[] Affirmative Defenses, Mistaken Designations

See *Fed. R. Civ. P. 8(c)*.

Patent Law > Infringement Actions > General Overview

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN19[] Patent Law, Infringement Actions

Abuse of process may be alleged in a patent infringement case as in any other. A claim of abuse of process is established when the defendant proves that the plaintiff had an ulterior purpose and committed a willful act in the use of the process that is not proper in the regular conduct of the proceedings. There must be some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of process. There is no liability where the plaintiff has done nothing more than carry out the process to its authorized conclusion.

Counsel: For Trueposition Inc, KSI Inc, PLAINTIFFS: Donald F Parsons, Jr, Morris, Nichols, Arsht & Tunnell, Wilmington, DE USA.

For Allen Telecom Inc, DEFENDANT: John Leonard Reed, Timothy Ryan Dudderar, Duane Morris LLP, Wilmington, DE USA.

For Allen Telecom Inc, COUNTER-CLAIMANT: John Leonard Reed, Timothy Ryan Dudderar, Duane Morris LLP, Wilmington, DE USA.

For Trueposition Inc, KSI Inc, COUNTER-DEFENDANTS: Donald F. Parsons, Jr, Morris, Nichols, Arsht & Tunnell, Wilmington, DE USA.

Judges: Gregory M. Sleet, UNITED STATES DISTRICT JUDGE.

Opinion by: Gregory M. Sleet

Opinion

MEMORANDUM AND ORDER

I. INTRODUCTION

On December 11, 2001, the plaintiffs, TruePosition, Inc. and KSI, Inc. (collectively "TruePosition") filed a complaint against the defendant, Allen Telecom, Inc. ("Allen"). In the complaint, TruePosition alleges that Allen has infringed three of its patents, namely U.S. Patent No. 4,728,959 ("the '959 patent"), U.S. Patent No. 6,108,555 ("the '555 patent"), and U.S. Patent No. 6,119,013 ("the '013 **[*2]** patent"). Each of these patents discloses a technology for locating cellular phones. In its Answer and Counterclaims (D.I. 6, 48), the defendant asserted six affirmative defenses to the plaintiffs' claims, as well as five counterclaims.

Presently before the court is TruePosition's Motion to Dismiss and/ or Strike the Defendant's Counterclaims III, IV, and V, and Affirmative Defenses III and VI (D.I. 58). For the following reasons, the court will grant in part and deny in part the plaintiffs' motion.

II. STANDARDS OF REVIEW

The plaintiffs move to dismiss Counterclaims III, IV, and V pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. ***HN1***[] Dismissal is appropriate pursuant to this Rule if the complaint fails "to state a claim upon which relief can be granted." *FED. R. CIV. P. 12(b)(6)*. In this inquiry, the court must accept as true and view in the light most favorable to the non-movant the well-pleaded allegations of the complaint. *Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000)*. The court 'need not accept as true "unsupported conclusions and unwarranted inferences. "' *Id.* (quoting *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998))* **[*3]** (quoting *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997))*. However, it is the duty of the court 'to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable.' *232 F.3d at 184* (quoting *City of Pittsburgh, 147 F.3d at 263*).

The plaintiffs rely upon *Federal Rules of Civil Procedure 8* and *12(f)* for their motion to strike Affirmative Defenses III and VI. ***HN2***[] *Rule 8* requires a "short and plain" statement of a claim or defense. *FED. R. CIV. P. 8(a)* and *(b)*. It is well settled that the Federal Rules intend a liberal pleading standard. *See Leatherman v. Tarrant county Narcotic Intelligence & Coordination Unit, 507 U.S. 163, 168, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993)* (holding that federal courts may not impose a more demanding standard of pleading beyond "the liberal system of 'notice pleading' set up by the Federal Rules"). Indeed, *Rule 8* expressly mandates that "each averment of a pleading shall be simple, concise, and direct." *FED. R. CIV. P. 8(e)*.

HN3[] *Rule 12(f)* allows a court to **[*4]** strike "any insufficient defense" from any pleading. *FED. R. CIV. P. 12(f)*. Motions to strike affirmative defenses are disfavored. *Proctor & Gamble Co. v. Nabisco Brands, Inc., 697 F. Supp. 1360, 1362 (D. Del. 1988)*. When ruling on such a motion, "the court must construe all facts in favor of the nonmoving party … and deny the motion if the defense is sufficient under the law." *Id.*

III. DISCUSSION

A. Counterclaim III

Counterclaim III alleges tortious interference with a contract. The plaintiffs move to dismiss the counterclaim pursuant to *Rule 12(b)(6)* on the grounds that it fails to plead an essential element of the alleged tort, namely, a breach of the relevant contract.

HN4[] The tort of interference with a contract requires "an intentional act that is a significant factor in causing the breach of the contract." [1] *Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 584 (Del. Ch. 1998)*. Without a breach, there is no viable tortious interference claim. As to this point, Delaware law is well-settled. *See id.; see also Associated/ Acc Int'l, LTD. v. Dupont Flooring Sys. Franchise Co., 2002 U.S. Dist. LEXIS 6464*, at *27-28 (D. **[*5]** Del. 2002); *DeBakey Corp. v. Raytheon Serv. Co., 2000 Del. Ch. LEXIS 129, 2002 WL 1273317 (Del. Ch. 2000)*; *Boyer v. Wilmington Materials, 1997 Del. Ch. LEXIS 97, 1997 WL 382979 (Del. Ch. 1997)*; *Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 992 (Del. Ch. 1987)*. There is no discussion in these cases as to behavior that could constitute tortious interference when no breach of contract occurs. Presumably, this is because there is no conduct that could constitute the tort of interference with a contract, unless a breach of that contract results. [2]

[*6] In this case, the contract at issue is between AT&T Wireless Services, Inc. ("AT&T") and Allen for the purchase of Allen's wireless location systems, which systems are the subject of the present patent infringement suit. In its counterclaim, Allen alleges that the plaintiffs, by filing the present suit and by publicizing it, intended to cause a breach of the AT&T contract. Answer and Counterclaims (D.I. 48) PP 17-18. This is insufficient to state a claim of tortious interference with a contract because, as the defendant concedes, there has been no breach of the AT&T contract. [3] Answering Brief at 10. Therefore, Counterclaim III must be dismissed.

[*7] B. Counterclaim IV

Counterclaim IV alleges tortious interference with prospective business opportunities. ***HN7***[] The elements of this tort are: '(a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages, all of which must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner.' *DeBonaventura v. Nationwide Mut. Ins. Co., 428 A. 2d 1151, 1153 (Del. 1981)* (quoting *DeBonaventura v. Nationwide Mut. Ins. Co., 419 A.2d 942, 947 (Del. Ch. 1980))* (citations omitted). The plaintiffs move to dismiss the counterclaim on the grounds that the defendant cannot prove all of the required elements, namely, a prospective business opportunity, or an interference with that opportunity.

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[1] Contrary to the defendant's paraphrasing, the court did not style this element as requiring only some kind of interference and no resultant breach. *See* Answering Brief at 9.

[2] Although the defendant acknowledges that "a review of the relevant case law shows that the cases are universally precipitated by a breach of contract," it maintains that "the absence of a total breach does not foreclose recovery for damages caused by improper interference." Answering Brief at 10-11. This assertion is unpersuasive as it applies to interference with a contract, particularly given Allen's conspicuous failure to cite any supporting caselaw for it. Furthermore, Allen's contention that a breach of contract is not required in such a case because "the applicable tort here is, for a reason, labeled 'tortious *interference* with contractual relations' not 'tortious *breach* of contractual relations,'" Answering Brief at 12 n.5 (emphasis added), is astounding in its fatuity. The tort is not labeled "tortious breach of contractual relations" because a non-party to a contract generally is not bound by the contract and thus can not breach the contract. *See, e.g., Traffas v. Bridge Capital Investors II, 1993 U.S. Dist. LEXIS 12028, 1993 WL 339293 (D. Kan. 1993)*, at *3 ***HN5***[] ("It would be a novel holding for the court to rule that a breach of contract action can be maintained against a person who is not a party to the contract being sued upon …. A party to a contract cannot sue a person who is not a party to that contract for breach of contract."); ***Credit Gen. Ins. Co. v. Midwest Indem. Corp.,916 F. Supp. 766, 772 (N.D. Ill. 1996)*** (finding "ludicrous" the defendants' contention that a non-party to a contract can breach that contract).

[3] The court is mindful of Allen's contention that "much of this may … be a matter of semantics." Answering Brief at 12 n.6. Allen argues that, because the original AT&T contract was modified subsequent to TruePosition's initiation of the present suit, it suffered a complete loss of the original anticipated contract. *Id.* Apparently, Allen wishes the court to view this "loss" as a breach. However, ***HN6***[] a mutual modification of a contract certainly is not a breach. *See, e.g., Anderson v. Golden, 569 F. Supp. 122, 140 (S.D. Ga. 1982)* (distinguishing between breach and mutual modification). To the extent such a loss represents the loss of an economic expectation, the corresponding tort is interference with a prospective business opportunity. The court reiterates that Delaware law requires a breach to sustain the tort of interference with a contract.

The only "prospective business opportunity" at issue in the counterclaim is the AT&T contract. As stated above, the defendant acknowledges a completed and continuing contract with AT&T. Allen's expected business opportunity, thus, appears to have been consummated before the allegedly tortious conduct of the plaintiffs. **[*8]** This is particularly true because "the probability of the business opportunity must be assessed at the time of the alleged interference." *Malpiede v. Townson, 780 A.2d 1075, 1099 (Del. 2001)*. In this case, the alleged interference occurred after Allen had been awarded the contract with AT&T. Answer and Counterclaims (D.I. 48) P 17.

Allen maintains, however, that the plaintiffs' interference caused a modification of the expected contract terms. Following TruePosition's commencement of a patent infringement action against Allen and a press release announcing the same, Allen allegedly incurred additional legal expenses in renegotiating certain provisions of the AT&T contract, more onerous indemnification terms in the contract, and damages to its reputation. Thus, Allen contends, TruePosition's actions interfered with its expected business opportunity in that the final terms of the AT&T contract differed from the original terms. For purposes of this motion only, this is sufficient to state a claim of tortious interference with prospective business opportunities. *See* *McHugh v. Board of Educ., 100 F. Supp. 2d 231, 247 n.15 (D. Del. 2000)* (noting that ***HN8***[] the **[*9]** tort requires "a valid business relationship or expectancy" and citing cases).

Assuming that these facts constitute a sufficient interference, the counterclaim may be challenged on other grounds, namely, that Allen has not shown that the plaintiffs engaged in any wrongful conduct. ***HN9***[] To sustain the tort of interference with a business opportunity, the interference must have been improper. *Bohatiuk v. Delaware Chiropractic Servs. Network, L.L.C., 1997 Del. Super. LEXIS 215*, at *8-10 (Del. Super. 1997). The conduct at issue is the filing of a patent infringement suit and the public announcement of the suit by a press release. ***HN10***[] Normally, lawful actions cannot form the basis of a claim of tortious interference, particularly in light of TruePosition's "privilege to compete and protect its own business interests." *Acierno v. Preit-Rubin, Inc., 199 F.R.D. 157, 164-65 (D. Del. 2001)* (dismissing tortious interference with contractual relations claim because defendant corporation and real estate investment trust, in failing to affirmatively suggest to County that competitor plaintiff's property be included in a traffic impact study, committed no wrongful conduct) **[*10]** (citing caselaw). In this case, however, the defendant also has alleged the counterclaim of "sham litigation." In the sham litigation context, the mere initiation of a lawsuit may be wrongful if it constitutes unlawful antitrust activity. Because the court will allow the "sham litigation" counterclaim to stand, *see infra* Section I.C., the tortious interference with a prospective business opportunity claim must survive as well. It is axiomatic that if the defendant can prove that the instant lawsuit is merely a "sham" and violative of ***antitrust law***, then the filing of the lawsuit constitutes improper conduct. Therefore, in the interest of consistency, and viewing the pleadings in the light most favorable to Alien, Counterclaim IV survives the instant motion to dismiss.

C. Counterclaim V

TruePosition moves for the dismissal of Counterclaim V, which alleges "sham litigation," on the grounds that such a cause of action does not exist. ***HN11***[] The term "sham litigation" refers to an exception to the doctrine of antitrust immunity. Immunity to certain antitrust suits was established by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, **[*11]** and *Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. These cases established that "the Sherman Act does not prohibit … persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr, 365 U.S. at 136*. The Supreme Court refused to "impute to Congress an intent to invade" the *First Amendment* right to petition. *Id. at 136*. Thus, the *Noerr-Pennington* doctrine protects those who petition the government from antitrust liability.

Later caselaw extended *Noerr* antitrust immunity to "the approach of citizens … to administrative agencies … and to courts." *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*. However, such immunity is not afforded to "sham" petitioning that is only "an attempt to interfere directly with the business relationships of a competitor." *Noerr, 365 U.S. at 144*. Litigation is a mere "sham" if it is objectively baseless and subjectively motivated to interfere **[*12]** with business competition by using a governmental process 'as an anticompetitive weapon.' *Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)* (quoting *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991))*.

The plaintiffs urge that "sham litigation" is not a cognizable cause of action. The court cannot agree. A counterclaim of sham litigation is, essentially, an assertion that ***antitrust law*** has been violated. Indeed, in litigation leading to the Court's decision in *Professional Real Estate Investors,* Columbia Pictures had sued the defendant, PRE, for copyright infringement. *508 U.S. at 52*. The defendant counterclaimed, accusing Columbia of violations of *§§ 1* and *2* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S.C. §§ 1-2*. *Id.* "In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade." *Id.* Although the counterclaim did not survive summary judgment on the facts of the case, the Court upheld the validity **[*13]** of the sham counterclaim itself. Indeed, in announcing a two-part test for its application, the Court only clarified the existence and context of the sham litigation exception. [4]

Since *Professional Real Estate Investors,* **[*14]** the sham litigation exception has been invoked in varied contexts. For example, in a recent case, the Supreme Court refused to strip antitrust immunity from an employer who filed a losing and retaliatory lawsuit where the suit was not objectively baseless. *BE&K Constr. Co. v. NLRB, 536 U.S. 516, 153 L. Ed. 2d 499, 122 S. Ct. 2390 (2002)*. In so doing, the Court implicitly held that ***HN12***[] the sham litigation exception applies to the National Labor Relations Act in the same way it applies to the Sherman Act. *See 122 S. Ct. at 2402* (Scalia, J., concurring) ("The implication of our decision today is that … we will construe the National Labor Relations Act … in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process.") (emphasis in original). Other courts have applied the immunity principles *of Noerr-Pennington* to other contexts. *See, e.g., State of Missouri v. National Organization of Women, 620 F.2d 1301, 1318-19 (8th Cir. 1980)* (applying *Noerr-Pennington* liability principles to state tort laws); **[*15]** *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1084(5th Cir. 1988)* (holding that *Noerr-Pennington* doctrine applies to Civil Rights Act liability); *Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614-15 (8th Cir. 1980)* (same). It follows that if the *Noerr-Pennington* immunity principles apply in these contexts, the sham litigation exception to immunity applies as well. [5] Other cases have explicitly or implicitly accepted the sham exception in the patent infringement context. *See, e.g., Carroll Touch, Inc. v. Electro Mechanical Sys., 15 F.3d 1573 (D.C. Cir. 1993)* (discussing sham litigation counterclaim in patent infringement context); *U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592, 597 (Fed. Cir. 1995)* (rejecting sham counterclaim on the facts of the case).

[*16] In sum, the court can find no justification for refusing to allow the sham exception to be litigated in the instant case. Indeed, a copyright infringement action, like that at issue in *Professional Real Estate Investors,* and a patent infringement action such as the one at issue here present such analogous contexts regarding the application of the

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[4] Of course, as already stated, a violation of ***antitrust law*** underlies any sham exception to antitrust immunity. Although the defendant has not specifically pled a violation of the Sherman Act in Counterclaim V, the invocation of the sham litigation doctrine is sufficient to give notice of the basis of its claim. This is particularly true in the context of a *Rule 12(b)(6)* motion to dismiss, and in light of both the liberal pleading philosophy of the Federal Rules and the court's responsibility 'to examine the complaint to determine if the allegations provide for relief on any possible theory.' *O ' Boyle v. Jiffy Lube Int'l, Inc., 866 F.2d 88, 93 (3d Cir. 1989)* (quoting C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1357, at 601-02 (1969) (footnotes omitted)).

[5] Unlike the defendant, however, the court recognizes a distinction between the *Noerr- Pennington* doctrine, which shields petitioners from antitrust liability, and the sham litigation exception, which strips this immunity when the petition is meritless and anticompetitive in nature. *See, e.g.,* Answering Brief at 15 ('… the Noerr-Pennington *[i.e.,* "sham litigation"] doctrine …').

sham litigation exception that it would strain credibility to announce a relevant and dispositive difference between them. Thus, Counterclaim V may remain, to succeed or fail as it may in the ensuing litigation. [6]

[*17] D. Affirmative Defense III

As its third affirmative defense, Alien alleges that TruePosition engaged in "fraud and/ or inequitable conduct" in acquiring the relevant patents. The plaintiffs move to strike the defense, as well as Counterclaim I, which is predicated on the inequitable conduct defense, on the grounds that the affirmative defense does not meet the pleading requirements of *Federal Rule of Civil Procedure 9(b)*.

HN13[] *Rule 9* requires that all pleadings of fraud or mistake "be stated with particularity." *FED. R. CIV. P. 9(b)*. [7] These averments, however, remain subject to the liberal pleading standard of *Rule 8*, which requires only a "short and plain" statement of a claim or defense. *See* *In re Westinghouse Sec. Litig., 90 F.3d 696, 703 (3d Cir. 1996)* (citing cases); *see generally* *Leatherman,* 507 U.S. at 168 (holding that federal courts may not impose a more demanding standard of pleading beyond "the liberal system of 'notice pleading' set up by the Federal Rules"); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER FEDERAL PRACTICE AND PROCEDURE § 1281, at 520-21 (1990) (pleading with particularity under *Rule 9(b)* should be done consistently with **[*18]** the general philosophy of *Rule 8*); 2A JAMES W. MOORE, MORRE'S FEDERAL PRACTICE P 8.13, at 8-58 (2d ed. 1995) (the mandate of *Rule 8* applies "even where the Rules command particularity, as in the pleading of fraud under *Rule 9(b)*") (footnote omitted).

The pleading requirements are satisfied by Alien's third affirmative defense. The defense constitutes one paragraph which names the title and publication date of at least one allegedly withheld material prior art publication. ***HN14***[] In the context of alleged inequitable conduct before the PTO during a patent prosecution, "pleadings that disclose the name of the [allegedly withheld] relevant prior art and disclose the acts of the alleged fraud fulfill the requirements of *Rule 9(b)*." *EMC Corp. v. Storage Tech. Corp., 921 F. Supp. 1261, 1263 (D. Del. 1996)*. **[*19]** The third affirmative defense discloses at least this much, and thus suffices "to apprise the other party of what is being alleged in a manner sufficient to permit responsive pleadings" as *Rule 9* requires. 5 WRIGHT & MILLER § 1296 (1990).

TruePosition objects that the named publication is relevant to only certain of their patents and, therefore, the defendant has not sufficiently pled the defense of inequitable conduct as to the other patents. The court declines, however, to weigh the relevance and materiality of the allegedly withheld prior art for purposes of this motion. ***HN15***[] It is the court's duty for purposes of this motion only to test the sufficiency of the pleading, not to resolve disputed facts or decide the merits of the case. *Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993)*. Furthermore, ***HN16***[] the Third Circuit has made clear that, although "it is certainly true that allegations of 'date, place or time'" satisfy the pleading requirements, "nothing in [*Rule 9*] requires them." *Seville Industrial Machinery v. Southmost Machinery, 742 F.2d 786, 791*. The affirmative defense, as pled, suffices to place the plaintiffs on notice of the misconduct with **[*20]** which they are charged. *Id.; see also* *Scripps Clinic and Research Found., et al. v. Baxter Travenol Lab., et al, 1988 U.S. Dist. LEXIS 1972, 1988 WL 22602*, at *3 (D. Del.) (defense of inequitable conduct sufficiently pled when defendant simply "alleged that [the plaintiff] failed to identify to the PTO relevant prior art of which it was aware").

[6] In this vein, the court stresses that the defendant, of course, will be tasked in the ensuing litigation with proving the elements of the sham litigation exception, namely, that the present patent infringement suit is objectively baseless and subjectively motivated by an intent to interfere with competition. *See* *Carroll Touch, 15 F.3d at 1583* (holding that sham litigation counterclaim could not survive summary judgment because defendant did not establish a genuine issue regarding whether the patent infringement action was baseless).

[7] Because the court has found that Alien's pleadings satisfy the heightened pleading requirements of *Rule 9(b)*, it need not address the defendant's argument that *Rule 9(b)* may not apply to allegations of inequitable conduct.

The motion to strike the third affirmative defense, and to dismiss Counterclaim I, which is at least partially premised on the defense of inequitable conduct, is denied.

E. Affirmative Defense VI

Finally, the plaintiffs move to strike Affirmative Defense VI, abuse of process, on the grounds that it is not a defense to a patent infringement action, and that, in any event, it has not been pled properly.

The plaintiffs are correct that ***HN17***[] abuse of process is not a defense to a patent infringement action. Rather, it is a tort, *see* PROSSER, LAW OF TORTS, § 121 (4th Ed. 1971), which should have been pled as a counterclaim. This mistake is not fatal, however. ***HN18***[] *Federal Rule of Civil Procedure 8(c)* states that "when a party has mistakenly designated ... a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading **[*21]** as if there had been a proper designation." *FED. R. CIV. P. 8(c)*. The court will view the defendant's averment of the "defense" of abuse of process as a counterclaim.

HN19[] Abuse of process may be alleged in a patent infringement case as in any other. *See, e.g., Bayer AG v. Sony Elecs., Inc., 229 F. Supp. 2d 332 (D. Del. 2002)*. A claim of abuse of process is established when "the defendant ... proves that the plaintiff had an 'ulterior purpose' and committed 'a willful act in the use of the process that is not proper in the regular conduct of the proceedings.'" *Id. at 368* (quoting *Feinman v. Bank of Delaware, 728 F. Supp. 1105, 1115 (D. Del. 1990)*, *aff'd, 909 F.2d 1475 (3d Cir. 1990))*. "There must be 'some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of process ... there is no liability where the [plaintiff] has done nothing more than carry out the process to its authorized conclusion.'" *Id.* (citations omitted).

The defendant has asserted that the "plaintiffs have abused the judicial process by bringing the present action based on the patents that plaintiffs **[*22]** know are invalid, unenforceable, and/ or not infringed." Answer and Counterclaims (D.I. 48) at 8. There is no elaboration in the Answer and Counterclaims. The defendant's briefing, however, contends that "the same averments with regard to TruePositions tortious interference with Allen's business contracts and relations also establish a basis to proceed against TruePosition for abuse of process." Answering Brief at 17-18 n.10.

The defendant's averments are sufficient to sustain a *Rule 8*, *Rule 12(f)*, or *Rule 12(b)(6)* motion to strike and/ or dismiss. Allen has offered a "short and plain" statement of the claim and has presented a factual context that, viewed in the light most favorable to Allen, states an abuse of process claim. Again, it is the court's duty for purposes of this motion only to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *Kost, 1 F.3d at 183*. Despite the defendant's anemic presentation of its abuse of process claim, the facts presented in the context of its sham litigation and tortious interference claims suffice to state a claim for relief for abuse of process as well. The plaintiffs' motion to **[*23]** dismiss the claim is denied.

IV. CONCLUSION

The court concludes that the defendant's tortious interference with a contract claim can not be sustained because there has been no breach of contract. Allen's other counterclaims of tortious interference with prospective business opportunities, sham litigation, declaratory judgment, and abuse of process survive this motion to dismiss. Likewise, the defendant's third affirmative defense of fraud and/ or inequitable conduct may remain.

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. TruePosition's Motion to Dismiss and/ or Strike (D.I. 58) is GRANTED IN PART and DENIED IN PART.

2. Counterclaim III, alleging tortious interference with a contract, is DISMISSED.

Dated: January 21, 2003

Gregory M. Sleet

UNITED STATES DISTRICT JUDGE

End of Document

Money Masters, Inc. v. TRW, Inc.

Court of Appeals of Texas, Fifth District, Dallas

January 23, 2003, Opinion Issued

No. 05-98-02017-CV

Reporter

2003 Tex. App. LEXIS 622 *; 2003-1 Trade Cas. (CCH) P73,958

THE MONEY MASTERS, INC., THE MASTERS OF MONEY AND CREDIT CORP., THE MASTERS SYSTEM, INC. AND BRUCE J. DANIELSON, Appellants v. TRW, INC., TRANS UNION CORP., CSC CREDIT SERVICES, INC., DIANE FLEMING, KELLY CURRIE, TEXACO, INC. AND EXPERIAN, CORP., Appellees

Subsequent History: **[*1]** Rehearing Petition Denied April 17. 2003.

Petition for review denied by, 04/17/2003

Prior History: On Appeal from the 14th Judicial District Court. Dallas County, Texas. Trial Court Cause No. 96-00941-G.

Disposition: AFFIRMED.

Core Terms

credit reporting agency, appellants', summary judgment, summary judgment motion, credit report, consumer, clinics, agencies, reporting, sheet, tortious interference, antitrust, trial court, asserted claim, amended petition, credit reporting, antitrust claim, docket entry, boycott, parties, affirmative defense, present evidence, no writ, complained-of, fatally, letters, delete

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN1[] **Price Discrimination, Defenses**

Justification is an affirmative defense to both an antitrust claim and a claim for tortious interference. *Tex. Bus. & Com. Code Ann. § 15.05(g)* (Vernon 2002). Justification can be based on the exercise of either: (1) the party's own legal rights; or (2) the party's good faith claim to a colorable right, even though the claim ultimately proves to be mistaken. When the party conclusively establishes it had a legal right to engage in the complained-of conduct, the party's motive for engaging in that conduct is irrelevant.

Banking Law > Consumer Protection > Fair Credit Reporting > Consumer Reports

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

HN2[] **Fair Credit Reporting, Consumer Reports**

15 U.S.C.S. § 1681b, (1993 & Supp. 2002) specifies under what circumstances credit reporting agencies may release consumer reports, § 1681e mandates the credit reporting agencies limit the disclosure of consumer reports in accordance with section 1681b, and requires reporting agencies ensure the reports are as accurate as possible.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

HN3[] **Consumer Protection, Fair Credit Reporting**

See 15 U.S.C.S. § 1681b (1993 & Supp. 2002).

Torts > ... > Defamation > Defenses > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN4[] **Defamation, Defenses**

The justification defense is not available where the plaintiff pleads and proves methods of interference that are tortious in themselves, such as defamation.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN5[] **Practices Governed by Per Se Rule, Boycotts**

A party may recover for tortious interference and antitrust claims by showing an illegal boycott.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

HN6[] **Consumer Protection, Fair Credit Reporting**

15 U.S.C.S. § 1681b is a permissive statute, specifically stating reporting agencies "may" furnish reports to third parties but only under the listed circumstances.

Counsel: FOR APPELLANT: W. D. Masterson, Kilgore & Kilgore, Inc., Dallas, TX. Theodore Carl Anderson, Kilgore & Kilgore, P.L.L.C., Dallas, Tx. John H. Crouch, Kilgore & Kilgore, Inc., Dallas, TX. Mr. Paul Rayford Smith, Kilgore & Kilgore, Dallas, Tx.

FOR APPELLEE: Neil Kenton Alexander, Porter & Hedges, L.L.P., Houston, TX. Mark W. Bayer, Gardere & Wynne, LLP, Dallas, TX. Patricia A. Nolan, Thompson & Knight, L.L.P., Dallas, TX. Debora McWilliams Alsup, Thompson & Knight, P.C., Austin, TX. Paul L. Myers, Strasburger & Price, Dallas, TX. Roy Atwood, Jones, Day, Reavis & Pogue, Dallas, TX.

Judges: Before Justices James, FitzGerald, and Dodson. [1] Opinion By Justice James.

Opinion by: TOM JAMES

Opinion

MEMORANDUM OPINION

Before Justices James, FitzGerald, and Dodson [1]

Opinion By Justice James

The Money Masters, Inc. (Money Masters), The Masters of Money and Credit Corp. (Masters of Money), The Masters System, Inc. (Masters System), and Bruce Danielson (Danielson) (collectively appellants) appeal summary judgments in favor of TRW, Inc. (TRW), Trans Union Corp. (Trans Union), CSC Credit Services, **[*2]** Inc. (CSC), Experian Corp. (Experian), TRW/Experian employees Diane Fleming (Fleming) and Kelly Currie (Currie) (collectively credit reporting agencies), and Texaco, Inc. (Texaco). In a conditional cross-appeal, the credit reporting agencies challenge the trial court's denial of additional grounds for summary judgment. We affirm the trial court's judgment.

Background

Money Masters, Masters of Money, and Masters System (collectively corporate appellants) are "for-profit" consumer credit counseling and restoration companies founded by Danielson at different times during the 1990s. [2] Their client population consists of individuals attempting to "clean" their credit record by having creditors remove negative account information that was (a) incorrect altogether; (b) had been at one point correct but had been either "charged off" or paid; [3] or (c) was correct but could be paid in full or some lesser negotiated amount. If the clients did not already have their credit reports, appellants would request them from Trans Union, CSC, TRW and Experian, [4] after obtaining their clients' powers of attorney. According to Danielson, in order to assist the clients properly, it was necessary **[*3]** to have both the consumer version of the credit report, as well as the commercial version, which contained additional consumer and credit rating information. Appellants would review the reports and consult with their clients to determine what information needed correction, or what outstanding balances could be paid. Once that determination was made, appellants would contact the credit reporting agencies and/or creditors,

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[1] The Honorable Carlton B. Dodson, Justice, Court of Appeals, Seventh District of Texas at Amarillo, Retired, sitting by assignment.

[1] The Honorable Carlton B. Dodson, Justice, Court of Appeals, Seventh District of Texas at Amarillo, Retired, sitting by assignment.

[2] According to the deposition testimony of Danielson, Masters of Money is actually a mortgage business which provided credit restoration services only "for a short time."

[3] This could include a judgment that had been vacated, lien that had been released, or bankruptcy that had been dismissed.

[4] Experian purchased TRW's credit reporting agency in 1996. Appellants do not differentiate between the two in their allegations against them. Accordingly, neither do we and any reference to either shall be deemed a reference towards both.

including Texaco, inquiring about those "errors" and offering to pay outstanding balances in exchange for the removal from the report of the negative information.

[*4] Over a period of time, Danielson noticed the credit reporting agencies and Texaco were not responding to appellants' requests for credit reports or dispute resolution and his businesses were failing. At Experian, the requests were handled by either Fleming or Currie. According to the credit reporting agencies, they did not respond directly to appellants' requests for credit reports because they could not verify the authenticity of the powers of attorney. Additionally, the reporting agencies and Texaco did not respond to the requests to delete negative or delinquent accounts, once those accounts had been paid, because, in their opinion, deleting negative but accurate information rendered the credit reports false and misleading. However, the credit reporting agencies did send appellants' clients' credit reports directly to the clients and also responded directly to the clients concerning any "legitimate" inquiries. Those responses were often accompanied by an "information sheet" advising the clients of some of the risks of working with credit clinics and of their consumer rights, including their right to deal directly with the credit reporting agencies and creditors at no cost. The **[*5]** "information sheet" also advised appellants' clients that they could report any unsatisfactory experiences with credit clinics to the local attorney general or Better Business Bureau.

In order to continue to provide services to the clients, appellants began obtaining the clients' credit reports from collection agencies or resellers. Appellants would also prepare the necessary disputes for their clients and have the clients submit the disputes. However, after a period of time, appellants were no longer able to obtain the reports from collection agencies or resellers. Apparently, the credit reporting agencies had informed those agencies and resellers that credit clinics such as the corporate appellants used the reports for allegedly wrongful purposes, and the reports should not be provided to appellants. At approximately the same time, the credit reporting agencies were exchanging information with each other about the credit clinics through a "clinic task force," and Texaco began advertising the "PrivacyGuard" program, which provided Texaco credit card holders direct access to their credit reports. In addition to exchanging information about credit clinics in general, the clinic task **[*6]** force, which met about once a month, also conducted a limited survey on consumers' opinions of credit clinics. The task force later communicated the results, along with their own concerns about credit clinics, to the Federal Trade Commission (FTC). The FTC later began a public campaign on fraudulent credit clinics, although the corporate appellants were apparently never identified as a part of that group. The FTC also promulgated a set of telemarketing rules under which the FTC intended to prosecute fraudulent credit clinics.

In 1996, appellants sued the credit reporting agencies and Texaco, [5] asserting various antitrust claims pursuant to the Texas Free Enterprise and Antitrust Act of 1983 ("the Texas Antitrust Act"). *See* *TEX. BUS. & COM. CODE ANN. § 15.01-.52* (Vernon 2002). These claims consisted of conspiracy to boycott, restraint of trade, monopolization, attempt to monopolize, and conspiracy to monopolize. Additionally, appellants asserted claims for tortious interference with existing contracts and prospective business relationships. The complaints stemmed primarily from (a) the credit reporting agencies' refusal to provide appellants copies **[*7]** of their clients' credit reports; (b) the agencies' granting Texaco access to credit reports for purposes of the PrivacyGuard program; (c) the agencies' and Texaco's refusal to investigate credit disputes submitted by appellants on behalf of their clients; (d) the agencies' encouraging appellants' clients to deal directly with the bureaus and creditors; and (e) the agencies' lobbying for anti-credit clinic legislation. According to Danielson, these actions destroyed Money Masters, causing it to file for bankruptcy, [6] and resulted in Masters System's failure.

The credit reporting agencies and Texaco answered by filing both general and verified denials and asserting **[*8]** various affirmative defenses, including estoppel, legal justification, privilege, statute of limitations, and the *Noerr-Pennington* doctrine. [7] **[*9]** After the parties had conducted substantial discovery, the credit reporting agencies and

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[5] Appellants also filed suit against Consumer Credit Counseling Service of Greater Dallas, Inc., National Foundation for Consumer Credit, and Equifax, Inc. The trial court subsequently dismissed those claims and they are not part of this appeal.

[6] Money Masters filed for bankruptcy in December 1993. The bankruptcy was closed in November 1996.

Texaco also filed both individual and joint traditional and no evidence summary judgment motions on all of appellants' claims. The trial court heard these motions December 2, 1998. At the time, the live pleading was appellants' third amended petition. Two days later, the trial court entered the following order:

On December 2, 1998, came on to be heard the following Defendants' Motions for Summary Judgment, the Responses filed by Plaintiffs, and the replies and objections filed by defendants, and after hearing the arguments of counsel, the Court ORDERS:

Texaco['s] Motion for Summary Judgment is GRANTED.

Defendants' Joint Motion for Summary Judgment on [Danielson's] Claims . . . for Lack of Standing is GRANTED.

Defendants' Joint Motion for Summary Judgment on All Claims Asserted by Money Masters is GRANTED.

Defendants' Motion for Summary Judgment on All Claims Asserted in Plaintiff's Third Amended Petition is GRANTED. [8]

Defendants' Motion for Partial Summary Judgment on the Basis of Statute of Limitations is DENIED.

Trans Union's Motion for Partial Summary Judgment on Plaintiffs' Causes of Action for Tortious Interference is DENIED.

Defendants' Motion for Partial Summary Judgment on *Noerr-Pennington* Affirmative Defense is DENIED.

By separate written instrument, the court also entered a final "take nothing" judgment dismissing appellants' suit with prejudice.

On appeal, appellants present six points of error. In their first point, appellants argue (a) the trial court's judgment lacks finality and is fatally defective; and (b) the credit reporting agencies are judicially estopped from appealing any rulings unfavorable to them. In their second through sixth points of error, appellants challenge the court's order granting the following motions:

[*10] (a) the credit reporting agencies' and Texaco's joint motion for summary judgment on Danielson's claims for lack of standing;

(b) the credit reporting agencies and Texaco's joint motion for summary judgment on all claims asserted by Money Masters;

(c) Texaco's motion for summary judgment; and,

(d) the credit reporting agencies and Texaco's motion for summary judgment on all claims asserted in the third amended petition.

In two conditional cross-points, the credit reporting agencies contend the court erred in denying their motions for partial summary judgment on the basis of limitations and the *Noerr-Pennington* doctrine. Since our jurisdiction in this case is contingent upon having a final, appealable judgment, we begin by addressing appellant's first point of error. *See* *TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.012*, *51.014* (Vernon 1997 & Supp. 2003); *Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195, 44 Tex. Sup. Ct. J. 364 (Tex. 2001)*. [EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]. **Finality and Validity of Judgment**

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[7] *See* *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*.

[8] We note this motion was filed by the credit reporting agencies. However, Texaco subsequently joined this motion, specifically adopting the arguments raised in the motion and also incorporating by reference the arguments made in its individual summary judgment motion.

In their first point of error, appellants contend the trial court entered a "fatally defective **[*11]** final

judgment." Appellants base their contention on the following docket sheet entry:

D's msj (>). Texaco granted (leave to supp granted) on vicarious lia; all granted on jud estop, [O>tortious int<O] conspiracy, [O>anti-trust<O] ok, (Noerr-Pennington), [9] ind claims of Danielson. Ok as to [O>anti-trust <O], boycott,, tort int, s of l. (judge's initials)

Appellants maintain this entry reflects they prevailed on the interference, antitrust, and boycott claims, and also on appellees' affirmative defenses of *Noerr-Pennington* and statute of limitations. Appellants note, however, that the order actually entered by the court grants the motion for summary judgment on all claims asserted in the third amended petition, a motion not mentioned in the docket sheet entry, while at the same time appearing to leave the interference claims to be tried. Because the interference **[*12]** claims purportedly remain outstanding, appellants argue the judgment is not final, despite its language dismissing appellants' action. Additionally, because of the discrepancy between the docket sheet and the order, appellants argue the order is fatally defective. Appellants assert the docket sheet entry controls, and, because the credit reporting agencies and Texaco prepared the "fatally defective" order, the credit reporting agencies are judicially estopped from challenging the judgment. We reject appellants' contentions.

As the parties are aware, we, too, questioned the finality of the judgment and by order issued July 18, 2002, abated the appeal to allow the trial court to enter a final appealable judgment. Specifically, we directed the trial court to dispose of the interference claims and modify the judgment so as to make it a final appealable judgment. We also directed the clerk to file a supplemental record containing the modified judgment. On November 27, 2002, we reinstated the appeal, after receiving the supplemental record.

We have reviewed that record and conclude the modified judgment is in fact final and appealable. This judgment expressly and unequivocally adjudicates **[*13]** all parties and claims. *See* Lehmann, 39 S.W.3d at 192-93. Accordingly, appellants' complaint that the judgment is not final is now moot.

Having concluded the judgment is final, we now address appellants' complaint concerning the validity of the judgment. In support of their contention that the order disposing of the various summary judgment motions is in fatal conflict with the docket sheet and the docket sheet controls, appellants cite Hardtke, Inc. v. Katz, 813 S.W.2d 548 (Tex. App.-Houston [1st Dist.] 1991, no writ). In *Hardtke*, the court considered the effect of a signed docket sheet entry which reinstated an improperly dismissed case. *Id. at 550*. The trial court had signed an order dismissing the case the previous day. *Id.* Apparently realizing the dismissal was in error, the trial court then signed the docket entry reinstating the case but did not sign a separate written order. *Id.* Although recognizing that a docket entry of what the judgment purports to be cannot override or cast doubt upon the written judgment where the two are different, *see* N-S-W Corp. v. Snell, 561 S.W.2d 798, 799, 21 Tex. Sup. Ct. J. 115 (Tex. 1977) **[*14]** (orig. proceeding), the *Hardtke* court nonetheless concluded, under the facts before it, the docket entry effectively reinstated the case. Hardtke, 813 S.W.2d at 551. In so concluding, the court noted the docket entry was unambiguous. *Id.* The court also noted it was not using the docket entry as evidence of what the dismissal judgment purported to be - each was "entirely separate, and the meaning of each [was] clear." *Id.*

We fail to find *Hardtke* binding. As the credit reporting agencies and Texaco point out, *Hardtke* is limited to its facts. *Id.*; Intercity Mgmt. Corp. v. Chambers, 820 S.W.2d 811, 812-13 (Tex. App.-Houston [1st Dist.] 1991, no writ). Additionally, unlike in *Hardtke*, appellants here rely on the docket entry to specifically override the written judgment, which is impermissible. N-S-W, 561 S.W.2d at 799. Because *Hardtke* is distinguishable from the case before us, we conclude the judgment is not defective on the basis alleged by appellants.

Having concluded the judgment is not defective, we now address appellants' final contention, under this point of error, that the credit reporting **[*15]** agencies are precluded from appealing those rulings unfavorable to them

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[9] On the docket sheet, "Noerr-Pennington" is circled with an arrow pointing down towards the portion that states "ok as to boycott . . ."

because they drafted the order on the various summary judgment motions. It is well settled that a party cannot appeal from or attack a judgment to which he has consented or agreed absent an allegation of proof of fraud, collusion, or misrepresentation. *Gillum v. Rep. Hlth. Corp., 778 S.W.2d 558, 562* (Tex. App.-Dallas 1989, no writ). In this case, however, the credit reporting agencies did not consent to the judgment by the mere drafting of the order. The order recites it is based on the summary judgment hearing during which the court considered the arguments of all parties and then made its rulings. Nothing in the record even suggests the order was based on any agreement among the various parties. We conclude the credit reporting agencies are not precluded from challenging those rulings unfavorable to them. We overrule appellants' first point of error.

The Challenged Summary Judgment Motions

In their second and third points of error, appellants contend the court erred in granting the motion for summary judgment on all claims asserted in the third amended petition. In this motion, the credit **[*16]** reporting agencies and Texaco asserted they were entitled to summary judgment on both the antitrust and tortious interference claims because their alleged anti-competitive and tortious acts were justified. Additionally, the credit reporting agencies and Texaco asserted they were entitled to summary judgment on the antitrust claims because appellants (a) lacked standing to bring those claims; and (b) neither the credit reporting agencies nor Texaco participated in the relevant market or conspired together, which are elements necessary to prove the antitrust claims.

When, as here, the trial court does not specify the grounds for granting summary judgment in which more than one ground is alleged, we will affirm the judgment if any of the grounds advanced are meritorious. *Rogers v. Ricane Enterps., Inc., 772 S.W.2d 76, 79, 32 Tex. Sup. Ct. J. 458 (Tex. 1989)*; *Provencio v. Paradigm Media, Inc., 44 S.W.3d 677, 680* (Tex. App.-El Paso 2001, no pet.). Because we conclude the credit reporting agencies and Texaco's conduct was justified, we conclude summary judgment in their favor on all of appellants' claims was proper. In reaching this conclusion, we assume, without deciding, appellants **[*17]** have standing and produced evidence of each of the essential elements of their claims.

HN1[] Justification is an affirmative defense to both an antitrust claim and a claim for tortious interference. *TEX. BUS. & COM. CODE ANN. § 15.05(g)* (Vernon 2002) (antitrust claims); *Calvillo v. Gonzalez, 922 S.W.2d 928, 929, 39 Tex. Sup. Ct. J. 639 (Tex. 1996)* (tortious interference claims). Justification can be based on the exercise of either (1) the party's own legal rights or (2) the party's good faith claim to a colorable right, even though the claim ultimately proves to be mistaken. *Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 211, 39 Tex. Sup. Ct. J. 523 (Tex. 1996)*. When the party conclusively establishes it had a legal right to engage in the complained-of conduct, the party's motive for engaging in that conduct is irrelevant. *Id.*

In this case, the credit reporting agencies and Texaco contend their conduct towards appellants was justified under *sections 1681b* and *1681e* of the Fair Credit Reporting Act ("FCRA"). *See* ***HN2***[] *15 U.S.C. §§ 1681b*, *1681e (1993 & Supp. 2002)*. *Section 1681b* specifies under what circumstances credit reporting agencies may release **[*18]** consumer reports. [10] *Id.* *§ 1681b*. *Section 1681e* mandates the credit reporting agencies limit the

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[10] ***HN3***[] Those circumstances or "permissible purposes" are:

. in response to a court order issued in conjunction with proceedings before a federal grand jury;

. in accordance with the written instructions of the consumer to whom it relates;

. to a person which it has reason to believe intends to use the information in connection with a credit transaction involving the consumer, for employment purposes, in connection with the underwriting of insurance involving the consumer, in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial responsibility or status, as a potential investor or servicer in connection with a valuation or assessment of the credit or repayment risks associated with an existing credit obligation, or otherwise has a legitimate business need to the information in connection with a business transaction initiated by the consumer, or to review an account to determine if the consumer continues to meet the terms of the account;

disclosure of consumer reports in accordance with *section 1681b*, and requires reporting agencies ensure the reports are as accurate as possible. *Id. § 1681e*.

[*19] In support of their defense, the credit reporting agencies and Texaco presented evidence showing the complained-of conduct resulted from appellants' obtaining credit reports to determine what negative but accurate information they could attempt to have deleted from their clients' reports, a purpose not listed in *section 1681b*. The credit reporting agencies and Texaco also presented evidence showing that, in their opinion, the deletion of negative but accurate information affects the integrity of the credit reporting process. Because *section 1681e* requires the credit reporting agencies to limit disclosure of reports in accordance with *section 1681b*, the credit reporting agencies and Texaco argued the complained-of conduct was necessary.

In response, appellants argued there are no restrictions under the FCRA in terms of a consumer's right "to dispute the 'completeness' or 'accuracy' of credit report items." *See id.* § 1681(a)(1)(A) (the consumer may dispute any item of information contained in a consumer's file). Moreover, appellants argued, the only remedy granted by FCRA to a credit reporting agency which determines a dispute is "frivolous or irrelevant" is to terminate a reinvestigation, **[*20]** *see id.* § 1681i(a)(3), but pursuant to *section 1681b*, the reporting agency must still provide the report "in accordance with the written instructions of the consumer to whom it relates." Because appellants were acting on behalf of consumers who had granted them powers of attorney, appellants maintained the credit reporting agencies were required to provide the reports. In the alternative, appellants maintained the credit reporting agencies could not avail themselves of the defense of justification because their actions constituted a group boycott which was illegal per se. *See* *Times Herald Printing v. A.H.Belo Corp., 820 S.W.2d 206, 211* (Tex. App-Houston [14th Dist.] 1991, no writ). Finally, with respect to their tortious interference claims, appellants also argued the reporting agencies could not avail themselves of the defense of justification because the "information sheets" the reporting agencies mailed to appellants' clients, informing them of their rights and advising them of some of the risks associated with working with credit clinics, were defamatory on their face.

Before addressing the parties' arguments, we pause to note that, in addressing the motion **[*21]** for summary judgment on all claims in the third amended petition, both at the trial court level and on appeal, appellants limited their arguments to the credit reporting agencies. Although appellants were entitled to present argument as to Texaco also, appellants failed to do so. *See* *Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121, 14 Tex. Sup. Ct. J. 140 (Tex. 1970)*. Thus, they have waived any error with respect to Texaco. *See* *Morriss v. Enron Oil & Gas Co., 948 S.W.2d 858, 871* (Tex. App.-San Antonio 1997, no writ).

We now turn to appellants' argument that the justification defense does not apply with respect to the letters the credit reporting agencies sent to appellants' clients because the letters were defamatory on their face. We agree with appellants that ***HN4***[] the justification defense is not available where the plaintiff pleads and proves methods of interference that are tortious in themselves, such as defamation. *See* *Prudential Ins. Co. v. Fin'l Rev. Servs., Inc., 29 S.W.3d 74, 80, 43 Tex. Sup. Ct. J. 980 (Tex. 2000)*. However, we disagree that the complained-of letters in this case were defamatory. As the reporting agencies note, the letters do not specifically refer to appellants **[*22]** and are consistent with disclosures required under current state and federal law. *See, e.g.*, *15 U.S.C. § 1679c (2002)* (providing specifically that credit repair organizations inform consumers of their rights and stating what the organizations must say); *TEX. FIN. CODE § 393.105* (Vernon 1998) (same). We conclude appellants' contention lacks merit and the reporting agencies could avail themselves of the justification defense with respect to the letters.

We next address appellants' argument that the justification defense does not apply because the credit reporting agencies' conduct constituted a per se illegal group boycott. Appellants correctly argue that ***HN5***[] a party may

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. in response to a request by the head of a state or local child support enforcement agency under specific circumstances; and

. to an agency administering a state plan under section 454 of the Social Security Act for use to set an initial or modified child support award.

See *15 U.S.C. § 1681b (Supp. 2002)*.

recover for tortious interference and antitrust claims by showing an illegal boycott. *See* *U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980)* (the per se rule is the trump card of ***antitrust law***, and when an antitrust plaintiff successfully plays it, he need only tally his score); [11] *Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726, 44 Tex. Sup. Ct. J. 486 (Tex. 2001)* (tortious interference). However, as the credit reporting agencies **[*23]** point out, to be subject to per se analysis, the complained-of conduct must be without "redeeming virtue." *Realty Multi-List, 629 F.2d at 1363*. Where conduct is expressly authorized by statute, it cannot be said to be without redeeming virtue. *Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646, 653 (5th Cir. 1977)*.

In this case, the credit reporting agencies presented evidence showing their actions were in accordance with *section 1681e*, because appellants' use of credit reports to attempt to delete negative but accurate information **[*24]** is not specifically authorized by *section 1681b* and reporting agencies must ensure "maximum possible accuracy of the information" in the report. Additionally, ***HN6***[] *section 1681b* is a permissive statute, specifically stating reporting agencies "may" furnish reports to third parties but only under the listed circumstances. *See* *15 U.S.C. § 1681b*. The credit reporting agencies were

under no statutory obligation to provide appellants with any reports. We conclude the reporting agencies' conduct was authorized by statute, and accordingly is not subject to a per se analysis.

Having concluded the credit reporting agencies could avail themselves of the justification defense, we also conclude the agencies conclusively established the elements of justification because they established their conduct was in accordance with a federal statute. When a defendant conclusively establishes each element of an affirmative defense, he is entitled to summary judgment, unless the plaintiff presents evidence creating a fact issue on one of the elements. *Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911, 40 Tex. Sup. Ct. J. 438 (Tex. 1997)*; *Provencio, 44 S.W.3d at 681*. Accordingly, **[*25]** the burden shifted to appellants to present evidence creating a fact issue.

As the credit reporting agencies point out, however, appellants failed to do so. To the extent appellants complain summary judgment on their antitrust and tortious interference claims on the basis of justification was improper, we overrule their second and third points of error.

Because we have concluded summary judgment was proper on the basis of justification, we need not address appellants' remaining points of error. *See* *Rogers, 772 S.W.2d at 79*. We also need not reach the credit reporting agencies' conditional cross-points. *See* *TEX. R. APP. P. 47.1*.

We affirm the trial court's judgment.

TOM JAMES

JUSTICE

End of Document

[11] Because the Texas Antitrust Act is modeled after the Sherman Antiturst Act and the Clayton Act, *see* *15 U.S.C. §§ 1-37a (1997 & Supp. 2002)*, we construe it in harmony with federal judicial interpretations of comparable federal antitrust statutes. *TEX. BUS. & COM. CODE ANN. § 15.04* (Vernon 1987); *Caller-Times Publ'g Co. v. Triad Communications, Inc., 826 S.W.2d 576, 580, 35 Tex. Sup. Ct. J. 509 (Tex. 1992)*.

Star Fuel Marts v. Murphy Oil USA

United States District Court for the Western District of Oklahoma

January 29, 2003, Decided ; January 29, 2003, Filed

CIV-02-202-F

Reporter

2003 U.S. Dist. LEXIS 4545 *; 2003-1 Trade Cas. (CCH) P74,001

STAR FUEL MARTS, LLC., Plaintiff, -vs- MURPHY OIL USA, INC., and SAM'S EAST, INC., Defendants.

Subsequent History: Affirmed by Star Fuel Marts, LLC v. Sam's E., Inc., 2004 U.S. App. LEXIS 5215 (10th Cir. Okla., Mar. 19, 2004)

Disposition: Plaintiffs Motion for Preliminary Injunction was granted by the court.

Core Terms

gasoline, pricing, sales, competitors, percent, membership fees, costs, prima facie evidence, preliminary injunction, intent to injure, Exhibits, retail, advertising, purposes, stations, volume, substantially lessen, below-cost, injunction, customers, destroy, rebate, lessening, purchaser, selling, operating expenses, merchandise, gross profit, gas station, membership

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

The granting of a preliminary injunction is a matter which lies within the sound discretion of the district court.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

The party seeking the preliminary injunction must show a substantial likelihood that it will prevail on the merits, that it will suffer irreparable injury without the preliminary injunction, that the threatened injury to the party seeking the injunction outweighs any damage which might be suffered by the opposing party, and that entry of the injunction would not be adverse to the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Grounds for Injunctions, Likelihood of Success**

The essential purpose of a preliminary injunction is to preserve the status quo. The party seeking the injunction need not show conclusively that it will prevail on the merits. It is only necessary that the movant establish a reasonable probability of success on the merits.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN4[] **Injunctions, Grounds for Injunctions**

Where the defendant is shown to have engaged in practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm need not be shown.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

The two major purposes of the Oklahoma Unfair Sales Act are to prevent "loss leader selling" and to protect small merchants from large competitors capable of driving them out of business by below-cost sales. Loss leader selling is defined as pricing featured items below cost to entice customers into a store where other merchandise prices are inflated. However, the statute does not require a showing of inflated prices.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Processing & Refining > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Contracts, Sales of Goods**

In holding that the Oklahoma Unfair Sales Act does not apply where the defendant is the producer (i.e. manufacturer, or, with respect to gasoline, the refiner) as well as the seller of the goods, the Oklahoma Supreme

Court declares that, in determining the scope of the coverage of the Unfair Sales Act, the Act is to be strictly construed.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Tax Law > State & Local Taxes > Sales Taxes > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

The beginning point for determining "cost to the retailer" within the meaning of the Oklahoma Unfair Sales Act is to determine the invoice cost of the goods and the replacement cost of the goods. *Okla. Stat. tit. 15, § 598.2(a)* (2001). The replacement cost is the cost per unit at which the goods in question could have been bought by the seller at any time within 30 days before the date of sale. *Okla. Stat. tit. 15, § 598.2(c)*. The beginning point is the lower of these two costs. To this cost, the statute requires that freight, taxes and markup be added, in order to determine the statutory minimum price. *Okla. Stat. tit. 15, § 598.2(a)*. The markup is intended to cover a proportionate part of the cost of doing business. *Okla. Stat. tit. 15, § 598.2(a)*. In the absence of proof of a lower cost of doing business, the statutory markup is six percent of the cost of the goods.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Okla. Stat. tit. 15, § 598.3* (2001).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Okla. Stat. tit. 15, § 598.5(c)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10[] **Regulated Practices, Trade Practices & Unfair Competition**

In the context of *Okla. Stat. tit. 15, § 598.5(c)*, prima facie evidence is such evidence as in the judgment of law is sufficient to establish a fact, and if not rebutted, remains sufficient to establish that fact.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN11[] **Regulated Practices, Trade Practices & Unfair Competition**

A showing of "antitrust injury" is not required by the Oklahoma Unfair Sales Act.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN12[] **Regulated Practices, Trade Practices & Unfair Competition**

The Oklahoma Unfair Sales Act prohibits, inter alia, the sale of merchandise at less than cost as defined in the Act with an intent and purpose prescribed by the Act where the result is one of the results specified in the Act. *Okla. Stat. tit. 15, § 598.3*. The proscribed intent and purpose is that of 1) inducing the purchase of other merchandise or 2) otherwise injuring a competitor; or 3) impairing or preventing fair competition; or 4) injuring public welfare. *Okla. Stat. tit. 15, § 598.3*. The prohibited result is 1) to tend to deceive any purchaser or prospective purchaser; or 2) to substantially lessen competition; 3) to unreasonably restrain trade; 4) to tend to create a monopoly. *Okla. Stat. tit. 15, § 598.3*. Thus, in order to establish a violation or threatened violation of the Unfair Sales Act, *Okla. Stat. tit. 15, § 598.5(a)*, a plaintiff must prove a below-cost sale, a prohibited intent and purpose and a prohibited result.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN13[] **Regulated Practices, Trade Practices & Unfair Competition**

The first part of *Okla. Stat. tit. 15, § 598.5* is clear. Evidence of below-cost sales is prima facie evidence of one of the prohibited intents (and purposes inasmuch as purposes is synonymous with intent) that of injuring one or more competitors. The second part of the statute is ambiguous. At first glance, it appears, that "intent" modifies the second phrase as well, i.e., evidence of below-cost sales is prima facie evidence of an intent to injure competitors and/or of an intent to destroy or substantially lessen competition. But "to substantially lessen competition" is one of the results that is prohibited by the Oklahoma Unfair Sales Act, not one of the prohibited intents (and purposes).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN14[] **Regulated Practices, Trade Practices & Unfair Competition**

In the context of *Okla. Stat. tit. 15, § 598.5*, it seems most likely, on balance, that the Oklahoma Legislature intended that evidence of below-cost sales be prima facie evidence both of the intent to injure competitors and of the result of destroying or substantially lessening competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN15[] **Regulated Practices, Trade Practices & Unfair Competition**

Under *Okla. Stat. tit. 15, § 598.3*, the "intent and purpose" which must be shown is the intent and purpose (i) of inducing the purchase of other merchandise or (ii) of unfairly diverting trade from a competitor or otherwise injuring a competitor.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN16[] **Regulated Practices, Trade Practices & Unfair Competition**

In the context of *Okla. Stat. tit. 15, § 598.3*, regardless of what the four alternative provisions may mean when analyzed one by one (e.g. regardless of whether "antitrust injury" is required as to the second, third and fourth of the four alternative "result" provisions), it is clear that these provisions are enacted in the alternative and, accordingly, that a showing of only one of them is necessary. Thus, the "result" which must be shown is that the below cost sales: 1) Tend to deceive any purchaser or prospective purchaser, or 2) Substantially lessen competition, or 3) Unreasonably restrain trade, or 4) Tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN17[] **Regulated Practices, Trade Practices & Unfair Competition**

In the context of *Okla. Stat. tit. 15, § 598.3*, as to deception, inherent in the below cost sale of one commodity among hundreds or thousands sold at the same establishment is the implication that the pricing of the item which is sold below cost is indicative of pricing generally at the same establishment.

Counsel: [*1] For STAR FUEL MARTS LLC, plaintiff: Warren Gotcher, Gotcher & Belote, McAlester, OK. Gary S Chilton, Timothy DeGiusti, Holladay Chilton & DeGiusti, Oklahoma City, OK.

For MURPHY OIL USA INC, defendant: Robert W Dace, Sheryl N Young, McAfee & Taft, Oklahoma City, OK.

For SAM'S EAST INC, defendant: Eric S Eissenstat, Fellers Snider Blankenship Bailey & Tippens, Oklahoma City, OK. Laurence L Pinkerton, Pinkerton & Finn, Tulsa, OK.

Judges: STEPHEN P. FROIT, UNITED STATES DISTRICT JUDGE.

Opinion by: Stephen P. Froit

Opinion

MEMORANDUM OPINION

This matter comes before the court on the plaintiff's motion for a preliminary injunction.

I.

Introduction

The plaintiff and the defendant Sam's East, Inc. are competitors in the retail gasoline business in central Oklahoma. The plaintiff asserts that Sam's East, Inc. has violated the *Oklahoma Unfair Sales Act* by selling gasoline below cost at its three central Oklahoma stores. Following the briefing of plaintiffs motion for a preliminary injunction, an evidentiary hearing was held on the motion. Accordingly, the court has the benefit of the excellent briefs of counsel and of the very helpful presentations at the evidentiary hearing.

Having **[*2]** carefully considered the briefs, the evidence presented at the hearing and the arguments of counsel, the court has concluded that plaintiff has made the showing necessary for entry of a preliminary injunction on the basis on the findings of fact and conclusions of law set forth below.

II.

Findings of Fact

The plaintiff, Star Fuel Marts, LLC, is a limited liability company organized under the laws of the state of Kansas. Its members are residents of Oklahoma, Kansas and Nevada.

Sam's East, Inc., is an Arkansas corporation having its principal place of business in the State of Arkansas. Sam's is a subsidiary of Wal-Mart Stores, Inc. Sam's does business as Sam's Club. [1]

There is complete diversity of citizenship between the plaintiff and the defendant. The amount in controversy exceeds the jurisdictional amount.

Plaintiff operates **[*3]** 28 retail gasoline and convenience store outlets in the Oklahoma City area. These outlets now operate as Shell gas stations; they were previously operated as Texaco stations. Plaintiff began operating the stations on March 1, 2001. The stations purchased and operated by plaintiff had been Texaco's company-operated locations in the Oklahoma City area.

Defendant operates three Sam's Club stores in the Oklahoma City area. They are located at the intersection of Pennsylvania Avenue and Memorial Road (Store No. 8117), on South MacArthur Blvd. near Interstate 40 (Store No. 8289), and in Midwest City (Store No. 8241). Sam's describes its Sam's Club stores as membership wholesale stores. Consumers and businesses pay annual membership fees for the right to purchase goods at the Sam's Clubs. The membership fee ranges from $ 30 to $ 100 per year, depending upon the type of membership. Nationally, there are 517 Sam's Club stores and 187 Sam's gasoline sales operations.

In 2001, Sam's started selling gasoline at its three Sam's Club stores in central Oklahoma. The Sam's gasoline operations in central Oklahoma are all located on or directly adjacent to Sam's Club store premises. Gas sales started **[*4]** at the store at Pennsylvania Avenue and Memorial Road on June 5, 2001, slightly more than three months after plaintiff acquired and started operating its stations in the Oklahoma City area.

Plaintiff has a policy, consistent with the *Oklahoma Unfair Sales Act*, of marking its gasoline products up by at least six percent over laid-in cost. Laid-in cost is the cost of the product, plus freight and applicable taxes. After plaintiff started operating its stations in central Oklahoma, plaintiffs managers noticed that Sam's was becoming very aggressive in pricing its gasoline. This led plaintiff to investigate the possibility that Sam's was pricing its gasoline at a level below that permitted by the *Unfair Sales Act*.

Both parties agreed that the market for the sale of gasoline in the Oklahoma City metropolitan area is highly competitive and has been highly competitive for a number of years. It was competitive before Sam's entered the market with its gasoline operations at its three central Oklahoma stores, and the market continues to be highly competitive.

At the Memorial Road store, both members and non-members may purchase gasoline. Gasoline is sold to club members at the Memorial Road **[*5]** store at a five cent per gallon discount. At the other two stores, gasoline is sold to members only. At the Memorial Road store, purchases by members account for 90 percent of gasoline sales; non-members purchase only ten percent of the gasoline sold there.

The Sam's gasoline operations at its three central Oklahoma stores sell only unleaded and premium gasoline. Premium accounts for 15 percent, or less, of the gasoline sold. The balance is unleaded.

Notwithstanding Sam's assertions to the contrary, the evidence clearly establishes that the gasoline operations are integral to the operations of the store facilities where the gasoline facilities are located. More importantly for purposes of this case, it is equally clear that the gasoline selling operations at the three central Oklahoma stores play an important role in Sam's marketing strategy at those stores. As indicated by plaintiffs Exhibit 25, from Sam's Manager's Manual:

> GAS IS A GREAT BENEFIT TO THE CLUB
> . Gas increases membership. Our members recognize the value and convenience gas adds to the Club. Gas drives both new membership sign-ups and increases renewal rates.

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[1] This memorandum opinion relates only to defendant Sam's East. It the court's understanding that an agreed resolution of this matter is pending as to defendant Murphy Oil USA, Inc.

. Gas increases frequency of shopping **[*6]** and total purchase by our Members. In addition to gas sales, the Members buying gas also shop in the Club more frequently and purchase more.

. Gas increases total box sales and profits in the Club. Sales and profits at the gas station go to Division 59, which rolls into total box results for the Club.

Plaintiff's Exhibit 25.

Significantly, the same exhibit also states that "our members understand gas prices. They will recognize the outstanding value we offer." This, in combination with the fact that "the Sam's Gas Station is a highly visible extension of the Club," *id.,* and viewed in light of the testimony of Sam's managers at the hearing, convinces the court that the gasoline operations at these stores are not only integral to the stores themselves, they make up an important component of Sam's strategy for projecting a low price image to the buying public.

Acting on its suspicion that Sam's might be pricing its gasoline below statutory costs, plaintiff undertook an investigation of Sam's gasoline pricing. It is relatively easy to ascertain, between very narrow upper and lower limits, the retail cost of premium and unleaded gasoline in the Oklahoma City market for **[*7]** any given day. This information is available in price information services to which gasoline retailers may subscribe. One such service is DTN FastRacks. Using the DTN FastRacks service, plaintiff compared the day to day wholesale cost of gasoline in the Oklahoma City market with Sam's day to day retail prices at the pump. Sam's retail prices at the pump were photographically documented.

Exhibit A to plaintiff's Exhibit 1 is a spreadsheet showing sales, cost and price information for the gasoline operation at Sam's Memorial Road store for the period beginning December 7, 2001 and ending July 31, 2002. During that period, there were 41 days on which the member price for unleaded gasoline at the Memorial Road store was below actual laid-in cost (i.e., the wholesale price of the product, plus applicable taxes and freight charges for getting the product delivered to the station).

For the month of December, 2001, Sam's had a negative gross profit (i.e., total sales minus cost of goods sold, ignoring operating expenses) on gasoline sold at the Memorial Road store. [2] For the year to date through December 2001, after deducting operating expenses, Sam's lost in excess of $ 100,000 in its **[*8]** gasoline operation at the Memorial Road store (ignoring, for the moment, any issues with respect to accounting for membership fees, which will be discussed below). For the year to date through January, 2002 (an accounting period which would have begun in mid-2001 when Sam's started selling gasoline at the Memorial Road location), Sam's made a gross profit on gasoline sales, before deduction of operating expenses, of less than $ 10,000. The gross margin (gross profit as a percentage of net sales) was less than six tenths of one percent (which should not be confused with the six percent markup required by the *Unfair Sales Act* in the absence of proof of lower costs of operation). For the six months ending July 31, 2002, Sam's made a gross profit on gasoline sales at the Memorial Road store of less than $ 10,000. This again amounted to a margin of approximately six tenths of one percent. For the same period, the gasoline segment of Sam's business at the Memorial Road store posted a net operating loss in excess of $ 100,000.

[*9] Turning to the Sam's Club on Interstate 40, for the year to date through January, 2002 (which, again, would have begun in mid-2001 when gasoline sales started), Sam's gross profit on gasoline sales amounted to less than $ 100,000 (a margin of slightly over two percent), and the gasoline sales operation resulted in a net operating loss, after deduction of operating expenses, in mid-five figures. Plaintiff's Exhibit 14. For the six months ended July 31, 2002 at the same store, the gross profit percentage (again, without allowing for operating expenses) was less than two percent. After deduction of operating costs, the gasoline operation at the Interstate 40 store lost more than $ 20,000 for the year to date through July, 2002.

One of the matters in contest at the hearing was the appropriate approach to allocating operational costs to the gasoline operations at the three Sam's stores which are involved here. Plaintiff, at least for the most part *(see,* e.g.,

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[2] The court will, in the main, refer only generally to dollar amounts and other quantitative matters, because much of this information is commercially sensitive and has been treated by the parties as being confidential.

plaintiff's Exhibit 29), used Sam's internally reported operational costs. On the other hand, Sam's preferred to employ an approach to cost allocation which was adopted for the purpose of this litigation and which dramatically **[*10]** reduced the operational costs attributable to the gasoline business at the three stores. As is discussed in more detail below, the court, in most respects, rejects Sam's revisionist approach to allocation of operational costs.

Plaintiffs Exhibit 29 analyzes Sam's gasoline operation at the Memorial Road store for the period beginning December 7, 2001 and ending July 31, 2002, taking into account Sam's operational costs as internally reported, and not as revised by Sam's for litigation purposes. For that period, deducting Sam's cost of operations as internally reported, on a per gallon basis for unleaded gasoline, Sam's sold unleaded gasoline below statutory costs (i.e., laid-in costs plus actual cost of operation where that is less than six percent) 99 times, based on member prices, which accounted for approximately 90 percent of sales. Applying a six percent markup (rather than using actual internally reported operating costs), the product was sold below cost 149 times during the same period. *See* plaintiffs Exhibit 32.

Turning to the Midwest City store, and focusing on gasoline operations at that store for the fiscal year to date through January, 2002, Sam's gross profit **[*11]** on gasoline sales amounted to something in excess of $ 100,000, for a 2.2 percent markup, which resulted in a loss in excess of $ 10,000 after deduction of operating expenses and aside from issues as to allocation of membership fees.

Membership fees, which, of course, are an important aspect of Sam's approach to doing business, deserve special attention. Obviously, the fact that Sam's collects membership fees from consumers and businesses complicates the reckoning of the actual financial results of any aspect of store performance. For some purposes, Sam's has suggested that membership fees should be treated as a negative expense and attributed in part to the gasoline operation. However, as internally reported, the annual membership fees do not reduce Sam's cost of gasoline and do not reduce other costs such as the cost of electricity, rent, taxes and wages. Sam's members are not required to buy gasoline at Sam's, and Tom Skinner, Sam's director of operational finance support, acknowledged that it is very likely that some Sam's members buy none of their gas at Sam's. In those cases, none of the membership fee paid by the member should be allocated to gasoline sales. Tr. 277 - 78.

[*12] It is also certainly conceivable that a Sam's Club member could pay his or her thirty dollars and then do nothing with the membership other than purchase gasoline. This might have a significant effect on the member's per-gallon cost of gasoline and would logically, at least as to that member, suggest that Sam's should get the benefit of the membership fee in determining what it costs to sell gasoline to that member. However, as befits Sam's avowed purpose of operating the gasoline business as an extension of the store and for the purpose of conveying a pricing impression to the general public, it is clear to the court from the totality of the evidence that, on the whole, membership fees are paid for the privilege of shopping inside of the store as well as for the purpose of getting the five cent per gallon discount at the pump if the member so desires.

On the basis of the evidence before the court; the fairest conclusion to reach as to membership fees is that the fees certainly can, and, to some extent, should, make a difference in the court's evaluation of Sam's gasoline pricing practices. On the other hand, examination of the results of gasoline sales at the Memorial Road store **[*13]** makes it clear that even a generous allocation of membership fees to the gasoline operation will not make *enough* difference to avoid the conclusion that Sam's has repeatedly priced its gasoline below cost.

Analysis of the membership fees in the context of the overall results of operations at these three stores in late 2001 through July 2002 is facilitated by some of the income statements which were received in evidence at the hearing. Some of these statements (e.g., plaintiffs Exhibits 5, 12 and 19) cover the "total box" results of operations at these three stores for the six months ending July, 2002. Other exhibits isolate the results of the gasoline operations (Division 59) at these three stores. Plaintiffs Exhibit 6 shows the results of operations for December, 2001, plaintiff's Exhibit 7 shows the results of operations for January, 2002, and plaintiffs Exhibit 8 shows the results of operations for February through July, 2002, all as to the Memorial Road store. Plaintiffs Exhibits 13 through 15 and 20 through 22 contain the same information as to the Interstate 40 and Midwest City stores, respectively.

These exhibits show that, for the eight months ended July, 2002, gasoline **[*14]** operations at these three stores lost nearly $ 250,000. [3] Looking at the Memorial Road store alone, for February through July, 2002, the net operating loss on gasoline sales, before allocation of membership fees, was nearly $ 170,000. Allocation of 14% of membership fee income attributable to the Memorial Road store for that period (a percentage suggested by Sam's as a fair indication of the contribution to gross revenues made by the gasoline operation) still leaves the gasoline operation at the Memorial Road store in a net operating loss position as a result of Sam's consistent below-cost sales of gasoline. Obviously, the effect of allocation of membership fees will vary depending upon the store involved, depending upon the period of operations being scrutinized, and depending upon the theory by which the percentage allocation is effected. One thing remains clear, however. As the experience at the Memorial Road store indicates, no rational allocation of membership fees is sufficient, as a mathematical proposition, to keep Sam's from having repeatedly sold gasoline below statutory cost.

[*15] In attempting to justify their pricing behavior, Sam's managers referred during the hearing to rebates which are given to gasoline purchasers by some of Sam's competitors, either on a percent basis or on a cents-per-gallon basis. These competitors who have paid rebates include Citgo, Murphy Oil and Shell. This evidence is of limited relevance, because no cogent showing was made that would enable the court to find that the net (after rebate) prices charged by Sam's competitors provided a basis for a "meeting competition" defense. However, the Shell rebate perhaps deserves some additional attention. The Shell MasterCard rebate program does not reduce the price of the gasoline paid by the customer to the retailer. The customer pays the full posted pump price for gasoline. Under this program, the customer gets no discount from the retailer. Instead, the Shell MasterCard rebate program is a co-branded credit card program between Shell and a financial institution which gives the customer a five percent rebate on future purchases of Shell gasoline if he or she uses the card to purchase Shell gasoline. The purchaser also can receive a one percent rebate on any other product which he or she **[*16]** might purchase with the co-branded MasterCard. For instance, the consumer could use his Shell MasterCard to purchase gasoline at Sam's, and would receive a one percent rebate. None of the rebate goes to the fuel retailer. This rebate program is not relevant to the issues in this case.

When Sam's sets its gasoline prices, as it does on a daily or nearly daily basis, it does not perform any calculations to determine whether a competitor's price is legal or illegal, although Richard Ezell, the operations manager for the fuel division of Sam's, acknowledged that Sam's has a general idea of whether a price is legal or illegal. Mr. Ezehl also acknowledged that although he has no way to determine with certainty whether a competitor's price is legal, it is not difficult to get a general idea as to what a competitor's product cost would be. Sam's has not taken any steps to disclose to its members or to the general public that it has sold gasoline below cost. This was explained on the basis that Sam's does not feel that it has sold below cost. This proposition is persuasively contradicted by Sam's own evidence as well as the evidence presented by the plaintiff.

At the hearing, Sam's attempted **[*17]** to meet the plaintiff's evidence (which was largely based upon Sam's own internal financial reporting) as to Sam's below cost sales of gasoline by preparing some revised financial reports which, if found to be persuasive, would cast a substantially more favorable light upon Sam's gasoline pricing activity. Sam's main exhibits portraying its proposed calculation of operating expenses for the gasoline operation were defendant's Exhibits 8, 9 and 10, which related, respectively, to the Memorial Road store, the Midwest City store and the Interstate 40 store. At the hearing, the questions related principally to defendant's Exhibit 8, relating to the Memorial Road store, as an exemplar. The format of Exhibits 9 and 10 is identical. These exhibits do not reflect Sam's routine internal reporting of the costs incurred with respect to the gasoline operations at these three stores. To the contrary, defendant's Exhibits 8, 9 and 10 are made-for-litigation exhibits.

On the basis of the allocation of expenses for the Memorial Road gasoline operation set forth in Defendant's Exhibit 8, Sam's comes out with a 3.53 percent (on the basis of cost of goods sold) expense ratio before allocation, of membership **[*18]** income to the gasoline operation, and a 1.24 percent cost of operation after allocation of

[3] The transcript reflects (Tr. 271) that Mr. Skinner acknowledged on cross examination that the net operating loss for the gasoline operations for this period for the three stations exceeded $ 300,000. The court's review of the exhibits suggests that the correct amount is slightly less than $ 250,000.

membership income. Mr. Skinner, Sam's director of operational finance support, offered defendant's Exhibits 8 through 10 as a reflection of the true cost of operations for each location with the exception of the management fee (not to be confused with membership fees), which he suggested was potentially *overstated.* Tr. 284.

The beginning point for evaluation of Sam's proposed allocation of operating costs to the gasoline operations is to look at the big picture. At the Memorial Road store, gasoline operations generated 14 percent of the revenues, but Sam's proposes to allocate only three percent of operating expenses to that source of revenue. Tr. 258.

Comparing the expense categories shown on plaintiffs Exhibit 2 - generated by Sam's - with the expenses actually allocated, regardless of how small the allocation might be, on defendant's Exhibits 8, 9 and 10, it is evident that, in allocating expenses to the gasoline operation, Sam's attributed no costs in the categories of managers' salaries, assistant manager wages, advertising, accident costs, security service, contributions and maintenance, **[*19]** to name only some of the more prominent items which are entirely absent from Sam's proposed allocation of operating costs. It is abundantly clear from the evidence, however, that managers and assistant managers do devote more than negligible amounts of time to their gasoline operations. Sam's approach to allocation of costs to the gasoline operation is perhaps best exemplified by its explanation of the reason for which it allocates no advertising cost to the gasoline operation. Mr. Skinner testified tamely that the "gas station itself doesn't perform any advertising functions." Tr. 235. He went on to explain that the gas station relies simply on word of mouth advertising, apparently presupposing that Sam's advertising benefits only the specific items advertised in any specific instance. Likewise, with respect to charitable contributions, none of which are attributed to the gasoline operation; Mr. Skinner explained, in a non sequitur, that the "gas station doesn't participate in any charitable fund raising or anything by itself, most of that is done inside the club." Tr. 241.

For December 2001 through July 2002, Sam's attributed approximately $ 2,500 per month in occupancy cost to **[*20]** the gasoline operation for the Memorial Road store. To his credit, Mr. Skinner declined to proffer that as a fair amount. Tr. 267. Using Sam's internal rate of return guidelines, Mr. Skinner acknowledged that a fair occupancy cost would be more like $ 6,500 per month. Tr. 268. Likewise, for litigation purposes, Sam's attributes only seven tenths of one percent of its property insurance (actually self-insurance) cost to the gasoline operation. Tr. 274. No credible substantiation for this minuscule allocation was offered. The court finds that Sam's proposed cost allocation is obviously contrived and equally untenable. In fact, as Mr. Skinner acknowledged at the hearing, Sam's operating expenses, as allocated internally, exceed the gross profit on the gasoline operations at these three stores. Tr. 271. Plaintiffs Exhibits 8, 15 and 22.

As shown by Sam's own internal profit and loss statements, even after allocating membership income to the gasoline operations by way of reduction of costs, Sam's still loses money on gasoline sales. Tr. 272. Gasoline sales are, as a matter of fact as well as in Sam's business plan and in Sam's internal profit and loss statements, an integral part of a **[*21]** unitary operation. As is stated above, one of the predominant purposes of the gasoline operation, at least at these three central Oklahoma stores, is to project a pricing image to the public (as per Sam's management manual discussed above). Despite having been given two chances to do so in response to questions from the court, Dr. Joseph Jadlow, Sam's expert witness, was unable to articulate an economic rationale for consistent pricing of unleaded gasoline at a level that results in consistent losses on gasoline sales. Tr. 223. The answer, of course, is evident. There would be no rationale for this course of conduct if the gasoline operation were a free standing business. The purpose of the gasoline business at these three stores is to pull customers in and to do so if need be by operating the gasoline facilities at a loss. This is not intrinsically immoral, but is illegal if it violates the *Unfair Sales Act*.

As is discussed on pp. 18 - 23, below, plaintiff has the benefit of a showing which amounts, as a matter of law, to prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. The evidence also establishes this intent to injure as **[*22]** a factual matter. One of the very purposes of wholesome, lawful competition is to best (i.e. "injure") competitors in the marketplace. The intent to do that becomes intent to injure a competitor or competitors in the statutory sense when the means used are the means which are proscribed by statute. Given the volumes of gasoline sold by Sam's and the proximity of Sam's stations to plaintiff's stations in central Oklahoma, there is no room for doubt that plaintiff has in fact been "injured" by Sam's below-cost sales. As is discussed below, this analysis requires no consideration of Sam's overall market power, of whether Sam's has the power to drive plaintiff out of business, or of the extent to which competition has been lessened.

Sam's gasoline facilities at the three central Oklahoma stores are, by any standard, high volume operations. At the Memorial Road store, Sam's monthly volume of gasoline sold is several-fold the typical volume for a retail gasoline station in Oklahoma City. As has been noted, plaintiffs policy is to price its gasoline at or above the level required by the *Unfair Sales Act*. In fact, plaintiffs stations typically price their product toward the high end of the **[*23]** gasoline pricing spectrum in the Oklahoma City market. Customers have told plaintiff's personnel that, because of the pricing difference, they are going to buy their gasoline at Sam's rather than at plaintiff's stations. Given the very substantial volumes of gasoline sold by Sam's and the price gap between plaintiffs prices and Sam's prices, the court easily concludes that, as was suggested by Alan Wilkerson, plaintiff's chief operating officer, plaintiff has lost volume to Sam's. Obviously, the evidence does not disclose the extent of that loss of volume, much less what the loss of volume would have been if Sam's had always sold its product at a barely legal price. The most salient indicator provided by the evidence as to the impact of Sam's pricing is plaintiffs description of the difference in its volume before and after the inception of Sam's gasoline sales. Any effort at precise quantification is highly suspect. The evidence persuades the court, however, that Sam's entry into the market, with the approach to pricing which has been proven and is described above, has had a negative impact upon plaintiff's sales volume. The price gap leaves plaintiff's customers with the impression **[*24]** that plaintiff is gouging. As is discussed below, this pricing behavior is deceptive and, as such, is one of the alternative results of below-cost pricing which may be shown in order to establish a violation of the *Unfair Sales Act*. Sam's pricing behavior has, in turn, had a negative effect on the goodwill of plaintiff's customers. The loss in volume is not quantified by the evidence and may well be unquantifiable. Even more so, the impact of the loss of goodwill is not quantifiable.

III.

Conclusions of Law

HN1[] The granting of a preliminary injunction is a matter which lies within the sound discretion of the district court. *Lundgrin v. Claytor, 619 F.2d 61 (10th Cir. 1980)*. ***HN2***[] The party seeking the preliminary injunction must show a substantial likelihood that it will prevail on the merits, that it will suffer irreparable injury without the preliminary injunction, that the threatened injury to the party seeking the injunction outweighs any damage which might be suffered by the opposing party, and that entry of the injunction would not be adverse to the public interest. *Id.*

HN3[] The essential purpose of a preliminary injunction is to preserve the status quo. *Atchison, Topeka and Santa Fe Railway Co. v. Lennen, 640 F.2d 255, 261 (10th Cir. 1981).* ***[*25]*** The party seeking the injunction need not show conclusively that it will prevail on the merits. It is only necessary that the movant establish a reasonable probability of success on the merits. *Id.*

There is substantial authority for the proposition that, ***HN4***[] where the defendant is shown to have engaged in practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm need not be shown. *Atchison, 640 F.2d at 259*. The court concludes that this rule is applicable in the case at bar and that irreparable injury need not be shown. However, the court also concludes that the harm which plaintiff has suffered as a result of Sam's approach to gasoline pricing is both irreparable and impossible to quantify with precision.

HN5[] The two major purposes of the *Unfair Sales Act* are to prevent "loss leader selling" and to protect small merchants from large competitors capable of driving them out of business by below-cost sales. *So-Lo Oil Co., Inc. v. Total Petroleum, Inc., 1992 OK 71, 832 P.2d 14 at 17 (Okla. 1992)*. The court, in So-Lo, defined loss leader selling as pricing featured items below cost to entice customers into a store where other **[*26]** merchandise prices are inflated. Although Sam's would not be in business long if the results of its operations inside the store were no better than the results of its gasoline operation, the evidence certainly does not establish - and plaintiff has not attempted to assert - that prices inside the store are inflated. However, the statute does not require a showing of inflated prices.

In a case directly involving the *Oklahoma Unfair Sales Act*, the United States Supreme Court has concluded that the selling of selected goods at a loss in order to lure customers is not only a destructive means of competition, it also plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assoc., 360 U.S. 334, 340, 3 L. Ed. 2d 1280, 79 S. Ct. 1196 (1959)*. ***HN6***[] In holding that the *Unfair Sales Act* does not apply where the defendant is the producer (i.e. manufacturer, or, with respect to gasoline, the refiner) as well as the seller of the goods, the Oklahoma Supreme Court has declared that, in determining the scope of the coverage of the *Unfair Sales Act* ***[*27]*** , the Act is to be strictly construed. *So-Lo, 832 P. 2d at 18-19*. The case at bar presents no issue as to coverage; that is uncontested here.

HN7[] The beginning point for determining "cost to the retailer" within the meaning of the Act is to determine the invoice cost of the goods and the replacement cost of the goods. 15 O.S. 2001 *§ 598.2(a)*. The replacement cost is the cost per unit at which the goods in question could have been bought by the seller at any time within 30 days before the date of sale. *§ 598.2(c)*. The beginning point is the lower of these two costs. To this cost, the statute requires that freight, taxes and markup be added, in order to determine the statutory minimum price. *§ 598.2(a)*. The markup is intended to "cover a proportionate part of the cost of doing business." *Id.* In the absence of proof of a lower cost of doing business, the statutory markup is six percent of the cost of the goods.

In the case at bar, there is little controversy as to the application of the cost and markup formula in *§ 598.2*. The real controversy revolves around the construction and application of *§§ 598.3* and *598.5(c)*. *Section 598.3* provides, in its entirety, as follows:

> ***HN8***[] It is **[*28]** hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this act, *where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.*

15 O.S. 2001 *§ 598.3* (emphasis added).

> *Section 598.5(c)* of Title 15 states, in its entirety, as follows:
>
> ***HN9***[] (c) Evidence of advertisement, offer to sell, or sale of merchandise by any retailer or wholesaler at less than cost to him shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

Sam's has repeatedly sold unleaded gasoline below statutory costs, so plaintiff has the benefit of the statutory boost provided **[*29]** by *§ 598.3*. Specifically, the evidence of the sales of gasoline below cost is to be treated as "prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition."

Surprisingly, the Oklahoma Supreme Court has not squarely specified the showing which must be made to satisfy the second, third and fourth of the four alternative "results" required by the final portion of *§ 598.3* (namely, substantial lessening of competition or unreasonable restraint of trade or tendency to create a monopoly in any line of commerce). Sam's has understandably urged that the relatively stringent concepts which are firmly embedded in federal ***antitrust law*** should be imported into *§ 598.3*, so as to require a showing of the relevant market, market power, and an overall lessening of competition within the relevant market. To the extent that the decisions of the Oklahoma Supreme Court shed any light on these issues, they suggest a more relaxed approach to resolution of the issues as to lessening of competition, restrain of trade and creation of a monopoly. For that reason, and because the reasoning of the Honorable David L. Russell on similar issues is quite persuasive, **[*30]** the court disagrees with Sam's on these points.

Turning first to the guidance available from the Oklahoma Supreme Court, *Diehl v. Magic Empire Grocers Ass'n, 399 P.2d 460 (Okla. 1964)* and *Glenn Smith Oil Co. v. Sheets, 1985 OK 56, 704 P.2d 474 (Okla. 1985)* are instructive.

In Diehl, the defendant grocer was clearly advertising (and presumably selling) popular grocery items below cost. *Diehl 399 P. 2d at 462*. The court quoted *§ 598.3* and *§ 598.5(c)*, both of which are quoted above. The court was thus cognizant of the requirements of those sections. After concluding that a pricing violation had occurred, at least by way of advertisement (and advertisement alone is sufficient under *§ 598.3*), the court appears to have concluded that that was the end of the matter. *Id. 399 P. 2d at 463*. This approach, if it indeed was the approach employed by the court in Diehl, gives sweeping effect to the prima facie evidence provision of *§ 598.5*.

Glenn Smith Oil v. Sheets arose from a "gas war" in Muskogee. *Glenn Smith Oil, at 475*. Plaintiffs gasoline station was located close to defendant's station. Defendant's station was clearly demonstrated to have been selling **[*31]** gasoline below cost. In granting an injunction, the trial judge stated that: "I have no trouble at all finding that Mr. Glenn Smith is financially damaged by his competitor selling gas eight cents cheaper, within a few blocks under similar sales circumstances." *Id. at 476*. Then, after quoting the prima facie evidence provision found in *§ 598.5(c)*, the Supreme Court stated that ***HN10***[] prima facie evidence "is such evidence as in the judgment of law is sufficient to establish a fact, and if not rebutted, remains sufficient to establish that fact." *Id at 478*. The court held that the defendant had failed to adequately rebut the prima facie evidence of intent to injure competition. *Id. at 478-79*. The court's opinion includes no discussion at all of any market-wide effect of the defendant's pricing practices. Moreover, the opinion includes no discussion as to destruction or lessening of competition other than the quotation of the trial judge's comments. Thus, with respect to the "result" requirement found in the final portion of *§ 598.3*, the Supreme Court's sole focus was on what might be called the *micro* economic effect of defendant's practices on plaintiff's business.

Entirely **[*32]** absent from Diehl, Glenn Smith or any other reported Oklahoma decision is any indication that the more complex and demanding requirements of federal ***antitrust law*** are to be imported into the court's construction and application of the final portion of *§ 598.3*. [4]

Judge Russell's reasoning, as expressed at length in Ranger Oil Company, Inc. v. Murphy Oil USA, Inc., case no. CIV-01-1297-R, USDC WD Okla. is entirely consistent with the Diehl and Glenn Smith decisions and fortifies the conclusion of the undersigned that ***HN11***[] a showing of "antitrust injury" as urged by Sam's is not required by the *Oklahoma Unfair Sales Act*. Reading *§ 598.3*, Judge Russell succinctly analyzed the statutory language, as a point **[*33]** of departure for construction of *§ 598.5*, as follows:

> ***HN12***[] The *Unfair Sales Act* prohibits, inter alia, the sale of merchandise at less than cost as defined in the Act with an intent and purpose prescribed by the Act where the result is one of the results specified in the Act. *Okla. Stat. tit. 15, § 598.3*. The proscribed intent and purpose is that of 1) inducing the purchase of other merchandise or 2) otherwise injuring a competitor; or 3) impairing or preventing fair competition; or 4) injuring public welfare. *Id.* The prohibited result is 1) to tend to deceive any purchaser or prospective purchaser; or 2) to substantially lessen competition; 3) to unreasonably restrain trade; 4) to tend to create a monopoly. *Id.* Thus, in order to establish a violation or threatened violation of the Unfair Sales Act, *see Okla. Stat. tit. 15 § 598.5(a)* a Plaintiff must prove a below-cost sale, a prohibited intent and purpose and a prohibited result.

Order of Russell, J. in Ranger Oil, September 17, 2002. [5]

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[4] It is perhaps also noteworthy at this point that, in *Oklahoma Retail Grocers Ass'n v. Wal-Mart Stores, Inc., 605 F.2d 1155*, Wal-Mart stipulated that selling or offering to sell merchandise at less than cost "would destroy or lessen competition" *Id. at 1157*.

[5] It is arguable that the third and fourth items identified by Judge Russell as proscribed intents and purposes are actually legislative declarations of the *effects* of the first two proscribed intents and purposes. That possible variation in construction is immaterial on the facts of this case.

[*34] Having parsed *§ 598.3* as set forth above, Judge Russell then turned to *§ 598.5*, and specifically to the question of the statutory boost set forth in *§ 598.5*: Evidence of sales below cost "shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition." Because the court is entirely in agreement with Judge Russell's reasoning as to the effect of this provision, it is quoted at length:

> ***HN13***[] The first part of this statue is clear. Evidence of below-cost sales is prima facie evidence of one of the prohibited intents (and purposes inasmuch as purposes is synonymous with intent) that of injuring one or more competitors. The second part of the statue is ambiguous. At first glance, it appears, that "intent" modifies the second phrase as well, i.e., evidence of below-cost sales is prima facie evidence of an intent to injure competitors and/or of an intent to destroy or substantially lessen competition. But "to substantially lessen competition" is one of the results that is prohibited by the Act, not one of the prohibited intents (and purposes). One might question why, if the Oklahoma Legislature had intended that proof of **[*35]** below-cost sales be prima facie evidence of an intent to injure competitors and of a result of destroying or substantially lessening competition, they did not use that language or words to that effect. On the other hand, the Oklahoma Legislature did not say that evidence of below-cost sales shall be prima facie evidence of intent to injure competitors or destroy or substantially less competition. Instead, it used the conjunctive "and" and repeated the word "to" as part of a new infinitive which would have been unnecessary had it intended that evidence of below costs sales be prima facie evidence of disjunctive or alternative intents, only one of which matches in language one of the statutorily proscribed intents. Thus, ***HN14***[] it seems most likely, on balance, that the Oklahoma Legislature intended that evidence of below-cost sales be prima facie evidence both of the intent to injure competitors and of the result of destroying or substantially lessening competition, as Plaintiff argued in its response to Defendant's reply brief.

Id. at 4-5 (emphasis in original). Thus, Judge Russell rejected the assertion of the defendant in Ranger Oil to the effect **[*36]** that plaintiff must present evidence as to the relevant market, the competitors in that market, the defendant's market share, market power to drive out competitors, and related matters which may loosely and collectively be placed under the heading of "antitrust injury." *Id.* at 2.

The court accordingly concludes that, ***HN15***[] under *§ 598.3*, the "intent and purpose" which must be shown is the intent and purpose (i) of inducing the purchase of other merchandise or (ii) of unfairly diverting trade from a competitor or otherwise injuring a competitor. (It may well be, under Judge Russell's construction, that impairing or preventing fair competition or injuring public welfare may also, alternatively, be shown.) The evidence clearly establishes and the court accordingly finds and concludes that Sam's consistent practice of pricing gasoline below cost did have the intent and purpose of inducing the purchase of other merchandise. This much is shown, if by no other evidence, than by Sam's internal management manual as discussed above. The court also concludes that this conduct had the intent of unfairly diverting trade from a competitor and that it did impair fair competition. The first portion **[*37]** of *§ 598.3* is easily satisfied in this case.

This brings the court to the "result" language which is set forth in the final portion of *§ 598.3*. ***HN16***[] Regardless of what those four alternative provisions may mean when analyzed one by one (e.g. regardless of whether "antitrust injury" is required as to the second, third and fourth of the four alternative "result" provisions), it is clear that these provisions are enacted in the alternative and, accordingly, that a showing of only one of them is necessary. Thus, the "result" which must be shown is that the below cost sales:

1. Tend to deceive any purchaser or prospective purchaser, or
2. Substantially lessen competition, or
3. Unreasonably restrain trade, or
4. Tend to create a monopoly in any line of commerce.

As is discussed above, we do have in this case prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition, within the contemplation of *§ 598.5*. The court has concluded, consistently with Judge Russell's conclusion, that the prima facie showing encompasses both intent to injure competitors and the result of destroying or substantially lessening competition, **[*38]** as discussed above. The complex and demanding requirements of federal ***antitrust law***, none of which are intimated by any Oklahoma cases under the *Unfair Sales Act*, are thus pretermitted.

It is not necessary for the court to address the third and fourth alternatives with respect to "result" (unreasonable restraint of trade or tendency to create a monopoly). The first two "result" alternatives (tendency to deceive any purchaser or prospective purchaser and tendency to substantially lessen competition) have been established; the first by the evidence presented at the hearing and the second by way of an unrebutted prima facie showing under *§ 598.5(c)*.

HN17[] As to deception, inherent in the below cost sale of one commodity among hundreds or thousands sold at the same establishment is the implication that the pricing of the item which is sold below cost is indicative of pricing generally at the same establishment. *Safeway Stores Inc. v. Oklahoma Retail Grocers Ass'n. Inc., 360 U.S. 334, at 340 (1959)*. That is the intent of Sam's in the case at bar, as shown by the totality of the evidence including particularly the manual which clearly demonstrates that the intent of the gasoline **[*39]** operation is to convey a pricing image to the general public. To the extent that this image is generated by below cost pricing of gasoline, that pricing practice does "tend to deceive any purchaser or prospective purchaser," and the court so concludes. 15 O.S. 2001 *§ 598.3*. *See also,* as to deceptive result, *Harolds Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533 at 1552(10th Cir. 1996)*, cert. denied *519 U.S. 928, 136 L. Ed. 2d 216, 117 S. Ct. 297(1996)*.

The second of the four alternative statutory results, substantial lessening of competition, is, prima facie, established in this case. The prima facie showing stands unrebutted. That is the end of the matter on this point. *Glenn Smith Oil Co. v. Sheets, 704 P.2d 474, at 478-79 (Okla. 1985)*.

The court accordingly holds for purposes of plaintiffs motion for a preliminary injunction that plaintiff has satisfied the prerequisites of the *Oklahoma Unfair Sales Act*. A consistent course of below-cost sales has been demonstrated. The intent of the sales was as required by the first portion of *§ 598.3*, namely the intent to induce the purchase of other merchandise or to unfairly divert trade from a competitor **[*40]** or otherwise injure a competitor. The *result* requirement has likewise been satisfied, namely deception of any purchaser or prospective purchaser or substantial lessening of competition.

Returning to the *Lundgrin v. Claytor* formulation, the court concludes that plaintiff, as the party seeking the preliminary injunction, has demonstrated a substantial likelihood that it will prevail on the merits. Plaintiff has made a strong factual showing. To the extent that Sam's defenses are factual, they have been found wanting. For the most part, Sam's legal defenses amount to an attempt to engraft federal antitrust principles onto the *Oklahoma Unfair Sales Act*. This attempt is not supported by the statutory scheme and is without warrant in the Oklahoma cases. For that reason, as discussed above, the undersigned joins Judge Russell in rejecting-those contentions.

Although the court has concluded, as discussed above, that the plaintiff, in enforcing this statutory claim, need not show irreparable injury, the court also finds that irreparable injury has been demonstrated. Specifically, plaintiff has persuaded the court that Sam's below cost sales of gasoline have had an inherently difficult **[*41]** to measure effect both on plaintiff's sales volume and on the good will plaintiff enjoys with the consuming public. Plaintiff has not shown, and need not show, that its business is about to be destroyed by Sam's violations. Where, as here, the evidence amply establishes a violation of the clear command of the statute, it is certainly sufficient that plaintiff show, as it has, ongoing commercial injury of a kind and to an extent which is difficult to quantify.

Plaintiff has likewise demonstrated that the injury it will suffer if injunctive relief is not granted outweighs the "injury," if any, which might be suffered by Sam's as a result of the court's grant of preliminary injunctive relief. This is not a situation in which the grant of preliminary injunctive relief will preclude Sam's from undertaking a course of conduct which it would otherwise be free to pursue. To the contrary, the injunction will do no more than put the force of the court's processes behind the statutory command which Sam's is, in any event, bound to obey.

Finally, entry of the injunction will not be adverse to the public interest. To the contrary, for purposes of this diversity case, the Oklahoma legislature, **[*42]** by enacting the *Unfair Sales Act*, has *defined* the only relevant public interest.

The violation having been demonstrated, "the court shall enjoin and restrain or otherwise prohibit, such violation." 15 O.S. *§ 598.5(a)*.

CONCLUSION

Star Fuel Marts has clearly made its case, under the *Oklahoma Unfair Sales Act*, for entry of a preliminary injunction restraining Sam's from continuing to sell gasoline below cost at the three central Oklahoma Sam's Clubs. The parties are directed to collaborate upon the form of a preliminary injunction and to submit the form of an injunction, if one can be agreed upon, within 10 days from the date of this order. In the absence of agreement, the parties shall submit to the court, within 11 days from the date of this order, their respective proposed forms of preliminary injunction.

Plaintiffs Motion for Preliminary Injunction, docket entry no. 34, is accordingly **GRANTED.**

DATED January 29, 2003.

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

ORDER

In light of the fact that the court has now ruled on plaintiffs motion for a preliminary injunction, plaintiffs request for a temporary restraining order (docket entry no. 34-2) is **[*43]** STRICKEN AS MOOT.

DATED January 29, 2003

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

Spanish Broad. Sys. v. Clear Channel Communs., Inc.

United States District Court for the Southern District of Florida

January 31, 2003, Decided ; January 31, 2003, Filed

CASE NO. 02-21755-SEITZ/BANDSTRA

Reporter

242 F. Supp. 2d 1350 *; 2003 U.S. Dist. LEXIS 1416 **; 2003-1 Trade Cas. (CCH) P73,951; 16 Fla. L. Weekly Fed. D 125

SPANISH BROADCASTING SYSTEM, INC., Plaintiff, v. CLEAR CHANNEL COMMUNICATIONS, INC. and HISPANIC BROADCASTING CORPORATION. Defendants.

Subsequent History: Reconsideration denied by *Spanish Broad. Sys. v. Clear Channel Communs., Inc., 2003 U.S. Dist. LEXIS 13945 (S.D. Fla., Aug. 6, 2003)*
Affirmed by Spanish Broad. Sys. of Fla. v. Clear Channel Communs., 2004 U.S. App. LEXIS 13468 (11th Cir. Fla., June 30, 2004)

Disposition: [1]** Defendants' Motions to Dismiss Counts I and II granted with prejudice. Plaintiff's state law causes of action dismissed without prejudice.

Core Terms

relevant market, advertising, antitrust, oral argument, monopolize, radio, competitors, alleges, Sherman Act, non-competitor, market power, markets, interchangeability, anticompetitive, probability, conspiracy, compete, monopoly power, radio station, top-ten, purposes, stations, effects, cigars, motion to dismiss, market share, budget, merger, state law claim, geographic

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

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

HN1[] **Motions to Dismiss, Failure to State Claim**

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a complaint need only provide a short and plain statement of the claim and the grounds on which it rests. A *Rule 12(b)(6)* motion tests not whether the plaintiff will prevail on the merits, but instead, whether the plaintiff has properly stated a claim for which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. Thus, a court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. In deciding such a motion, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the nonmovant's favor. Moreover, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. In an antitrust action, a plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified. In short, the complaint must allege enough facts, rather than conclusions, to show there is a legal claim for which relief can be granted.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Sherman Act, Penalties

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] Antitrust & Trade Law, Sherman Act

Under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, a plaintiff must show that the defendant: (1) entered into a contract, combination or conspiracy which was (2) in restraint of trade or commerce, and (3) that it was damaged by the violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Per Se Rule & Rule of Reason, Per Se Violations

An alleged violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act which does not fall within the category of per se antitrust violations is analyzed under the "rule of reason." The rule of reason looks beyond the structure of the agreement and requires a plaintiff to show that: (1) a relevant market existed that was affected by the challenged restraint; (2) the defendant possessed "market power" within the relevant market; (3) there was an anticompetitive effect in the intrabrand or interbrand market; and (4) the negative effects on competition are not outweighed by the positive effects on competition.

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

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

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

HN5[] Relevant Market, Product Market Definition

A relevant market consists of a geographic and a product component. The relevant market is defined geographically as the area of effective competition. The relevant product market consists of: products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered. A relevant market is a market composed of products which compete with each other; that is, products that are reasonably interchangeable from a buyer's point of view. The question of a relevant market is a factual one.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

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

HN6[] **Relevant Market, Product Market Definition**

Factors pertaining to the relevant product market include: (1) whether the products and services have sufficiently distinctive uses and characteristics; (2) whether industry firms routinely monitor each other's actions and calculate and adjust their own prices on the basis of other firm's prices; (3) the extent to which consumers consider various categories of sellers as substitutes; and (4) whether a sizeable price disparity between different types of sellers persists over time for equivalent amounts of comparable goods and services.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN7[] **Regulated Practices, Market Definition**

Courts in the Southern District of Florida have not required plaintiffs to allege facts regarding the level of product interchangeability of use or cross-elasticity of demand at the complaint stage.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN8[] **Antitrust & Trade Law, Sherman Act**

The United States Court of Appeals for the Eleventh Circuit has defined market power narrowly as the ability to raise price significantly above the competitive level without losing all of one's business. Market share may be an alternative to analyzing market power to determine the potential for genuine adverse effects on competition because market power is often difficult to define and requires complex econometric analysis. Market share directly relates to the effectiveness of interbrand competition in minimizing the anticompetitive effects of a restraint on intrabrand competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Interbrand competition is defined as competition among suppliers or manufacturers of the same generic product, while intrabrand competition is the competition between distributors of the product of a particular supplier or manufacturer.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

To prove an anticompetitive effect a plaintiff must show an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition. In short, the plaintiff must show that the defendant's action harmed the consumer. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Even unfair means to substitute one competitor for another without more does not violate the antitrust laws. This injury to competition requirement ensures that otherwise routine business disputes between business competitors do not escalate to the status of an antitrust action.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

A non-competitor in the relevant market normally cannot be liable for a violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. A non-competitor violates *§ 1* of the Sherman Act if it enters a conspiracy already existing between two or more competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

HN14[] **Monopolies & Monopolization, Attempts to Monopolize**

To prevail on a claim pursuant to *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, a plaintiff must establish: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In the Eleventh Circuit, to have a dangerous probability of successfully monopolizing a market, the defendant must be close to achieving monopoly power. Courts look at the relevant market under consideration and the defendant's power within that relevant market in determining whether there is a dangerous probability of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN15[] **Monopolies & Monopolization, Attempts to Monopolize**

Although monopoly power under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act is similar to market power under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, it requires something greater than market power. Monopoly power involves the power to raise prices to supra-competitive levels or the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market. As with market power under *§ 1*, market share is a revealing guidepost in determining whether there is a dangerous probability of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN16[] **Monopolies & Monopolization, Actual Monopolization**

A dangerous probability of achieving monopoly power may be established by a 50 percent share. When a plaintiff pleads less than a majority share of the relevant market, the plaintiff must show additional factors such as: the defendant's share compared to its competitors, the strength and capacity of current competitors, the potential for entry, the historic intensity of competition; and the impact of the legal or natural environment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN17[] **Monopolies & Monopolization, Attempts to Monopolize**

Even if a plaintiff can allege a dangerous probability of monopolizing the relevant market, it must also show harm to competition under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN18[] **Monopolies & Monopolization, Attempts to Monopolize**

A claim pursuant to *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act against a non-competitor also is not viable against a non-competitor in the relevant market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Torts > Vicarious Liability > Corporations > General Overview

HN19[] **Regulated Practices, Monopolies & Monopolization**

Before one corporate entity can be held liable for the alleged federal antitrust wrongs of another corporate entity, a plaintiff must satisfy the state law standard for piercing the corporate veil. Under Florida law, a court can pierce the corporate veil when there is a showing that a corporation was formed, or at least employed, for an unlawful or improper purpose--as a subterfuge to mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some analogous betrayal of trust.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN20[] **Regulated Practices, Monopolies & Monopolization**

The United States Court of Appeals for the Eleventh Circuit has said that contract power under an exclusive dealing arrangement is distinguishable from market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Conspiracy to Monopolize**

No authority exists holding a defendant can conspire to monopolize a market in which it does not compete.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN22[] **Monopolies & Monopolization, Attempts to Monopolize**

The United States Court of Appeals for the Eleventh Circuit does not recognize a monopoly leveraging claim against a party who is a non-competitor.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN23[] **Regulated Practices, Monopolies & Monopolization**

Fed. R. Civ. P. 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases.

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Antitrust & Trade Law, Sherman Act**

The injury to competition element is a critical element of both § 1 (15 U.S.C.S. § 1) of the Sherman Act and § 2 (15 U.S.C.S. § 2) of the Sherman Act because it prevents heated business disputes between individual competitors from turning into federal antitrust actions.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN25[] **Antitrust & Trade Law, Sherman Act**

When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN26[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

When all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them without prejudice.

Counsel: For SPANISH BROADCASTING SYSTEM OF FLORIDA, INC., plaintiff: Stephen N. Zack, Boies Schiller & Flexner, Miami, FL.

For SPANISH BROADCASTING SYSTEM OF FLORIDA, INC., plaintiff: David Boies, Robert J. Dwyer, Boies Schiller & Flexner, Armonk, NY.

For SPANISH BROADCASTING SYSTEM OF FLORIDA, INC., plaintiff: Mark Jurgen Heise, Boise Schiller & Flexner, LLP, Miami, FL.

For SPANISH BROADCASTING SYSTEM OF FLORIDA, INC., plaintiff: Sigrid Stone McCawley, Boies Schiller & Flexner, Hollywood, FL.

For CLEAR CHANNEL COMMUNICATIONS, INC., defendant: Michael Nachwalter, Brian F. Spector, Lauren Carol Ravkind, Kenny Nachwalter Seymour Arnold Critchlow & Spector, Miami, FL.

For CLEAR CHANNEL COMMUNICATIONS, INC., defendant: Stephen D. Susman, Charles R. Eskridge, III, Erica W. Harris, Susman Godfrey, Houston, TX.

For HISPANIC BROADCASTING CORPORATION, defendant: Robert C. Josefsberg, Podhurst **[**2]** Orseck Josefsberg et al, Miami, FL.

For HISPANIC BROADCASTING CORPORATION, defendant: G. Irvin Terrell, Samuel W. Cooper, Rebeca Aizpuru, Baker Botts L.L.P., Houston, TX.

For HISPANIC BROADCASTING CORPORATION, defendant: Larry D. Carlson, Baker Botts, Dallas, TX.

Judges: PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE.

Opinion by: PATRICIA A. SEITZ

Opinion

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS WITH PREJUDICE

[*1352] THIS CAUSE is before the Court on the Motions of Defendant Clear Channel Communications, Inc. and Defendant Hispanic Broadcasting Corporation to Dismiss Plaintiff's Amended Complaint. **[D.E. 23, 24]**. Having considered the motions, the consolidated response, the replies, and after **[*1353]** extensive oral argument, [1] the Court grants both motions with prejudice.

[3]** Defendant Clear Channel Communications, Inc. ("CC"), cannot be liable for a Sherman Act Section Two ("Section Two") monopolization, attempted monopolization, or conspiracy to monopolize violation or a violation of Sherman Act Section One ("Section One") because it is a non-competitor in the "relevant market." [2] Although Defendant Hispanic Broadcasting Corporation, ("HBC"), is a competitor in the Plaintiff's definition of the relevant market, the Plaintiff fails to assert facts indicating injury to competition in general, and merely alleges injury to a specific competitor, itself. Such a defect is fatal to the Section One and Section Two claims against the Defendants. Because the Court has federal jurisdiction over this case only under the Sherman Act, the Court declines to exercise its supplemental jurisdiction over the remaining myriad of state law claims.

[4] Background**

Plaintiff, Spanish Broadcasting System, Inc. ("SBS"), is a Spanish-language radio company which owns fourteen stations in seven U.S. markets. Defendant, HBC, [3] operates fifty-five Spanish-language radio stations in the United States in fourteen different markets. Defendant, CC, is the largest English-language radio company in the country with 1,200 stations in over 300 markets. SBS and HBC are direct competitors in five of the top-ten U.S. markets for Spanish-language radio [4] and both companies have expanded rapidly in the past few years-paralleling the swift growth of the country's Hispanic population. [5] **[**6]** See Am. Compl. P 12. At oral argument, SBS supplemented

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[1] At the January 9, 2003 oral argument, the Plaintiff had an extensive opportunity to bring forth any facts which would buttress its federal antitrust claims. The Seventh Circuit has questioned whether a district court should "'flesh out'" an antitrust complaint, and has noted that "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)*.

However, the Court allowed SBS to rectify orally the facial deficiencies in its Amended Complaint because at this procedural stage, the Court must draw all reasonable inferences in the Plaintiff's favor and consider, in the interests of justice and efficiency, the Plaintiff's best arguments. Moreover, the Eleventh Circuit has even permitted district courts to consider claims first raised at a motion to dismiss hearing so long as the court also considers the factual allegations offered orally to support that claim. See *Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1195(11th Cir. 2002)*; see also *Crowe v. Coleman, 113 F.3d 1536, 1541 n.4 (11th Cir. 1997)* ("when motions are orally argued [even when the pertinent hearing is for argument only and not one for the presentation of evidence], important things sometimes happen which impact on the factual record-for example, the judge while interrogating the lawyers obtains stipulations, concessions, and so on.").

[2] For purposes of the motion to dismiss, CC did not contest the Plaintiff's definition of the relevant market: the top-ten Spanish-language radio listening markets.

[3] HBC resulted from the 1997 merger of Clear Channel-owned Heftel Broadcasting Corporation and Tichenor Media Systems, Inc. CC owned 63% of Heftel Broadcasting before the merger, and after the merger, CC owned 26% of the new company, HBC.

[4] These ten largest markets in descending size order are: Los Angeles, Miami, New York, Houston, Chicago, San Francisco, San Antonio, Dallas, Brownsville and Phoenix. SBS competes with HBC in Los Angeles, Miami, New York, Chicago, and San Antonio.

[5] Hispanics are the fastest growing U.S. minority group. The Hispanic population increased 58% during the 1990s from 22.4 million in 1990 to 35.3 million in 2000; Hispanics are the largest racial minority at 12.5% of the total U.S. population. See Robert Suro, *Latino Growth in Metropolitan America: Changing Patterns, New Locations*, Center on Urban & Metropolitan Policy and the Pew Hispanic Center (July 2002) at *www.pewhispanic.org/index.jsp* (last visited January 29, 2003). By 2020 the Hispanic

[*1354] its Amended Complaint by adding that the relevant product was the sale of advertising allocated to Spanish-language radio in those ten markets. [6] In support of their definition of the relevant market, the Plaintiff pointed to the fact that advertisers and advertising companies have set aside separate budgets for Spanish-language radio and English-language radio. Oral Argument p.12, line 7-12. In addition, Spanish-language radio advertising is distinct from other media advertising such as Spanish-language **[**5]** television and print advertising because the advertisers designate a specific budget amount for Spanish-language radio. Oral Argument p. 12, line 13-21.

The essence of SBS's claims is that after SBS refused CC's 1996 acquisition offer, HBC and CC engaged in anticompetitive conduct which "prevented SBS from competing on a level playing field with HBC . . . ." Am. Compl. P 16. SBS contends that CC and/or HBC sought to frustrate SBS's plans to expand its operations [7] and limited SBS's ability to compete in the top-ten Spanish-language markets. Allegedly, CC and/or HBC: (1) hindered SBS's ability to raise capital; [8] **[**8]** (2) attempted to depress SBS's stock price; [9] (3) in June 2002, **[*1355]** forced HBC to be acquired by Univision rather than continue merger talks with SBS; (4) wrongfully prevented SBS from acquiring radio stations and **[**7]** bid up the prices of other stations; [10] **[**9]** (5) induced SBS employees to breach their contracts and work for HBC; (6) vandalized property at SBS stations; and (7) interfered with SBS's

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population will double its 1995 size to 53 million and triple its 1995 size in 2040 to 80 million, and reach nearly 97 million in 2050. Jennifer Cheeseman Day, Population Projections of the United States by Age, Sex, and Hispanic Origin: 1995 to 2050, U.S. Bureau of the Census, Current Population Reports 15-17 (1996).

[6] See Transcript of Spanish Broadcasting System, Inc. v. Clear Channel Communications, Corp. et. al., Hearing on Motions to Dismiss, 02-21755-CIV-SEITZ (January 9, 2003) (hereinafter "Oral Argument") at p.8, line 15-17 ("and what we are talking about in terms of a product here is the sale of advertising by radio stations in each of those [ten] markets. We are not talking about the sale of radio stations . . .").

[7] To operate a radio station in the United States, a company must first obtain one of the limited number of licenses from the Federal Communications Commission ("FCC"). The FCC granted these licenses long ago, and they are infrequently sold. A radio company seeking to enter a market or expand its current market presence ordinarily must raise capital to acquire existing stations. Am. Compl. P 13.

[8] SBS alleges three particular actions. First, in December 1996, CC induced SBS's long-time sales representative, Katz Hispanic Media, to breach its contract with SBS and to become HBC's national sales representative. Second, in May 1999, SBS selected Lehman Brothers ("Lehman") as sole lead manager and selected Merrill Lynch and BT Alex Brown ("BTAB") and CIBC to be the co-managers of SBS's Initial Public Offering ("IPO"). Randall Mays (CC's Executive Vice-President and CFO) told Lehman's Managing Director that Raul Alarcon, Jr. (SBS's CEO) was a "drug user and/or drug trafficker" and thus not to proceed with the IPO. Am. Compl. P 21(b). The IPO proceeded nonetheless. Third, after BTAB was selected as a co-manager, CC called BTAB and stated that if BTAB participated in SBS's IPO, CC would take its business ($ 30 million in annual fees) elsewhere. Thus, BTAB was forced to withdraw from the underwriting syndicate.

[9] According to the Plaintiff, CC and HBC took steps to depress SBS's stock price by seeking to limit or eliminate coverage of SBS by leading securities analysts, specifically: (a) CC pressured a leading BTAB analyst not to cover SBS; (b) CC and HBC orchestrated the departure of a leading Lehman radio analyst who had prepared to cover SBS stock; and (c) HBC threatened to deny normal analyst access to another Lehman radio analyst if he continued to cover SBS.

HBC also attempted to get SBS's shareholders to sell their shares and thus depress SBS's stock price. HBC leaked confidential acquisition discussions between SBS and HBC and made disparaging remarks about SBS's future to SBS's leading institutional investors such as Putnam Investment Management and Janus Capital, Inc. Am. Compl. P 22(c)(i)-(ii).

[10] For example, SBS alleges that CC wrongfully appropriated a business opportunity SBS proposed to Golden West Broadcasters, operators of a Los Angeles radio station (KSCA-FM) in 1996. Am. Compl. P 23(a). CC purchased the option on KSCA-FM and then assigned it to HBC in Feb. of 1997. SBS alleges that CC or HBC interfered with SBS's acquisition of other radio stations by driving up the prices SBS paid for those stations. See Am. Compl. P 23(b)-(c).

relationships with its advertisers. [11] Moreover, the Plaintiff asserts that CC effectively controls HBC because CC owns 26% of HBC's stock and has veto power over critical HBC activities. [12]

The catalyst for this lawsuit began on March 25, 2000 when SBS proposed that HBC and SBS merge and integrate the "leading companies in the operation of Spanish-language radio stations" in the top-ten Spanish markets. Am. Compl. P 11. Negotiations continued through May of 2002 and SBS thought it would make a presentation to HBC's Board of Directors in early June, 2002. Oral Argument at p. 38, line 20-25 thru p. 39 line 1-7. However, on June 12, 2002, HBC announced it intended **[**10]** to merge with Univision, a major Spanish-language television company, instead of with SBS. On the same day, the Plaintiff filed an eleven-count complaint against Defendants, for violation of Sections One and Two of the Sherman Act, for violations of the Florida Antitrust Act, the California Unfair Competition Act and Cartwright Act, and for tortious interference with business relationships, defamation, injurious falsehood, trade libel, and breach of confidentiality. [13] Plaintiff alleges CC interfered with the Plaintiff's negotiations with HBC because CC wanted Univision to acquire HBC.

CC's motion to dismiss argues that SBS fails to state a claim under the Sherman Act because: (1) CC is not a competitor with SBS in the relevant market and CC does not effectively control HBC, and (2) while SBS alleges **[**11]** an economic injury to itself, it does not allege an anti-competitive effect to the relevant market. HBC argues that SBS: (1) fails to state a claim under Section One because it fails to plead the existence of a relevant market and harm to competition, and (2) fails to state a **[*1356]** claim under Section Two because it does not identify the facts indicating there is a dangerous probability that HBC could monopolize the relevant market.

For the purposes of this motion, the Court has accepted the Plaintiff's definition of the relevant market and HBC's alleged market share of that relevant market. However, the Court finds that SBS, as a matter of law, has not and cannot allege that HBC's and CC's actions have injured competition in general. This omission is fatal to both Plaintiff's Sherman One and Sherman Two claims against both Defendants. In addition, CC as a non-competitor in the relevant market cannot, as a matter of law, be liable under Section One or Two.

Discussion

HN1[] To survive a *Rule 12(b)(6)* motion to dismiss, a complaint need only provide a short and plain statement of the claim and the grounds on which it rests. *Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. **[**12]** A *Rule 12(b)(6)* motion tests not whether the plaintiff will prevail on the merits, but instead, whether the plaintiff has properly stated a claim for which relief can be granted. See *Fed. R. Civ. P. 12(b)(6)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. Thus, a court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*. In deciding such a motion, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the nonmovant's favor. See *Scheuer, 416 U.S. at 236*. Moreover, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. *Ancata v. Prison Health Svcs., Inc., 769 F.2d 700, 703 (11th Cir. 1985)* (citation omitted). In an antitrust action, "[a] plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified." *Mun. Util. Bd. of Albertville*

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[11] SBS contends that HBC pressured Cardenas-Fernandez Associates (which is 50% owned by CC) to discontinue advertising on SBS stations. Am. Compl. at P 20.

[12] CC has veto power over any HBC plan to: sell or transfer substantially all of its assets; issue any shares of preferred stock; amend HBC's certificate of incorporation to adversely affect the shareholder rights of CC's class of stock; declare or pay any non-cash dividends or any non-cash distribution; and amend the articles of incorporation concerning HBC's capital stock. CC also appoints two of HBC's five-member Board of Directors. Am. Compl. P 26.

[13] SBS withdrew its Tenth Cause of Action for Trade Libel. Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss Plaintiff's Amended Complaint, ("Pl's Opp.") (filed Oct. 16, 2002) at 30.

v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991). **[**13]** In short, the complaint must allege enough facts, rather than conclusions, to show there is a legal claim for which relief can be granted.

I. Sherman Act Section One

Section One of the Sherman Act prohibits ***HN2***[] "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." and penalizes "every person who shall make any contract or engage in any combination or conspiracy . . . declared to be illegal." *15 U.S.C. § 1 (West 2002)*. ***HN3***[] Under Section One, a plaintiff must show that the defendant: (1) entered into a contract, combination or conspiracy which was (2) in restraint of trade or commerce, and (3) that it was damaged by the violation. *Moecker v. Honeywell Int'l, Inc., 144 F. Supp. 2d 1291, 1300 (M.D. Fla. 2001)*.

HN4[] An alleged Section One violation which does not fall within the category of *per se* antitrust violations is analyzed under the "rule of reason." [14] *Id. at 1301-02*. The "rule of reason" looks beyond the **[*1357]** structure of the agreement and requires a plaintiff to show that: "(1) a relevant market existed that was affected by the challenged restraint; (2) **[**14]** the defendant possessed 'market power' within the relevant market; (3) there was an anticompetitive effect in the intrabrand or interbrand market; and (4) the negative effects on competition are not outweighed by the positive effects on competition." *Godix Equip. Exp. Corp. v. Caterpillar, Inc., 948 F. Supp. 1570, 1579 (S.D. Fla. 1996)*.

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The Court will assume, as SBS alleges, that the Defendants agreed to frustrate SBS's efforts to expand its operations and limit SBS's ability to compete. However, even assuming that such an agreement existed, to prevail on its antitrust claims SBS must show a relevant **[**15]** market affected by the challenged restraint, the Defendants' market power in that relevant market, and the anticompetitive effect on competition in general. The Court will examine each of these critical elements.

1. Relevant Market

HN5[] A relevant market consists of a geographic and a product component. *Godix, 948 F. Supp. at 1579*. The relevant market is defined geographically as "'the area of effective competition.'" *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 423 (11th Cir. 1984)* citing *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. The relevant product market consists of: "'products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered.'" Moecker, 144 F. Supp. at 1302. [15] A relevant market "is a market composed of products which compete with each other; that is, products that are reasonably interchangeable from a buyer's point of view." *Godix Equip., 948 F. Supp. at 1580-81* (finding relevant market to be a market for both "will fit" and genuine Caterpillar replacement **[**16]** parts). The question of a relevant market is a factual one. See, e.g., *Covad Communications Co. v. Bellsouth Corp., 299 F.3d 1272, 1279 (11th Cir. 2002)* (noting that antitrust cases are fact-intensive inquiries); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994* & 996 (11th Cir. 1993) (holding that the relevant market consisted of light weight generic and economy fluke anchors and a reasonable juror could not find

[14] The four categories of restraints subject to *per se* treatment are: (1) horizontal and vertical price fixing; (2) horizontal market divisions; (3) group boycotts or concerted refusals to deal; and (4) tying arrangements. ***Moecker, 144 F. Supp. 2d at 1302***. SBS does not allege that the Defendants engaged in any of these activities.

[15] Other ***HN6***[] factors include: "(1) whether the products and services have sufficiently distinctive uses and characteristics; (2) whether industry firms routinely monitor each other's actions and calculate and adjust their own prices on the basis of other firm's prices; (3) the extent to which consumers consider various categories of sellers as substitutes; and (4) whether a sizeable price disparity between different types of sellers persists over time for equivalent amounts of comparable goods and services." ***Moecker, 144 F. Supp. 2d at 1303-04***.

that the market also included branded higher quality boat anchors); *Godix Equip., 948 F. Supp. at 1580* ("The composition of the relevant product market is a question of fact usually resolved by the jury.").

[17]** The Second and Third Circuits require federal antitrust plaintiffs to allege sufficient facts to show that an alleged product market bears a "rational relation to the methodology courts prescribe to define a market for antitrust purposes-analysis of the interchangeability of use or the cross-elasticity **[*1358]** of demand [16] . . . ." *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)*; see *Queen City Pizza, Inc. v. Domino's Pizza, 124 F.3d 430, 436* ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitutes . . . the relevant market is legally insufficient and a motion to dismiss may be granted."); see also, *B.V. Optische Industrie de Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 172 (S.D.N.Y. 1995)* (finding that chest equalization radiography [the Plaintiff's defined relevant market] was not an independent product market but part of overall X-ray market). In Queen City Pizza, the Third Circuit found that the plaintiff defined its proposed **[**18]** relevant market too narrowly because the Domino's approved supplies and ingredients (which the franchisee must purchase from Domino-approved vendors) were fully interchangeable with other pizza supplies outside the relevant market. See *Queen City Pizza, 124 F.3d at 441*.

The parties have not cited any Eleventh Circuit decisions addressing whether plaintiffs must plead facts regarding the level of product interchangeability of use or cross-elasticity of demand. ***HN7***[] Courts in this District, however, have not required plaintiffs to allege such important facts at the complaint stage. See *Aventura Cable Corp. v. Rifkin/Narragansett S. Fla. CATV Ltd. P'ship, 941 F. Supp. 1189, 1193 (S.D. Fla. 1996)* (stating that "determining [the] 'reasonable interchangeability of use . . . between **[**19]** a product and its substitutes constitutes the outer boundaries of a product market'" is a factual question and "best left for a later stage of the proceedings."); In re American Online, Inc. Version 5.*0 Litig., 168 F. Supp. 2d 1359, 1375-76 (S.D. Fla. 2001)* (dismissing complaint for failing to allege relevant geographic and product market, not for failing to allege interchangeability). Furthermore, in defining the relevant market, courts in this District have found it sufficient if the plaintiff provides facts demonstrating a distinct market. *Gen. Cigar Holdings v. Altadis, S.A., 205 F. Supp. 2d 1335, 1349-50 (S.D. Fla. 2001)*. The General Cigar court found that the plaintiff defined a relevant market consisting of "cigars and non-Cuban premium cigars" because they sufficiently distinguished cigars from other tobacco products. Id. ("cigars are distinguished from other tobacco products based on their distinctive tastes, aromas, size, shape, and other characteristics" and "non-Cuban premium cigars have 'tastes, aromas, histories, reputations and other characteristics that differ from Cuban premium cigars.'").

At oral argument, SBS stated that the **[**20]** relevant product was the advertising allocated to Spanish-language radio in the top ten markets. The Plaintiff contends that Spanish-language radio is distinct because advertisers and advertising companies have set aside separate budgets for Spanish-language radio and English-language radio. Oral Argument p.12, line 7-12. The Spanish-language advertising budget is distinct from other media budgets such as Spanish-language television and print advertising because advertisers designate a specific amount and budget for Spanish-language radio. Oral Argument p. 12, line 13-21. Given these allegations **[*1359]** and the favorable deference the Court must give to the Plaintiff's factual allegations and the minimal pleading requirements, the Plaintiff has defined a relevant product and geographic market. SBS has also alleged facts to show that Spanish-language radio advertising is not interchangeable with English-language radio advertising or other Spanish-language media advertising such as in television and newspapers. While SBS has distinguished its defined relevant market from other language radio markets, SBS has not alleged any facts that show HBC advertising time is interchangeable with **[**21]** that of SBS. However, for the purposes of this motion, the Court assumes that they are interchangeable. Thus, the Court accepts that SBS has pled the relevant product and geographic market and now turns to the remaining elements under Section One: market power and anticompetitive effect.

2. Market Power

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[16] "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *Todd, 275 F.3d at 201-02* (citation omitted).

HN8[] The Eleventh Circuit has defined market power narrowly as: "'the ability to raise price significantly above the competitive level without losing all of one's business.'" See *Graphic Prods. Distrib. v. Itek Corp., 717 F.2d 1560, 1570 (11th Cir. 1983)*. Market share may be an alternative to analyzing market power to determine the potential for genuine adverse effects on competition because market power is often difficult to define and requires complex econometric analysis. See id.; see also, *Retina Assocs. P.A. v. S. Baptist Hosp., 105 F.3d 1376, 1382 (11th Cir. 1997)* (finding that Defendants' control of fifteen percent of general ophthalmologists referrals to retina specialists in Jacksonville area was insufficient to constitute market power). "Market share directly relates to the effectiveness of interbrand competition [17] in minimizing the **[**22]** anticompetitive effects of a restraint on intrabrand competition." Moecker, *144 F. Supp. 2d at 1305* (citation omitted).

SBS alleged at oral argument that HBC held 51% of the ad revenues for Spanish-language radio in the top-ten markets. Oral Argument at 20, line 11-20. Moreover, SBS alleges that with HBC's market share, HBC can control prices and keep competition out. Id. at 35, line 5-11. Therefore, for the purposes of this motion as to HBC, the Court accepts that SBS has sufficiently alleged that HBC has market power. [18]

[23] 3. Anticompetitive Effect**

HN10[] To prove an anticompetitive effect the Plaintiff must show "an 'actual detrimental effect' on competition, or that the behavior had 'the potential for genuine adverse effects on competition . . . .'" *Levine v. Central Fla. Medical Affiliates, 72 F.3d 1538, 1551* (citations ommitted). In short, the plaintiff must show that the defendant's action harmed the consumer. "Even an act of pure malice by one business competitor against another does not, **[*1360]** without more, state a claim under the federal antitrust laws . . . ." *Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*. "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports Inc. v. McQuillan, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*.

Thus, *HN11*[] even unfair means to substitute "one competitor for another without more does not violate the antitrust laws." **[**24]** *L.A. Draper, 735 F.2d at 421* (citations omitted); see also, *Weight-Rite Golf Corp. v. U.S. Golf Ass'n, 766 F. Supp. 1104, 1111 (M.D. Fla. 1991)* (noting that USGA's ability to decrease the marketability of a manufacturer's golf shoes by amending its rules of play did not constitute violation of the rule of reason). "This [injury to competition] requirement ensures that otherwise routine business disputes between business competitors do not escalate to the status of an antitrust action." *Tops Markets Inc. v. Quality Markets, Inc., 142 F.3d 90, 96 (2d Cir. 1998)* (citation omitted).

SBS alleges injury to itself such as the depression of its stock price, paying more for stations than it might have had to, and the misappropriation of business opportunities, but it has not alleged actual or potential detrimental effect on competition. [19] The Court has extensively culled through the allegations in both the Amended Complaint and

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[17] *HN9*[] "Interbrand competition is defined as competition among suppliers or manufacturers of the same generic product, while intrabrand competition is the competition between distributors of the product of a particular supplier or manufacturer." Moecker, 144 F. Supp. at 1305.

[18] The U.S. Anchor court noted that the quantity of actual goods or services sold to consumers, as compared to revenues, is the appropriate determinant of market power; "actual unit sales must be used whenever a price spread between various products would make the revenue figure an inaccurate estimator of units sales." *7 F.3d at 999*. At this procedural stage, the Plaintiff's measure of market share is assumed to be correct.

[19] HBC cites *Caribbean Broadcasting System., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080 (D.C. Cir. 1998)*, as an example of where a court found that a plaintiff had given sufficient notice of injury to the relevant market to survive a motion to dismiss on its Sherman Act claim. There, however, the plaintiff alleged facts that the defendant's conduct injured the consumer in the relevant market and that U.S. customers in the relevant market suffered antitrust injury. *148 F.3d at 1086-87*.

Plaintiff's oral argument. While SBS alleges numerous examples of injury to itself, it does not allege--beyond its one conclusionary statement--"the person hurt is the advertiser who has less opportunity to reach **[**25]** an audience, has to pay a higher price, those kind of things"--how the advertiser has or will be injured. See Oral Argument at 51, line 8-10. In fact, SBS contends that CC and HBC allegedly used their market power to keep advertising rates down in the Spanish-language market so that CC could benefit by keeping English rates up. See Oral Argument, p.35, line 5-11. How the advertiser in the top-ten Spanish language radio markets is injured by radio stations keeping advertising rates low is not clear. Moreover, even SBS's claim that it was **[*1361]** injured is suspect because SBS states that it has "expanded rapidly in the past few years." Am. Compl. P 12.

[26]** Finally, it is puzzling how the alleged actions of CC and HBC in the 1990s, in federal antitrust terms, have injured or have the potential to genuinely and adversely injure the advertisers in the Plaintiff's defined market. As recently as the Spring of 2002, the Plaintiff proposed the merger of the "two leading companies [HBC and SBS] in the operation of Spanish-language radio stations." Am. Compl., P 11. It is curious that Plaintiff saw no federal anticompetitive problem there, yet it complains the actions of HBC and CC would injure the advertiser in the relevant market. Oral Argument, pps. 24 line 19-25 thru p. 25 line 1-13. The Plaintiff has not and apparently cannot allege facts showing general anticompetitive effects to support its Section One claim against the Defendants.

B. Clear Channel as Non-Competitor in Relevant Market

CC also argues that it is free from Sherman Act liability because it is a non-competitor in the relevant market. ***HN12***[ ] A non-competitor in the relevant market normally cannot be liable for a Section One violation. See *United States v. MMR Corp., 907 F.2d 489, 498 (5th Cir. 1990)*; *United States v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir. 1986)* **[**27]** (concluding that "an agreement among persons who are not actual or potential competitors in the relevant market is for Sherman Act purposes *brutum fulmen*."); *United States v. Reicher, 777 F. Supp. 901, 904 (D.N.M. 1991)* (finding that defendant's agreement to have a non-competitor submit sham bid for laboratory project did not violate Section One because sham bidder was not a current or potential competitor in relevant market). A non-competitor violates Section One if it enters a conspiracy *already existing between two or more competitors*. [20] See *MMR Corp., 907 F.2d at 498* (emphasis added) ("a noncompetitor can join a Sherman Act bid-rigging conspiracy among competitors."); see also, *Smithkline Beecham Corp. v. E. Applicators, Inc., 2002 U.S. Dist. LEXIS 10061*, * 25 (E.D. Pa. May 24, 2002) (concluding that non-competitor defendant who entered an already existing conspiracy to fix bids could be liable for a Section One violation).

[28]** In fact, SBS does not contend that CC and SBS compete in the proposed relevant market. CC does not even own any radio stations in the Plaintiff's relevant market. Thus, as a non-competitor who has no present potential to compete with SBS, CC cannot, as a matter of law, conspire with HBC to violate Section One. Nor, under the facts Plaintiff alleges, does CC further an already existing conspiracy between two competitors. Therefore, for this additional reason, SBS also fails to state a Sherman Act One claim against CC.

II. Sherman Act Section Two

Nowhere in the Amended Complaint or during oral argument does SBS argue facts, rather than present a conclusionary statement on this element. Moreover, SBS cites *Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, 754 (10th Cir. 1999)*, for the proposition that "eliminating or diminishing a competitor's ability to vie for business is precisely the type of injury that the antitrust laws were intended to protect against." Pl's Opp., at 15. However, in Full Draw, the Tenth Circuit noted that the plaintiff in that case had alleged that the elimination of the plaintiff as a competitor would "directly and substantially reduce 'output' of exhibitor space and directly and substantially reduce the ability of the consumers of such space to purchase exhibitor space." *182 F.3d at 753-54*. Plaintiff's complaint continued: "because FDP [an archery show promoter] produced one of only two archery business trade shows in the United States, the purposeful and wrongful destruction of FDP's business by Defendants directly *injured competition as well as injuring FDP*." *Id. at 754* (emphasis added).

[20] The Plaintiff has not alleged that there was an already existing agreement between two or more competitors in the relevant market. Since there is no legal basis for CC's liability under Section One, it follows that there can be no conspiracy liability against HBC. HBC cannot conspire with itself.

The Sherman Antitrust Act makes it is a crime for any ***HN13***[] "person [to] monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the Several States . . . ." *15 U.S.C. § 2 (West 2002)* ("Section Two"). ***HN14***[] To prevail **[*1362]** on a Section Two claim, the Plaintiff must establish: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. . . ." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. **[**29]** In the Eleventh Circuit, "to have a dangerous probability of successfully monopolizing a market, the defendant must be close to achieving monopoly power." *U.S. Anchor, 7 F.3d at 994*. Courts look at the relevant market under consideration and the defendant's power within that relevant market in determining whether there is a dangerous probability of monopolization. Id.

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The Court must conduct an analysis of SBS's Section Two claims similar to its anaylsis of SBS's Section One claims. Having accepted for the purposes of this motion the Plaintiff's definition of the relevant market, see infra pp. 7-10, the Court considers the allegations of the Defendants' possession of or dangerous probability of possessing monopoly power and the effect to competition in general.

1. Monopoly Power

HN15[] Although monopoly power under Section Two is similar to market power under Section One, it requires something greater than market power. *Moecker, 144 F. Supp. 2d at 1308, n.13* (citation omitted). Monopoly power involves "the power to raise prices to supra-competitive levels . . . or the power to exclude competition **[**30]** in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." *U.S. Anchor, 7 F.3d at 994*. As with Section One market power, market share is a revealing guidepost in determining whether there is a dangerous probability of monopolization. *7 F.3d 986, 999* ("the primary measure of the probability of acquiring monopoly power is the defendant's proximity to acquiring a monopoly share of the market.").

HN16[] "A dangerous probability of achieving monopoly power may be established by a 50% share . . . ." Id. When the plaintiff pleads less than a majority share of the relevant market, the plaintiff must show additional factors such as: the defendant's share compared to its competitors, "the strength and capacity of current competitors, the potential for entry, the historic intensity of competition; and the impact of the legal or natural environment." General Cigar, 205 F. Supp. 2d 1350-51 (concluding that defendant's 39% share of relevant market without more could not, as a matter of law, constitute dangerous probability of monopolization of relevant market).

SBS's Amended Complaint alleges nothing about **[**31]** market share. Only at oral argument did the Plaintiff contend that HBC held 51% of the advertising revenues in the top-ten markets for Spanish-language radio. However, considering the low-threshold of the Plaintiff's pleading burden and the fact that SBS has alleged that HBC holds a majority share of the relevant market, for the purposes of HBC's motion, the Court accepts that SBS has sufficiently asserted facts indicating a dangerous probability of HBC monopolizing the relevant market.

2. Injury to Competition

However, ***HN17***[] even if the plaintiff can allege a dangerous probability of monopolizing **[*1363]** the relevant market, it must also show harm to competition under Section Two. See *American Key Corp. v. Cole Nat. Corp., 762 F.2d 1569, 1579 n.8 (11th Cir. 1985)* (citation omitted). As described above, [21] SBS's omission of any facts alleging injury to competition in the relevant market is likewise fatal to its Section Two claim. Plaintiff is represented by respected and knowledgeable counsel in these proceedings. Notwithstanding the Plaintiff's two attempts at formal pleading and the Court's specific request to address this issue at oral argument, the Plaintiff has **[**32]** not

[21] See infra p.11-13.

provided any facts to allege this element. At this point, the Court must conclude there are none. Plaintiff's failure necessitates dismissal of its Sherman Act claims against both Defendants.

B. Clear Channel as Non-Competitor in Relevant Market

HN18[] A Section Two claim against a non-competitor also is not viable against a non-competitor in the relevant market. See *Aquatherm v. Flordia Power & Light, 145 F.3d 1258, 1261 (11th Cir. 1998)* (affirming district court's dismissal of Section Two claim because electric power company did not compete in the relevant market--pool heaters); *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1348 (11th Cir. 1987)* (concluding defendant did not compete in the same market--the sale of national advertising); *Moecker, 144 F. Supp. 2d at 1309* (finding manufacturer of conversion van seat belts did not compete with a distributor of seatbelts in the distribution **[**33]** market).

As noted above, SBS does not allege nor can it allege that CC competes in the Plaintiff's proposed relevant market of advertising in the top-ten Spanish-language radio markets. Seeking to circumvent this legal impediment to its Section Two claim, SBS contends that CC effectively controls HBC and thus can attempt to monopolize the relevant market--i.e., HBC is really CC's stealth vehicle to monopolize the market. Thus, SBS alleges that CC owns 26% of HBC and appoints two members of HBC's five-person board of directors. [22] However, ***HN19***[] before one corporate entity can be held liable for the alleged federal antitrust wrongs of another corporate entity, the plaintiff must satisfy the state law standard for piercing the corporate veil. See *United Nat'l Records v. MCA, Inc., 616 F. Supp. 1429, 1432 (N.D. Ill. 1985)* (holding that corporate parent could not be held liable for antitrust violations of its subsidiary because both companies maintained separate corporate identities). Under Florida law, a court can pierce the corporate veil when there is "a showing that a corporation was formed, or at least employed, for an unlawful or improper purpose--as a subterfuge to **[**34]** mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some analogous betrayal of trust . . . ." *Lipsig v. Ramlawi, 760 So. 2d 170, 187 (Fla. 2000)*. SBS has not alleged that HBC was a sham or mere instrumentality for CC to engage in illegal or improper activities. In fact, at oral argument, SBS did not dispute CC and HBC's representations that the FCC *requires* that CC play a passive role in the operations of HBC, and CC has an agreement that it will not have any control over HBC. Oral Argument p.60, line 17-20.

Furthermore, ***HN20***[] the Eleventh Circuit has said that contract power under an exclusive **[*1364]** dealing arrangement is distinguishable from market power. See *Maris Distr. Co. v. Anheuser-Busch Inc., 302 F.3d 1207, 1224 (11th Cir. 2002)* (holding that beer manufacturer's restriction on distributors from being owned in whole or in part by the public was a valid **[**35]** exercise of contract power and not violation of Sherman Act). Similarly, any purported "control" that CC has over HBC is an exercise of a valid contract agreement between the parties, and under these facts, not a violation of the Sherman Act. Therefore, the conclusionary allegation of "control" is insufficient to state a Section Two claim against CC for attempted monopolization. The immutable fact is that CC is a non-competitor in Plaintiff's defined relevant market, and SBS cannot avoid that fact's legal effect.

In its response, Plaintiff asks that if the Court dismisses its Section Two claims against CC, it be allowed to amend its Amended Complaint to add a claim of conspiracy to monopolize against CC. However, the Eleventh Circuit in Aquatherm stated that "equally fatal to Aquatherm's conspiracy allegation is the fact that ***HN21***[] no authority exists holding a defendant can conspire to monopolize a market in which it does not compete." *145 F.3d at 1262 n.4*. Thus, leave to amend to add a conspiracy to monopolize claim against CC would be futile and therefore is denied.

Although not explicitly referenced in its Section Two cause of action, the Plaintiff articulated a monopoly **[**36]** leveraging claim at oral argument. See, e.g., Oral Argument, pps. 27-28 (arguing that CC, through its alleged monopoly of major concert venues, leverages its power to prevent performers from appearing on SBS stations). ***HN22***[] The Eleventh Circuit does not recognize a monopoly leveraging claim against a party who is a non-competitor. *Aquatherm, 145 F.3d at 1262*.

[22] See supra p.4 n. 12 (describing CC's decision-making authority over HBC policy).

III. Dismissal with Prejudice

Having considered the parties' papers and extensive oral argument, the Court must dismiss this action with prejudice. Although the Eleventh Circuit has stated recently that ***HN23***[] "*Rule 12(b)(6)* dismissals are particularly disfavored in fact-intensive antitrust cases," *Covad, 299 F.3d at 1279*, the facts of this case warrant dismissal with prejudice. Unlike Covad where the defendant telephone company denied a high-speed internet digital subscriber line company an essential facility to function, this case is really about the fallout from a failed merger. SBS expected to merge with HBC and create the largest Spanish-language radio station in the top-ten markets, but HBC decided to accept Univision's offer instead. On the same day as the merger was announced, **[**37]** SBS sued CC and HBC for alleged predatory conduct which is purpoted to have started approximately six years ago.

SBS argues that its deal with HBC would have been different from the Univision/HBC merger because it called for the combined company to sell off many of its radio stations to keep competition healthy. Assuming the SBS/HBC merger would have had no detrimental effect on competition, would not the Univision/HBC deal, if anticompetitive problems arise, also require a sell off of the necessary number of stations similar to the SBS/HBC deal? Moreover, based on SBS's statements, it appears that consumers may benefit from HBC and CC's actions because those actions will keep the prices for the advertiser--the buyer in this antitrust analysis--low.

HN24[] The injury to competition element is a critical element of both Sections One and **[*1365]** Two because it prevents heated business disputes between individual competitors from turning into federal antitrust actions. The Sherman Act was enacted as an aegis to protect the consumer and competition, not as a sword to redress grievances against competitors. It appears that in its haste to assert a federal antitrust claim against CC and HBC, SBS has **[**38]** lost sight of the most important player in this case--the consumer.

The Plaintiff has amended its complaint once already. The Court gave the Plaintiff extensive time to address the injury to competition element at oral argument. Still, SBS could only provide one vague and conclusionary allegation of injury to general competition. As Judge Conway noted in Aquatherm:

> ***HN25***[] when the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.
>
> *971 F. Supp. 1419, 1424 (M.D. Fla. 1997)* (quotation omitted).

Based on the events SBS has related, SBS may or may not have a state law claim against HBC and CC. However, its remedy is not founded in federal ***antitrust law***. Therefore, dismissal of the federal antitrust claim with prejudice is proper.

IV. State Law Claims

Having dismissed the federal claims, the Court will dismiss the remaining state law claims without prejudice. [23] ***HN26***[] "When all federal claims are eliminated **[**39]** in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them *without* prejudice." *Tops Markets, 142 F.3d at 103* (emphasis in original) (citation omitted); see, e.g., *General Cigar, 205 F. Supp. 2d at 1357-58* (declining to exercise supplemental jurisdiction after dismissing federal antitrust claims that were the only basis for federal jurisdiction).

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[23] There is no diversity of citizenship under *28 U.S.C. § 1332* because all the parties were Delaware corporations.

Therefore it is

ORDERED that Defendant Clear Channel Communications Inc.'s and Hispanic Broadcasting Corporation's Motions to Dismiss Counts I and II are GRANTED WITH PREJUDICE.

IT IS FURTHER ORDERED that Spanish Broadcasting System's state law causes of action (Counts III-XI) are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that this CASE is CLOSED and all pending motions are **[**40]** DENIED as MOOT.

ORDERED in Miami, Florida, this 31st day of January, 2003.

PATRICIA A. SEITZ

UNITED STATES DISTRICT JUDGE

Royce v. Willowbrook Cemetery, Inc.

Superior Court of Connecticut, Judicial District of Stamford-Norwalk, Complex Litigation Docket At Stamford

February 3, 2003, Decided ; February 3, 2003, Filed

XO8CV010185694

Reporter

2003 Conn. Super. LEXIS 262 *; 2003 WL 431909

David Royce v. Willowbrook Cemetery, Inc. et al.

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Prior History: Royce v. Willowbrook Cemetery Ass'n, 2002 Conn. Super. LEXIS 3400 (Conn. Super. Ct., Oct. 21, 2002)

Disposition: Fifth count of the amended complaint stricken.

Core Terms

motion to strike, allegations, baseless, defamation suit, lawsuit, sham, quotation, contends, courts, marks, factual allegations, complex litigation, amended complaint, cause of action, defamation case, judicial notice, file suit, defamation, motivation, interfere, non-sham, stricken, Appeals, argues, rights

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN1[] **Defenses, Demurrers & Objections, Motions to Strike**

The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaints to state a claim upon which relief can be granted. Conn. Gen. Prac. Book, R. Super. Ct. § 10-39. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff. The court must accept as true the facts alleged in the complaint. However, a motion to strike does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings. If facts provable in the complaint would support a cause of action, the motion to strike must be denied.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine, which was initially developed in the context of federal ***antitrust law*** and now applies in many contexts, shields individuals and groups from liability for petitioning a government agency for redress. The doctrine has limits in that it does not protect petitioning activity which is a sham or pretense, i.e. that which is intended to interfere with someone's rights, and has no reasonable expectation of success.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Connecticut Appellate Court has adopted the Noerr-Pennington doctrine and its sham exception in the context of determining liability of parties filing appeals to the courts.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN4[] **Regulated Practices, Trade Practices & Unfair Competition**

The filing of a single, non-sham lawsuit is not a basis for a Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, claim.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Sham litigation is objectively baseless in that no reasonable litigant could realistically expect success on the merits and which lawsuit conceals an effort to interfere improperly with the defendant's rights. This definition has been followed by Connecticut courts.

Judges: Taggart D. Adams, Superior Court Judge.

Opinion by: Taggart D. Adams

Opinion

MEMORANDUM OF DECISION RE MOTION TO STRIKE (282.00)

The defendant Cornerstone Family Services, Inc. (Cornerstone) has moved to strike the fifth count of the Amended Complaint, dated April 4, 2002, in which the pro se plaintiff David Royce asserts a claim against Cornerstone pursuant to the Connecticut Unfair Trade Practices Act, *General Statutes § 42-110a et seq.* (CUTPA).

The fifth count alleges:

> Cornerstone, motivated by a wish to intimidate plaintiff and prevent his prosecution of this action, filed suit against him claiming defamation, based solely on statements attempting to influence a forthcoming WCA board election. This S.L.A.P.P. suit violated C.U.T.P.A. by attacking a consumer's attempted protection of interests purchased from defendants.

Standard of Review

HN1[] "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of **[*2]** any complaints . . . to state a claim upon which relief can be granted." (Citation and internal quotation marks omitted.) *Peter-Michael, Inc. v. Sea Shell Associates, 244 Conn. 269, 270, 709 A.2d 558 (1998)*; *Practice Book § 10-39*. "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff." (Internal quotation marks omitted.) *Waters v. Autuori, 236 Conn. 820, 825, 676 A.2d 357 (1996)*. "The court must accept as true the facts alleged in the complaint." *Pamela B. v. Ment, 244 Conn. 296, 325, 709 A.2d 1089 (1998)*. However, a motion to strike "does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp., 240 Conn. 576, 693 A.2d 293 (1997)*. If facts provable in the complaint would support a cause of action, the motion to strike must be denied. *Id. at 580*.

Discussion

Cornerstone contends that the allegations of the fifth count are insufficient to state a claim for relief as a matter **[*3]** of law. It claims that Royce has not alleged sufficient facts on which to base a CUTPA claim and that, since there is evidence to show that the defamation lawsuit commenced by Cornerstone against Royce is not a sham, it has a constitutionally protected right to prosecute the suit.

Resolution of this matter requires the court to consider what is known as the *Noerr-Pennington* doctrine which arises from three United States Supreme Court cases. [1] In essence, ***HN2***[] the doctrine, which was initially developed in the context of federal ***antitrust law*** and now applies in many contexts, shields individuals and groups from liability for petitioning a government agency for redress. *Zeller v. Consolini, 59 Conn.App. 545, 758 A.2d 376 (2000)*. The doctrine has limits in that it does not protect petitioning activity which is a sham or pretense, i.e. that which is intended to interfere with someone's rights, and has no reasonable expectation of success. *Id. at 552*.

[*4] ***HN3***[] The Connecticut Appellate Court recently adopted the *Noerr-Pennington* doctrine and its sham exception in the context of determining liability of parties filing appeals to the courts. *Zeller v. Consolini, supra.* In that case the Appellate Court noted that the United States Court of Appeals for the Second Circuit, in *Suburban Restoration Co. v. ACMAT, 700 F.2d 98 (1983)*, had predicted that Connecticut courts would provide *Noerr-Pennington* protection to a single non-sham lawsuit and held that such a suit was not a violation of CUTPA. The *Keller* court stated it was fulfilling "the Second Circuit's prophecy." *Zeller v. Consolini, supra 59 Conn.App. at 554*.

Even before, and certainly after *Keller* was decided by the Appellate Court, the law in Connecticut was quite clear that ***HN4***[] the filing of a single, non-sham lawsuit was not a basis for a CUTPA claim. *Ancona v. Manafort Bros., Inc., 56 Conn. App. 701, 715, 746 A.2d 184*, cert. denied *252 Conn. 954, 749 A.2d 1144, 749 A.2d 1202 (2000)* (citing *Suburban Restoration supra*); *Roncari Dev. Co. v. GMG Enters., 45 Conn. Supp. 408, 718 A.2d 1025, 19 Conn. L. Rptr. 237 (1997)*; **[*5]** *New Milford Savings Bank v. Jajer, Superior Court, judicial district of Litchfield at Litchfield, CV92-0061073 (January 2, 2001, Frazzini, J.) (28 Conn. L. Rptr. 490)*.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*, the United States Supreme Court defined ***HN5***[] sham litigation as one which is objectively baseless in that no reasonable litigant could realistically expect success on the merits and which lawsuit conceals an effort to interfere improperly with the defendant's rights. *Id. at 60-61*. This definition has been followed by Connecticut courts. See e.g. *Zeller v. Consolini, supra*; *Roncari Development Co. v. GMC Enterprises, Inc., supra.*

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[1] *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*; *United Mineworkers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*.

Cornerstone contends that Royce's fifth count fails to state a viable claim because the evidence shows that its defamation suit is not baseless. That evidence includes several fruitless efforts by Royce to have the suit dismissed or stricken. The defamation suit, *Cornerstone Family Services, Inc., David Royce*, Superior Court, Complex Litigation Docket X08 CV01-0184443, is presently before this **[*6]** court on the complex litigation docket, and Cornerstone argues that this court should take judicial notice of the denials of Royce's motions and find that the defamation case is not an objectively baseless litigation. [2] As tempting as this approach might be, it is not consistent with Connecticut law and procedures.

As stated above, a court, in ruling on a motion to strike, is limited to the facts alleged in the complaint. While a small handful of Superior Court decisions have determined it is appropriate in some circumstances to rule on a motion to strike based on judicially noticed facts, this court decides the better course of action is to decline that approach. See *The Cadle Co. v. Gable*, Superior Court, judicial district of Middlesex at Middletown, CV00-0091155 (July 31, 2001, Gilardi, J.); **[*7]** *Sand Dollar Development Group v. Michael*, Superior Court, judicial district of New Haven, SPNH 961048736 (February 18, 1997, Levin, J.) (19 Conn. L. Rptr. 453).

However, Cornerstone also contends that Royce's allegations alone do not state a cause of action because no where is it alleged that the defamation suit is objectively without merit or baseless. The allegations of the fifth count state that Cornerstone filed the suit with improper motives and that it was a classic S.L.A.P.P. suit [which the court understands is the acronym for strategic litigation against public participation, see *Field v. Kearns, 43 Conn.App. 265, 275-76, 682 A.2d 148 (1996)]*. These allegations are insufficient. The motivation of Cornerstone is not relevant unless the suit is objectively baseless, and calling the defamation case a S.L.A.P.P. suit is a conclusion or opinion without supporting factual allegations. Royce argues that the court should imply from the allegations that the defamation suit is baseless. While a court must draw all reasonable inferences in favor of the pleader, the inferences must be drawn from pleaded facts. The fifth count is bereft of any factual allegation that states or infers the defamation **[*8]** suit is without legal or factual merit. See *New Milford Savings Bank v. Jajer*, *supra*; compare *Roncari Development Co. v. GMG Enterprises, Inc., 45 Conn.Sup. 408, 416, 718 A.2d 1025, 19 Conn. L. Rptr. 237 (1997)* (allegations that defendants commenced and participated in an appeal without a reasonable basis in fact and in law for the claim found sufficient to withstand a motion to strike). For the foregoing reasons, the fifth count of the amended complaint is stricken.

Taggart D. Adams, J.

Superior Court Judge

End of Document

[2] It should be noted that while the defamation suit is now on this judge's docket the earlier motions to dismiss and strike were heard and decided by other Superior Court judges.

In re S.D. Microsoft Antitrust Litig.

Supreme Court of South Dakota

November 20, 2002, Argued ; February 12, 2003, Opinion Filed

22306

Reporter
2003 SD 19 *; 657 N.W.2d 668 **; 2003 S.D. LEXIS 16 ***; 2003-1 Trade Cas. (CCH) P73,962

IN RE: SOUTH DAKOTA MICROSOFT ANTITRUST LITIGATION

Subsequent History: Appeal after remand at, Remanded by *In re S.D. Microsoft Antitrust Litig., 2005 SD 113, 707 N.W.2d 85, 2005 S.D. LEXIS 174 (2005)*

Prior History: **[***1]** APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT HUGHES COUNTY, SOUTH DAKOTA. HONORABLE STEVEN L. ZINTER Judge.

United States v. Microsoft Corp., 84 F. Supp. 2d 9, 1999 U.S. Dist. LEXIS 21782 (D.D.C., 1999)

Disposition: Remanded to the circuit court.

Core Terms

class certification, class member, damages, certification, circuit court, class action, scientific, antitrust, methodology, overcharge, purchasers, indirect, trial court, expert testimony, calculate, consumers, reliable, rigorous, abuse of discretion, individual member, predominate, proceedings, threshold, battle, merits, prices, member of the class, rule requirements, anticompetitive, plaintiffs'

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN1[] **Standards of Review, Abuse of Discretion**

On review of an order denying or granting a motion to maintain a class, the lower court may be reversed only for an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN2[] **Standards of Review, Abuse of Discretion**

An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence. In applying the abuse of discretion standard, the reviewing court does not determine whether it would have made a like decision, only whether a judicial mind, considering the law and the facts, could have reached a similar decision. Under such a standard of review, the reviewing court must be careful not to substitute its reasoning for that of the trial court.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Governments > Legislation > Expiration, Repeal & Suspension

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Purchasers, Indirect Purchasers**

Indirect purchaser suits for overcharge damages are barred under federal ***antitrust law***. However, South Dakota, like many other states, has enacted a repealer statute, *S.D. Codified Laws § 37-1-33*, that allows for indirect purchaser lawsuits to be maintained at the state level.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

See *S.D. Codified Laws § 37-1-33*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] **Class Actions, Certification of Classes**

In order to obtain certification of a class, the plaintiffs must satisfy all the requirements of *S.D. Codified Laws § 15-6-23(a)* and at least one of the provisions of *S.D. Codified Laws § 15-6-23(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN6[] **Class Actions, Prerequisites for Class Action**

See *S.D. Codified Laws § 15-6-23(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] **Class Actions, Prerequisites for Class Action**

A court is required to conduct a rigorous analysis to determine if the elements of *Fed. R. Civ. P. 23* have been met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8[] **Class Actions, Certification of Classes**

A party seeking certification must show "actual, not presumed," conformance with class certification requirements. However, any doubts as to whether the class should be granted certification should be resolved in favor of certification.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

S.D. Codified Laws § 2-14-13 mandates that when a South Dakota statute has as its source a uniform law, it shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. The South Dakota Supreme Court has determined the federal rules of civil procedure to be similar to uniform laws.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN10[] **Public Enforcement, State Civil Actions**

S.D. Codified Laws § 37-1-33 directs that a trial court, in any subsequent action arising from the same conduct, may take any steps necessary to avoid duplicative recovery against a defendant. One method of insuring against this threat is to try all claims in a single proceeding.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Remedies > Damages > General Overview

HN11[] **Purchasers, Indirect Purchasers**

In an indirect-purchaser antitrust action, the plaintiffs are not required to prove their case on the merits at the class certification stage. They must make a "threshold showing" that the antitrust activity, if proven, had a common impact on the class members. The plaintiffs must advance a method for determining generalized damages on a class-wide basis.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12[] Class Actions, Prerequisites for Class Action

A reviewing court must conduct a "rigorous analysis" in determining whether the elements of *Fed. R. Civ. P. 23* have been met.

Civil Procedure > Remedies > Damages > General Overview

HN13[] Remedies, Damages

Difficulty in computing damages ought not to be confused with the requirement of proving damages as an essential element for recovery. Once the existence of damage has been shown by a preponderance of the evidence, a claimant must produce only the best evidence available to allow a jury a reasonable basis for calculating the loss. While jurors cannot speculate, they have some leeway in figuring damages. Any doubt persisting on the certainty of damages should be resolved against the contract breaker. Breaching parties may not complain when the task is made difficult by their own acts. All courts require, therefore, is a reasonable basis for measuring the loss.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN14[] Expert Witnesses, Daubert Standard

Under Daubert, the circuit court's rigorous certification analysis may be guided by whether an expert's testimony rests on both a reliable foundation and is relevant to the task at hand.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

Governments > Legislation > Interpretation

HN15[] Class Actions, Prerequisites for Class Action

S.D. Codified Laws § 15-6-1 is a guide to S.D. Codified Laws § 15-6-23 certification questions. It states in part that South Dakota's civil procedure code is to be construed to secure the just, speedy, and inexpensive determination of every action.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN16[] Expert Witnesses, Daubert Standard

Before expert scientific testimony may be received, it must be shown that: (1) it has been tested; (2) it has been subjected to peer review and publication; (3) the known or potential rate of error must be known; and (4) to what extent it has received general acceptance. The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN17[] Class Actions, Certification of Classes

In order to be granted class certification, the class members must show that damages can be calculated on a class-wide basis.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN18[] Class Actions, Class Members

The judicial inquiry regarding calculation of damages in a class action does not involve a determination as to the likely success of the class members' proposed methods. However, the class members must present at least one viable method for computing damages on a class-wide basis, one which a reasonable factfinder could accept.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN19[] Class Actions, Certification of Classes

A disagreement on impact and damages should be adjudicated at trial by the factfinder, not by a court on a motion for class certification. Avoiding a "battle of the experts" at the class certification stage is consistent with United States Supreme Court authority.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN20[] Standards of Review, Abuse of Discretion

An abuse of discretion occurs only where a judicial mind, in view of the law and circumstances, could not have reasonably reached the same conclusion. Abuse of discretion is the most deferential standard of review available with the exception of no review at all.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN21[] **Jury Trials, Province of Court & Jury**

When opposing experts give contradictory opinions on the reliability or validity of a conclusion, the issue of reliability becomes a question for the jury. The trial process is well equipped to deal with contradictory opinions. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Admissibility > Expert Witnesses > Ultimate Issue

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN22[] **Class Actions, Prerequisites for Class Action**

Production of a self-professed expert is simply not enough to meet the certification requirements under South Dakota's rigorous analysis standard. However, the South Dakota Supreme Court has consistently refused to extend any gate-keeping function to usurp the factual determination role of the ultimate trier of fact.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN23[] **Jury Trials, Province of Court & Jury**

The purpose of expert testimony is to assist the jury as the trier of fact and not to supplant it. South Dakota is not a trial-by-expert jurisdiction. The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true. The credibility of witnesses and the evidentiary value of their testimony falls solely within the province of the jury.

Counsel: CHARLES B. CASPER of Montgomery, McCracken, Walker & Rhoads, LLP, Philadelphia PA, DAVID B. TULCHIN, JOSEPH E. NEUHAUS, Sullivan & Cromwell, LLP, New York NY, GENE N. LEBRUN, of Lynn, Jackson, Shultz & Lebrun, P.C., Rapid City, South Dakota, Attorneys for appellant Microsoft.

MARK A. MORENO of Schmidt, Schroyer & Moreno, PC, Pierre, South Dakota, BEN BARNOW of Barnow & Associates, P.C., Chicago, IL, LEONARD B. SIMON of Milberg, Weiss, Bershad, Hynes & Lerach, LLP, San Diego, CA, Attorneys for appellees Swanson, Knecht, Schoenfelder, Gengler.

Judges: GILBERTSON, Chief Justice. MEIERHENRY, Justice, and TUCKER, Circuit Judge, concur. KONENKAMP, Justice, and AMUNDSON, Retired Justice, concurs with a writing. MEIERHENRY, Justice, not having been a member of the Court at the time this action was submitted to the Court, was appointed as a Circuit Judge to sit for SABERS, Justice, disqualified. TUCKER, Circuit Judge, sitting for ZINTER, Justice, disqualified.

Opinion by: GILBERTSON

Opinion

[670]** GILBERTSON, Chief Justice

[*P1] The Sixth **[***2]** Judicial Circuit Court granted class certification in this indirect- purchaser antitrust action to members of a certified class of South Dakota end-users (Class Members). This Court granted a discretionary appeal brought by Microsoft Corporation (Microsoft). We affirm the circuit court's certification order.

FACTS AND PROCEDURE

[*P2] The Class Members, who are indirect purchasers of Microsoft Windows or MS- DOS operating systems software (OSS), are residents of the State of South Dakota. The Class Members allege that Microsoft has maintained a monopoly in the marketplace since the late 1980's or early 1990's. They contend that this monopoly was established through various anti- competitive acts such as stifling innovation in the market place and overcharging customers. The Class Members claim that Microsoft's actions "eliminated competition in the market for similar OSS, deprived purchasers of the benefits of a free market and injured consumers by forcing them to purchase Microsoft OSS at artificially high and supra-competitive prices in violation of South Dakota antitrust laws."

[*P3] The Class Members sought and after extensive proceedings before the circuit **[***3]** court, obtained certification of a class in the Sixth Judicial Circuit. [1] Microsoft was granted this discretionary appeal, raising the following issue for our review:

Whether the circuit court abused its discretion when it granted class certification in this indirect-purchaser antitrust action.

[*4] [**671] STANDARD OF REVIEW**

[*P4] ***HN1***[] "On review of an order denying or granting a motion to maintain a class, the lower court may be reversed only for an abuse of discretion." *Trapp v. Madera Pacific, Inc., 390 N.W.2d 558, 560-61 (SD 1986)*; *see also* *Swanson v. Sioux Valley Empire Elec. Ass'n Inc., 535 N.W.2d 755, 759* [2] ***[***8]*** *(SD 1995)*.

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[1] The Class Members sought certification of the following class pursuant to SDCL 15-6-23 (Rule 23):

All persons and entities who acquired for use, and not for further selling, leasing or licensing, a license in South Dakota from Microsoft, an agent of Microsoft, or an entity under Microsoft's control, for an Intel-compatible PC version of MS-DOS, Windows 95, upgrades to higher MS-DOS versions, upgrades to or of Windows 95, Windows 98, upgrades to or of Windows 98, or other software products in which MS-DOS or Windows have been incorporated in full or in part at any time during the class period or after March 21, 1996. Excluded from the class are government entities, Microsoft, its officers, directors, employees, subsidiaries and affiliates and any judges and justices who preside over this case or any portion thereof.

[2] Rule 23(a) provides:

[*P5] ***HN2***[] "'An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.'" *Black v. Class, 1997 SD 22, P27, 560 N.W.2d 544*. In applying the abuse of discretion standard, "'we do not determine whether we would have made a like decision, only whether a judicial mind, considering the law and the facts, could have reached a similar decision.'" *State v. Wilkins, 536 N.W.2d 97, 99 (SD 1995)* (citations omitted). Under such a standard of review "we must be careful not to substitute our reasoning for that of the trial court." *State v. Larson, 512 N.W.2d 732, 736 (SD 1994)*.

ANALYSIS AND DECISION

[*P6] *The United States Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720, 729, 97 S. Ct. 2061, 2066, 52 L. Ed. 2d 707 (1977),* **[***5]** held that ***HN3***[] indirect purchaser suits for overcharge damages are barred under federal ***antitrust law***. However, South Dakota, like many other states, has enacted a repealer statute that allows for indirect purchaser lawsuits to be maintained at the state level. Our state's repealer statute, *SDCL 37-1-33*, provides:

HN4[] No provision of this chapter may deny any person who is injured directly or *indirectly* in his business or property by a violation of this chapter the right to sue for and obtain any relief afforded under § 37-1-14.3. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

(emphasis added).

[*P7] ***HN5***[] In order to obtain certification of a class, the plaintiffs must satisfy all the requirements of *SDCL 15-6-23(a)* (*FRCP 23(a)*) [2] (hereinafter Rule 23(a)) and at least one of the provisions of *SDCL 15-6-23(b)* (*FRCP 23(b)*) (hereinafter Rule 23(b)). *Trapp, 390 N.W.2d at 560*; *Shangreaux v. Westby, 281 N.W.2d 590, 592- 93 (SD 1979)*. Microsoft does not **[***6]** dispute that the requirements of Rule 23(a) are met on this appeal; [3] therefore, we will only address the requirements of Rule 23(b). In its entirety, this statute reads:

HN6[] An action may be maintained as a class action if the prerequisites of § 15- 6-23(a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of **[**672]** the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

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One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,

(4) the representative parties will fairly and adequately protect the interests of the class, and

(5) the suit is not against this state for the recovery of a tax imposed by chapter 10-39, 10- 39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A, 10-46B, or 10-52.

[3] The Circuit Court nevertheless made an independent review of rule 23(a) and concluded that the plaintiffs satisfied all the requirements of that rule.

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate permanent injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate **[***7]** over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

[*P8] Plaintiffs assert that questions of law or fact common to all members of the proposed class predominate, including:

a. Whether Microsoft is a monopolist in the market for operating system software;

b. Whether Microsoft engaged in anti-competitive conduct in order to unlawfully maintain its monopoly powers;

c. Whether Microsoft's conduct violated South Dakota's antitrust laws;

d. The impact of Microsoft's activity in the relevant marketplace;

e. Whether Microsoft's conduct caused harm; and f. Whether Plaintiffs and putative class are entitled to damages and appropriate measure of such damages.

According to General Tel. Co. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982), ***HN7***[] a court is required to conduct a rigorous analysis to determine if the elements of Rule 23 have been met.

[4] Furthermore, in applying the federal version of Rule 23, the United States Supreme Court has held that **[***9]** ***HN8***[] a party seeking certification must show "actual, not presumed," conformance with class certification requirements. *Id*. However, any doubts as to whether the class should be granted certification should be resolved in favor of certification. Bellinder v. Microsoft Corp., No. 99- CV-17089, 2001 WL 1397995, at *8 (KanDistCt Sep 7, 2001) (citing *Arch v. American Tobacco Co., 175 F.R.D. 469, 476 (EDPa 1997)*.

[*P9] The question we are faced with here is whether this case is suitable for **[**673]** resolution on a class-wide **[***10]** basis. We stated in *Trapp, 390 N.W.2d at 560*:

Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

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[4] *SDCL 2-14-13* ***HN9***[] mandates that when a South Dakota statute has as its source a uniform law, "it shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it." We have determined the federal rules of civil procedure to be similar to uniform laws. *State v. Wright, 1999 SD 50, P13 n.4, 593 N.W.2d 792, 798 n.4*; *Miller v. Hernandez, 520 N.W.2d 266, 269 (SD 1994)*.

[*P10] This is consistent with the last sentence of *SDCL 37-1-33* ***HN10***[] which directs a trial court: "in any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant." One method of insuring against this threat is to try all claims in a single proceeding.

[*P11] We are aware that denial of class certification may be the death knell of claims due to the de minimus amounts of each individual claim which may economically preclude attempted redress by plaintiffs in separate law suits. c*.f.* *Lick v. Dahl, 285 N.W.2d 594 (SD 1979)*. Herein the circuit court held that there were "a very large number of claimants with relatively **[***11]** small amounts at stake. Most consumers have little incentive to file suit independently because the high cost of litigation would far exceed their potential recovery." At oral argument before this Court, Microsoft conceded that should the class not be certified, individual consumers could not in all likelihood, economically pursue separate legal actions against it.

[*P12] Moreover, ***HN11***[] the Plaintiffs are not required to prove their case on the merits at the class certification stage. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140, 2152- 53, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*; *Bellinder*, 2001 WL 1397995, at *7. They must make a "threshold showing" that the antitrust activity, if proven, had a common impact on the class members. *Bellinder*, 2001 WL 1397995, at *7; *In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1041-42 (ND Miss 1993)*. The Plaintiffs must advance a method for determining generalized damages on a class-wide basis. *Bellinder*, 2001 WL 1397995, at *7; *Catfish, 826 F. Supp. at 1042-43*.

[*P13] Microsoft first argues that the trial court abused its discretion **[***12]** because it evaluated Plaintiff's showing under Rule 23(b) under an improper relaxed standard of proof. In so doing, Microsoft seeks to avoid the effect of this deferential standard of review by arguing the circuit court committed an error of law in its improper application of a lower standard of proof. It relies upon our holding in *State v. Vento, 1999 SD 158 P5, 604 N.W.2d 468, 469* that "by definition, a decision based on an error of law is an abuse of discretion." [5] Microsoft argues that the circuit court improperly applied a standard of proof of "not so insubstantial or illusory as to amount to no method at all." We agree with Microsoft that such a standard is little better than no standard. It would invite procedural abuses of the legal system never intended for proper use of class actions. While the circuit court did acknowledge that such a standard has been applied by other courts, [6] it did not rest its **[**674]** decision on that standard. Instead it plainly stated in its findings of fact and conclusions of law

In applying the federal version of Rule 23, the United States Supreme Court has held that a party seeking certification must show "actual, not presumed," conformance **[***13]** with class certification requirements, and that ***HN12***[] a reviewing court must conduct a "rigorous analysis" in determining whether the elements of Rule 23 have been met. *See* , General Telephone Company v. Falcon, 457 U.S. [at 160-61, *102 S. Ct. at 2372, 72 L. Ed. 2d 740]*; . . . *This Court has applied that standard.*

(emphasis added).:

[*P14] **[***14]** Having determined the circuit court identified the proper legal standard, we now proceed to Microsoft's second contention that that circuit court abused its discretion by improperly applying that standard when the court considered the evidence submitted to it on the certification question. Microsoft asserts that under Rule 23(b)(3), the Plaintiffs must demonstrate at the time class certification is sought that the "impact" on each class member can be established by common proof. Rule 23(b)(3) requires that either common questions of law or fact predominate. The circuit court found that "Plaintiffs need not calculate each class member's damages individually. Instead damages can be calculated in the aggregate for the class. A summing of all individual claims is not

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[5] As an example, in *Lick* class certification of a group of taxpayers was denied by the circuit court on the basis that sovereign immunity barred a class action against the Defendant County. Had the circuit court granted certification sovereign immunity notwithstanding, this would have been an error of law and thus by definition, an abuse of discretion.

[6] *Catfish, 826 F. Supp. at 1042-43*, In *Re Potash Litig., 159 F.R.D. 682, 697 (D Minn 1995)*; ***In re Domestic Air Transportation Antitrust Litigation, 137 F.R.D. 677, 692 (ND Ga 1991)***; ***In re Indus. Gas Antitrust Litig., 100 F.R.D. 280, 306 (ND Ill. 1983)***.

required." For support, the circuit court points to Coordination Proceedings Special Title (Rule 1550(b)) Microsoft I-V Cases, NO.JCCP.NO. 4106 (CalSuperCt, San Francisco Co., Aug. 29, 2000) and *Catfish, 826 F. Supp. at 1043*.

[*P15] Microsoft specifically challenges the proposed methodology Plaintiffs advance to determine damages. *Recently in McKie v. Huntley, 2000 SD 160, P20, 620 N.W.2d 599, 604,* **[***15]** we set forth the general doctrine of proof of damages by a plaintiff, especially when the claimed difficulty in its determination was purportedly caused by the acts of the defendant who now is complaining about the lack of accuracy of such proof: [7]

HN13[] Difficulty in computing damages ought not to be confused with the requirement of proving damages as an essential element for recovery. Once the existence of damage has been shown by a preponderance of the evidence, a claimant must produce only the best evidence available to allow a jury a reasonable basis for calculating the loss. While jurors cannot speculate, they have some leeway in figuring damages. "Any doubt persisting on the certainty of damages should be resolved against the contract breaker." **[**675]** "Breaching parties may not complain when the task is made difficult by their own acts." All we require, therefore, is a reasonable basis for measuring the loss.

[*16]** ***HN14***[] *Id.* (internal citations omitted). From a review of the record which is more fully discussed hereinafter, along with the detailed 86 findings of fact and conclusions of law entered by the circuit court, we are satisfied the circuit court accomplished what it set for itself as an appropriate standard, conducting a "rigorous analysis" of the entire certification question.

[*P16] The term "threshold showing" based upon a "rigorous analysis" is probably not subject to a more specific legal definition than its generic understanding because of the various types of potential evidence that could be submitted to the court in the certification controversy. We are mindful that if the standard is set too low, it invites non-meritorious claims to be filed as class actions, which may force a potential defendant to evaluate the case more on economic costs of defending a class action rather than the case on the merits. On the other hand, should too high a standard be set, potential plaintiffs with valid claims, but limited means, are economically precluded from redress to the courts because they cannot each financially maintain individual actions. *See* *Lick, 285 N.W.2d 594* **[***17]** . ***HN15***[] *SDCL 15-6-1* is a guide to 15-6-23 certification questions. It states in part that our civil procedure code is to "be construed to secure the just, speedy and inexpensive determination of every action."

[*P17] In the case now before us, the evidence appears to be limited to a battle of experts. In such instances, the circuit court may be assisted by borrowing concepts from the standard which this Court routinely uses for determining the admissibility of purported expert evidence; that being the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. This is not to suggest that the certification issue be combined with a full blown *Daubert* hearing, but rather has been described as a "lower *Daubert* standard." *Howe v. Microsoft Corp, 2003 ND 12 P26, 656 N.W.2d 285* (citing *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc., 209 F.R.D. 159, 162-3 (CD Cal 2002))*. [8] Under

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[7] This type of analysis has also been adopted by the United States Supreme Court concerning the quantum of proof required for antitrust plaintiffs to recover. In *Truett v. Chrysler Motors, 451 U.S. 557, 566-67, 101 S. Ct. 1923, 1929, 68 L. Ed. 2d 442 (1981)*, the Court reasoned:

"Any other rule would enable the wrongdoer to profit by [its] wrongdoing at the expenses of [its] victim. . . .Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery."

Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages . . . The vagaries of the marketplace usually deny us sure knowledge of what [the] plaintiff's situation would have been in the absence of the defendant's antitrust violation. But it does not "'come with very good grace'" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

(internal citations omitted).

Daubert, the circuit court's rigorous certification analysis may be guided by whether "an expert's testimony rests on both 'a reliable foundation **[***18]** and is relevant to the task at hand.'" *Rogen v. Monson, 2000 SD 51, P13, 609 N.W.2d 456, 459* (citing *State v. Hofer, 512 N.W.2d 482, 484 (SD 1994))*.

[*19] [**676]** In *Daubert* . . . the United States Supreme Court held that ***HN16***[] before expert scientific testimony may be received, it must be shown that: (1) it has been tested; (2) it has been subjected to peer review and publication; (3) the known or potential rate of error must be known; and (4) to what extent it has received general acceptance. The *Daubert* Court explained:

The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Webster's Third New International Dictionary* 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science.

Kuper v. Lincoln-Union Elec, 1996 SD 145, P39, 557 N.W.2d 748, 759-60 (citing *Daubert, 509 U.S. at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481*). Admission of expert witnesses is also governed by an abuse of discretion standard. *State v. Guthrie, 2001 SD 61, 30, 627 N.W.2d 401, 414-15*.

[*P18] [*20]** The Class Members allege that they were harmed because Microsoft's antitrust violations forced direct purchasers to pay non-competitive prices for Microsoft OSS, and that a portion of the overcharged amount was passed on to them as indirect purchasers. As proof of the impact, Plaintiffs intend to use common evidence and economic methodologies.

[*P19] In seeking certification as a class, the Class Members presented an affidavit by Dr. Leffler, an Associate Professor of Economics at the University of Washington. [9] He presented three theories in which to show that Microsoft harmed the class by monopolistic conduct. Dr. Leffler opined in his affidavit that "the monopolization activity and overcharges at issue here substantially predate the class period. As a consequence, any Microsoft overcharge would have been embedded in the prices at all levels of distribution at the beginning of the class period." The Class Members argue, therefore, that Dr. Leffler's testimony "plainly establishes that the fact of injury can be shown with some certainty."

[*P20] [*21]** Moreover, the Class Members assert that the amount of antitrust injury can be calculated using "standard, yardstick methodologies." Dr. Leffler proposes that this can be determined by measuring the difference

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[8] The actual *Daubert* hearing with full evidentiary and legal arguments comes later in the judicial proceeding than the class certification issue. However, the two may still be connected as a *Daubert* hearing may convince the circuit court that its initial certification of the class can no longer be justified, thus resulting in a decertification of the class.

Under NDRCiv P 23(b), a trial court generally considers issues about certification of a class action "as soon as practicable after the commencement of a class action," and at that stage of the proceeding, issues regarding a joint or common interest may not be fully crystallized. A trial court may amend a certification order at any time before entry of judgment on the merits. NDRCivP 23(b)(3). Under similar language in FedR CivP 23(c)(1), federal trial courts are free to decertify, subclassify, or modify a class certification previously granted. In *Richardson v. Byrd, 709 F.2d 1016, 1019 (5thCir 1983)*, the court aptly explained a federal trial court "must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts."

Howe, 2003 ND 12, P29, 656 N.W.2d 285 (citing *Rose v. United Equitable Ins. Co., 2002 ND 148, P18, 651 N.W.2d 683*).

[9] Dr. Leffler's specialty is antitrust economics including the study of monopolies and the impact of monopolies on consumers. In addition to teaching classes and conducting research for over 25 years in industrial organizations and antitrust economics, he has preformed complex economic analysis in antitrust cases for many years. Dr. Leffler has been qualified as an expert in proceedings before both federal and state courts. He has assisted the Federal Trade Commission and the Justice Department in their investigation of Microsoft's activities in the early 1980's and 1990's.

between the price a South Dakota end-user paid for Microsoft's OSS and the price the user would have paid in the absence of Microsoft's alleged illegal conduct. Three methods are offered.

[*P21] The first method is the "comparative margin method." This method compares the prices of Microsoft OSS with the prices of products from a comparable market not affected by anticompetitive activity. The second method is termed the "competitive margin method" in which the margins earned by sellers in a comparable market free from antitrust violations are **[**677]** compared to the margins earned by sellers in the anticompetitive market. The third method is the "violation-free-period method." This method compares the price of Microsoft's OSS being charged during the anticompetitive time period with the price of OSS being charged during the period free of anticompetitive conduct.

[*P22] In addition to Dr. Leffler's expert testimony, the Class Members submitted several published **[***22]** works from other economists. These works were based on the economists' empirical studies and analyses showing how Microsoft's alleged illegal activities have affected consumers.

[*P23] ***HN17***[] In order to be granted class certification, the Class Members must also show that damages can be calculated on a class-wide basis. *Bellinder*, 2001 WL 1397995, at *7. Again, the Class Members use the testimony of Dr. Leffler. He opines that "the amount of Microsoft's overcharge can be estimated using a class-wide statistical determination of the relationship between costs faced by Microsoft's customers and the prices paid by end-users." Dr. Leffler proposes to calculate this amount by statistical estimation, using data available from public sources and third-party discovery.

[*P24] As the circuit court correctly concluded, ***HN18***[] this judicial inquiry does not involve a determination as to the likely success of the Class Members' proposed methods. However, the Class Members must present at least one viable method for computing damages on a class-wide basis, one which a reasonable factfinder could accept. *Microsoft I-V Cases*, slip op. at 17-18; Gordon v. Microsoft Corp., 2001 WL 366432, **[***23]** at **11-12 (MinnDistCt Mar 30, 2001).

[*P25] Microsoft puts forth numerous arguments refuting Dr. Leffler's opinions. For example, one such expert, Dr. Hausman, submitted affidavits and provided testimony for Microsoft. [10] The essence of Microsoft's argument is that there are a multitude of complexities and variances in the marketplace and distribution chain that will affect the Class Members' ability to analyze whether, and the extent to which, overcharges were passed on to consumers. Additionally, Microsoft claims that the Class Members have failed to make a "threshold showing" of impact because of problems relating to the nature and extent of the overcharges being passed-on to consumers.

[*P26] **[***24]** ***HN19***[] We find that the circuit court did not abuse its discretion when it did not completely accept Microsoft's arguments at this stage of the proceedings. The disagreement on impact and damages should be adjudicated at trial by the factfinder, not by a court on a motion for class certification. Avoiding a "battle of the experts" at the class certification stage is consistent with Supreme Court authority. *See* *Eisen, 417 U.S. at 178, 94 S. Ct. at 2153* (concluding that on a motion for class certification, the determination is whether the Plaintiffs have satisfied the requirements of Rule 23, not whether they will prevail on the merits). The court in *Microsoft I-V Cases* stated:

The question at this stage is not whether plaintiffs will be able to carry their burden **[**678]** of proving that their experts' analyses are reliable, but whether it appears that the differences between the experts can be intelligently presented and evaluated within the framework of the class action. On a motion for class certification, it is inappropriate to resolve a battle of the experts. Whether or not [plaintiffs' experts] is correct in his assessment of common/impact injury is for the **[***25]** trier of fact to decide at the proper time.

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[10] Dr. Hausman is the MacDonald Professor of Economics at the Massachusetts Institute of Technology. His academic and research specialties are econometrics (the use of statistical models and techniques on economic data) and microeconomics (the study of consumer behavior and behavior of firms). He has substantial experience in computer programming. He has testified in nine antitrust trials in the United States and has given seminars to the American Bar Association, the Justice Department and the Federal Trade Commission on topics in anti-trust economics.

Slip op. at 15. (internal quotations and citations omitted).

[*P27] At oral argument, Microsoft relied heavily upon the recent case of *A & M Supply v. Microsoft Corp, 252 Mich. App. 580, 654 N.W.2d 572 (Mich 2002)*. Therein the Court reversed a previous class certification by a trial court. We do not find *A & M* persuasive. Initially, Michigan applies a "clear error" standard of appellate review while South Dakota uses the "abuse of discretion" standard that grants a trial court more appellate deference. *A & M*, 252 Mich. App. at 588, 654 N.W.2d at 577. ***HN20***[] An abuse of discretion occurs only where "a judicial mind, in view of the law and circumstances, could [not] have reasonably reached the same conclusion." *State v. Barber, 1996 SD 96, P14, 552 N.W.2d 817, 820* (citations omitted). "'Abuse of discretion is the most deferential standard of review available with the exception of no review at all.'" *Guthrie, 2001 SD 61, P89, 627 N.W.2d at 431* (Gilbertson, J., concurring in result) (citing *State v. Chamley, 1997 SD 107, P51, 568 N.W.2d 607, 620* (Gilbertson, J., **[***26]** dissenting) (citing Martha S. Davis, *Basic Guide to Standards of Judicial Review,* 33 SD Law Rev, 468, 480 (1988)).

[*P28] The *A & M* Court proceeded to review what it determined to be the "battle of the experts." It was once again Dr. Leffler for the plaintiffs and Dr. Hausman for Microsoft. The *A & M* court reversed certification after a very extensive examination of each expert's methodology. *A & M Supply, 252 Mich. App. at 584, 654 N.W.2d at 575*. It concluded Leffler's theories insufficient to support certification, as they were "slogans, not methods of proof." *A & M Supply, 252 Mich. App. at 638-39, 654 N.W.2d at 602*. Beyond the differing standards of appellate review between our two courts, it further appears from our analysis that under South Dakota case law, the *A & M* court would have entered into an examination of the case on the evidentiary merits rather than the threshold issue of class certification. There appears to be little left to ultimately try in front of a jury after it settled the "Battle of the Experts" at the certification stage.

[*P29] In South Dakota the admissibility question awaits **[***27]** a *Daubert* hearing. Thereafter, other procedural devices such as a motion for summary judgment may be invoked. Assuming the "Battle of the Experts" raises questions of fact which are not settled by these pre-trial proceedings, such matters are best left for a jury determination with the experts subject to cross- examination in front of a jury rather than reliance upon numerous salvos of pre-trial affidavits by opposing experts in a certification hearing.

HN21[] When opposing experts give contradictory opinions on the reliability or validity of a conclusion, the issue of reliability becomes a question for the jury. *See* *State v. Hofer, 512 N.W.2d 482, 484 (SD 1994)*. The trial process is well equipped to deal with contradictory opinions. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert 509 U.S. at 596, 113 **[**679]** S. Ct. at 2798, 125 L. Ed. 2d at 484* (citations omitted).

Guthrie, 2001 SD 61, P38, 627 N.W.2d at 417.

[*P30] Microsoft cites us to authority from other jurisdictions, which **[***28]** it interprets to conclude that a mere clash between "experts" is not enough by itself to support class certification. That is correct to a point. ***HN22***[] Production of a self-professed expert is simply not enough to meet the certification requirements under our rigorous analysis standard. [11] However, this Court has consistently refused to extend any gate-keeping function to usurp the factual determination role of the ultimate trier of fact.

We begin analysis of this issue from the long-accepted premise that ***HN23***[] the purpose of expert testimony is to assist the jury as the trier of fact and not to supplant it. This state is not a trial-by-expert jurisdiction. The value of the opinion of an expert witness is no better than the facts upon which **[***29]** it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true. The credibility of witnesses and the evidentiary value of their testimony falls solely within the province of the jury.

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[11] In so doing, we respectfully decline to adopt the standard adopted by the Court in *Howe*, that being: "as long as the basis of the expert's opinion is not so blatantly flawed that, on its face, it would be inadmissible as a matter of law. . ." *2003 ND 12, P27, 656 N.W.2d 285*.

Lien v. Class, 1998 SD 7, P23, 574 N.W.2d 601 [12], 1998 SD 7, 574 N.W.2d 601, 610 (citing Bridge v. Karl's Inc, 538 N.W.2d 521, 525 (SD 1995)).

[*P31] Our decision here is in line with other jurisdictions that have faced the same certification issue. Every state, with the exception of Maine and Michigan, [13] that has a repealer statute has granted class certification to indirect purchasers seeking redress against Microsoft for antitrust violations. The very same pass-through and overcharge arguments that Microsoft **[***30]** makes here, have been rejected by a large majority of courts considering the issue. In re New Mexico Indirect Purchaser Microsoft Corp. Antitrust Litig., NO. D-0101-CV-2000-1697 (NMDistCt., Santa Fe Co., Sept. 30, 2002); In re Florida Antitrust Litig., No. 99-27340 CA 11 (FlaCirCt, Dade Co., Aug. 26, 2002); Howe, 2003 ND 12, 656 N.W.2d 285; *Bellinder*, 2001 WL 1397995; Capp v. Microsoft Corp., No. 00-CV-0637 (Wis CirCt, Dane Co., June 28, 2001); Friedman v. Microsoft Corp., CV-2000-000722 (Consol.) (ArizSuperCt, Maricopa Co., Nov. 15, 2000 & July 13, 2001; Gordon v. Microsoft Corp., No. 00-5994, 2001 WL 366432 (MinnDistCt, Mar. 30, 2001), *aff'd*, 645 N.W.2d 393 (Minn 2002); Microsoft I-V Cases, supra.

[*P32] For the foregoing reasons, we find that the trial court did not abuse its discretion in granting class certification **[***31]** to the Class Members. We find that the Class Members have met their "threshold showing" of harm to end-users/consumers. Its decision in certifying this case as a class action is sufficiently supported by the evidence and applicable law and satisfies all of the requirements of Rule 23.

[*P33] We remand to the circuit court for further proceedings consistent with this opinion.

[*P34] **[**680]** MEIERHENRY, Justice, and TUCKER, Circuit Judge, concur.

[*P35] KONENKAMP, Justice, and AMUNDSON, Retired Justice, concurs with a writing.

[*P36] MEIERHENRY, Justice, not having been a member of the Court at the time this action was submitted to the Court, was appointed as a Circuit Judge to sit for SABERS, Justice, disqualified.

[*P37] TUCKER, Circuit Judge, sitting for ZINTER, Justice, disqualified.

Concur by: KONENKAMP

Concur

KONENKAMP, Justice (concurring).

[*P38] I concur in this decision, but with reservations. I express these reservations in view of the prospect that we may be reviewing this case again before any final resolution. At some point, the plaintiffs' expert, Professor Leffler, must verify his untested economic theories, just as all scientists must establish **[***32]** the reliability of their methods. By his own admission, Dr. Leffler offers only a prediction, a hypothesis that given enough time and data, he can adequately calculate damages for the class members. In an indirect purchaser action, the plaintiffs must prove the actual damages to each class member. *See generally* SDCL 37-1-33. To date, the Professor's theories have not proven effective in accomplishing this task.

A. Daubert Standards and Class Certification

[*P39] While my concerns with the plaintiffs' theories on damages are not so serious as to discommend class certification, the question remains whether those theories will survive the *Daubert* hearing. Daubert v. Merrell Dow

[12] The obvious exception to this would be where the evidence is undisputed such as occurred in *Lick.* In such instances all that is left for the circuit court to do is correctly apply the law to those undisputed facts.

[13] *See* Melnick v. Microsoft Corp., Nos. CV 99-709-752, 2001 WL 1012261 (Me SuperCt, Aug. 24, 2001) and *A&M Supply Co*.

Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469(1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). This Court's opinion acknowledges that the full *Daubert* criteria have yet to be applied here. These standards cannot be satisfied by simply establishing the threshold tests for achieving class action status. Each expert's theories must pass the rigors of **[***33]** scientific methodology.

[*P40] Though the substantive arguments may be similar, evaluating expert evidence in accord with *Daubert* entails an inquiry "distinct from" the appraisal of expert evidence in support of a motion for class certification. In re Visa Check/Mastermoney Antitrust Litigation, 280 F.3d 124, 132 n4 (2dCir 2001). Trial courts should not "postpone consideration of a motion for class certification for the sake of waiting until a *Daubert* examination is appropriate." *Id*.; *see* SDCL 15-6-23(c)(1) ("As soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."). In applying discretion to grant or deny a motion for class certification, the court's inquiry "is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 2153, 40 L. Ed. 2d 732 (1974).

[*P41] On the other hand, SDCL 19-15-2 (Rule 702) governs the admissibility **[***34]** of expert testimony. The test for admissibility, the *Daubert* standard, was adopted in South Dakota in State v. Hofer, 512 N.W.2d 482, 484 (SD 1994). *See also* Estate of Dokken, 2000 SD 9, P51, 604 N.W.2d 487, 500 (Amundson, J., concurring specially) (explaining that *Kumho* expands the *Daubert* gate-keeping function). To abide by *Daubert-Kumho*, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge under SDCL 19-15-2 (Rule 702). **[**681]** State v. Guthrie, 2001 SD 61, P34, 627 N.W.2d 401, 415-16. This burden is met by establishing that there has been adequate empirical proof of the validity of the theory or method. Edward J. Imwinkelried, Evidentiary Foundations 287 (4th ed 1998). Under this standard, a court considers admissibility based on technical methodology, not the scientific correctness of an opinion because "it is not the trial court's role to decide whether an expert's opinion is correct." *See* Smith v. Ford Motor Co., 215 F.3d 713 (7thCir 2000). In deciding whether to admit expert testimony, a court **[***35]** must ensure that the opinion rests on a reliable foundation. Daubert, 509 U.S. at 597, 113 S. Ct. at 2799, 125 L. Ed. 2d at 485. The standards set forth in *Daubert* are not limited to what has traditionally been perceived as scientific evidence. These standards must be satisfied whenever scientific, technical, or other specialized knowledge is offered. Kumho, 526 U.S. at 141, 119 S. Ct. at 1171, 143 L. Ed. 2d at 246.

[*P42] When "faced with a proffer of expert [testimony on scientific, technical, or other specialized knowledge]," the trial judge must determine at a preliminary hearing "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert, 509 U.S. at 592, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482. *See also* SDCL 19-9-7 (Rule 104(a)) (preliminary questions determined by court). Thus the trial court, not the jury, must make a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied **[***36]** to the facts in issue. *Id.* That has yet to be established here.

[*P43] In the *Daubert* hearing, the trial judge may consider the following nonexclusive guidelines for assessing an expert's methodology: (1) whether the method is testable or falsifiable; (2) whether the method was subjected to peer review; (3) the known or potential error rate; (4) whether standards exist to control procedures for the method; (5) whether the method is generally accepted; (6) the relationship of the technique to methods that have been established as reliable; (7) the qualifications of the expert; and (8) the non-judicial uses to which the method has been put. *See* Guthrie, 2001 SD 61 at P35, 627 N.W.2d at 416 (citations omitted). *Daubert's* list of factors may not each apply to all experts in every case. Rogen v. Monson, 2000 SD 51, P28, 609 N.W.2d 456, 462-63 (Konenkamp, J. concurring) (citing Kumho, 526 U.S. at 141, 119 S. Ct. at 1171, 143 L. Ed. 2d 238). With these and perhaps other relevant considerations, a judge must ensure that the testifying experts provide a proven scientific basis for a jury to find with reasonable scientific, technical, **[***37]** or, as here, econometric probability that it is more likely than not that defendant's conduct proximately caused the claimed loss to each class member.

B. Decertification

[*P44] Considering the provisional nature of the plaintiffs' expert opinions, a *Daubert* hearing could result in decertification. The Supreme Court labels class actions a "nontraditional" type of litigation. *United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 100 S. Ct. 1202, 1212, 63 L. Ed. 2d 479 (1980)*. The action has requirements peculiar to its nature. To secure class certification, the plaintiffs must satisfy all the requirements in *SDCL 15-6-23(a)* and at least one of the criteria set out in *SDCL 15-6-23(b)*. *Eisen, 417 U.S. at 163*. Here, the circuit court found that the plaintiffs satisfied all the requirements of § 15-6-23(a) and one requirement of § 15-6-23(b), namely, subsection (3). **[**682]** *SDCL 15-6-23(b)(3)* provides in part that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

***

[*38]** (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In my view, the plaintiffs maintain a thin hold under this provision.

[*P45] To meet the predominance requirement of *SDCL 15-6-23(b)(3)*, the plaintiffs must establish that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11thCir 2000)* (internal quotation marks omitted). As the Michigan Court of Appeals points out in a parallel case, "Dr. Leffler's methodologies, even if they were to work with respect to small, well- defined subclasses that group class members by a very few strongly unifying characteristics, will essentially require separate trials to determine the different pass-on rates affecting the class as a whole." *A & M Supply Co. v. Microsoft Corporation, 252 Mich. App. 580, 654 N.W.2d 572, 603 (MichCtApp 2002)*.

[*P46] **[***39]** Despite this conclusion in A & M, I agree with the Court that this case should not guide our decision on class certification because Michigan has a different standard of review at the motion to certify stage. However, a reason justifying decertification here may be that the requirements of *SDCL 15-6-23(b)(3)* are no longer satisfied. *Commonwealth of Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 90 F.R.D. 589, 593 (EDPa 1981)*; Edward F. Sherman, *Aggregate Disposition of Related Cases: the Policy Issues,* 10 Rev Litig 231, 272 (1991). The Daubert hearing may reveal that Professor Leffler's theories cannot achieve a practical answer to satisfy the plaintiffs' burden of proof on damages.

[*P47] Under *SDCL 15-6-23(c)(1)*, a court may alter or amend a decision on class certification "before the decision on the merits." Indeed, a court is obligated to monitor class certification and correct the decision as needed in light of evidentiary developments. *Richardson v. Byrd, 709 F.2d 1016, 1019 (5thCir 1983)*; *Reynolds v. Sheet Metal Workers, Local 102, 226 U.S. App. D.C. 242, 702 F.2d 221, 225-26 (DCCir1981)*; **[***40]** *Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 864 (3dCir 1977)*; *Reed v. Town of Babylon, 914 F. Supp. 843, 848-49 (EDNY 1996)*.

[*P48] Professor Leffler's economic theories have not reached methodological maturity. It remains to be seen whether they will. His "aggregate" damages proposal fails to meet the requirement that each individual member of the class in an indirect purchaser action was injured by the defendant's alleged conduct. *Alabama v. Blue Bird Body Co., 573 F.2d 309, 316-17 (5thCir 1978)*. Both the Court and the plaintiffs cite *McKie v. Huntley, 2000 SD 160, 620 N.W.2d 599*, to permit proof of "aggregate" damages. But that case was not a class action. To allow aggregate damages here means that some members of the class who suffered no loss may be unjustly enriched while others may be under compensated. The Professor's theories must accommodate the requirement that damages be shown for each class member.

[*P49] In certifying this class action, the circuit judge gave Dr. Leffler an opportunity **[**683]** to prove that his theories are workable. If he fails, decertification should follow.

[*P50] AMUNDSON, Retired **[***41]** Justice, joins this special writing.

Coatings Res. Corp. v. Akzo Nobel Coatings, Inc.

United States Court of Appeals for the Ninth Circuit

February 5, 2003, Argued and Submitted, Pasadena, California ; February 13, 2003, Filed

No. 01-57162

Reporter
57 Fed. Appx. 752 *; 2003 U.S. App. LEXIS 2799 **; 2003-1 Trade Cas. (CCH) P73,983

COATINGS RESOURCE CORPORATION, a California Corporation, Plaintiff-Appellant, v. AKZO NOBEL COATINGS, INC., a Delaware Corporation, Defendant-Appellee.

Notice: **[**1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: Appeal from the United States District Court for the Central District of California. D.C. No. CV-00-00704-AHS. Alicemarie H. Stotler, District Judge, Presiding.

Disposition: Affirmed.

Core Terms

pricing, bid, injurious effect, intent to injure, cause of action, competitor, threatens, destroy, fails

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN1[] **Regulated Practices, Trade Practices & Unfair Competition**

A court reads *Cal. Bus. & Prof. Code § 17043* to require an injurious intent (a specific intent to injure or destroy) and not just an intent to divert customers from a competitor.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN2[] **Regulated Practices, Trade Practices & Unfair Competition**

"Unfair" competition is defined as conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Counsel: For COATINGS RESOURCE CORPORATION, Plaintiff-Appellant: James R. Jones, Jr., Esq., Newport Beach, CA.

For AKZO NOBEL COATINGS, INC., Defendant-Appellee: Jeffrey T. Thomas, Esq., Jeffrey Alan Ogar, Esq., GIBSON, DUNN & CRUTCHER, Irvine, CA.

Judges: Before: D.W. NELSON, WARDLAW and FISHER, Circuit Judges.

Opinion

[*753] MEMORANDUM *

Before: D.W. NELSON, WARDLAW and FISHER, Circuit Judges.

Coatings Resources Corporation appeals from the grant of summary judgment in favor of Akzo Nobel Coatings, Inc. The district court **[**2]** ruled that Akzo did not violate California statutory and common law when it successfully bid for an account with Travis Industries Inc. We have jurisdiction pursuant to *28 U.S.C. § 1291* and we affirm.

Regardless whether Akzo priced its product below cost as calculated in accordance with *Cal. Bus. & Prof. Code §§ 17026*, *17029*, Coatings's cause of action under *Cal. Bus. & Prof. Code § 17043* fails for lack of a triable issue of fact as to whether Akzo bid with the required purpose of injuring competitors or destroying competition. *See W. Union Fin. Servs. v. First Data Corp., 20 Cal. App. 4th 1530, 25 Cal. Rptr. 2d 341, 346 n.10 (Ct. App. 1993)* ***HN1***[] ("We read *[§ 17043]* to require an injurious intent (a specific intent to injure or destroy) and not just an intent to divert customers from a competitor."). Nor can Coatings invoke the presumption of unlawful intent provided by *Cal. Bus. & Prof. Code § 17071*, because even if Akzo sold below cost, the evidence was undisputed that there was no injurious effect because any harm Coatings suffered was not the result of Akzo's pricing. Had Akzo not entered the bidding contest at all, Coatings would have **[**3]** lost the Travis account to Lilly Industries, Inc., which consistently underbid Coatings with prices that Coatings never challenged as below cost.

Coatings's second cause of action under *Cal. Bus. & Prof. Code § 17200* fails because Coatings did not show that Akzo's **[*754]** bidding had any injurious effect on competition as required by *Cel-Tech v. L.A. Cellular Communications, 20 Cal. 4th 163, 973 P.2d 527, 544, 83 Cal. Rptr. 2d 548 (Cal. 1999)* (predatory pricing case defining ***HN2***[] "unfair" competition as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition").

Coatings's common law causes of action for interference with contractual relations and prospective economic advantage fail because Coatings did not present any evidence of the existence of a contract, *see Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 791 P.2d 587, 589-90, 270 Cal. Rptr. 1 (Cal. 1990)*, or of wrongful conduct "other than the fact of the interference itself," *Della Penna v. Toyota Motor Sales, 11 Cal. 4th 376, 902 P.2d 740, 751, 45 Cal. Rptr. 2d 436 (Cal. 1995)*. **[**4]**

Akzo's request for sanctions is denied as improperly made to this Court. *See Fed. R. App. P. 38*; *28 U.S.C. § 1927*.

AFFIRMED.

End of Document

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

[Mikeron, Inc. v. Exxon Co., U.S.A.](#)

United States District Court for the District of Maryland

February 14, 2003, Decided

Civil Action No. DKC 98-1070

Reporter

264 F. Supp. 2d 268 *; 2003 U.S. Dist. LEXIS 14543 **

MIKERON, INC. v. EXXON COMPANY, U.S.A.

Disposition: [1]** Defendant's motion for summary judgment granted. Judgment entered.

Core Terms

termination, franchise, gasoline, Lease, summary judgment, service station, pricing, franchisor's, fuel, disapprove, dispensing, products, stations, motor fuel, dealers, franchise agreement, good faith, Robinson-Patman Act, discriminatory, deposition, summary judgment motion, provisions, antitrust, breached, alleges, entitled to summary judgment, franchise relationship, franchisee, branded, genuine

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[ ] **Entitlement as Matter of Law, Appropriateness**

A motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In other words, if there clearly exist factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party, then summary judgment is inappropriate. The moving party bears the burden of showing that there is no genuine issue as to any material fact.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN2[] **Summary Judgment, Opposing Materials**

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. A complete failure of proof concerning an essential element necessarily renders all other facts immaterial. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Supporting Materials, Affidavits**

Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file. Such a motion, whether or not accompanied by affidavits, will be made and supported as provided in this rule, and *Fed. R. Civ. P. 56(e)* therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN4[] **Summary Judgment, Evidentiary Considerations**

A mere scintilla of evidence is not enough to create a fact issue. There must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN5[] **Types of Contracts, Covenants**

The covenant of good faith and fair dealing merely obligates the parties to exercise good faith in performing their contractual obligations; it cannot be invoked to require a party to take an action contrary to the express terms of a contract.

Business & Corporate Law > Distributorships & Franchises > Assignments & Transfers

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

HN6[] **Distributorships & Franchises, Assignments & Transfers**

Under *Md. Code Ann., Com. Law II § 11-304*, a gasoline supplier may not unreasonably withhold his consent to any assignment, transfer, sale, or renewal of a service station business. The statute does not define the term "unreasonable." However, in a decision relying on the decisional law on the general assignment of leases, the United States District Court for the District of Maryland has determined that a franchiser's disapproval must be based on reasonable commercial standards.

Business & Corporate Law > Distributorships & Franchises > Assignments & Transfers

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Business & Corporate Law > Distributorships & Franchises > General Overview

HN7[] **Distributorships & Franchises, Assignments & Transfers**

It is not unreasonable for a franchiser to disapprove the sale of one of its franchises to a financially unstable transferee. Similarly, it is not unreasonable for a franchiser to reject a transferee, who it deems to lack the requisite business experience or acumen.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN8[] **Testimony, Expert Witnesses**

If an "expert" witness is relying solely or primarily on experience, he must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *Fed. R. Evid. 702* advisory committee's note.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN9[] **Summary Judgment, Burdens of Proof**

A mere scintilla of evidence is not enough to create a fact issue.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > ... > Statements as Evidence > Hearsay > General Overview

HN10[] **Summary Judgment, Evidentiary Considerations**

Hearsay evidence does not provide sufficient support to defeat a summary judgment motion.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN11[] **Robinson-Patman Act, Claims**

In order to establish a violation of the Robinson-Patman Act, *15 U.S.C.S. § 13*, a plaintiff must prove: (1) sales of commodities in interstate commerce; (2) that the gasoline and other goods sold to plaintiff were of the same grade and quality as those sold to other similarly situated dealers; (3) that defendant discriminated in price between plaintiff and other dealers; and (4) that the discrimination had a prohibited effect on competition.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN12[] **Supporting Materials, Affidavits**

Fed. R. Civ. P. 56(f) requires that a party alleging inadequate discovery must file an affidavit setting forth the specific discovery that needs to be taken and the reasons for the needed discovery.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Labor & Employment Law > ... > Racial Discrimination > Employment Practices > Compensation

HN13[] **Price Discrimination, Competitive Injuries**

Possible injury to competition so obviously follows from differential pricing that it is established prima facie by proof of a substantial price discrimination between competing purchasers over time.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN14[] Robinson-Patman Act, Claims

The Maryland legislature has stated that the purpose of the Maryland Antitrust Act is to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices and has directed that courts construing Maryland's state ***antitrust law*** should be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. *Md. Code Ann., Com. Law II § 11-202(a)(2)*. The court has specifically noted that it is appropriate to look to Robinson-Patman Act decisions in construing *Md. Code Ann., Com. Law II § 11-204*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN15[] Robinson-Patman Act, Claims

State claims under *Md. Code Ann., Com. Law II § 11-204(a)* and *(b)* must fail where those same claims would also fail under similar federal law.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing > Franchise Nonrenewal & Termination

Energy & Utilities Law > ... > Gasoline Fuels > Petroleum Marketing Practices Act > General Overview

HN16[] Distributorships & Franchises, Termination

Under the Petroleum Marketing Practices Act (PMPA), *15 U.S.C.S. §§ 2801-2806*, a franchiser may terminate or refuse to renew a franchise only if one of the grounds set forth in *15 U.S.C.S. § 2802(b)* exists. *15 U.S.C.S. § 2802(a)*. *Section 2802(b)(2)(A)* authorizes termination where there has been a failure by the franchisee to comply with a provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship. *15 U.S.C.S. § 2802(b)(2)(A)*. 15 U.S.C.S. § 2808(b)(2)(C) allows termination upon the occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable. 15 U.S.C.S. § 2808(b)(2)(C).

Counsel: For Mikeron, Inc., Plaintiff: Allen J Kruger, Law Offices of Allen J Kruger PA, Laurel, MD, LEAD ATTORNEY.

For Exxon Company USA, Defendant: Gregory T. Kenney, Law Office, PH, Houston, TX, LEAD ATTORNEY. Stuart H Harris, Howrey Simon Arnold and White LLP, Washington, DC, LEAD ATTORNEY. Roger A Klein, Howrey Simon Arnold and White LLP, Washington, DC.

Judges: DEBORAH K. CHASANOW, United States District Judge.

Opinion by: DEBORAH K. CHASANOW

Opinion

[*270] MEMORANDUM OPINION

Presently pending and ready for resolution in this case is the motion for summary judgment of Defendant Exxon Mobil Corporation (sued as "Exxon Company, U.S.A." and referred to herein as "ExxonMobil" or "Defendant"). The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For the reasons that follow, the court will grant the motion for summary judgment in its entirety.

I. Background

The following facts are uncontroverted or set forth in the light most favorable to Plaintiff. On or about September 25, 1996, Plaintiff Mikeron, Inc. ("Mikeron" or "Plaintiff") and Defendant entered into a Retail Motor Fuel Store Lease ("Lease") **[**2]** and a Retail Motor Fuel Store Sales Agreement ("Sales Agreement"). Under these agreements, Plaintiff leased from Defendant and operated two Exxon service stations, one in Fort Washington, Maryland and the other in Woodbridge, Virginia, and purchased Exxon-branded motor fuel to be resold at those service stations. The two agreements constituted a franchise pursuant to the Petroleum Marketing Practices Act ("PMPA"), *15 U.S.C. §§ 2801-2806*, which governs the relationship between suppliers and re-sellers of branded petroleum products. The Lease and Sales Agreement covered the period from October 1, 1996 through October 1, 1999.

In the fall of 1997, Plaintiff proposed to Defendant the idea that Plaintiff would transfer its interests in the two service stations to two separate individuals. Plaintiff retained the services of Corporate Investments, a commercial brokerage firm that engages in the sale of service stations, to screen and approve two potential purchasers. Plaintiff then proposed as transferees Hamid Aziz ("Aziz") for the Woodbridge station and Shamsher Singh ("Singh") for the Fort Washington station. However, Defendant refused to consent to the transfer **[**3]** of Plaintiff's interests in either service station to the proposed transferees even though, Plaintiff alleges, both were qualified to operate the businesses. Defendant contends that it rejected Aziz and Singh pursuant to the ExxonMobil Dealer Selection Guidelines ("Guidelines") because Aziz failed a credit review and Singh did **[*271]** not score enough points under the Guideline's six screens. [1]

[4]** In addition, Plaintiff alleges that Defendant charged other, independently-owned Exxon stations within close proximity to those operated by Plaintiff a substantially lower price-per-gallon of gasoline and other goods. Plaintiff further alleges that Defendant gave other stations greater voluntary concessions, such as rent adjustments and rebates, than it gave to Plaintiff. On April 8, 1998, Plaintiff filed suit charging Defendant with improperly withholding

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[1] The Guidelines contain six tests or "screens" by which Defendant evaluates dealer applicants. The six screens include: (a) the written application (50 points); (2) a math and reading comprehension test (50 points); (3) a Hogan Personal Inventory (50 points); (4) an initial interview (50 points); (5) a credit review (50 points); and (6) a panel interview (100 points). If an applicant receives a score of at least 300 points, the applicant is approved unless he has failed the credit review. *See* Paper no. 79, App. A, Tab 2, Ex. B. Singh scored only 259.8 points and had the most difficulty in the initial and panel interviews, where he allegedly failed to demonstrate sufficient business acumen.

consent to the transfer of the service stations. Plaintiff amended the complaint on October 28, 1998, and then again on November 10, 1998, adding counts pertaining to the allegations of price discrimination against Defendant.

On January 18, 1999, Plaintiff sent a letter requesting an accounting from Defendant and disputing charges for the sale and delivery of certain Exxon products to Plaintiff. The letter also notified Defendant of Plaintiff's intention to sell non-Exxon branded fuel and to begin the de-branding and de-identification process as specified in the Sales Agreement. Approximately one week later, on January 25, 1999, Defendant terminated Plaintiff's Lease, Sales Agreement and franchise. The termination letter stated **[**5]** that the grounds for the termination were that Plaintiff (a) breached its Lease with Defendant by using Defendant's motor fuel storage tanks and dispensing equipment for the storage, dispensing and sale of non-Exxon-branded motor fuel and (b) breached its Sales Agreement with Defendant by failing to provide a representative offering of Exxon-branded motor fuel at the two service stations it leased and operated. *See* Paper no. 79, App. A, Tab 2, Ex. N.

On January 27, 1999, Defendant filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin Plaintiff from using the Exxon trademark and to prevent Plaintiff from using Defendant's storage tanks, lines, dispensers and other equipment in connection with the dispensing and/or sale of non-Exxon motor fuel. The court granted the temporary restraining order by consent as to the trademark issue, but denied the remainder. Plaintiff then filed a motion to preliminarily enjoin Defendant's termination of the franchise pending litigation. At a hearing on February 19, 1999, the court denied that motion and ordered Plaintiff to vacate both service stations. On February 24, 1999, Plaintiff filed a Third Amended **[**6]** Complaint adding a count for violation of the PMPA to its existing counts. Defendant now moves for summary judgment on all counts.

II. Standard of Review

It is well established that ***HN1***[] a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In other words, if there clearly exist factual issues "that **[*272]** properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson, 477 U.S. at 250*; *see also* *Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987)*; *Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir. 1979)*; *Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950)*. The moving party bears the burden of showing that there is no genuine **[**7]** issue as to any material fact. *FED. R. CIV. P. 56(c)*; *Pulliam Inv. Co., 810 F.2d at 128* (citing *Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979))*.

HN2[] When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*; *Gill v. Rollins Protective Servs. Co., 773 F.2d 592, 595 (4th Cir. 1985)*. A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp., 477 U.S. at 323*. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence. *Anderson, 477 U.S. at 256*.

In *Celotex Corp.*, the Supreme Court stated:

> In cases like the instant one, ***HN3***[] where the nonmoving party will **[**8]** bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and *Rule 56(e)* therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp., 477 U.S. at 324. However, ***HN4***[] "'a mere scintilla of evidence is not enough to create a fact issue.'" *Barwick v. Celotex Corp., 736 F.2d 946, 958-59 (4th Cir. 1984)* (quoting *Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, 632 (E.D.N.C. 1966)*, *aff'd*, *388 F.2d 987 (4th Cir. 1967))*. There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson, 477 U.S. at 249-50* **[**9]** (citations omitted).

III. Analysis

A. Disapproval of Assignment Claims

1. Breach of Contract Claim (Count I)

Plaintiff claims that Defendant breached the Franchise Agreement with Plaintiff, including its obligation of good faith and fair dealing, by arbitrarily and unreasonably refusing to approve Plaintiff's prospective transferees. However, both the Lease Agreement and Sales Agreement (which together constitute the Franchise Agreement) contain provisions explicitly *prohibiting* Plaintiff from transferring or assigning its franchises to a third party. *See* Paper no. 79, App. A, Tab 2, Ex. A. The Assignability Rider to the Lease provides that "TENANT shall make no assignment of this Lease . . . in whole or in part, directly or indirectly." **[*273]** *Id.* The Assignability Rider to the Sales Agreement provides that "DEALER shall make no assignment of this Sales Agreement . . . in whole or in part, directly or indirectly." *Id.* Thus, Defendant's refusal to approve the transfer of the two stations, whether reasonable or not, does not violate any contractual provision, and Defendant is entitled to summary judgment. [2] *See, e.g., Bill Call Ford v. Ford Motor Co., 830 F. Supp. 1053, 1056-57 (N.D.Ohio 1993)* **[**10]** (finding that where contract prohibited assignment or transfer of franchise, franchisee's claim that franchisor unreasonably withheld consent to transfer was "without contractual predicate").

Plaintiff cannot rescue this claim by relying on ***HN5***[] the covenant of good faith and fair dealing. That obligation merely obligates the parties to exercise good faith in performing their contractual obligations; it cannot be invoked to require a party to take an action contrary to the express terms of a contract. *See, e.g., Parker* ***[**11]*** *v. Columbia Bank, et al., 91 Md.App.346, 366, 604 A.2d 521, 531 (Md.Ct.Spec.App. 1992)*. Because the Franchise Agreement expressly prohibits transfer or assignment of the franchise, Plaintiff cannot use the obligation of good faith and fair dealing to penalize Defendant for disapproving the proposed transfers.

2. Maryland Gasohol and Gasoline Products Marketing Act Claim (Count II)

Plaintiff next alleges that Defendant violated *MD. CODE ANN., COM. LAW II § 11-304* (part of the Gasohol and Gasoline Products Marketing Act), which states that ***HN6***[] a gasoline supplier "may not unreasonably withhold his consent to any assignment, transfer, sale, or renewal" of a service station business. *Id. § 11-304(g)*. Defendant argues that this claim must fail because its decisions to disapprove Plaintiff's proposed transferees, Aziz and Singh, were made in accordance with its Dealer Selection Guidelines. The statute does not define the term "unreasonable." However, in a recent decision relying on the decisional law on the general assignment of leases, this court determined that a franchisor's disapproval must be based on "reasonable commercial standards." *See Hannon v. Exxon Co., U.S.A., 54 F. Supp.2d 485, 494 (D.Md. 1999).* **[**12]** Then, the court turned specifically to Defendant's Guidelines and ruled that they "embod[]y 'reasonable commercial standards,'" and that a defendant's adherence to them in disapproving an applicant "shields [that] decision from accurately being regarded as unreasonable, even if it was not wise or even 'correct' in some sense." *Id. at 495* (quoting *The Maxima Corp. v.*

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[2] The Assignability Riders also provide that if a "valid state statute specifically applicable to the transfer of branded motor fuel contracts or retail motor fuel store leases requires Exxon [Mobil] to consider giving consent" to a proposed assignment, then the franchisee must give ExxonMobil a right of first refusal with regard to any proposed assignment. *See* Paper no. 79, App. A, Tab 2, Ex. A. These riders, however, do not establish a contractual right for Plaintiff to assign its franchises.

Cystic Fibrosis Found., 81 Md.App. 602, 568 A.2d 1170, 1176 (1990)). In the instant case, neither applicant scored the requisite number of points under the Guidelines' scoring system.

Even independent of the Guidelines and the court's decision in *Hannon*, Defendant arguably acted in a reasonable manner in rejecting Aziz and Singh. With regard to Aziz, who failed the credit review, **HN7**[] it is not unreasonable for a franchisor to disapprove the sale of one of its franchises to a financially unstable transferee. *See, e.g.,* *In re Pioneer Ford Sales, Inc., 729 F.2d 27, 31 (1st Cir. 1984)*; *Simonds* **[*274]** *Chevrolet, Inc. v. General Motors Corp., 564 F. Supp. 151, 153 (D.Mass. 1983)*. Similarly, it is not unreasonable for a franchisor to reject a transferee, such as **[**13]** Singh, who it deems to lack the requisite business experience or acumen. *See, e.g.,* *Simonds Chevrolet, 564 F. Supp. at 153*.

Plaintiff does not come forward with any substantial evidence that Defendant acted unreasonably in disapproving the assignments to Aziz and Singh. Plaintiff does not challenge the Guidelines on their face, nor does Plaintiff provide any evidence that Defendant applied the Guidelines incorrectly in evaluating Aziz and Singh as transferees. Plaintiff also does not challenge the applicability of the *Hannon* ruling to this case. In defense of its claim, Plaintiff merely offers the deposition testimony of Arnold Heckman ("Heckman") of Corporate Investments. [3] *See* Heckman Dep. at 168 (Paper no. 79, App. A, Tab 7). However, Heckman's testimony that the rejections of Aziz and Singh were unreasonable is only a subjective, unsubstantiated opinion, which is insufficient to raise a genuine issue of material fact. Heckman did not contend that the Guidelines were unreasonable, had no evidence that Defendant misapplied the Guidelines in the case of Aziz or Singh, and, in fact, had never seen the Guidelines before. *See id.* at 126, 131-32, 144-47. Further, **[**14]** Heckman appears to have formed his opinion without knowing about Aziz's financial woes, or how Singh had performed in his interviews. *See id.* at 337-38, 199-200, 203. He failed to provide any basis for his conclusory statement that Defendant acted unreasonably. **HN8**[] If an "expert" witness is relying solely or primarily on experience, as Heckman appears to be, he must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *See* FED.R.EVID. 702 advisory committee's note. Because Heckman provided no basis for his opinion, his deposition is not reliable evidence and does nothing to cast into doubt the "reasonableness" of Defendant's decision to disapprove the proposed transferees. **HN9**[] "'[A] mere scintilla of evidence is not enough to create a fact issue.'" *Barwick, 736 F.2d at 958-59* (internal citation omitted). Therefore, there is no genuine dispute of material fact here that Defendant's disapproval of the proposed transferees was reasonable. Accordingly, summary judgment shall be granted in Defendant's favor as to the Maryland Gasohol and Gasoline **[**15]** Products Marketing Act claim.

[16] B. Pricing Claims**

1. Robinson-Patman Act Claim (Count III)

Plaintiff argues that Defendant violated the Robinson-Patman Act, *15 U.S.C. § 13*, by acting in a discriminatory manner toward Plaintiff with respect to the prices **[*275]** of gasoline and "other goods," rents charged to lessee-dealers, and voluntary concessions. Plaintiff alleges that Defendant discriminated against it in this manner with the intent to substantially lessen competition or to create a monopoly. **HN11**[] In order to establish a violation of the Robinson-Patman Act, Plaintiff must prove: (1) sales of commodities in interstate commerce; (2) that the gasoline and other goods sold to Plaintiff were of the same grade and quality as those sold to other similarly situated

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[3] Plaintiff also makes an unsubstantiated assertion that Defendant purposefully withheld the transfer of the service stations as part of a personal vendetta against Mangum, without any consideration of the qualifications of the proposed transferees. Plaintiff offers no evidence, other than Mangum's own deposition, to support this theory. The assertion in his deposition that Defendant's representative John Greco told Corporate Investment's broker Bryan Smyth who then told Mangum that Defendant was "not going to approve any purchaser" is multiple hearsay. **HN10**[] Hearsay evidence does not provide sufficient support to defeat a summary judgment motion. *See* *Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996)*. Moreover, it makes no sense that if Defendant had a vendetta against Mangum that it would withhold consent to transfer his franchises; if Defendant truly did not like Mangum, it would make more sense to approve the transfer and no longer have to do business with him.

dealers; (3) that Defendant discriminated in price between Plaintiff and other dealers; and (4) that the discrimination had a prohibited effect on competition. *See* Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990); Berlyn, Inc. v. The Gazette Newspapers, Inc., 157 F. Supp.2d 609, 621 (D.Md. 2001). The first two elements are not subjects of dispute in the instant **[**17]** case, but Defendant contends that the third and fourth elements have not been met. The court agrees.

Plaintiff has failed to provide sufficient evidence to establish that Defendant engaged in discriminatory pricing between Plaintiff and similarly situated dealers. Plaintiff's answers to Defendant's interrogatories about the pricing claims were vague and provided no concrete information. The record is devoid of any details of allegedly discriminatory price transactions, such as dates of sale, identities of purchasers, or actual prices charged. The only evidence of discriminatory pricing offered is the deposition of Plaintiff's president Mangum, which contains general assertions that some other ExxonMobil dealers were charged lower wholesale gasoline prices than Plaintiff. *See* Paper no. 79, App. A, Tab 1. Although Mangum claimed to have seen other ExxonMobil dealers' invoices showing lower gas prices, he neither provided any copies of them nor any specific information regarding allegedly discriminatory transactions. [4] Plaintiff has similarly failed to provide any evidence regarding discrimination in "other goods" and "voluntary concessions."

[18]** Plaintiff has also failed to establish any injury to competition. ***HN13***[] Possible injury to competition "so obviously follows from [differential pricing] that it 'is established prima facie by proof of a substantial price discrimination between competing purchasers over time.'" *Hoover Color Corp. v. Bayer Corp., 199 F.3d 160, 163 (4th* ***[*276]*** *Cir. 1999)* (quoting *Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428, 435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983))*. Plaintiff has not offered any such proof. Because Plaintiff has not established the elements necessary for a violation of the Robinson-Patman Act, Defendant is entitled to summary judgment on this count.

2. Maryland Antitrust Act Claim (Count IV)

Plaintiff makes the same arguments about discriminatory pricing under *MD. CODE ANN., COM. LAW II § 11-204*, which is nearly identical to the Robinson-Patman Act. ***HN14***[] The Maryland legislature has stated that the purpose of the Maryland Antitrust Act is to "complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices" and has directed that courts construing Maryland's state **[**19]** ***antitrust law*** should be "guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." *MD. CODE ANN., COM. LAW II § 11-202(a)(2)*. This court has specifically noted that it is appropriate to look to Robinson-Patman Act decisions in construing *Section 11-204*. *See* *Soth v. Baltimore Sun Co., 4 F. Supp. 2d 417, 420 (D.Md. 1996)* ("Federal ***antitrust law*** is used to interpret . . . *[Section 11-204*], which mirror[s] . . . section 13(a) of the Robinson-Patman Act . . .").

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[4] Plaintiff concedes in its opposition that it has "little physical documentation to support" these claims, but suggests that its lack of evidence is due to Defendant's obstruction of the discovery process. *See* Paper no. 82 at 4, 8. Specifically, Plaintiff claims that Defendant refused to schedule the depositions of Exxon executives John Allred and Jim Carter, and inhibited Plaintiff's efforts to obtain documents from competitor Exxon stations. *See id.*

Plaintiff's complaints about discovery at this time are inappropriate and insufficient. Plaintiff had more than enough time to conduct discovery on its claims; in fact, excluding the time the case was stayed due to Plaintiff's bankruptcy, Plaintiff had close to two years to take discovery. Moreover, during the years this case has been pending, Plaintiff never filed a motion to compel discovery. Plaintiff never moved to compel the depositions of Carter or Allred or responses to interrogatories or document requests. Plaintiff may not do so for the first time at summary judgment.

Finally, even if it were appropriate at this stage to express discovery-related complaints, Plaintiff has not complied with *FED.R.CIV.P. 56(f)*, which ***HN12***[] requires that a party alleging inadequate discovery must file an affidavit setting forth the specific discovery that needs to be taken and the reasons for the needed discovery. *See* *Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995)*. Plaintiff neither filed an affidavit nor described with specificity the materials he seeks to uncover. For all of these reasons, Plaintiff's complaints about discovery are irrelevant.

Therefore, just as Plaintiff's Robinson-Patman Act claim failed because Plaintiff did not establish two of the essential elements, it also fails under Section 11-204 for the same reasons. **HN15**[] "State claims under section 11-204(a)and (b) must fail where those same claims would also fail under similar federal law." Hinkleman v. Shell Oil Co., 962 F.2d 372, 379 (4th Cir. 1992); Neugebauer v. The A.S. Asbell Co., 474 F. Supp. 1053, 1071 (D.Md. 1979) (granting summary judgment on Section 11-204 claim because summary judgment was granted on similar Robinson-Patman Act claim). *See also* Baltimore Scrap Corp. v. The David J. Joseph Co., 81 F. Supp.2d 602, 620 (D.Md. 2000) **[**20]** (granting summary judgment on state law antitrust claim because claim under similar federal ***antitrust law*** failed on summary judgment). Because Plaintiff's state antitrust claim is based on the same factual record as the Robinson-Patman claim for which the court has already granted summary judgment, Defendant is also entitled to summary judgment on the state law claim.

3. Good Faith Pricing Claim (Count V)

Plaintiff argues that Defendant violated MD. CODE ANN., COM. LAW II § 2-305, which requires that the price of the gasoline and other goods sold by Defendant to Plaintiff be established in good faith and in accordance with reasonable commercial standards. *See id.* cmt. 3. Plaintiff contends that by acting in a discriminatory manner toward Plaintiff with respect to the price of gasoline and other goods, Defendant has not acted in good faith and in accordance with such standards. However, as discussed in the subsections above, Plaintiff has not provided any substantial evidence that Defendant charged higher prices to Plaintiff than to Plaintiff's competitors for gasoline or any other product, or that Defendant set any of its prices in bad faith. Because Plaintiff has forecast **[**21]** no evidence whatsoever to support its Section 2-305 claim, Defendant is entitled to summary judgment.

C. PMPA Claim - Wrongful Termination of Franchise *(Count VI)*

Plaintiff has claimed that Defendant violated the PMPA when it terminated the franchise agreement between the parties on January 25, 1999. **HN16**[] Under the PMPA, a franchisor may terminate or refuse to renew a franchise only if one of the **[*277]** grounds set forth in § 2802(b) exists. *See* 15 U.S.C. § 2802(a). Defendant asserts that it was justified in terminating the franchise with Plaintiff based on the exceptions in § 2802(b)(2)(A)and 2802(b)(2)(C). Section 2802(b)(2)(A) authorizes termination where there has been a "failure by the franchisee to comply with a provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship." *Id.* § 2802(b)(2)(A). Section 2802(b)(2)(C) allows termination upon "the occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable . . . ." *Id.* § 2802(b)(2)(C).

Defendant's justification **[**22]** for the termination is that Plaintiff failed to comply with at least two provisions of the franchise agreement: (1) the specification in Article 3(L) of the Lease that Plaintiff could use Defendant's equipment "only for the storage, dispensing, and sale of EXXON-branded gasolines and diesel fuels purchased directly from EXXON"; and (2) Section 10.1(F) of the Sales Agreement, which required Plaintiff to promote, preserve and increase the public's confidence in Exxon-branded products, to maintain and enhance the sale of such products, and to sell a "representative offering" of Exxon-branded fuels, defined as at least two Exxon-branded fuels. *See* Paper no. 79, App. A, Tab 2, Ex. A.

Defendant has provided considerable evidence that Plaintiff breached both of these provisions. Plaintiff's own president, Mangum, testified in his deposition that Mikeron sold unbranded gasoline at the two service stations using Defendant's tanks, lines, and dispensers. *See id.*, Tab 1. Mangum also admitted having sold non-Exxon branded gasoline at both stations in an affidavit filed with this court. *See id.*, Tab 5. Defendant has also provided receipts generated by the fuel dispensers at both stations **[**23]** stating that the fuel dispensed was not Exxon fuel. *See id.*, Tab 2, Ex. M. In addition, Mangum admitted in his deposition that Mikeron ceased purchasing fuel from Defendant for either station in late 1998 and that during that period, Mikeron sold only non-Exxon branded fuels. *See id.*, Tab 1.

Defendant argues that Plaintiff's demonstrated breaches of Article 3(L) of the Lease and Section 10.1(F) of the Sales Agreement constitute proper grounds for termination of the franchise under 2802(b)(2)(A) and (C) of the PMPA. With respect to the requirement in Article 3(L) of the Lease that Plaintiff use Defendant's tanks, lines and pumps only to store and dispense Exxon-branded gasoline, it is well-settled that such a provision is an acceptable means of protecting a franchisor's goodwill and ensuring safe distribution of a hazardous product. *See, e.g., FTC v. Sinclair Refining Co., 261 U.S. 463, 474-75, 67 L. Ed. 746, 43 S. Ct. 450, 6 F.T.C. 587 (1923)*. In *Pugh v. Mobil Oil Corp., 533 F. Supp.169, 175 (S.D.Tex. 1982)*, a case very similar to this one, the court held that the franchisor's "need to protect goodwill and reputation" justified a contract provision requiring the franchisee **[**24]** to use pumps and other service station equipment solely for the franchisor's products. The law is also well-settled regarding provisions like Section 10.1(F) of the Sales Agreement, which requires Plaintiff to offer a representative sampling of Defendant's branded motor fuels. Courts have repeatedly held that contract provisions requiring a gas station franchisee to purchase and sell a minimum amount of the franchisor's products are reasonable and significant to the franchise agreement. *See, e.g., Shell Oil Co. v. A.Z. Services, Inc., 990 F. Supp. 1406, 1413-14 (S.D.Fla. 1997)*; *Smoot v. Mobil Oil Corp., 722 F. Supp.849, 855* ***[*278]*** *(D.Mass. 1989)* (finding that a provision of the franchise agreement requiring the franchisee to sell the franchisor's fuel was fundamental to the franchise relationship); *Mobil Oil Corp. v. Shah, 671 F. Supp.503, 506 (N.D.Ill. 1987)*.

Thus, the court agrees that both contract provisions breached by Plaintiff are reasonable and of material significance to the franchise relationship, and their breach is sufficient grounds for termination of the franchise, pursuant to *§ 2802(b)(2)(A)*. [5] Accordingly, because Defendant's termination of the **[**25]** franchise was justified, Defendant has not violated the PMPA and is entitled to summary judgment on this count. [6]

IV. Conclusion

For the **[**26]** foregoing reasons, Defendant ExxonMobil's motion for summary judgment will be granted. A separate Order will be entered.

DEBORAH K. CHASANOW

United States District Judge

February 14, 2003.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 14th day of February, 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendant's motion for summary judgment BE, and the same hereby IS, GRANTED;

2. JUDGMENT BE, and the same hereby IS, ENTERED in favor of Defendant Exxon Mobil Corporation and against Plaintiff Mikeron, Inc.; and

3. The Clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

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[5] Because the court finds that Defendant's termination of the franchise was justified under *§ 2802(b)(2)(A)*, it is unnecessary to consider whether the termination was also justified under *§ 2802(b)(2)(C)*.

[6] To the extent that Plaintiff has argued for the first time in its reply that Defendant somehow forced it to breach the Franchise Agreement by charging Plaintiff discriminatory prices and unreasonably disapproving assignment to Aziz and Singh, that argument is without merit. As discussed earlier in this opinion, Plaintiff has not provided evidence that Defendant charged discriminatory prices or that Defendant's disapproval was unreasonable. Moreover, the lengthy record in this case indicates that Mangum made the decision on his own for Plaintiff to breach the Franchise Agreement. *See, e.g.*, Mangum Dep. at 217-18, 220-22 (Paper no. 79, App. A, Tab 1).

DEBORAH K. CHASANOW

United States District Judge

Stolow v. Greg Manning Auctions, Inc.

United States District Court for the Southern District of New York

February 14, 2003, Decided ; February 18, 2003, Filed

02 Civ. 2591 (SAS)

Reporter

258 F. Supp. 2d 236 *; 2003 U.S. Dist. LEXIS 2248 **; 2003-1 Trade Cas. (CCH) P73,967

GREGORY STOLOW, GREGORY STOLOW trading as GOLD MEDAL AUCTIONS, Plaintiffs, -against- GREG MANNING AUCTIONS INC., IVY & MADER PHILATELIC AUCTIONS, INC., EARL P.L. APFELBAUM, INC., JOHN D. APFELBAUM, ANTHONY FELDMAN, DAVITT FELDER, DAVITT FELDER, INC., DANA OKEY, STEPHEN OSBORNE, ROBERT A. SIEGEL AUCTION GALLERIES, INC., SHREVES PHILATELIC GALLERIES INC., HR HARMER INC., MATTHEW BENNETT INC., DANIEL F. KELLEHER CO. INC., EDWARD YOUNGER, AHMED HEGAZI, AMERICAN PHILATELIC SOCIETY, AMERICAN STAMP DEALERS ASSOCIATION, Defendants.

Subsequent History: *Affirmed by Stolow v. Greg Manning Auctions, 2003 U.S. App. LEXIS 23408 (2d Cir., Nov. 17, 2003)*

Disposition: Defendants' motions to dismiss complaint granted.

Core Terms

Auction, Stamp, Ring, Dealers, enterprise, antitrust, alleges, bid, bid-rigging, Associations, conspiracy, bylaws, driven, statute of limitations, motion to dismiss, defendants', summary judgment, Philatelic, bidders, aiding and abetting, racketeering, damages, fraudulent concealment, standing to bring, acquisition, violations, toll, genuine issue of material fact, alleged facts, predicate act

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. At the motion to dismiss stage, the issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test. A complaint need not state the legal theory, facts, or elements underlying the claim, except in certain instances.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Heightened Pleading Requirements, Fraud Claims**

Pursuant to the simplified pleading standard of *Fed. R. Civ. P. 8(a)*, a complaint must only include a short and plain statement of the claim showing that the pleader is entitled to relief. In contrast, the heightened pleading standard of *Fed. R. Civ. P. 9(b)* requires that in claims of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

The task of the court in ruling on a *Fed. R. Civ. P. 12(b)(6)* motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. When deciding a motion to dismiss, courts must accept all factual allegations in the complaint as true, and draw all reasonable inferences in plaintiff's favor. Courts may not consider matters outside the pleadings but may consider documents attached to the pleadings, documents referenced in the pleadings, or documents that are integral to the pleadings.

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

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN4[] **Private Actions, Standing**

Dismissals in antitrust cases prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Nonetheless, it is not proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Private Actions, Standing**

To plead an antitrust action, a plaintiff must first allege standing to bring suit. A plaintiff only has standing if he suffered an antitrust injury. An antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation. The fact that defendants' behavior is alleged to be illegal per se under *§ 1* of the Sherman Act does not in any way diminish the requirement that plaintiffs show an antitrust injury.

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

HN6[] **Private Actions, Standing**

The purpose of the antitrust laws is to protect competition, not competitors. Therefore, a plaintiff must allege an injury beyond harm to an individual competitor. The plaintiff must allege that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. To survive a motion to dismiss, a plaintiff must plead an antitrust injury, even if the chances of proving such an injury are small.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Public Enforcement, State Civil Actions**

See *N.Y. Gen. Bus. Law § 340* (2002).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Antitrust & Trade Law, Sherman Act**

New York's ***antitrust law*** is modeled on the Sherman Act and should be construed in light of federal precedent.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > Procedural Matters > Commencement & Prosecution > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN10[] **Conspiracy, Elements**

Although there is no substantive tort of conspiracy under New York law, a plaintiff may allege conspiracy to connect the actions of separate defendants with an otherwise actionable tort. If a conspiracy claim does not have an underlying actionable tort, it must be dismissed.

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN11[] **Governments, Fiduciaries**

A civil conspiracy claim will be dismissed where the conspiracy claim is duplicative of a breach of fiduciary duty and common law fraud claims.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN12[] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeer Influenced and Corrupt Organization Act civil liability provision confers standing on any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962*. A plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN13[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1962(a) prohibits any person who derived income from a pattern of racketeering activity from investing that income in an "enterprise" as defined by the statute. *18 U.S.C.S. §§ 1961(4)*, *1962(a)*. The essence of a violation of *§ 1962(a)* is not the commission of predicate acts but the investment of racketeering income. Thus, to have standing to bring a claim for civil damages under *§ 1962(a)*, a plaintiff must allege injury from defendants' investment of racketeering income in an enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN14[] Private Actions, Racketeer Influenced & Corrupt Organizations

See 18 U.S.C.S. § 1962(a).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN15[] Private Actions, Racketeer Influenced & Corrupt Organizations

Pursuant to 18 U.S.C.S. § 1962(b), it is unlawful for any person through a pattern of racketeering activity to acquire or maintain any interest in or control of any enterprise. The purpose of this statute is to prohibit the takeover of a legitimate business through racketeering, typically extortion or loan sharking. Similar to the investment injury requirement of 18 U.S.C.S. § 1962(a), a plaintiff must suffer an acquisition or maintenance injury to have standing to sue under 18 U.S.C.S. § 1962(b). Therefore, to have standing under § 1962(b), a plaintiff must allege injury arising from the acquisition or maintenance of any interest in or control of an enterprise. These injuries must be distinct from those resulting from the commission of the predicate acts.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN16[] Private Actions, Racketeer Influenced & Corrupt Organizations

Without a distinct "acquisition injury," a plaintiff cannot state a cause of action under 18 U.S.C.S. § 1962(b).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN17[] Private Actions, Racketeer Influenced & Corrupt Organizations

Pursuant to 18 U.S.C.S. § 1962(c), it is unlawful for any person employed by or associated with any Racketeer Influenced and Corrupt Organization Act enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. A plaintiff has standing to bring a § 1962(c) claim if he has been injured in his business or property by a defendant conducting the affairs of an enterprise through a pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN18[] Private Actions, Racketeer Influenced & Corrupt Organizations

If a plaintiff has standing, an *18 U.S.C.S. § 1962(c)* claim must also allege the existence of two distinct entities: a "person" and an "enterprise." The enterprise cannot simply be the "person" referred to by a different name. A corporate entity may be held liable as a Racketeer Influenced and Corrupt Organization Act person where it associates with others to form an enterprise that is sufficiently distinct from itself.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN19[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1962(d) makes it unlawful for any person to conspire to violate any provision of *18 U.S.C.S. § 1962*.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN20[] Heightened Pleading Requirements, Fraud Claims

Under *Fed. R. Civ. P. 9(b)*, in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. The plaintiff must allege facts supporting the essential elements of a fraud claim.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN21[] Nondisclosure, Elements

Aa common law fraudulent concealment claim requires the plaintiff to allege facts showing: (1) that the defendant failed to disclose material information that it had a duty to disclose, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of the reliance.

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN22[] Governments, Fiduciaries

A duty to disclose generally arises in one of three ways: (1) when one party makes a partial or incomplete statement that requires clarification; (2) when the parties are in a fiduciary or confidential relationship; or (3) where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge.

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN23[] **Consideration, Enforcement of Promises**

A plaintiff alleging a common law fraudulent concealment claim must allege that he actually relied on the purported fraudulent statements or omissions. Reasonable, detrimental reliance upon a misrepresentation is an essential element of a cause of action for fraud, and such reliance must be pleaded with particularity. A party's reliance on false statements or omissions is not reasonable or justifiable if the party has reason to believe that the representations may be false but fails to inquire into their accuracy.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN24[] **Contract Interpretation, Fiduciary Responsibilities**

A duty to disclose based on superior knowledge ordinarily arises only in the context of business negotiations where parties are entering a contract.

Business & Corporate Law > Corporations > Articles of Incorporation & Bylaws > General Overview

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Business & Corporate Law > Corporations > Corporate Governance > General Overview

Business & Corporate Law > Unincorporated Associations

Civil Procedure > ... > Justiciability > Standing > General Overview

HN25[] **Corporations, Articles of Incorporation & Bylaws**

The bylaws of a corporation constitute a contract between a corporation and its members. Similarly, the bylaws of an unincorporated association express the terms of a contract which define privileges secured and the duties assumed by those who have become members. A third-party, who is not a member of the association or corporation nor a party to the bylaws, lacks standing to bring suit against an organization for violation of its bylaws. Were it otherwise, bylaws would subject organizations to unlimited liability resulting from duties owed to third-parties who have no relationship to the organization.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN26[] Accessories, Aiding & Abetting

To allege aiding and abetting, a plaintiff must claim: (1) a violation of law by the primary party; (2) knowledge of the violation by the aider and abettor; and (3) "substantial assistance" by the aider and abettor in achieving the primary violation.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Governments > Fiduciaries

HN27[] Accessories, Aiding & Abetting

Inaction by a party is not typically considered substantial assistance. Inaction is actionable participation only when the defendant owes a fiduciary duty directly to the plaintiff.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN28[] Entitlement as Matter of Law, Genuine Disputes

Fed. R. Civ. P. 56 provides for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. An issue of fact is "material" for these purposes if it might affect the outcome of the suit under the governing law, while an issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN29[] Summary Judgment, Opposing Materials

In assessing the record to determine whether genuine issues of material fact are in dispute for the purposes of summary judgment, a court must resolve all ambiguities and draw all reasonable factual inferences in favor of the non-moving party. Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the nonmovant must set forth specific facts showing that there is a genuine issue for trial. The non-moving party may not, however, rest upon mere allegations or denials. Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment. Mere conclusory statements, conjecture, or speculation cannot by themselves create a genuine issue of material fact.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > General Overview

HN30[] Antitrust & Trade Law, Clayton Act

Pursuant to § 4B (*15 U.S.C. § 15b*) of the Clayton Act and *N.Y. Gen. Bus. Law § 340(5)*, private antitrust suits are governed by a four-year statute of limitations.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > General Overview

HN31[] Antitrust & Trade Law, Clayton Act

Antitrust actions accrue when a defendant commits an act that injures plaintiff's business in violation of the antitrust statutes. When there is an alleged continuing antitrust conspiracy, the statute of limitations has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of that act. However, the commission of a separate and new overt act will not permit the plaintiff to recover for the injury caused by the old overt acts that do not fall within the limitations period.

Antitrust & Trade Law > Clayton Act > Penalties

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN32[] **Clayton Act, Penalties**

The statute of limitations in a private antitrust suit is tolled whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws. *15 U.S.C.S. § 16(i)*. Also, the statute of limitations may be tolled under the doctrine of fraudulent concealment. A plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > General Overview

HN33[] **Antitrust & Trade Law, Clayton Act**

The statute of limitations is not tolled by state actions brought under the Clayton Act. Additionally, private actions brought under the Donnelly Act are not tolled by New York Attorney General proceedings. *N.Y. Gen. Bus. Law § 342-c* (2002).

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN34[] **Summary Judgment, Opposing Materials**

Self-serving, conclusory allegations cannot defeat a summary judgment motion.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN35[] **Antitrust & Trade Law, Clayton Act**

Civil Racketeer Influenced and Corrupt Organization Act (RICO) actions are subject to the four-year limitations period contained in § 4B (*15 U.S.C.S. § 15b*) of the Clayton Act. The limitations period begins to run when the plaintiff discovers or should have discovered the RICO injury. There is a "separate accrual" rule under which a new claim accrues and the four-year limitation period begins anew each time a plaintiff discovers or should have discovered a new and independent injury. Under the separate accrual rule, when a plaintiff is continuously injured by an underlying RICO violation, he may only recover for injuries discovered or discoverable within four years of the time suit is brought.

Counsel: [1]** Appearances

For Plaintiff: Jonathan B. Altschuler, Esq., New York, NY.

For Defendants Greg Manning Auctions Inc., Ivy & Mader Philatelic Auctions, Inc., Robert A. Siegel Auction Galleries, Inc., Shreves Philatelic Galleries Inc., HR Harmer Inc., and Daniel F. Kelleher Co. Inc.: Ronald C. Minkoff, Esq. Jessie F. Beeber, Esq. Jennifer R. Rackoff, Esq. Frankfurt Garbus Kurnit Klein & Selz, P.C. New York, NY.

For Defendants American Stamp Dealers Association, Inc. and the American Philatelic Society: Christopher M. Houlihan, Esq. James M. Strauss, Esq. Putney, Twombly, Hall & Hirson LLP, New York, NY.

For Defendants John D. Apfelbaum, Earl P.L. Apfelbaum, Inc., Davitt Felder, and Davitt Felder, Inc.: James A. Mitchell, Esq. Stillman & Friedman, P.C., New York, NY.

Judges: Shira A. Scheindlin, United States District Judge.

Opinion by: SHIRA A. SCHEINDLIN

Opinion

[*240] OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

On April 4, 2002, Gregory Stolow brought this action in his individual capacity and trading as Gold Medal Auctions (collectively "Stolow"). The suit arises from defendants' alleged bid-rigging scheme. Stolow seeks damages under: the Sherman Act, the New York State Donnelly Act, **[**2]** the Federal Racketeer Influenced and Corrupt Organization Act ("RICO"), common law fraud, conspiracy, and aiding and abetting. Defendants now move for dismissal of Stolow's First Amended Complaint ("Am. Compl.") pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, and in the alternative, summary judgment under *Rule 56 of the Federal Rules of Civil Procedure*.

I. BACKGROUND

A. The Parties

Stolow is a citizen of New York and worked as an auctioneer and stamp dealer, occasionally trading as Gold Medal Auctions. Am. Compl. P 1. Defendants include John D. Apfelbaum, Davitt Felder, Davitt Felder, Inc., Anthony Feldman, Dana Okey, Stephen Osborne, Edward Younger, and Ahmed Hegazi [1] (collectively "Stamp Dealers"). *Id.* PP 20-25, 30-31. The Stamp Dealers placed bids and purchased stamp lots at auctions held in New York **[*241]** and other states. [2] *Id.* Defendants also include Greg Manning Auctions Inc., Ivy & Mader Philatelic Auctions, Inc., Robert A. Siegel Auction Galleries, Inc., Shreves Philatelic Galleries Inc., HR Harmer Inc., Earl P.L. Apfelbaum, Inc., Matthew Bennett Inc., and Daniel F. Kelleher Co. Inc. (collectively "Auction Houses"). **[**3]** *Id.* PP 17-19, 26-29, 49. The Auction Houses conducted general stamp auctions. *Id.* The remaining defendants are the American Stamp Dealers Association, Inc. ("ASDA") and the American Philatelic Society ("APS") (collectively "Trade Associations"). *Id.* PP 32-33. The Trade Associations are trade organizations in the stamp industry whose members include stamp auctioneers and stamp dealers.

B. The Complaint

Stolow alleges that in 1970, the Stamp Dealers began rigging bids at public postage stamp auctions. **[**4]** *Id.* P 40. The Stamp Dealers, who referred to themselves as the "Ring", agreed to share bidding information prior to auctions. *Id.* P 41. The Ring reviewed stamp lots and submitted secret bids among themselves for particular lots. The Ring member who submitted the highest bid for a specific lot "won" the privilege of being the only member who would bid on that lot at the actual auction. *Id.* P 54. Under this arrangement, the "winning" Ring member would submit a very high bid at the actual auction. As a result, "any non Ring member dealer would be forced to bid at a [level] where a profit on that lot was minimal or actually resulted in a loss when resold." *Id.* In exchange for the exclusive right to bid on a lot, the "winning" Ring member made payments to the other members. *Id.* P 44.

The Auction Houses were aware of the Ring's activities and assisted in the bid-rigging scheme. The Auction Houses extended favorable credit terms to Ring members. The Ring was also given special private viewing access to the stamp lots prior to auctions. *Id.* P 43. In addition, the Auction Houses reduced the Ring's competition by deliberately mis-describing the stamp collections in **[**5]** their catalogs in a manner that discouraged other bidders. These catalogs were sent worldwide to mail bidders who represented the majority of potential bidders at the sales. *Id.* P 55. The Auction Houses benefitted from this arrangement because floor attendance was reduced, drastically decreasing overhead and increasing the Auction Houses' profits. *Id.* This bid-rigging scheme continued until 1999. *Id.* P 40.

Because of the scheme, Stolow and other bidders refrained from participating in auctions whenever they learned that a Ring member was bidding. *Id.* P 54. Competition at the auctions was significantly reduced and sellers earned less as a result of the bid-rigging scheme. [3] Stolow prohibited the Ring from participating in **[*242]** auctions that he conducted. *Id.* P 13 Consequently, the Ring boycotted Stolow's auctions and he was forced to relocate outside of Manhattan and was eventually driven out of business. *Id.* P 56.

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[1] Although Ahmed Hegazi did not actually place bids and purchase stamps, he is considered a "Stamp Dealer" here because he allegedly compiled the secret bids for the dealers prior to the auctions. *See id.* P 30.

[2] On January 28, 2002, John D. Apfelbaum and Earl P.L. Apfelbaum pled guilty to criminal charges of violating section 1 of the Sherman Act. *See* Am. Compl. P 34. On April 16, 2002, Davitt Felder and Davitt Felder, Inc. pled guilty to the same charges. *See id.* P 35.

[3] The Amended Complaint includes contradictory allegations that the Ring drove stamp prices above competitive levels and that it brought stamp prices below competitive levels. *Compare* Am. Compl. P 54 ("Any non Ring member dealer would be forced to bid at a level, where a profit on that lot was minimal or actually resulted in loss when resold.") *with id.* P 58 (Defendants' actions restrained trade by "reducing the prices paid by Ring members to sellers below their competitive levels."). For the purpose of the Rule 12(b)(6) motion, all inferences must be drawn in Stolow's favor. Accordingly, it is fair to infer that the Ring would bid both above and below competitive prices.

[6]** Based on these events, Stolow advances seven claims for relief. [4] **[**7]** Defendants submitted two separate motions to dismiss Stolow's claims. *First*, the Stamp Dealers and Auction Houses move to dismiss Claims I - VI. *See* Defendants Greg Manning Auctions Inc., Ivy & Mader Philatelic Auctions, Inc., Robert A. Siegel Auction Galleries, Inc., Shreves Philatelic Galleries Inc., HR Harmer Inc., and Daniel F. Kelleher Co. Inc.'s Memorandum in Support of Motion to Dismiss ("Auction Houses Mem.") at 1. (Defendants John D. Apfelbaum, Earl P.L. Apfelbaum, Inc., Davitt Felder, and Davitt Felder, Inc. join in the arguments made in the Auction Houses Mem. [5]). *Second*, the Trade Associations move to dismiss Claims III and VII, the only two claims against them. *See* American Stamp Dealers Association, Inc., and American Philatelic Society's Memorandum in Support of Motion to Dismiss ("Trade Assocs. Mem.") at 1, 5. In the alternative, the Stamp Dealers and Auction Houses move for summary judgment on Claims I, II, III, and V, pursuant to *Rule 56*. *See* Auction Houses Mem. at 1.

II. MOTION TO DISMISS

A. Legal Standard

HN1[] A motion to dismiss should be granted only if "' appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief.'" *Weixel v. Board of Educ. of New York, 287 F.3d 138, 145 (2d Cir. 2002)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (alterations omitted)). At the motion to dismiss stage, the issue "'is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Phelps v. Kapnolas, 308 F.3d 180, 184-85 (2d Cir. 2002)* (quoting *Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998))*. **[**8]** A complaint need not state the legal theory, facts, or elements underlying the claim, except in certain instances. *Compare Fed. R. Civ. P. 8 with Fed. R. Civ. P. 9*. ***HN2***[] Pursuant to the simplified pleading standard of *Rule 8(a)*, a complaint must only include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)* (quoting *Rule 8(a)(2)*). In contrast, the heightened pleading standard of *Rule 9(b)* requires that in claims of fraud or mistake "the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*.

HN3[] The task of the court in ruling on a *Rule 12(b)(6)* motion is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Pierce v. Marano, 2002 U.S. Dist. LEXIS 14870*, *No. 01 Civ. 3410, 2002 WL 1858772*, at *3 (S.D.N.Y. Aug. 13, 2002) (internal quotation marks and citations omitted). When deciding a motion to dismiss, courts must accept all factual allegations in the complaint as true, and draw all reasonable inferences in plaintiff's **[**9]** favor. *See Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*. Courts **[*243]** may not consider matters outside the pleadings but may consider documents attached to the pleadings, documents referenced in the pleadings, or documents that are integral to the pleadings. *See id. at 152-53*.

B. Claims I and II: Sherman Act and Donnelly Act Violations

1. Standing

HN4[] Dismissals in antitrust cases "prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*. "Nonetheless, 'it is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.'" *George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998)* (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))*.

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[4] The Amended Complaint mistakenly labels two separate claims as Claim VI.

[5] The following Stamp Dealers have not appeared in this action: Anthony Feldman, Dana Okey, Stephen Osborne, Edward Younger, and Ahmed Hegazi. There has also been no appearance by the Auction House of Matthew Bennett Inc.

HN5[] To plead an antitrust action, a plaintiff must first **[**10]** allege standing to bring suit. A plaintiff only has standing if he suffered an antitrust injury. *See* G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766 (2d Cir. 1994); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 250 (2d Cir. 1985)(citing Associated Gen. Contractors, 459 U.S. at 538-40). An antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). "The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). "The fact that defendants' behavior is alleged to be illegal per se under § 1 of the Sherman Act does not in any way diminish the requirement that plaintiffs show an *antitrust* injury." Volmar Distribs., Inc. v. New York Post Co., 825 F. Supp. 1153, 1159 (S.D.N.Y. 1993)(emphasis in **[**11]** original).

HN6[] The purpose of the antitrust laws is to protect competition, not competitors. *See* George Haug, 148 F.3d at 139. Therefore, a plaintiff must allege an injury beyond harm to an individual competitor. *See* Todd v. Exxon Corp., 275 F.3d 191, 213 (2d Cir. 2001) ("An antitrust plaintiff must allege not only cognizable harm to [himself], but an adverse effect on competition market-wide."); Electronics Communications Corp. v. Toshiba America Consumer Prods., 129 F.3d 240, 242 (2d Cir. 1997). The plaintiff must allege "that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." *Id.* (emphasis in original). To survive a motion to dismiss, Stolow must *plead* an antitrust injury, even if the chances of proving such an injury are small. *See* George Haug, 148 F.3d at 139.

2. Stolow Has Standing to Bring Sherman Act and Donnelly Act Claims

Claims I and II of the Amended Complaint allege that the Stamp Dealers and Auction Houses unreasonably restrained interstate trade in violation of the Clayton Act [6], the Sherman Act [7] and the **[*244]** Donnelly Act [8]. **[**12]** The issue is whether Stolow has alleged that the bid-rigging scheme described in the Amended Complaint harmed competition as a whole. He first alleges that he was personally injured by the Ring's bid-rigging scheme, claiming that he lost his source of business "because of the difficulty of buying stamps at [public auctions] against Ring members who could drive up the prices to force him to be unable to buy stamps and eliminated him as a buyer at the sales." Am. Compl. P 56.

[13]** But Stolow goes on to allege injury to competition within the stamp trading industry as a whole in the following ways: *First*, competition among bidders at auctions decreased because competitors refrained from participating when they learned that Ring members were bidding. Id. PP 54, 56. *Second*, competition among bidders decreased because the Auction Houses purposely discouraged non-Ring members from bidding by misdescribing stamp lots in their catalogs. Id. P 55. *Third*, the Stamp Dealers and Auction Houses reduced "the prices paid by Ring members to sellers below their competitive levels." Id. P 58. According to Stolow, because bidders throughout the industry were intimidated by the bid-rigging, the Ring was practically the exclusive bidder at

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[6] Stolow is seeking treble damages for the antitrust violations pursuant to 15 U.S.C. § 15.

[7] Section 1 of the Sherman Act provides that HN7[] "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2002).

[8] The Donnelly Act provides: HN8[] "Every contract, agreement, arrangement or combination whereby . . . competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void." N.Y. Gen. Bus. § 340 (2002).

The Sherman Act and Donnelly Act claims are discussed as if one claim because HN9[] "New York's ***antitrust law*** . . . is 'modeled on the Sherman Act and should be construed in light of federal precedent.'" Granite Partners, L.P. v. Bear Stearns & Co., 17 F. Supp. 2d 275, 298 (S.D.N.Y. 1998)(quoting Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 254 (S.D.N.Y. 1995)).

many auctions. Thus, sellers did not receive competitive prices for their stamps. Stolow has standing because he has sufficiently alleged that the bid-rigging scheme resulted in antitrust injuries.

C. Claim III: Conspiracy

Defendants next challenge Stolow's claim that the Auction Houses "conspired together and maliciously and wilfully entered into a scheme to rig and manipulate" stamp auctions. Am. Compl. P **[**14]** 70. Stolow also claims that the Trade Associations "aided and supported the wrongful conspiracy by failing to police and rectify the legal practices of the stamp industry." *Id. P 72*. Finally, Stolow claims that Greg Manning aided and abetted the conspiracy.

HN10[] Although there is no substantive tort of conspiracy under New York law, a plaintiff may allege conspiracy to connect the actions of separate defendants with an otherwise actionable tort. *See* *Hi Pockets, Inc. v. Music Conservatory of Westchester, Inc., 192 F. Supp. 2d 143, 157 (S.D.N.Y. 2002)*; *Alexander & Alexander of New York, Inc. v. Fritzen, 68 N.Y.2d 968, 510 N.Y.S.2d 546, 547, 503 N.E.2d 102 (1986)*. If a conspiracy claim does not have an underlying actionable tort, it must be dismissed. *See* *Hi Pockets, 192 F. Supp. 2d at 157*.

The Amended Complaint does not allege an underlying actionable tort to support the conspiracy claim. Claim VI, which alleges fraud, is Stolow's only tort claim. However, because the fraud claim is dismissed, *see infra* Part II.F, the conspiracy claim against the Auction Houses and the Trade Associations is also dismissed. For the same reason, the **[**15]** aiding and abetting claim against Greg Manning is also dismissed.

[*245] D. Claim IV: Greg Manning Auctions Inc.

Claim IV is brought solely against defendant Greg Manning Auctions Inc. It alleges "that Greg Manning participated directly in the Ring by financing the purchase of stamps by defendant Davitt Felder." Am. Compl. P 76. In addition, "Felder transferred or turned over the stamps he purchased as part of the Ring to Greg Manning for resale in Greg Manning's auctions, Manning, Ivy & Mader or in private sales to the damage of plaintiff . . . ." *Id. P 77*. This claim does not specify any law that was violated nor the grounds on which Stolow is entitled to relief. To the extent that this claim alleges antitrust, fraud, RICO, or conspiracy violations, it is duplicative of the other claims. As a result, this claim must be dismissed. *See* *Lewis v. Rosenfeld, 138 F. Supp. 2d 466, 479 (S.D.N.Y. 2001)* (dismissing ***HN11***[] civil conspiracy claim where "conspiracy claim is duplicative of the breach of fiduciary duty and the common law fraud claims").

E. Claim V: RICO Violations

1. *Sections 1962(a)* and *(b)*

a. Standing

HN12[] "The RICO civil liability provision **[**16]** confers standing on 'any person injured in his business or property by reason of a violation of *section 1962*.'" *Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23 (2d Cir. 1990)* (quoting *18 U.S.C. § 1964(c)*). A "'plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property *by the conduct constituting the violation*.'" *Ouaknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990)* (emphasis in original) (quoting *Sedima v. Imrex Co., Inc., 473 U.S. 479, 497, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985))*.

HN13[] *Section 1962(a)* prohibits any person who derived income from a pattern of racketeering activity from investing that income in an "enterprise", as defined by the statute. *See* *18 U.S.C. §§ 1961(4)*, *1962(a) (2002)*; *Ouaknine, 897 F.2d at 83*; *Allen v. New World Coffee, Inc., 2002 U.S. Dist. LEXIS 4624*, No. 00 Civ. 2610, 2002 WL 432685, at *2 (S.D.N.Y. Mar. 19, 2002). "The essence of a violation of *§ 1962(a)* is not [the] commission of predicate acts but [the] investment of racketeering income." *Ouaknine, 897 F.2d at 83*. **[**17]** [9] Thus, to have standing to bring "a claim for civil damages under section 1962(a), a plaintiff must allege injury from defendants' investment of racketeering income in an enterprise." *Id. See also* *Fogie v. Thorn Americans, Inc., 190 F.3d 889, 895 (8th Cir. 1999)* ("RICO gives only individuals who have suffered injury from the use or investment of racketeering income standing to bring a civil suit under §§ 1962(a) and 1964(c)."); *Vemco, Inc. v. Camardella, 23 F.3d 129, 132 (6th Cir. 1994)*; *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992)*; *Parker & Parsley Petroleum v. Dresser Indus., 972 F.2d 580, 584 (5th Cir. 1992)*; *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 291 U.S. App. D.C. 303, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991)*; *Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149-51 (10th Cir. 1989)*.

[18]** ***HN15***[] Pursuant to section 1962(b), it is unlawful for "any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control **[*246]** of any enterprise . . . ." 18 U.S.C. § 1962(b). The purpose of this statute is "to prohibit the takeover of a legitimate business through racketeering, typically extortion or loansharking." *Allen, 2002 U.S. Dist. LEXIS 4624, 2002 WL 432685*, at *5. Similar to the investment injury requirement of section 1962(a), a plaintiff must suffer an acquisition or maintenance injury to have standing to sue under section 1962(b). *See* *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1063 (2d Cir. 1996)* (dismissing section 1962(b) claim where plaintiff did not allege injury from defendants' acquisition or maintenance of a telephone company enterprise), *rev'd on other grounds*, *525 U.S. 128, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*. Therefore, to have standing under section 1962(b), a plaintiff must allege injury arising from the acquisition or maintenance of any interest in or control of an enterprise. These injuries must be distinct from those resulting from the commission of the predicate acts. *See id.*; *Kaczmarek v. International Bus. Machs., Corp., 30 F. Supp. 2d 626, 629 (S.D.N.Y. 1998)* **[**19]** (finding no maintenance or acquisition injury where plaintiff only alleges injury resulting from the existence of the enterprise and the commission of predicate acts).

b. Stolow Lacks Standing to Bring Claims Under *Sections 1962(a)* and *(b)*

Stolow does not allege an injury from the Stamp Dealers' and Auction Houses' investment of racketeering income in the alleged enterprise. [10] **[**20]** The Amended Complaint only alleges that "as a result of the pattern of racketeering activity, plaintiff suffered damages to business and property." Am. Compl. P 83. Stolow's RICO Statement explicitly states that he does not know how any income derived from the enterprise was used or invested. *See* RICO Statement, Ex. C to Trade Associations' Notice of Motion, P 11. [11] As a result, the section 1962(a) claim must be dismissed for lack of standing. *See* *Ouaknine, 897 F.2d at 83*.

Similarly, Stolow fails to allege an acquisition or maintenance injury distinct from injury caused by commission of the predicate acts. As alleged, Stolow's injury resulted from defendants' bid-rigging scheme, which is based on the predicate acts of mail and wire fraud. *See* Am. Compl. PP 78-85. This injury is not a separate and distinct injury

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[9] *18 U.S.C. § 1962(a)* provides:

> ***HN14***[] It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[10] Stolow adequately alleges that defendants constitute an enterprise. *See* 18 U.S.C. § 1961(4); *United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*; *Feinberg v. Katz, 2002 U.S. Dist. LEXIS 13771*, No. 99 Civ. 45, 2002 WL 1751135, at *12 (S.D.N.Y. July 26, 2002)(citing *Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10, 18 (2d Cir. 1987))*. He asserts that the Stamp Dealers were a group of individuals who formed the Ring for the purpose of bid-rigging. *See* Am. Compl. P 13. The Auction Houses are described as a group of corporations that worked together to assist the Ring in the bid-rigging scheme. *See* *id.* P 14. Together these individuals and corporations were an association-in-fact operating as an enterprise engaged in the predicate acts of mail and wire fraud. *See* *id.* P 80.

[11] Paragraph 11(b) of the RICO Statement asks Stolow to "describe the use or investment of [the racketeering] income." Stolow's response states "Not known."

caused by the acquisition or maintenance of an alleged enterprise. ***HN16***[] "Without a distinct 'acquisition injury,' [a plaintiff] cannot state a cause of action under subsection 1962(b)." *Allen, 2002 U.S. Dist. LEXIS 4624, 2002 WL 432685*, at *5 (quoting *Discon, 93 F.3d at 1063*). As a result, Stolow lacks standing to bring the *section 1962(b)* claim, which is therefore dismissed.

2. *Section 1962(c)*

a. Standing

HN17[] Pursuant to *section 1962(c)*, it is unlawful for "any person employed by or associated **[*247]** with any [RICO] enterprise . . . to conduct or participate, directly or indirectly, **[**21]** in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." *18 U.S.C. § 1962(c)*. A plaintiff has standing to bring a *section 1962(c)* claim if he has been injured in his business or property by a defendant conducting the affairs of an enterprise through a pattern of racketeering activity. *See* *Sedima, 473 U.S. at 496-97*; *Ouaknine, 897 F.2d at 83*.

HN18[] If a plaintiff has standing, a *section 1962(c)* claim must also allege the existence of two distinct entities: a "person" and an "enterprise." The enterprise cannot simply be the "person" referred to by a different name. *See* *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 150 L. Ed. 2d 198, 121 S. Ct. 2087 (2001)*. A corporate entity may be held liable as a RICO person "where it associates with others to form an enterprise that is sufficiently distinct from itself." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994)*.

b. Stolow Has Standing to Bring a Claim Under *Section 1962(c)*

Stolow has alleged facts showing that he has standing to bring the *section 1962(a)* **[**22]** claim against the Stamp Dealers and Auction Houses. He sufficiently alleges a RICO violation where "the pattern of racketeering engaged in by defendants [that] involved fraudulent acts in support of the [bid-rigging] scheme constituting mail fraud . . . and wire fraud. . . ." RICO Statement P 2. In addition, Stolow alleges that "as a result of the illegal activities in violation of the RICO statute . . . plaintiff was driven out of business." *Id. P 15*. This is an adequate allegation of injury to Stolow's business caused by the Stamp Dealers and Auction Houses conducting the affairs of an enterprise through a pattern of racketeering actitivy.

Also, Stolow has sufficiently alleged that the bidrigging enterprise is distinct from each defendant. Unlike enterprises that only consist of a corporation and its employees, here the bid-rigging enterprise is an amalgam of unrelated individual defendants and corporations. *See* *Kushner, 533 U.S. at 166* (determining whether sole shareholder of corporation was a "person" distinct from the enterprise); *Riverwoods, 30 F.3d at 345* (determining whether distinctness requirement satisfied where enterprise consisted **[**23]** of corporation and its officers). The enterprise consists of nine corporations and seven individuals, all of whom committed the predicate acts of mail and wire fraud. *See* RICO Statement P 2. Neither Stolow nor defendants have alleged that all of the individuals are merely employees or agents of the corporations. Instead, Stolow claims that "all of the defendants acted individually and in consort [sic] to support the illegal enterprise and are members of the enterprise." *Id. P 6*. Stolow has standing and has properly pled his *section 1962(c)* claim. Accordingly, the motion to dismiss this claim is denied. [12]

F. Claim VI: Fraud

1. Pleading Fraud

[24]** ***HN20***[] Under *Rule 9(b)*, in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*. The plaintiff must allege facts supporting the essential elements of the fraud claim. *See* *Jose Armando Bermudez & Co. v. **[*248]** Bermudez Int'l, Inc., 2001*

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[12] Stolow also brings a claim under ***HN19***[] *section 1962(d)*, which makes it unlawful for any person to conspire to violate any provision of *section 1962*. *See* Am. Compl. PP 78-85; RICO Statement P 14. Because Stolow has alleged that two or more persons agreed together to violate *section 1962(c)*, the motion to dismiss the *section 1962(d)* claim is denied.

U.S. Dist. LEXIS 18121, No. 99 Civ. 9346, 2001 WL 1382582, at *3 (S.D.N.Y. Nov. 6, 2001) (citing Learning Works, Inc. v. Learning Annex, Inc., 830 F.2d 541, 546 (4th Cir. 1987)).

Stolow brings a common law fraudulent concealment claim against the Stamp Dealers and the Auction Houses, which **HN21**[] requires him to allege facts showing: "(1) that the defendant failed to disclose material information that [it] had a duty to disclose, '(2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of the reliance.'" *Bermuda Container Line Ltd. v. International Longshoremen's Assoc., AFL-CIO, 192 F.3d 250, 258 (2d Cir. 1999)* (quoting *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l* Bank, 57 F.3d 146, 153 (2d Cir. 1995)). **[**25]**

HN22[] "A duty to disclose generally arises in one of three ways: (1) when one party makes a partial or incomplete statement that requires clarification; (2) when the parties are in a fiduciary or confidential relationship; or (3) where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge." *All American Adjusters, Inc. v. Acceleration Nat'l* Ins. Co., 1997 U.S. Dist. LEXIS 18685, No. 96 Civ. 9344, 1997 WL 732445, at *7 (S.D.N.Y. Nov. 25, 1997) (internal quotation marks omitted); *see also* Brass v. Am. Film Techns., 987 F.2d 142, 150 (2d Cir. 1993).

Next, **HN23**[] a plaintiff must allege that he actually relied on the purported fraudulent statements or omissions. *See Banque*, 57 F.3d at 156. "'Reasonable, detrimental reliance upon a misrepresentation is an essential element of a cause of action for fraud, and such reliance must be pleaded with particularity.'" Bermudez, 2001 U.S. Dist. LEXIS 18121, 2001 WL 1382582, at *3 (quoting Learning Works, 830 F.2d at 546). "A party's reliance on false statements or omissions is not reasonable or justifiable if the party has reason to **[**26]** believe that the representations may be false but fails to inquire into their accuracy." Schlaifer Nance & Co. v. Estate of Warhol, 927 F. Supp. 650, 660 (S.D.N.Y. 1996).

2. Stolow Has Not Alleged a Duty to Disclose or Reasonable Reliance

Stolow does not allege facts suggesting that defendants made a partial or incomplete statement nor does he allege facts indicating that he was in a fiduciary or confidential relationship with the Stamp Dealers or Auction Houses. In addition, Stolow does not allege facts supporting a claim that defendants possessed superior knowledge not readily known to others. [13]

[27]** The Amended Complaint does not include any allegations from which a duty to disclose can be inferred. According to Stolow, the Stamp Dealers were his competitors. There are no factual allegations of a special relationship among Stolow and his competitors. Similarly, Stolow attended auctions conducted by the Auction Houses, but there are no allegations suggesting any special duty owed to bidders by the Auction Houses. Consequently, the Amended Complaint fails to allege an essential element of fraud, a result of which is that the claim must be dismissed. There is, however, another ground for dismissing this claim.

[*249] Stolow has not pled reasonable reliance because he acknowledges that he was aware of the bid-rigging. *See* Am. Compl. P 54. Essentially, Stolow alleges that he was injured because he could not bid on stamp lots "when aware [that] the Ring was bidding, or even aware that a Ring member viewed the lot." *Id.* Indeed, he states that competition as a whole was affected because it was widely known when Ring members rigged bids. *See id.* Furthermore, Stolow was aware of the Ring's bidrigging activities, as a result of which, *he* prohibited Ring members from bidding **[**28]** at *his* auctions. *See* id. P 13 (Defendants' actions included "boycotting plaintiff's own auctions, because of *his* refusal to permit the Ring to bid at his sales.") (emphasis added). After devoting numerous pages of the Amended Complaint to alleging that he was aware of the bid-rigging scheme, Stolow attempts to satisfy the

[13] **HN24**[] A duty to disclose based on superior knowledge "ordinarily arises only in the context of business negotiations where parties are entering a contract." Ray Larsen Assocs., Inc. v. Nikko America, Inc., 1996 U.S. Dist. LEXIS 11163, No. 89 Civ. 2809, 1996 WL 442799, at *5 (S.D.N.Y. Aug. 6, 1996). *See also Banque Arabe*, 57 F.3d at 155; Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 123 (2d Cir. 1984); Williams v. Bank Leumi Trust Co., 1998 U.S. Dist. LEXIS 10636, No. 96 Civ. 6695, 1998 WL 397887, at *4 (S.D.N.Y. July 15, 1998).

fraud pleading requirement by suddenly inserting one sentence denying any knowledge of the scheme. *See* id. P 89 ("Plaintiff was not aware that . . . the Ring members in consort [sic] and aided and abetted by the auction house did not permit him to purchase stamps at public auctions for resale in his own sales . . . ."). This awkward and inconsistent denial does not negate Stolow's admission that he was aware of the Ring's activities. This portion of the Amended Complaint is a perfect example of a plaintiff pleading himself out of court by alleging information that defeats his claim. *See* Conn v. GATX Terminals Corp., 18 F.3d 417, 419 (7th Cir. 1994).

G. Claim VII: Aiding and Abetting

Finally, the Amended Complaint alleges that the ASDA and APS aided and abetted the illegal activities of the Stamp Dealers and Auction Houses **[**29]** by failing to investigate the matter, in violation of the Trade Associations' bylaws. It is unclear whether Stolow is seeking damages for the Trade Associations' violation of their own bylaws or simply for the Associations' role as aiders and abettors. In any event, the claim is dismissed on both grounds.

1. Bylaws Violation

HN25[] The bylaws of a corporation constitute a contract between a corporation and its members. *See ALH Props. Ten, Inc. v. 306-100th* Street Owners Corp., 191 A.D.2d 1, 600 N.Y.S.2d 443, 452 (1st Dep't 1993); Procopio v. Fisher, 83 A.D.2d 757, 443 N.Y.S.2d 492, 495 (4th Dep't 1981). Similarly, the "bylaws of an unincorporated association express the terms of a contract which define privileges secured and the duties assumed by those who have become members." Desir v. Spano, 259 A.D.2d 749, 687 N.Y.S.2d 411, 411 (2d Dep't 1999). A third-party, who is not a member of the association or corporation nor a party to the bylaws, lacks standing to bring suit against an organization for violation of its bylaws. *See Local 1-2,* Util. Workers of America v. Helmer, 734 F. Supp. 652, 653 (S.D.N.Y. 1990) (The **[**30]** "By-Laws violation [is] dismissed for lack of standing because [counter-claim plaintiff] is not a member of the Union and not a party to the By-Laws contract."). Were it otherwise, bylaws would subject organizations to unlimited liability resulting from duties owed to third-parties who have no relationship to the organization.

Stolow alleges that pursuant to the bylaws of the Trade Associations, each organization agreed to "assist governmental agencies in the prosecution of violations of laws relating to philatelic materials." Am. Compl. PP 92, 94. According to Stolow, he notified the ASDA in writing of the illegal activities of the Ring, but the ASDA refused to act because one or more of its board members were involved in the illegal activity. *See* id. P 97. Similarly, the APS was aware or should have been aware of the Ring's activities, but also failed to investigate. **[*250]** *See* id. P 9. Nonetheless, this claim must be dismissed because Stolow does not allege that he is a member of either of these associations. He is owed no duty under their bylaws and therefore lacks standing to bring an action for bylaws violation.

2. "**Substantial Assistance**"

HN26[] To allege aiding **[**31]** and abetting, a plaintiff must claim: (1) a violation of law by the primary party; (2) knowledge of the violation by the aider and abettor; and (3) "substantial assistance" by the aider and abettor in achieving the primary violation. *See, e.g.*, Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983); *ITT, an Int'l* Inv. Trust v. Cornfeld, 619 F.2d 909, 923 (2d Cir. 1980); Cromer Fin. Ltd. v. Berger, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001). Because the Amended Complaint excludes the Trade Associations from the RICO claim and because Claims III, IV, and VI are dismissed, the only remaining violations that the Trade Associations could have aided and abetted are the antitrust claims. However, Stolow does not allege any facts supporting the claim that the Trade Associations provided substantial assistance to the Stamp Dealers and Auction Houses with respect to these violations.

HN27[] Inaction by a party is not typically considered substantial assistance. *See* Armstrong, 699 F.2d at 91. "Inaction is 'actionable participation only when the defendant owes a fiduciary duty directly to the plaintiff.'" Cromer, 137 F. Supp. 2d at 470 **[**32]** (discussing inaction in the fraud context)(quoting Kolbeck v. LIT Am. Inc., 939 F. Supp. 240, 247 (S.D.N.Y. 1996)). As already discussed, the Trade Associations did not owe Stolow any duty to investigate the Stamp Dealers and Auction Houses. The Trade Associations' failure to investigate is not sufficient affirmative assistance to qualify them as aiders and abettors. Consequently, this claim is dismissed.

III. SUMMARY JUDGMENT

The Stamp Dealers and Auction Houses move for summary judgment on the remaining antitrust and RICO claims (Claims I and II and part of V). Defendants contend that based on the undisputed facts, Stolow's claims are time-barred. *See* Auction Houses Mem. at 4-7.

A. Legal Standard

HN28[] *Rule 56 of the Federal Rules of Civil Procedure* provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. "An issue of fact is 'material' for these purposes if it might affect the outcome of the suit under **[**33]** the governing law [while] an issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Shade v. Housing Auth. of City of New Haven, 251 F.3d 307, 314 (2d Cir. 2001)* (internal quotation marks and citations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (internal quotation marks and citations omitted).

HN29[] In assessing the record to determine whether genuine issues of material fact are in dispute, a court must resolve all ambiguities and draw all reasonable factual inferences in favor of the non-moving party. *See* *Parkinson v. Cozzolino, 238 F.3d 145, 150 (2d Cir. 2001)*. "Although the moving party bears the initial burden of establishing **[*251]** that there are no genuine issues of material fact, once such a showing is made, the nonmovant must 'set forth specific facts showing that there is a genuine issue for trial.'" *Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000)* **[**34]** (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*.

The non-moving party may not, however, "rest upon . . . mere allegations or denials." *St. Pierre v. Dyer, 208 F.3d 394, 404 (2d Cir. 2000)*. "Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll., 196 F.3d 435, 452 (2d Cir. 1999)*; *see also* *Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998)* ("If the evidence presented by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted.") (quotation marks, citations, and alterations omitted). Mere conclusory statements, conjecture or speculation cannot by themselves create a genuine issue of material fact. *See* *Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996)*.

B. Antitrust Claims

1. Applicable Statute of Limitations

HN30[] Pursuant to section 4B of the Clayton Act and *section 340(5) of the New York General Business Law*, private antitrust suits are governed by a **[**35]** four-year statute of limitations. *See 15 U.S.C. § 15b*; *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 138 L. Ed. 2d 373, 117 S. Ct. 1984 (1997)*. ***HN31***[] Antitrust actions accrue when a defendant commits an act that injures plaintiff's business in violation of the antitrust statutes. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*. When there is an alleged continuing antitrust conspiracy, the statute of limitations "has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of that act." *Higgins v. New York Stock Exch. Inc., 942 F.2d 829, 832 (2d Cir. 1991)*. However, "the commission of a 'separate and new overt act' will not permit the plaintiff to recover for the injury caused by the old overt acts that do not fall within the limitations period." *Nine West Shoes Antitrust Litigation, 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000)* (quoting *Klehr, 521 U.S. at 189*). **[**36]**

HN32[] The statute of limitations in a private antitrust suit is tolled "whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws." *15 U.S.C. § 16(i)*. [14] Also, the statute of limitations may be tolled under the doctrine of fraudulent concealment. A "plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988)*.

[37] [*252] 2. Stolow's Antitrust Claims Are Time-Barred**

Stolow's Sherman Act and Donnelly Act claims are time-barred because they were not brought within the four-year statute of limitations period. Stolow "had finally been driven out of business" by August 14, 1997. 6/9/00 Deposition of Gregory Stolow ("Stolow Dep."), Ex. F to 7/24/02 Declaration of Carol Meltzer, General Counsel of Greg Manning Auctions Inc. and Ivy & Mader Philatelic Auctions, Inc. ("Meltzer Decl."), at 86. *See also* 8/14/97 Letter to John Apfelbaum from Peter T. Goodrich ("Goodrich Letter"), Ex. E to Meltzer Decl., at 1. Therefore, August 14, 1997 is the latest possible date that he could have suffered a business injury, and the latest date that an antitrust cause of action accrued. *See* *Zenith, 401 U.S. at 338*. As a result, the statute of limitations had run by August 14, 2001. Stolow did not file his Complaint until April 4, 2002.

Despite Stolow's new contention that he was never driven out of business, there is no genuine issue of material fact as to the date of his injury. Stolow has repeatedly admitted that he was driven out of business by defendants' conduct. In a letter dated August 14, 1997, Stolow's **[**38]** attorney, Peter Goodrich, wrote to defendant John Apfelbaum, stating that Stolow had been driven out of business. *See* Goodrich Letter at 1; *Fed. R. Evid. 801(d)(2)*. The letter further advises Apfelbaum that Stolow will pursue legal action to recoup $ 5 million for damages caused over ten years, unless Apfelbaum negotiates a settlement. *See id.* The parties did not negotiate a settlement and Stolow did not pursue legal action at that time.

Stolow again admitted that he was driven out of business by 1997 during a deposition related to the New York Attorney General's investigation of the Ring in 2000. When the Assistant Attorney General asked Stolow why he initially decided to contact Goodrich, Stolow responded: "Well, I had finally been driven out of business by the ring by not being able to buy any products and I no longer felt pressured or afraid of retribution because I was out of the business so I went to the attorney and tried to see if I could sue them." Stolow Dep. at 86. He explained further that his family-owned businesses, J & H Stolow and Gold Medal Auctions, ended in 1989 and 1996, respectively. *See id. at 34-35*.

Most importantly, Stolow admits that he was driven **[**39]** out of business to support his overall theory of damages. In the Amended Complaint, he alleges how he was injured by defendants' misconduct, stating that "in summary [defendants'] activities drove plaintiff out of business." Am. Compl. P 56. Similarly, in his RICO statement, he claims that "as a result of [defendants'] illegal activities . . . plaintiff was driven out of business." RICO Statement P 16.

In response to the Stamp Dealers' and Auction Houses' summary judgment motion, Stolow now argues for the first time that he "is a stamp dealer uninterruptedly since the 1960's currently selling stamps out of his residence." Gregory Stolow's Statement of Material Facts Pursuant to Local Rule 56.1(b) ("Rule 56.1 Statement") P 1. The only support he cites for the contention that he was never driven out of business is his deposition testimony, where he describes himself as being a selfemployed stamp dealer operating out of his home. *See* Stolow Dep. at 28-29.

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[14] ***HN33***[] The statute of limitations is not tolled by State actions brought under the Clayton Act. Additionally, private actions brought under the Donnelly Act are not tolled by New York Attorney General proceedings. *See* *N.Y. Gen. Bus. Law § 342-c* (2002) (providing for the "tolling of the period of limitations by proceedings of the *United States*") (emphasis added).

However, during the same deposition he explains that he decided to consider legal action after he was finally driven out of business. *See* *id. at 86*.

Stolow's frequent admissions that he was driven out of business cannot **[**40]** be genuinely **[*253]** disputed by his unsupported, selfserving Rule 56.1 Statement conclusory statement that he remains in business. His new allegation does not create a genuine issue of material fact. *See Tadros v. Coleman, 717 F. Supp. 996, 1006 (S.D.N.Y. 1989)* ***HN34***[] ("Self-serving, conclusory allegations cannot defeat [a summary judgment motion]."). Moreover, this unsupported argument is "insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff, 196 F.3d at 452*.

Stolow contends that the statute of limitations for any injury suffered before 1998 was tolled by the commencement of the Department of Justice's ("DOJ") criminal action and by the doctrine of fraudulent concealment. *See* Memorandum of Law in Opposition to Auction Houses Mem. at 12. Both parties acknowledge that the DOJ did not begin its proceedings until 2002. *See* Affidavit of Gregory Stolow ("Stolow Aff."), Ex. A; Defendants Greg Manning Auctions, Inc., Ivy & Mader Philatelic Auctions, Inc., et al. Reply Memorandum at 4. Therefore, any injury that occurred before 1998 was already time-barred before the DOJ began its proceedings.

The doctrine of fraudulent concealment **[**41]** also fails to toll the statute of limitations. It is undisputed that Stolow was fully aware of the bid-rigging scheme no later than 1997. The Goodrich Letter informed Apfelbaum that Stolow knew that the Ring has rigged bids since "at least 1987." *See* Goodrich Letter at 1. In addition, on November 29, 1997, Stolow sent a letter to Greg Manning, detailing the bid-rigging and his intent to bring suit against the Ring and the Auction Houses. *See* 11/29/97 Letter to Greg Manning from Gregory Stolow, Ex. D to Stolow Aff., at 1. Because Stolow was aware of the scheme as early as 1997, the doctrine of fraudulent concealment cannot toll the statute of limitations.

C. RICO Claims

1. Applicable Statute of Limitations Although no statute of limitations is explicitly set forth in the RICO statute, the Supreme Court has held that ***HN35***[] civil RICO actions are subject to the four-year limitations period contained in section 4B of the Clayton Act. *See* *Klehr, 521 U.S. at 188-89*; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987)*. "The limitations period begins to run when the plaintiff discovers **[**42]** or should have discovered the RICO injury." *In re Merrill Lynch Ltd. P'ships.* *Litig., 154 F.3d 56, 60 (2d Cir. 1998)*. "This Court recognizes a 'separate accrual' rule under which a new claim accrues and the four-year limitation period begins anew each time a plaintiff discovers or should have discovered a new and independent injury." *Id. at 59*. Under the separate accrual rule, when a plaintiff is continuously injured by an underlying RICO violation, he may only recover for injuries discovered or discoverable within four years of the time suit is brought. *See* *Bingham v. Zolt, 66 F.3d 553, 560 (2d Cir. 1995)*.

2. Stolow's RICO Claims Are Time-Barred

As discussed in detail in Part III.B.2, there is no genuine issue of material fact concerning the date when Stolow's business was last injured by the alleged RICO violations. As a result, his claims under *sections 1962(c)* and *(d)* are not within the four-year statute of limitations and are dismissed. Furthermore, the doctrine of fraudulent concealment does not toll the statute of limitations for the reasons previously stated in Part III.B.2. [15]

[43] [*254] IV. CONCLUSION**

For the foregoing reasons, pursuant to *Rule 12(b)(6)*, the Trade Associations' motion to dismiss is granted and all claims against the Associations are hereby dismissed. The Stamp Dealers' and Auction Houses' *Rule 12(b)(6)*

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[15] Although Stolow's claims under *sections 1962(a)* and *(b)* have been dismissed for lack of standing, they are also dismissed as time-barred.

motion to dismiss is partially granted and their *Rule 56* motion for summary judgment is granted in full. Therefore, all claims against all defendants are dismissed. The Clerk of the Court is directed to close these motions and this case.

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

February 14, 2003

Kovac v. Crooked River Ranch Club & Maint. Ass'n

Court of Appeals of Oregon

September 23, 2002, Argued and Submitted ; February 19, 2003, Filed

A102661

Reporter

186 Ore. App. 545 *; 63 P.3d 1197 **; 2003 Ore. App. LEXIS 253 ***

TOM KOVAC, dba Ranch Realty, Appellant, v. CROOKED RIVER RANCH CLUB AND MAINTENANCE ASSOCIATION, a not for profit corporation, Respondent. CROOKED RIVER RANCH CLUB AND MAINTENANCE ASSOCIATION, a not for profit corporation, Counterclaim-Plaintiff, v. TOM KOVAC, dba Ranch Realty, Counterclaim-Defendant.

Subsequent History: Review denied by *Kovac v. Crooked River Ranch Club, 336 Or. 16, 77 P.3d 319, 2003 Ore. LEXIS 704 (2003)*

Review granted by, *Modified by Kovac v. Crooked River Ranch Club & Maint. Ass'n, 2004 Ore. LEXIS 401 (Or., July 1, 2004)*

Prior History: [*1]** 96-CV-0060. Appeal from Circuit Court, Jefferson County. Gary Thompson, Judge.

Disposition: Supplemental judgment vacated and remanded; otherwise affirmed.

Core Terms

attorney's fees, antitrust, Architectural, summary judgment, planning commission, planning department, trial court, supplemental, immune

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Summary Judgment, Appellate Review**

Where the moving party prevails on its motion for summary judgment, the appellate court views the facts and inferences drawn from them in the light most favorable to the nonmoving party. The court then upholds the judgment if there is no genuine issue of material fact and the association is entitled to judgment as a matter of law. Or. R. Civ. P. 47 C.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Exemptions & Immunities, Labor**

Oregon's "little Sherman Act," *Or. Rev. Stat. § 646.725*, prohibits every contract, combination or conspiracy in restraint of trade.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine immunizes, on First Amendment grounds, attempts to persuade government to make policy decisions even when those decisions might have an anticompetitive intent and effect.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN4[] **Public Enforcement, State Civil Actions**

Conduct that is permitted under antitrust laws may not be punished as tortious interference; such common law "back-dooring" would subvert the function of ***antitrust law*** in defining, and regulating, the boundary between permissible and impermissible competitive conduct.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

HN5[] **Costs & Attorney Fees, State Regulation**

Pursuant to *Or. Rev. Stat. § 646.780(3)(a)*: The court may award reasonable attorney fees, expert witness fees and investigative costs to the prevailing party in an antitrust case.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

***HN6*[]** **Private Actions, Costs & Attorney Fees**

An award of attorney fees under *Or. Rev. Stat. § 646.780(3)(a)* must also meet the requirements of *Or. Rev. Stat. § 20.075(1)*, which lists several factors the court must consider in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees. The factors include such other factors as the court may consider appropriate under the circumstances of the case.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

***HN7*[]** **Standards of Review, Abuse of Discretion**

The appellate court reviews an award of attorney fees under *Or. Rev. Stat. § 20.075* for abuse of discretion. *Or. Rev. Stat. § 20.075(3)*. However, a court exercising that discretion must identify the facts and legal criteria that the circumstances of the particular case require the court to address in making its decision to award or deny attorney fees. Those findings need not be complex or lengthy; they need not include criteria immaterial to the decision and not used by the trial court. The purpose of requiring this specification of facts and legal standards is to permit "meaningful appellate review."

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

***HN8*[]** **Private Actions, Costs & Attorney Fees**

Regarding an award of attorney fees, costs, and disbursements, to review the court's decision meaningfully, the appellate court must know both the facts and the legal criteria on which the decision was based.

Counsel: Milo Petranovich argued the cause for appellant. With him on the brief was Lane Powell Spears Lubersky LLP.

I. Franklin Hunsaker argued the cause for respondent. With him on the brief were Joel Wilson and Bullivant Houser Bailey, A Professional Corporation.

Judges: Before Edmonds, Presiding Judge, and Kistler and Schuman, Judges.

Opinion by: SCHUMAN

Opinion

[1198]** **[*547]** SCHUMAN, J.

Jefferson County denied plaintiff's application for a permit to operate his real estate business out of his residence in a development called Crooked River Ranch. Alleging collusion between the county and the development's homeowner association, plaintiff sued the association for "Combination in Restraint of Trade" and "Interference with Business Relationship." The trial court granted the association's motion for summary judgment and, in a supplemental judgment, awarded costs, disbursements, and attorney fees. On appeal, we affirm the judgment, vacate the supplemental judgment, and remand.

HN1[] Because the association prevailed on its motion for summary judgment, we view the facts and **[***2]** inferences drawn from them in the light most favorable to plaintiff; we then uphold the judgment if there is no genuine issue of material fact and the association is entitled to judgment as a matter of law. *ORCP 47 C*; *Jones v. General Motors Corp., 325 Ore. 404, 408, 939 P.2d 608 (1997)*.

Crooked River Ranch (Ranch), a residential development in Jefferson

County, operates under covenants, conditions, and restrictions. Those "CC&Rs" establish a homeowner association called the Crooked River Ranch Club and Maintenance Association (defendant). On February 13, 1995, plaintiff, a licensed real estate agent, submitted to defendant's architectural committee a request to use part of his rented house on Ranch property as an office for his business. He also submitted the request to the Jefferson County Planning Department. At the time, two other real estate businesses operated on Ranch property, one out of a home.

Plaintiff submitted his request to the architectural committee not because it had authority to deny or grant conditional use permits (the committee's authority was limited to design features), but pursuant to an apparent agreement between the county and defendant. **[***3]** As described by the architectural committee in an article in defendant's newsletter, the "agreement is that **everything** that happens with Crooked River Ranch property must first go through the **[*548]** Architectural Committee for approval." (Emphasis in original.)

Defendant's committee considered the request and, on April 13, 1995, wrote a letter to a member of the county's planning department stating, "the Architectural Committee agreed to REJECT this application. The reasons for this rejection are for 1) safety; 2) non-compliance of County Zone and the CC&Rs * * *; and 3) discrepancies in the application submitted." (Underscoring in original.) Five single-spaced pages of "discrepancies" **[**1199]** followed. Defendant's board of directors sent its own letter to the county's planning department, declaring its support of the architectural committee's letter. Fifty-five other interested citizens also submitted letters, most of which supported plaintiff's application.

The county's planning department then prepared a nine-page "Staff Report" to the Jefferson County Planning Commission (the commission), recommending that the commissioners approve the application subject to several conditions. **[***4]** On April 27, following public notice, the commission held a hearing. A planning department staff member presented the department's report. Nine citizens, including plaintiff, testified in favor of the application and 11 testified against. One of the opponents was a member of defendant's board of directors, who presented the architectural committee's letter and read it into the record. After further discussion, including a review of the criteria plaintiff would have to meet in order to receive approval, the commission voted four to one to deny the application. The stated reasons for the denial were that plaintiff's requested conditional use was "not * * * consistent with the Comprehensive Plan and the objectives of the Zoning Ordinance and other applicable policies of the County," that the use would not "preserve assets of a particular interest to the community," and that plaintiff did not establish that he had "a bona fide intent and financial capability to use and develop the land as proposed to insure that the Conditional Use Permit will be acted on in an appropriate manner."

Plaintiff appealed the denial to the Jefferson County Board of Commissioners (board). The board, after public **[***5]** notice, held a hearing on July 26, 1995. After testimony from **[*549]** opponents and proponents and review of written testimony as well as staff recommendations, the board deliberated and voted to deny the application based on the following findings:

> "1. Public Safety, ingress and egress at the location site was determined to be a hazard.
>
> "2. On the face of the application, that the applicant did not satisfy the definition of a Home Occupation because he was not going to reside in the dwelling as a full time occupant.
>
> "3. That the applicant failed to meet Criteria # 4, the proposal will preserve assets of particular interest to the community."

The board mailed notice of its decision to plaintiff on October 18, 1995. In addition to informing him of the denial, the notice also stated, "If you feel that not all the facts have been presented or the information is incorrect, this decision may be appealed to the Land Use Board of Appeals (LUBA)." Plaintiff did not appeal to LUBA. Instead, he filed the present action against defendant in circuit court.

Plaintiff first assigns error to the trial court's grant of summary judgment on the antitrust claim. That claim rested on plaintiff's **[***6]** three-part theory alleging, first, that the evidence raises a question of fact regarding whether defendant and the county had an agreement under which the county delegated land use decisions on the Ranch to defendant; second, that such an agreement amounted to a violation of ***HN2***[] Oregon's "little Sherman Act," *ORS 646.725*, which prohibits "every contract, combination * * * or conspiracy in restraint of trade"; and third, that defendant's anticompetitive conduct was not immune from antitrust liability under the so-called ***HN3***[] *Noerr-Pennington* doctrine, which immunizes, on First Amendment grounds, attempts to persuade government to make policy decisions even when those decisions might have an anticompetitive intent and effect. *See* *Eastern R. Conf. v. Noerr Motor, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *see also* *ORS 646.715(2)* (federal court decisions are persuasive authority in construing Oregon ***antitrust law***). The trial court rejected that theory, holding that defendant's injury, if any, "was a result of the **[***7]** **[*550]** denial both by the Jefferson County Planning Commission and by the Jefferson County Commission. The Court believes that the Defendant's Motion for Summary Judgment, based on the *Noerr-Pennington* doctrine is correct."

[1200]** We agree. We need not reach plaintiff's contentions that an agreement to delegate governmental standard-setting authority to a private entity violates Oregon's antitrust statute and does not qualify for *Noerr-Pennington* immunity. *See* *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (so holding where legislature adopted trade group's standards as law). Nor need we reach defendant's counter-argument that such a holding in the present case "would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* (citation omitted). Rather, plaintiff's theory suffers from a more basic flaw. It depends on the existence of an agreement between county officials and defendant under which the county abdicated its **[***8]** own authority to render a decision on plaintiff's application and gave that authority to defendant. [1] On the evidence in the summary judgment record and the inferences flowing from it, no rational factfinder could believe that such an agreement existed.

Plaintiff identifies several items as evidence of the alleged anticompetitive agreement. The first is the article in defendant's newsletter quoted above referring to "an agreement that **everything** that happens with Crooked River Ranch property must first go through the Architectural Committee for approval" and that "**ALL** businesses located within homes of Crooked River Ranch residents must come through the Architectural Committee **[***9]** for

[1] Plaintiff expressly disavows any challenge based on an agreement among members of defendant association, stating, "Plaintiff does not claim that a group of Ranch residents conspired or agreed to restrain trade * * *. The antitrust violation here is the anticompetitive agreement between the County and the Ranch."

approval." (Emphasis in original.) The plain meaning of those statements is that Ranch rules require residents to submit building and land use proposals to the committee, presumably **[*551]** before submission to any governmental entities that also need to act on them, in what might be analogized to an "exhaustion of remedies" requirement. Because defendant's CC&Rs may be more stringent than county or state regulations, such an agreement is an efficient way to ensure that the county does not spend time and resources evaluating applications that defendant will subsequently deny. Nothing in either statement declares, hints, or even smacks of an agreement that the governmental entities have relinquished their independent and superseding decisional authority.

The second item of evidence is defendant's letter to the county planning commission stating that "the Architectural Committee agreed to REJECT this application." (Underscoring in original.) Again, that statement appears in a letter that is manifestly defendant's input to the county's decision-making process, informing official decision-makers of defendant's opinion and explaining defendant's reasons. It carries no implication that **[***10]** the county has agreed to rubber-stamp defendant's rejection.

The third item of evidence is a sentence contained in a 1992 report from the county planning commission recommending a change in the county's comprehensive land use plan. The sentence states, "It appears that, over time, the County and Crooked River Ranch Maintenance Association, through an informal agreement, allowed recreational use of lots and parcels on the Ranch." That statement occurred three years before the events in the present case, refers to a different issue, and, in any event, does not state or imply a delegation of governmental decision-making authority to defendant, but, at most, implies that the county was remiss in enforcement of its land use plan.

In short, a factfinder could not read that evidence to establish an agreement under which the county committed itself to follow defendant's recommendation unless the factfinder also could conclude that the exhaustive and thorough processes that the planning commission and the county commissioners went through were an elaborate sham and a conspiratorial farce. On this summary judgment record, no rational factfinder could so conclude. Defendant's actions amounted **[***11]** to **[**1201]** nothing more than constitutionally protected **[*552]** participation in the political process and were therefore immune from antitrust liability under the *Noerr-Pennington* doctrine. [2]

Plaintiff also assigns error to the trial court's grant of summary judgment on the "Interference with Business Advantage" claim. The trial court's letter opinion indicates that dismissal of the tort claim followed inevitably from dismissal of the antitrust claim. Again, we agree. The same rationale that underlies antitrust immunity in this case--concern for the free speech implications of penalizing political advocacy--applies with equal force with respect to the tort claim. Defendant's activities consist only of efforts to persuade the county to deny plaintiff's **[***12]** application for a conditional use permit. There are no allegations of defamation, solicitation, fraud, or any other form of speech activity the regulation of which could survive challenge under *Article I, section 8, of the Oregon Constitution* as "some historical exception that was well established when the first American guarantees of freedom of expression were adopted," nor is there an argument that "interference with business relationship" is such an exception. *State v. Robertson, 293 Ore. 402, 412, 649 P.2d 569 (1982)*. Further, as this court held in *Willamette Dental Group v. Oregon Dental Service, 130 Ore. App. 487, 499, 882 P.2d 637 (1994)*, *rev den*, *320 Ore. 508, 888 P.2d 569 (1995)*, ***HN4***[] conduct that is permitted under antitrust laws may not be punished as tortious interference; "such common law 'back-dooring' would subvert the function of ***antitrust law*** in defining, and regulating, the boundary between permissible and impermissible competitive conduct." The court did not err in granting summary judgment against plaintiff on its "Interference with Business Advantage" claim.

Finally, plaintiff assigns error to the supplemental judgment **[***13]** awarding attorney fees to defendant. Defendant argued for an award of $ 48,000 ***HN5***[] pursuant to *ORS 646.780(3)(a)*: "The court may award reasonable attorney **[*553]** fees, expert witness fees and investigative costs to the prevailing party [in an antitrust case]."

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[2] Defendant also contends that plaintiff cannot prevail under *ORS 646.725* because he claimed only damages personal to himself and did not claim "antitrust damages," that is, damages to competition. The trial court did not reach that issue, nor do we.

Defendant also sought fees under *ORS 20.105* on the ground that "there was no objectively reasonable basis for asserting the claim," but the trial court did not address that ground in its opinion. The court wrote:

> "Under *ORS 646.780(3)(a)*, in actions under the State's ***Antitrust law***, the Court may award reasonable attorneys fees, expert witness fees and investigative costs to the prevailing party. * * * The Plaintiff in this case elected, after losing an appeal to the Jefferson County [Board of Commissioners], not to appeal the matter to LUBA, but rather to file this action on an Antitrust basis. In reviewing the information that has been previously provided to the Court, it's the Court's opinion that if this matter was appealed to LUBA, that the Plaintiff had a better than average chance of prevailing before that body * * *."

The court subsequently **[***14]** entered a supplemental money judgment awarding $ 14,000 in attorney fees and $ 6,108 in costs and disbursements. On appeal, plaintiff maintains that no award of attorney fees is justified. Defendant does not contest the trial court's decision to award only $ 14,000 in fees instead of the $ 48,000 requested.

HN6[] An award of attorney fees under *ORS 646.780(3)(a)* must also meet the requirements of *ORS 20.075(1)*, which lists several factors the court must consider "in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees." The factors include "such other factors as the court may consider appropriate under the circumstances of the case." ***HN7***[] We review an award of attorney fees under *ORS 20.075* for abuse of discretion. *ORS 20.075(3)*. However, in *McCarthy v. Oregon Freeze Dry, Inc., 327 Ore. 185, 188, 957 P.2d 1200 (1998)*, the Supreme Court held that a court exercising that discretion must identify the "facts and legal criteria **[**1202]** that the circumstances **[***15]** of the particular case require the court to address in making its decision to award or deny attorney fees." Those findings need not be complex or lengthy; they need not include criteria immaterial to the decision and not used by the trial court. *Id.*; *Wright v. Jones, 155 Ore. App. 249, 252-53,* ***[*554]*** *964 P.2d 1048 (1998)*. The purpose of requiring this specification of facts and legal standards is to permit "meaningful appellate review." *McCarthy, 327 Ore. at 188*.

Under the foregoing precepts, we must remand this case. Although the court's letter opinion clearly states the fact on which it based its decision to award fees--plaintiff's decision to bring this action in circuit court instead of appealing to LUBA--the opinion does not specify the legal criteria to which that fact is relevant, nor does it provide a reviewable explanation of the connection between the fact and the criteria. ***HN8***[] To review the court's decision meaningfully, we must know both. *Kusyk v. Water Resources Dept., 164 Ore. App. 738, 746, 994 P.2d 798 (2000)* ("We cannot ascertain from the record on which statutory ground the trial court awarded fees nor the basis for making **[***16]** an award under that provision.").

Supplemental judgment vacated and remanded; otherwise affirmed.

End of Document

[In Town Hotels Ltd. Pshp. v. Marriott Int'l, Inc.](#)

United States District Court for the Southern District of West Virginia, Charleston Division

February 25, 2003, Decided ; February 25, 2003, Entered

CIVIL ACTION NO. 2:02-0481

Reporter
246 F. Supp. 2d 469 *; 2003 U.S. Dist. LEXIS 2703 **; 2003-1 Trade Cas. (CCH) P73,970

IN TOWN HOTELS LIMITED PARTNERSHIP, fka In Town Hotels, Ltd., and IN TOWN HOTELS, INC., Plaintiffs, v. MARRIOTT INTERNATIONAL, INC., and AVENDRA, LLC, Defendants.

Disposition: [1]** Defendants' motions to dismiss GRANTED in part and DENIED in part.

Core Terms

Hotels, antitrust, competitor, rebates, buyer, commercial bribery, vendors, anti trust law, allegations, Robinson-Patman Act, secret, cases, motion to dismiss, particularity, plaintiffs', purchasing, argues, seller, price discrimination, brokerage, counts, agency relationship, brokers, courts, dummy, receive payment, secret rebate, corruption, discounts, Unfair

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN1[ ] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

See *15 U.S.C.S. § 13(c)*.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN2[] Types of Price Discrimination, Brokerage, Commissions & Compensation

Section 2(c) (15 U.S.C.S. § 13(c)) of the Robinson-Patman Act prohibits brokerage or similar payments in the absence of services rendered for those payments. Section 2(c) is phrased broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination. Indeed, § 2(c) is intended to proscribe other practices such as the "bribing" of a seller's broker by the buyer. Thus, § 2(c) reaches commercial bribery as well as the use of dummy brokers to obtain indirect price discrimination.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN3[] Clayton Act, Claims

The private cause of action for antitrust violations is provided in § 4 of the Clayton Act, which states that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. 15 U.S.C.S. § 15(a). This means that not every private party who is somehow injured as a result of conduct forbidden by the antitrust laws has standing to bring a private antitrust suit. Rather, an antitrust plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Accordingly, even when a plaintiff properly alleges a clear antitrust violation, the plaintiff will nonetheless suffer dismissal if it does not allege that it suffered an antitrust injury.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN4[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

It is important to clearly distinguish between the elements of the substantive antitrust violation and the antitrust injury requirement. In certain cases an antitrust plaintiff must prove, as part of the substantive antitrust claim, that the conduct in question injured competition as a whole. For example, a plaintiff seeking to prove a unilateral monopoly under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act must prove that the defendant's conduct actually poses a danger of monopolization. In contrast, certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se under § 1 of the Sherman Act without inquiry into the harm it has actually caused. Violations of this sort, where injury to competition is presumed, are referred to as per se antitrust violations.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] **Robinson-Patman Act, Claims**

Depending on the conduct in question and the antitrust provision involved, an antitrust plaintiff may or may not be required to prove injury to competition in order to state an antitrust claim. *Section 2(c)* (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act violations are per se antitrust violations, meaning that the plaintiff need not prove injury to competition in order to prove that the defendant has violated *§ 2(c)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6[] **Robinson-Patman Act, Claims**

Even in the case of per se antitrust violations, where the plaintiff need not prove actual harm to competition as an element of the substantive violation, the plaintiff still must prove that its injury was of the type the antitrust laws were intended to prevent. All private antitrust plaintiffs must allege an antitrust injury, regardless of the type of antitrust claim involved. When the purpose of an antitrust provision is to prevent injury to competition, a plaintiff must always prove that it was injured as a result of injury to competition in order to show antitrust injury. Even when the defendant's conduct is presumed to injure competition, the question remains whether this particular plaintiff's injury was caused by the competition-reducing aspect of the defendant's conduct. Thus, the fact that injury to competition is not an element of a *§ 2(c)* (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act offense does not mean, as some might assume, that a *§ 2(c)* plaintiff need not show that its injury resulted from harm to competition.

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

HN7[] **Private Actions, Standing**

The court must ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.

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

HN8[] **Private Actions, Remedies**

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN9[] **Antitrust & Trade Law, Robinson-Patman Act**

Section 2(c) (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act only reaches bribery that crosses the seller-buyer line -- for example, when the seller makes a payment to an agent of the buyer.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Governments > Fiduciaries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN10[] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

While one main purpose behind *§ 2(c)* (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act is to prevent large buyers from using dummy brokers to circumvent discriminatory price prohibitions, Congress also intends *§ 2(c)* to protect the fiduciary relationship between a broker and his client.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Criminal Law & Procedure > ... > Bribery > Public Officials > Elements

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

HN11[] **Robinson-Patman Act, Coverage**

Corruption of the agency relationship is the type of injury that *§ 2(c)* (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act is intended to prohibit.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN12[] **Robinson-Patman Act, Claims**

There is no justification for implying that *§ 2(c)* (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act has only pro-competition purposes. One of the purposes of *§ 2(c)* is to protect against the corruption of an agency relationship.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN13[] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

In the context of a claim under *§ 2(c)* (*15 U.S.C.S. § 13(c)*) of the Robinson-Patman Act, the antitrust injury standing requirement is met when a plaintiff alleges an injury flowing from the corruption of an agency relationship.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN14[] **Public Enforcement, State Civil Actions**

See *W. Va. Code § 47-11A-3* (West 2002).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15[] **Public Enforcement, State Civil Actions**

West Virginia law creates a private right of action for unfair trade practices. *W. Va. Code § 47-11A-9*.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16[] **Private Actions, Remedies**

Courts interpreting Unfair Practice Acts generally hold that a payment or rebate to the injury of a competitor includes injuries to the competitors of the party receiving the payment or rebate as well as the competitors of the party providing the payment or rebate.

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN17[] **Governments, Fiduciaries**

To state a claim under the West Virginia Unfair Practices Act, the plaintiff need only allege facts indicating the secret payment or allowance of rebates to the injury of a competitor and where such payment or allowance tends to destroy competition. *W. Va. Code § 47-11A-3* (West 2002). There is no element of fraud in this provision -- the plaintiff need not allege or prove a misrepresentation, reliance, or any of the other elements of common law fraud.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN18[] **Contract Interpretation, Fiduciary Responsibilities**

Fed. R. Civ. P. 9(b) extends to averments of fraud or mistake, whatever may be the theory of legal duty -- statutory, tort, contractual, or fiduciary.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN19[] **Heightened Pleading Requirements, Fraud Claims**

Under *Fed. R. Civ. P. 9(b)*, in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. The "circumstances" required to be pled with particularity under *Rule 9(b)* are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. Even so, a court should hesitate to dismiss a complaint under *Rule 9(b)* if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN20[] **Pleadings, Heightened Pleading Requirements**

When the allegation of fraud relates to an omission rather than an affirmative misrepresentation, less particularity is required.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN21[] **Defenses, Demurrers & Objections, Motions to Dismiss**

When the plaintiff relies on a contract in its complaint, and indeed includes a copy of that contract as an attachment to the complaint, it is proper for the district court to consider it in ruling on a motion to dismiss.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN22[] **Business Torts, Fraud & Misrepresentation**

The elements of common law fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.

Counsel: For In Town Hotels Limited Partnership and In Town Hotels, Inc., Plaintiffs: Benjamin L. Bailey, Brian A. Glasser, & Jennifer S. Fahey, Bailey & Glasser, LLP, Edward P. Tiffey, Charleston, WV.

For In Town Hotels Limited Partnership and In Town Hotels, Inc., Plaintiffs: William M. Bosch & Brian H. Corcoran, Katten Muchin Zavis Rosenman, Washington, DC.

For Marriott International, Inc., Defendant: James R. Snyder & John Philip Melick, Jackson Kelly PLLC, Charleston, WV.

For Marriott International, Inc., Defendant: Karen Grubber, Marriott International, Inc., Bethesda, MD.

For Marriott International, Inc., Defendant: Patrick Lynch, O'Melveny & Myers, Los Angeles, CA.

For Avendra, LLC, Defendant: John J. Polak, Rose & Atkinson, Charleston, WV.

For Avendra, LLC, Defendant: Mark London & Christopher B. Mead, London & Mead, Washington, DC.

Judges: JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPH R. GOODWIN

Opinion

[*471]

[2] MEMORANDUM OPINION AND ORDER**

Pending is defendant Marriott International, Inc.'s motion to dismiss Counts IV and XIV [Docket 15] and defendant Avendra, LLC's motion to dismiss all counts [Docket 18]. For the following reasons, **[*472]** the court **DENIES** Marriott's motion to dismiss Counts IV and XIV. The court **GRANTS in part and DENIES in part** Avendra's motion to dismiss all counts. Specifically, the court **DISMISSES** count VI (fraud) as against Avendra for failure to plead fraud with specificity.

I. Background

The plaintiffs, In Town Hotels Limited Partnership and In Town Hotels, Inc. (collectively, "In Town Hotels"), brought suit against Marriott International, Inc. (Marriott) and Avendra, LLC (Avendra), alleging breach of contract, breach of fiduciary duty, negligence, and fraud arising out of Marriott's management of the plaintiffs' hotel, known as the Charleston Town Center Marriott (the Hotel). In an amended complaint, the plaintiffs further alleged that Marriott and Avendra violated the West Virginia Unfair Practices Act (WVUPA), *W. Va. Code § 47-11A-3*, as well as *§ 2(c)* of the Robinson-Patman Act, *15 U.S.C. § 13(c)*, a federal **[**3]** antitrust provision which prohibits the payment and acceptance of commissions that are not in exchange for services rendered.

Because the court is considering motions to dismiss, the following facts are set out as alleged by the plaintiffs in the complaint. For approximately twenty years the plaintiffs have contracted with Marriott to manage the plaintiffs' Hotel. Under the terms of the contract, Marriott is granted unfettered authority to manage and control the Hotel. The contract purports to create an agency relationship between Marriott and In Town Hotels whereby Marriott has a fiduciary duty to operate the Hotel solely for the benefit of the plaintiffs. The contract provides that Marriott's compensation for its services would consist solely of management fees as set forth in the agreement. For the purpose of their antitrust claim, the plaintiffs allege that Marriott, acting in conjunction with Avendra, entered into exclusive or preferred contracts with vendors to provide goods to the Hotel. In so doing, Marriott and Avendra solicited and received "sponsorship funds," which were payments and rebates by vendors made in the course of selling, or in exchange for the opportunity to **[**4]** sell, goods to the Hotel. Marriott and Avendra retained these payments and rebates for themselves and did not disclose them to the plaintiffs. As a consequence, the plaintiffs allege, the Hotel has been restricted in its choice of vendors, has paid a higher price for goods than it would otherwise have paid, and has suffered vis-a-vis rival hotels (some of which are owned or managed by Marriott) that are not paying these higher prices.

According to the plaintiffs, this scheme violates, among other things, *section 2(c)* of the Robinson-Patman Act as well as the WVUPA, and entitles them to treble damages. Marriott moved to dismiss both of these claims. Marriott argues that the plaintiffs have failed to allege that they have suffered an antitrust injury and that without such an allegation they lack standing to bring a *section 2(c)* claim. In addition, Marriott argues that the plaintiffs have failed to allege an injury to a competitor, a requirement of *§ 47-11A-3* of the WVUPA. The plaintiffs respond that they have adequately plead the necessary injuries for both statutes.

Avendra filed a separate motion to dismiss all claims against it. It joins in Marriott's arguments regarding the **[**5]** Robinson-Patman Act and the WVUPA. It also claims that the contract specifically authorizes all of the alleged conduct, and thus that all counts should be dismissed. Finally, it argues that the bulk of the plaintiffs' claims are fraud-based and that these claims must be dismissed because the plaintiffs have failed to plead fraud with **[*473]** particularity. The plaintiffs respond that the contract does not authorize the conduct in question, and that they have plead all counts with adequate specificity.

The court will first address Marriott's motion regarding the Robinson-Patman Act and the WVUPA. The court will then turn to Avendra's additional grounds for dismissal.

II. Marriott's Motion to Dismiss

A. Robinson-Patman Act *section 2(c)* Claim

The plaintiffs allege that Marriott's receipt of undisclosed payments and rebates in the course of purchasing goods for the Hotel violates *section 2(c)* of the Robinson-Patman Act. *Section 2(c)* provides, in pertinent part, that:

> ***HN1***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, … except for services **[**6]** rendered in connection with the sale or purchase of goods, wares, or merchandise ….

15 U.S.C. § 13(c) (West 2003). This provision has been described as a "prolix and obscure statute [which] is a model of bad drafting." XIV Herbert Hovenkamp, ***Antitrust Law*** P 2362, at 219 (1999) [hereinafter Hovenkamp]. Thankfully, the Supreme Court has provided a useful explanation of the intent and function of *section 2(c)*. In *FTC v. Henry Broch & Co., 363 U.S. 166, 4 L. Ed. 2d 1124, 80 S. Ct. 1158 (1960)*, the Court explained that "the Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Id. at 168*. Prior to the Act, large buyers were obtaining indirect price concessions while evading the Clayton Act's prohibitions on direct price discrimination. *Id. at 168-69*. They did this by "setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then **[**7]** turned it over to their employer." *Id. at 169*.

In response to this practice, Congress passed ***HN2***[] *section 2(c)* of the Robinson-Patman Act, which prohibits brokerage or similar payments in the absence of services rendered for those payments. "Congress in its wisdom phrased *section 2(c)* broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination." *Id.* Indeed, the Court noted that "the [Congressional] debates on the bill show clearly that *section 2(c)* was intended to proscribe other practices such as the 'bribing' of a seller's broker by the buyer." *Id. at 169 n.6* (citing 80 Cong. Rec. 7759-60, 8111-12). Thus, the Court indicated in *Henry Broch & Co.* that *section 2(c)* reaches commercial bribery as well as the use of dummy brokers to obtain indirect price discrimination. This statement from *Henry Broch & Co.* has been characterized as dicta, but most courts interpreting *section 2(c)* have concluded that it does prohibit commercial bribery. *See* *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 992 & n.6 (4th Cir. 1990)* ("commercial **[**8]** bribery" language is dicta, but noting cases recognizing *section 2(c)*'s application to commercial bribery).

In this case, the plaintiffs allege that Marriott, acting in conjunction with Avendra, received rebates and payments-so-called "sponsorship funds"-from vendors **[*474]** in the course of or in exchange for the opportunity to do business with the Hotel. These payments and rebates were not related to services rendered by Marriott, the plaintiffs allege, but were essentially commercial bribes of Marriott, which was supposed to be acting solely in the interest of In Town Hotels, not in its own conflicting self-interest. Marriott has not asserted that *section 2(c)* does not reach commercial bribery, nor has it attacked the merits of the plaintiff's claim under *section 2(c)*. Rather, Marriott argues that even if the plaintiffs have adequately stated a *section 2(c)* claim, they lack standing to pursue that claim because they have not alleged an antitrust injury.

HN3[] The private cause of action for antitrust violations is provided in section 4 of the Clayton Act, which states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may **[**9]** sue therefor in any district court of the United States." *15 U.S.C. § 15(a) (West 2003)*. According to the Supreme Court, this means that not every private party who is somehow injured as a result of conduct forbidden by the antitrust laws has standing to bring a private antitrust suit. Rather, an antitrust plaintiff "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Accordingly, even when a plaintiff properly alleges a clear antitrust violation, the plaintiff will nonetheless suffer dismissal if it does not allege that it suffered an antitrust injury. *See* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334-35, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*.

HN4[] It is important to clearly distinguish between the elements of the substantive antitrust violation and the antitrust injury requirement. In certain cases an antitrust plaintiff must prove, as part of the substantive antitrust claim, that the conduct **[**10]** in question injured competition as a whole. For example, a plaintiff seeking to prove a unilateral monopoly under *section 2* of the Sherman Act, *15 U.S.C. § 2*, must prove that the defendant's conduct actually "poses a danger of monopolization." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. In contrast, "certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se [under section 1 of the Sherman Act] without inquiry into the harm it has actually caused." *Id.* Violations of this sort, where injury to competition is presumed, are referred to as *per se* antitrust violations. Thus, ***HN5***[] depending on the conduct in question and the antitrust provision involved, an antitrust plaintiff may or may not be required to prove injury to competition in order to state an antitrust claim. The Fourth Circuit has held that *section 2(c)* violations are *per se* antitrust violations, meaning that the plaintiff need not prove injury to competition in order to prove that the defendant has violated *section 2(c)*. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 716 F.2d 245, 247 (4th Cir. 1983)* **[**11]** ("Nothing in the language of *section 2(c)* … requires proof of an adverse effect on competition before a violation may be found where there is an admitted payment of a commission or other compensation to an agent of the purchaser.").

Regardless of whether the defendant has violated *section 2(c)*, however, the question remains whether the plaintiff has standing to bring suit for that violation. **[*475]** The Supreme Court has made clear that ***HN6***[] even in the case of *per se* antitrust violations, where the plaintiff need not prove actual harm to competition as an element of the substantive violation, the plaintiff still must prove that its injury was of the type the antitrust laws were intended to prevent. *Atlantic Richfield, 495 U.S. at 339-40*. All private antitrust plaintiffs must allege an antitrust injury, "regardless of the type of antitrust claim involved." *Id. at 340*. When the purpose of an antitrust provision is to prevent injury to competition, a plaintiff must always prove that it was injured as a result of injury to competition in order to show antitrust injury. Even when the defendant's conduct is presumed to injure competition, the question remains **[**12]** whether this particular plaintiff's injury was caused by the competition-reducing aspect of the defendant's conduct. Thus, the fact that injury to competition is not an element of a *section 2(c)* offense does not mean, as some might assume, that a *section 2(c)* plaintiff need not show that its injury resulted from harm to competition. [1] If the purpose of *section 2(c)*, in all cases, were to protect competition, then the plaintiffs would be required to allege and prove "competitive injury," meaning an injury flowing from the competition-reducing aspect of the defendant's conduct, even if the defendant's conduct was inherently harmful to competition. But if the purpose of *section 2(c)* is not always to protect competition, then it is at least an open question whether the plaintiffs must prove competitive injury to satisfy the antitrust injury requirement.

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[1] If it did, then the Fourth Circuit's decision in *Metrix Warehouse* would provide a quick resolution to the antitrust injury requirement in this case.

The focus **[**13]** point of the disagreement between the plaintiffs and the defendant lies in their understandings of what constitutes antitrust injury in the context of a claim under section 2(c). Marriott contends that antitrust injury requires proof that the plaintiffs' injury resulted from "a competition-*reducing* aspect or effect of the defendant's behavior." Id. at 344. In contrast, the plaintiffs contend that antitrust injury is simply "injury of the type the antitrust laws were intended to prevent." Brunswick Corp., 429 U.S. at 489. In some cases, the plaintiffs acknowledge, the type of injury the antitrust laws were intended to prevent is a reduction in competition. This is true, for example, in claims brought under section 1 of the Sherman Act, the provision at issue in *Atlantic Richfield.* Section 2(c), the plaintiffs argue, is different: unlike most provisions of the federal antitrust laws, section 2(c) is intended to protect an individual firm from losses caused by commercial bribery (among other things), not to protect the competitive process as a whole. Accordingly, the plaintiffs say that in the context of section 2(c), an "injury of the type the **[**14]** antitrust laws were intended to prevent" is a firm's loss resulting from commercial bribery, not a loss resulting from a competition-reducing aspect of that bribery.

There is force to both parties' positions, and the caselaw does not provide a clear resolution of the issue. The Supreme Court cases discussing the antitrust injury requirement illustrate the ambiguity in the caselaw on this point. For example, in *Brunswick,* the Court first defines antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489. Under this definition, it seems that the court should inquire as to the type of injury that the antitrust provision in question was intended to prevent. **[*476]** Courts have explained that the particular antitrust provision at issue here -- section 2(c) -- was designed to "protect[] *those who compete* with a favored seller, not just the overall competitive process." Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, Circuit Judge). Thus section 2(c) of the Robinson-Patman Act is unlike other provisions of ***antitrust* [**15] *law***, such as the Sherman Act, which is only "concerned with the protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

The defendants argue that regardless of any additional purposes of the specific antitrust provision at issue, the Supreme Court has made clear that injury to competition is always a necessary part of antitrust injury. For example, in *Brunswick,* after describing an antitrust injury as "injury of the type the antitrust laws were intended to prevent," the Court immediately went on to say that "the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489. According to the defendants, this second statement clarifies the first -- it means that the type of injury that the antitrust laws were intended to prevent *always* results from the anticompetitive nature of the antitrust violation, regardless of whether one is dealing with section 1 of the Sherman Act -- which is designed to protect the competitive process -- or section 2(c) of the Robinson-Patman Act -- which **[**16]** is designed to protect individual competitors. If any ambiguity exists in *Brunswick,* the defendants argue, it was resolved by *Atlantic Richfield,* where the Court seems to equate antitrust injury with injury to competition. *See, e.g.,* Atlantic Richfield, 495 U.S. at 339 ("Antitrust injury does not arise for purposes of section 4 of the Clayton Act … until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct."); id. at 340 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.").

The court does not agree that these statements from *Brunswick* and *Atlantic Richfield* resolve the matter. While the Court in *Brunswick* and *Atlantic Richfield* seems to assume that preventing injury to competition is always the purpose of the antitrust provision in question, both cases involve the Sherman Act, not the Robinson-Patman Act. In this case, which involves an antitrust provision that was not designed to protect competition, but rather to protect individual **[**17]** competitors, this court concludes that the above statements from *Brunswick* and *Atlantic Richfield* are not relevant. Instead, the fundamental rule from both cases is that ***HN7***[] the court must "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." Id. at 342. The court therefore turns to consider the rationale behind the particular antitrust provision at issue here, namely section 2(c).

Cases directly addressing the issue of antitrust injury in the context of section 2(c) claims have reached different conclusions about the meaning of antitrust injury. Some cases hold that a competitive injury must be proven to satisfy the antitrust injury requirement. *See, e.g., Hansel ' N Gretel Brand, Inc. v. Savitsky, 1997 U.S. Dist. LEXIS 17615*, No. 94 Civ. 4027, 1997 WL 543088, at *8 (S.D.N.Y. Sept. 3, 1997); *Miyano Mach. USA, Inc. v. Zonar, 1993 U.S. Dist. LEXIS 963*, No. 92 C 2385, 1993 WL 23758, at *8 (N.D. Ill. Jan. 29, 1993); *NL Indus., Inc. v. Gulf & Western Indus., **[*477]** Inc., 650 F. Supp. 1115, 1124 (D. Kan. 1989)*; *Fed. Paper Bd. Co. v. Amata, 693 F. Supp. 1376, 1388 (D. Conn. 1988)*; **[**18]** *Bunker Ramo Corp. v. Cywan, 511 F. Supp. 531, 533 (N.D.Ill.1981)*. [2] **[**19]** Other cases hold that the antitrust injury requirement can be met in the context of a *section 2(c)* claim without any proof of any sort of competitive injury. *See, e.g., Philip Morris, Inc. v. Grinnell Lithographic Co., 67 F. Supp. 2d 126, 134 (E.D.N.Y. 1999)*; *Edison Elec. Inst. v. Henwood, 832 F. Supp. 413, 418-19 (D.D.C. 1993)*; *Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982)*. [3] The courts adopting the two approaches **[*478]** primarily disagree about the purpose of *section 2(c)* in relation to the antitrust laws generally.

[20]** On the one hand, the court in *Bunker Ramo* explained that "as envisioned by Congress and interpreted by the courts, *section 2(c)* is designed to protect and promote competition among businesses competing at the same functional level in the marketing chain." *Bunker Ramo Corp.* 511F. Supp. at 533. Similarly, the court in *Federal Paper Board Co.* stated that "even though there is evidence in the legislative history that Congress may have additionally intended for *section 2(c)* to prohibit commercial bribery, it appears that the main purpose of *section 2(c)* was to close the 'brokerage' loophole in the laws regulating price discrimination." *Federal Paper Bd. Co. 693 F.*

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[2] The only circuit court decision arguably adopting this approach is *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979)*. In this court's opinion, however, the *Cool Attic* opinion leaves it unclear whether injury to a competitor or injury to competition is necessary for antitrust injury. The plaintiff in *Cool Attic* was an independent broker hired on commission by an attic fan manufacturer to arrange sales to attic fan distributors. *Id. at 269*. Eventually, however, the purchasing agent for the attic fan distributor began dealing directly with the manufacturer and began demanding and receiving commissions from the manufacturer. *Id.* The independent broker brought a *section 2(c)* commercial bribery claim, but the court dismissed the claim for lack of antitrust injury. The independent broker's only injury, the court explained, arose from the breach (if any) of the brokerage agreement, not from the fact that the purchasing agent was now allegedly receiving illegal commissions from the manufacturer. *Id. at 272*. Thus, the independent broker had not suffered an antitrust injury.

Certain aspects of the court's reasoning appear to support the defendant's position. For example, the court stated that "recovery and damages under the ***antitrust law*** is available to those who have been directly injured by the lessening of competition." *Id. at 271*. At another point, however, the court stated that "only if Plaintiff was in the same business and in competition with [either the manufacturer or the distributor] … would he have standing." *Id. at 272*. This implies that injury to an individual competitor, regardless of injury to competition as a whole, would suffice for antitrust injury standing. The lack of clarity on this point is understandable, as the plaintiff in *Cool Attic* lacked standing under either theory of antitrust injury. Because of the ambiguities in *Cool Attic* regarding the precise contours of antitrust injury, this court does not rely on that case.

[3] Several other cases are sometimes cited by courts as holding that injury to competition need not be alleged to satisfy antitrust injury for a *section 2(c)* claim, but these cases do not address the antitrust injury standing requirement directly and thus are not reliable precedent on point. For example, in *Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12, 15 (6th Cir. 1943)*, the court affirmed a judgment for a *section 2(c)* plaintiff whose employee had been bribed, stating that "the buyer is suing for damages … because, on account of the fraud, it was obliged to pay more for its coal than it would otherwise have paid in a competitive market." Thus the court permitted a claim, very similar to the one alleged here, based on injury to a competitor without also requiring proof of injury to competition. However, it seems that the parties did not raise the issue of standing and antitrust injury, and the court never mentioned the antitrust injury requirement. The plaintiffs also cite *2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 2002 U.S. Dist. LEXIS 439*, No. Civ. A. 97-450, 2002 WL 53913 (D. Del. Jan 10, 2002), where the court held that the plaintiff had produced sufficient evidence to prove antitrust injury based on evidence that the hotel had suffered higher purchasing costs vis-a-vis its rivals as a result of the commercial bribery. *2002 U.S. Dist. LEXIS 439*, [WL] at *9. But the defendant in *2660 Woodley Road* only argued that the evidence was insufficient to prove that the hotel had in fact paid higher prices than other hotels, not that such an injury, even if proven, would not constitute an antitrust injury. *2002 U.S. Dist. LEXIS 439*, [WL] at *8. Therefore, the court did not address the issue of whether an antitrust injury must result from an injury to competition. *See also Calnetics Corp. v. Volkswagen of Am., 532 F.2d 674, 696 (9th Cir. 1976)* (holding, without acknowledging the antitrust injury requirement, that "if [Volkswagen Pacific] is able on remand to prove that [Calnetics] indeed committed acts of commercial bribery in violation of *section 2(c)*, then the defendants ought to be allowed any damages proximately caused by that violation.").

Supp. at 1388 (citations omitted). The court then concluded that "in light of the primary purpose of section 2(c), this court believes that the antitrust injury requirement … requires a plaintiff suing for treble damages for violations of section 2(c) to show that the probable affect of the discrimination would be to allow the favored competitor to draw sales or profits from him, the unfavored competitor." *Id.* (quotations omitted). Generally speaking, then, these courts reason that because section 2(c) was "primarily" intended to protect competitors against price **[**21]** discrimination resulting from dummy brokers, the antitrust injury requirement in the context of section 2(c) requires a showing of an injury flowing from this practice.

Other courts have not interpreted the goals of section 2(c) so narrowly. In contrast to the above-cited cases, the court in *Edison Electric Institute* claimed that "in enacting section 2(c), Congress had at least *two* objectives to prevent large buyers from extracting hidden price discounts from suppliers in the form of 'dummy brokerage' payments; and to prohibit commercial bribery that tended to undermine the fiduciary relationship between a buyer and its agent." 832 F. Supp. at 418 (emphasis added) (citing Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991-93 (4th Cir.1990); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936)). The court criticized the reasoning of *Federal Paper Board Co.,* stating that it "rested solely on the price discrimination/ dummy brokerage rationale of section 2(c) and ignored the commercial bribery rationale." Edison Elec. Inst. 832 F. Supp. at 419. Similarly, in *Municipality of Anchorage* the court acknowledged that "the prime concern of Congress was to **[**22]** curtail price discriminations accomplished by pseudo-brokerage arrangements," but noted that this was not the only purpose behind the statute. Municipality of Anchorage 547 F. Supp. at 640. Another "major concern of Congress in promulgating section 2(c) was protection of the fiduciary relationship between a broker and his client." *Id.* Accordingly, the court concluded that a plaintiff alleging an injury stemming from a violation of the broker-client fiduciary relationship satisfied the antitrust injury requirement just as much as a plaintiff alleging injury from price discrimination flowing from dummy brokers. Municipality of Anchorage 547 F. Supp. at 641. *See also* Philip Morris, Inc., 67 F. Supp. 2d at 133-34 (holding that plaintiff had alleged antitrust injury because injury "was the direct result of commercial bribery, an activity outlawed by section 2(c)"). [4]

[23]** **[*479]** All of the cases discussed above acknowledge the instructions from *Brunswick* that ***HN8***[] antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp., 429 U.S. at 489. As explained, they differ in their interpretations of what type of injury section 2(c) was intended to prevent. The Fourth Circuit has not addressed the antitrust injury requirement in the context of section 2(c). [5] Nonetheless, the Fourth Circuit has addressed the purposes behind section 2(c), and this discussion sheds light on how that court might interpret the antitrust injury requirement in the context of section 2(c) claims. In Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988 (4th Cir. 1990), the Fourth Circuit considered whether payments by a photographer to a school district for the privilege of taking student photos constituted commercial bribery under section 2(c). The Fourth Circuit, noting that most courts recognize claims for commercial bribery under section 2(c), assumed without deciding that section 2(c) applies to certain types of commercial bribery. 903 F.2d at 993. **[**24]** Even so, the court concluded, ***HN9***[] section 2(c)

[4] The plaintiffs quote at length from the court's decision in *Philip Morris.* This court has not discussed that case extensively, in part because the court does not fully endorse the reasoning in *Philip Morris.* For example, the court in *Philip Morris* declined to impose a "competitive injury" requirement on section 2(c) plaintiffs because, among other things, it concluded that commercial bribery always injures competition. *See* *Philip Morris,* 67 F. Supp. 2d 134-36. As the defendant points out, this analysis confuses the elements of a section 2(c) claim -- which does not require proof of injury to competition -- with the antitrust injury standing requirement of section 4 of the Clayton Act -- which limits private party standing to those injured in the manner the antitrust laws were designed to prevent. Whether the defendant's conduct is inherently harmful to competition is a different question from whether the plaintiff was injured as a result of the competition-reducing aspect of that behavior. *See* Atlantic Richfield, 495 U.S. at 335 (even for *per se* Sherman Act claim, in which injury to competition is presumed, the plaintiff must still prove competitive injury to have standing under section 4). This is not to say that this court disagrees with the *Philip Morris* court at all points in the analysis. The court simply wishes to emphasize, particularly in light of the plaintiffs' heavy reliance on *Philip Morris,* that it does not fully adopt the reasoning of *Philip Morris* (or any other decision cited), except to the extent that the court does so expressly in this opinion.

[5] Indeed, as indicated in footnotes 2 and 3, no circuit court has directly addressed this issue.

only reaches bribery that crosses the seller-buyer line -- for example, when the seller makes a payment to an agent of the buyer. *Id.* In *Stephen Jay,* the court concluded that the school was not acting as the students' agent when it arranged for the photographer. *Id.* Thus, the payment from the photographer to the school district did not cross a buyer seller line and did not violate *section 2(c)*.

In the course of reaching this conclusion, the court discussed the purposes behind *section 2(c)*. The court noted that ***HN10***[] while one main purpose behind *section 2(c)* was to prevent large buyers from using dummy brokers to circumvent discriminatory price prohibitions, Congress also intended *section 2(c)* to protect the fiduciary relationship between a broker and his client. *903 F.2d at 991-92*. The court noted several passages from the legislative history to **[**25]** *section 2(c)* that the Supreme Court had cited in *Henry Broch & Co., 363 U.S. at 169-70 n.6*, as examples of the type of commercial bribery that Congress targeted in *section 2(c)*. For example, the court quoted a statement from Senator Patman:

> There is a merchant in Virginia representing potato growers. He sells thousands of cars of potatoes a year, and our investigation has disclosed that he had a secret contract with a large mass corporate chain buyer by which he obligated himself to sell every car of those potatoes of those farmers to this large buyer .... This man representing the farmers sold those potatoes to that mass buyer, fixing the price himself, and what did he get out of it? He got a secret rebate of **[*480]** $ 2.50 to $ 5 on every car that the farmers knew nothing about .... That is the kind of dummy-brokerage arrangement we are trying to prohibit in this bill.

Stephen Jay, 903 F.2d at 993 (quoting 74 Cong. Rec. 8111-12 (1936) (statement of Sen. Patman)). The court explained that statements such as Senator Patman's "refer to the corruption of an agency relationship." *903 F.2d at 993*. Thus, the court in *Stephen Jay* inferred, **[**26]** although did not hold, that allegations of commercial bribery involving corruption of the agency relationship state a claim under *section 2(c)*. [6] The court's reasoning in *Stephen Jay* suggests that ***HN11***[] corruption of the agency relationship is the type of injury that *section 2(c)* was intended to prohibit.

This court concludes that it is a mistake to focus solely on the dummy brokerage/ price discrimination purpose behind *section 2(c)*. It may be the case that the dummy brokerage/ price discrimination purpose fits more easily with the pro-competition purposes of ***antitrust law*** generally. [7] But this court's job is to apply the law as written, not to second-guess the wisdom or efficacy of the statutes passed by Congress. Looking at the text and legislative history of *section 2(c)*, ***HN12***[] there is no justification for implying that *section 2(c)* has only **[**27]** pro-competition purposes. As explained in *Stephen Jay,* one of the purposes of *section 2(c)* was to protect against "the corruption of an agency relationship." *903 F.2d at 988*. It is certainly debatable whether concern over the corruption of the agency relationship is a matter that appropriately belongs in the antitrust laws, *see* Keller W. Allen & Meriwether D. Williams, *Commercial Bribery, Antitrust Injury and Section 2(c) of the Robinson-Patman Anti-Discrimination Act,* 27 Gonz. L. Rev. 153, 177-78 (1990-91), but to date Congress has neither repealed nor rewritten *section 2(c)*. *See* Hovenkamp P 2340a, at 118 (noting that "very few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act"). Accordingly, the court concludes that ***HN13***[] in the context of a claim under *section 2(c)*, the antitrust injury standing requirement is met when a plaintiff alleges an injury flowing from "the corruption of an agency relationship." *Stephen Jay, 903 F.2d 988*

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[6] *Stephen Jay* simply holds the converse -- that alleged commercial bribery that does not involve corruption of the agency relationship does not violate *section 2(c)*.

[7] Although for that matter, it is not clear whether even this aspect of *section 2(c)* fits within the broader goals of the antitrust laws. Even as to its dummy brokerage/ price discrimination function, *section 2(c)*, like the Robinson-Patman Act as a whole, has been roundly criticized for being out of step with, and in some cases in direct conflict with, the general pro-competition aims of the antitrust laws. *See* Hovenkamp P 2301 (explaining that price discrimination by a supplier among various dealers is not, absent market power, harmful to competition); *id.* 2362, at 234 (results under *section 2(c)* "can be quite at odds with general antitrust goals").

[28]** In this case, the plaintiffs allege that Marriott served as the agent for In Town Hotels in procuring and purchasing goods and supplies for the hotel. In its capacity as the agent of In Town Hotels, Marriott received undisclosed payments and rebates from vendors for the opportunity to sell goods to In Town Hotels. These allegations fit the terms of *section 2(c)*, which renders it unlawful "for any person engaged in commerce, in the course of such commerce, … to receive or accept, anything of value as a commission, brokerage, or other compensation, … except for services rendered in connection with the sale or purchase of goods, wares, or merchandise." *15 U.S.C. § 13(c)*. It is also useful to compare the plaintiffs' allegations **[*481]** to the case of Senator Patman's potato farmer. There, the potato farmer's selling agent "'sold the potatoes to [a] mass buyer, fixing the price himself, and [the agent] … got a secret rebate.'" *Stephen Jay, 903 F.2d at 993* (quoting 74 Cong. Rec. 8111-12 (1936)). Similarly in this case, the plaintiffs allege that their agent purchased hotel goods from vendors and received secret payments and rebates from those vendors **[**29]** that it did not pass along to In Town Hotels. Contrary to the facts in *Stephen Jay,* where the court dismissed the plaintiffs' claim, the alleged payment in this case crosses the seller-buyer line. The plaintiffs allege that Marriott, an agent for the buyer (In Town Hotels), received payments from the seller-vendors. Thus, the plaintiffs here have alleged a corruption of the agency relationship which crosses the seller-buyer line.

The plaintiffs allege that they were injured by this conduct in two ways: (1) they were deprived of the rebates and payments to which they were entitled, and (2) they lost business vis-a-vis their competitors, because they paid higher prices for their hotel supplies. [8] **[**30]** These injuries are typical harms caused by commercial bribery in the form of corruption of the agency relationship, and thus are injuries of the type that *section 2(c)* was intended to prevent. Accordingly, the plaintiffs have adequately alleged an antitrust injury, which gives them standing under section 4 of the Clayton Act to bring this private action. [9] Marriott's motion to dismiss Count XIV is **DENIED.**

B. West Virginia Unfair Practices Act Claim

The plaintiffs also bring suit under a provision of the WVUPA, which states in pertinent part:

> ***HN14***[] The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers, special services, or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice ….

[8] This second injury-the loss of business vis-a-vis competitors-sounds something like a "competitive injury." Of course, this court has concluded that competitive injury need not be plead as part of the antitrust injury requirement in a *section 2(c)* claim. Accordingly, the court need not, and does not, evaluate whether this second allegation would satisfy that requirement. Some courts imposing a competitive injury standing requirement in *section 2(c)* claims have held that similar allegations are sufficient; others have held that such allegations are insufficient. *Compare Hansel ' N Gretel Brand, Inc., 1997 U.S. Dist. LEXIS 17615, 1997 WL 543088*, at * 10 (allegations that the defendant "sold its products to HNG's competitors at a lower price than it charged to HNG, or charged HNG more than HNG's competitors were paying for the same kind of merchandise," were sufficient to state antitrust injury); *with Fed. Paper Bd. Co., 693 F. Supp. at 1388* (even though complaint alleged that the plaintiff had paid above-market rates for wastepaper because its purchasing agent had taken bribes from certain suppliers, "without allegations of additional facts that demonstrate how [other] suppliers were precluded from taking competitive actions in order to secure sales with Federal, the amended complaint does not sufficiently allege anticompetitive effect").

[9] Marriott also argues that the plaintiffs fail to adequately allege antitrust injury because they do not allege facts sufficient to define the relevant market in which competition was impaired. Because the court has concluded that an injury flowing from a reduction in competition need not be alleged to satisfy the antitrust injury requirement in the context of *section 2(c)*, the plaintiffs of course need not define the relevant market in which competition has been reduced.

[*482] *W. Va. Code § 47-11A-3* (West 2002). [10] Marriott argues **[**31]** that under this statute, proof to injury of a competitor of the party granting the rebate or paying the commission is a necessary element. Thus, Marriott argues, the plaintiffs must prove that competitors of the vendors who allegedly paid the sponsorship fees were injured. For example, a towel vendor might allege that it lost sales that it could have made to In Town Hotels because one of its competitors paid a secret fee to Marriott in exchange for the exclusive opportunity to sell towels (presumably at above-market prices) to the Hotel. In this type of scenario, Marriott argues, the towel vendor might fit the terms of the statute. The towel vendor would have alleged "injury of a competitor" to the party making a "secret payment," and also that "such payment … tends to destroy competition," insofar as the payment by the competitor destroyed the competitive process of bidding for towel sales to the Hotel.

[32]** The plaintiffs respond that in this case, they are a competitor of the defendant Marriott and thus they fit within the plain terms of the statute. The plaintiffs allege that Marriott owns or operates other hotels in the same market and thus competes with In Town Hotels directly. By accepting the sponsorship payments, the plaintiffs allege, Marriott caused injury to In Town Hotels, one of its competitors in the hotel market. Thus, the plaintiffs claim, they have alleged "injury of a competitor" of the party receiving the payments, here Marriott.

There are no West Virginia decisions interpreting this statute, but similar or identical Unfair Practice Acts exist in other jurisdictions. The court will therefore refer to caselaw in these jurisdictions for assistance in interpreting West Virginia's UPA. ***HN16***[] Courts interpreting UPAs have generally held that a payment or rebate "to the injury of a competitor" includes injuries to the competitors of the party receiving the payment or rebate as well as the competitors of the party providing the payment or rebate. *See, e.g., ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. of Am., 14 Cal. 4th 1247, 931 P.2d 290, 292, 61 Cal. Rptr. 2d 112 (Cal. 1997)* **[**33]** ("We conclude that a cause of action may be pled by alleging competitive injury among buyers" as well as among sellers); *Diesel Elec. Sales & Serv. v. Marco Marine San Diego, Inc., 16 Cal. App. 4th 202, 214-15, 20 Cal. Rptr. 2d 62 (Cal. App. Ct. 1993)* ("Both sellers and buyers should generally be held liable in the event of such discounts."). [11] Here, the parties providing **[*483]** the payment or rebate are the vendors. Their competitors -- in the example above, other towel vendors -- are one group covered by the phrase "injury to a competitor." The party receiving the payment or rebate here is Marriott. Marriott's competitors -- including In Town Hotels -- are also a group covered by the phrase "injury to a competitor."

[34]** It is true that the factual scenario presented by the plaintiffs' allegations is atypical for a claim under Unfair Practices Acts such as West Virginia's. UPAs typically protect competitors of the seller from injury due to secret rebates given to buyers by that seller, or protect competitors of a buyer from injury due to secret rebates given that buyer by a seller. Courts have characterized Unfair Practices Acts as "prohibiting sellers from giving secret discounts to certain purchasers when the discount 'injures a competitor and tends to destroy competition.'" *Am. Booksellers Ass'n v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031, 1043 (N.D. Cal. 2001)* (quoting *ABC Int'l Traders,*

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[10] *Section 47-11A-3* is actually a criminal statute that makes this conduct a misdemeanor. The plaintiffs may pursue a private cause of action based on this statute because ***HN15***[] West Virginia law creates a private right of action for unfair trade practices. *See W. Va. Code § 47-11A-9*.

[11] Marriott cites *Marco Marine* for the contrary proposition that UPAs only cover injury to a competitor of the party granting the rebate, not the party receiving the rebate. But *Marco Marine* holds to the contrary. The court specifically rejected the defendant's contention that the Act "does not apply to buyers who receive secret allowances of unearned discounts, but only to the sellers who provide them." *Marco Marine 16 Cal. App. 4th at 214*. Instead, the court held that "both sellers and buyers should generally be held liable in the event of such discounts." *Marco Marine 16 Cal. App. 4th at 214-15*. Marriott also cites *Burge v. Pulaski County Special Sch. Dist., 272 Ark. 67, 612 S.W.2d 108 (Ark. 1981)*, for support of its position. It is true that the *Burge* court held that "the Act provides a remedy only in favor of one seller against another seller, not in favor of a seller against a buyer or vice versa." *Burge 612 S.W.2d at 110*. But this does not mean that the Act covers sellers but not buyers, only that sellers are only covered vis-a-vis other sellers. (The court does not address whether buyers are covered vis-a-vis other buyers.) Moreover, the *Burge* court did not provide much explanation for its limitation of the right to recovery under the Acts, and it also justified dismissing the case on the alternative ground that the payments were not secret. *Id.* To the extent that *Burge* does stand for the plaintiffs' proposition that the Acts cover only injuries to competitors of the party granting the rebate, not the party receiving the rebate, this court declines to follow *Burge.*

Inc., 931 P.2d at 294). For example, the California Court of Appeals held that a distributor of hydraulic fittings and hoses stated a claim for injury under California's UPA by alleging that a competitor-distributor received secret rebates from the manufacturer. Diesel Elec. Sales & Service, Inc., 16 Cal. App. 4th at 212-14. The distributor alleged that it went out of business in part because its competitor was routinely given volume discounts by the manufacturer **[**35]** even though the competitor did not purchase enough hoses to qualify for the discount under the manufacturer's standard terms of sale. *Id.*

This case is different, as it involves allegations of a secret *premium,* not a secret *rebate.* In Town Hotels does not allege, of course, that it received a secret rebate (nobody complains about unknowingly saving money), nor does it allege that its competitors received a secret rebate in their purchase of goods. Rather, In Town Hotels in essence alleges that it incurred a secret premium on the goods it purchased. Specifically, In Town Hotels alleges that "it is restricted in its choice of and access to independent vendors and consequently has paid prices for goods, wares and merchandise that were higher than it would have paid in the absence of Defendants' kickback scheme." (Compl. P 176.) The idea here is that Marriott paid a premium for the goods it purchased from vendors on behalf of In Town Hotels, and that this premium was the benefit received by the vendors in exchange for their payments or rebates to Marriott. In other words, In Town Hotels paid above-market rates for goods, and Marriott and the vendors profited by splitting the **[**36]** difference.

Of course, the fact that this case is not like most UPA cases does not mean that the plaintiffs have failed to state a claim -- they may have struck upon a novel application of the law. The question is whether their claim meets the terms of the statutory language. The statute prohibits "the secret payment or allowance of rebates, refunds, commissions, or unearned discounts … to the injury of a competitor and where such payment or allowance tends to destroy competition." W. Va. Code § 47-11A-3. Here, the plaintiffs do allege a secret payment and allowance of commissions and rebates, namely payments and rebates paid to Marriott by **[*484]** vendors. The question is whether this commission was "to the injury of a competitor" and whether the commission "tended to destroy competition." *Id.*

As explained above, the plaintiffs allege that they are in competition with Marriott, because Marriott owns, operates, or franchises other hotels. (Compl. P 178.) The plaintiffs further allege that as a result of the secret payments received by Marriott, In Town Hotels paid a higher price for goods than did its competitor hotels, some of which are owned or operated by Marriott. Accepting these **[**37]** allegations as true, the court agrees with the plaintiffs that the secret commissions operated "to the injury of a competitor" (In Town Hotels) of the party receiving the payment (Marriott). Furthermore, the commissions tended to destroy competition. The alleged secret commissions removed In Town Hotels' purchase of goods from the competitive process and thereby eliminated competition in the provision of goods to the Hotel. Accepting the allegations as true, In Town Hotels' purchase of goods was not based on the best price for the goods in question, but rather on which vendor was willing to pay Marriott the sponsorship fee.

In fact, the court has discovered one case holding (albeit indirectly) that a UPA covers the type of conduct alleged here. The case involved a prosecution for making a false statement on a tax return. United States v. Di Girolamo, 808 F. Supp. 1445 (N.D. Cal. 1992). The defendant, the owner of a painting business, had taken business deductions for bribe payments to an employee of First Nationwide Savings to secure the award of painting contracts from First Nationwide. Id. at 1447. To prove its case, the government had to establish, **[**38]** among other things, that the payments were illegal under state or federal law. Id. at 1448. The government argued that the California UPA "proscribes certain forms of bribery and bid-rigging." Id. at 1451. The court agreed, holding that the alleged bribe payment "falls within the scope of the Unfair Practices Act" and "destroyed all competition in the letting of painting contracts for First Nationwide Savings." Id. at 1452.

In sum, the court concludes that the plaintiffs have adequately alleged a violation of W. Va. Code § 47-11A-3. Marriott's motion to dismiss this count is therefore **DENIED.**

III. Avendra's Motion to Dismiss

The other defendant, Avendra, filed a motion to dismiss all of the counts against it. For the reasons discussed below, the court concludes that Avendra is only entitled to dismissal of Count VI (fraud).

A. Dismissal based on the terms of the Contract

Avendra first argues that all claims must be dismissed because the contract between In Town Hotels and Marriott specifically permits Marriott to (1) purchase inventories and supplies from itself or from Marriott affiliates such as Avendra, and **[**39]** (2) make a reasonable profit on such transactions. Accordingly, Avendra argues, the profits obtained by Marriott and Avendra from purchasing hotel supplies are specifically permitted by the contract. According to Avendra, Marriott's and Avendra's receipt of these profits cannot possibly constitute a breach of contract, breach of fiduciary duty, commercial bribery in violation of the Robinson-Patman Act, or any of the other claims alleged. Avendra bases this argument on language from section 1.02 of the Management Agreement between Marriott and In Town Hotels. That section provides, under the heading "Delegation of Authority," that Marriott "shall have discretion and control … in all matters relating to the management **[*485]** and operation of the Hotel, including … procurement of inventories, supplies and services (purchases from [Marriott] and its affiliates shall be at competitive prices) …." (Compl. App. A, at 2.) This provision, Avendra agues, clearly contemplates that Marriott and its affiliates, such as Avendra, may profit from purchasing hotel supplies.

The plaintiffs respond by pointing to other sections of the Management Agreement that; they contend, prohibit Marriott from **[**40]** retaining profits related to their management of the Hotel except as provided in the management fee provision of the Agreement. Specifically, section 5.01.A of the Agreement provides that Marriott "will retain, as a management fee for services performed hereunder, an amount … equal to twenty percent (20%) of Operating Profit." (Compl. App. A, at 13.) Later, in section 5.01.D, the Agreement provides that "no charges or fees are to be paid by [In Town Hotels] to [Marriott] except as provided in the Agreement …." (Compl. App. A, at 15.)

Considering only the face of the Agreement, the court cannot conclusively determine whether the Agreement expressly permits the payments alleged to be wrongful in this case. There is some force to Avendra's argument that the phrase "purchases from [Marriott] and its affiliates shall be at competitive prices" contemplates that Marriott and its affiliates are permitted to profit from sales of supplies to the Hotel. The language of section 5.01.D of the Agreement, however, appears to restrict Marriott's compensation to the management fee set out in the Agreement. This suggests that Marriott's and Avendra's receipt of these payments and rebates **[**41]** may not be permitted. Without some factual development in the case regarding specific details of the relationship between Marriott and In Town Hotels, the context and nature of the alleged rebates and payments received by Marriott and Avendra, the course of dealing of the parties, and the standard practice in the industry, the court cannot resolve the tension between these two parts of the Agreement. The contract does not unambiguously authorize the allegedly wrongful rebates and payments to Marriott and Avendra. At this stage of the proceedings, Avendra is not entitled to dismissal of the counts against it based on the language of the contract. [12]

[42] B. Pleading Fraud with Particularity**

Second, Avendra argues that the claims for fraud, violations of the WVUPA, and aiding and abetting a breach of fiduciary duty must be dismissed because (1) all of these are fraud-based claims and (2) the plaintiffs have not plead fraud with particularity as required by *Rule 9(b)*. [13] The court will first dispose of **[*486]** Avendra's argument

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[12] In addition to this general argument that the contract explicitly permits the alleged wrongful conduct, Avendra presents several arguments that depend necessarily on the court accepting this conclusion. For example, Avendra argues that the claim for aiding and abetting a breach of fiduciary duty must be dismissed because there can be no breach of fiduciary duty in the first place when the contract explicitly permits the conduct alleged. As the court has rejected the premise upon which all of these arguments rely, they are likewise without merit and do not warrant further discussion.

related to the WVUPA and aiding and abetting a breach of fiduciary duty. ***HN17***[] To state a claim under the WVUPA, the plaintiffs need only allege facts indicating "the secret payment or allowance of rebates … to the injury of a competitor and where such payment or allowance tends to destroy competition." *W. Va. Code § 47-11A-3*. There is no element of fraud in this provision -- the plaintiff need not allege or prove a misrepresentation, reliance, or any of the other elements of common law fraud. Because the plaintiffs' WVUPA claim is not fraud-based, the plaintiffs need not plead that claim with particularity. Avendra also assumes, without supporting argument, that the plaintiffs' claim for aiding and abetting a breach of fiduciary duty claim is fraud-based. It may be the case that certain breach of fiduciary duty **[**43]** claims are fraud-based and that those claims must be plead in compliance with *Rule 9(b)*. *See* *Shapiro v. Miami Oil Producers, Inc., 84 F.R.D. 234, 236 (D. Mass. 1979)* ***HN18***[] ("[*Rule 9(b)*] extends to averments of fraud or mistake, whatever may be the theory of legal duty -- statutory, tort, contractual, or fiduciary."). But the main thrust of the plaintiffs' allegations here is that Marriott had a duty, as an agent of In Town Hotels, not to secretly profit on the side from the performance of its duties on behalf of In Town Hotels. This theory of breach of fiduciary duty does not depend on misrepresentations relied on by In Town Hotels, but simply on the receipt of illicit payments. This type of breach of fiduciary duty claim is not fraud-based and therefore need not meet the mandates of *Rule 9(b)*.

[44]** The only claim that Avendra has identified which *is* clearly subject to *Rule 9(b)* requirements is the claim for fraud itself. Avendra is entitled to dismissal of this claim, as the plaintiffs have failed to plead this claim with particularity as against Avendra. ***HN19***[] Under *Rule 9(b)*, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The Fourth Circuit has explained that "the 'circumstances' required to be pled with particularity under *Rule 9(b)* are 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999)* (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1297, at 590 (2d ed. 1990)). Even so, the court cautioned that "[a] court should hesitate to dismiss a complaint under *Rule 9(b)* if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial **[**45]** prediscovery evidence of those facts." *Id.*

In its count for fraud, the plaintiffs allege that the defendants, including Avendra, made false and misleading material statements and omissions, knowing that the statements were untrue, misleading, or lacking in material facts. Additionally, the plaintiffs allege that the defendants committed fraud by obtaining and retaining undisclosed kickbacks though their purchasing activities. The fraud **[*487]** claim can thus be grouped into three main categories: (1) fraud by way of affirmative misrepresentation; (2) fraud by way of omission of material facts; and (3) fraud by way of obtaining and retaining undisclosed payments related to purchasing activities. The court will address these three categories in turn.

As to affirmative misrepresentations, Avendra argues that the plaintiffs have failed to allege any such misrepresentation with particularity, as required by *Rule 9(b)*. Avendra correctly points out that while the complaint alleges generally that the defendants made false representations, the complaint does not specifically identify a single false representation made by Avendra to In Town Hotels. The complaint alleges, for example, that "defendants **[**46]** have committed fraud … by giving false information … regarding related party transactions." (Compl. P 119.) But the plaintiffs do not provide any specific examples of such information provided by Avendra to In Town Hotels. This would leave Avendra without knowledge of what information, if any, that it provided to In Town Hotels the plaintiffs believe to be false. The other allegations of affirmative misrepresentations fare no better. These

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[13] In its memorandum in support of its motion to dismiss, Avendra initially states that the plaintiffs must comply with *Rule 9(b)* in their claims for "fraud, violations of the West Virginia Unfair Practices Act, and breaches of fiduciary duties …." (Avendra Memo. at 4.) At the conclusion of this argument, however, Avendra states that "because all of the claims against Avendra allege intentional, fraudulent conduct, Plaintiff's failure to satisfy *Rule 9(b)* mandates reversal." *2002 U.S. Dist. LEXIS 439*, [WL] at 6. It is thus unclear which counts Avendra believes must satisfy *Rule 9(b)*. To the extent that Avendra implies that all of the claims must do so, it is incorrect. For example, a claim for commercial bribery under *section 2(c)* of the Robinson-Patman contains no fraud element and therefore need not be plead with particularity. The court will limit its discussion of *Rule 9(b)* to the three counts specifically identified by Avendra: fraud, WVUPA violations, and breach of fiduciary duty.

allegations of affirmative misrepresentations by Avendra to In Town Hotels lack the specificity necessary to provide Avendra with "the particular circumstances for which [it] will have to prepare a defense at trial," *Harrison, 176 F.3d at 784*, and are stated with insufficient particularity to meet the requirements of *Rule 9(b)*.

As for the allegations of material omissions, the plaintiffs correctly point out that ***HN20***[] when the allegation of fraud relates to an omission rather than an affirmative misrepresentation, less particularity is required. *See, e.g., Shaw v. Brown & Williamson Tobacco Corp., 973 F. Supp. 539, 552 (D. Md. 1997)*. As to the allegations of omission, however, the plaintiffs' claim depends necessarily **[**47]** on the existence of some legal duty on the part of Avendra to In Town Hotels to share the undisclosed information. In their complaint, the plaintiffs allege that "pursuant to section 11.03 [of the Management Agreement] … Marriot *and its affiliates and/ or related parties* agreed that they would not profit from the provision of Chain Services." (Compl. P 56) (emphasis added). To the extent that this allegation suggests that Avendra (or any other Marriott affiliates) agreed in the Management Agreement not to profit from the provision of Chain Services, that allegation is flatly contradicted by the terms of the Management Agreement itself. [14] **[**48]** Looking at the Management Agreement, it is clear that the agreement is between only In Town Hotels and Marriott. Avendra was not a party to and is not bound by that Agreement. The plaintiffs cannot claim that Avendra owes In Town Hotels any contractual duties as a result. [15]

Finally, the plaintiffs allege fraud based on Avendra's obtaining and retaining undisclosed payments related to purchasing activities. The court is unsure how this allegation fits in any way within ***HN22***[] the elements of common law fraud, which, generally speaking, are: "'(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied **[*488]** upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.'" *Legg v. Johnson, Simmerman & Broughton, L.C., 576 S.E.2d 532, 2002 W. Va. LEXIS 217*, No. 30591, 2002 WL 31730862 (W. Va. Dec. 3, 2002) (quoting *Horton v. Tyree, 104 W. Va. 238, 139 S.E. 737, 738 (W. Va. 1927))*. Avendra's receipt of payments itself does not constitute fraud, as no representation (false or otherwise) is involved.

In sum, the plaintiffs have failed to plead fraud with particularity as required by *Rule 9(b)*, warranting the dismissal of Count VI **[**49]** (fraud). The plaintiffs' other claims are not necessarily fraud-based and thus need not be plead with particularity. Finally, the contract does not unambiguously authorize the conduct alleged here. Accordingly, Avendra is not entitled to dismissal of any of the remaining claims at this time.

IV. Conclusion

For the foregoing reasons, the court concludes that the plaintiffs have adequately alleged antitrust injury for their claim under *section 2(c)* of the Robinson-Patman Act and have adequately alleged the elements of a violation of the West Virginia Unfair Practices Act. In addition, Avedra's arguments for dismissal of the claims against it are without merit, with the exception that the plaintiffs' fraud claim against Avendra is not plead with particularity as required by *Rule 9(b)*. Accordingly, the court **DENIES** Marriott's motion to dismiss Counts IV and **XIV, GRANTS** Avendra's motion to dismiss as to Count VI (fraud) and **DENIES** that motion as to all other counts.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party, and **DIRECTS** the Clerk to post this published opinion at http://www.wvsd. **[**50]** uscourts.gov.

ENTER: February 25, 2003

JOSEPH R. GOODWIN

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[14] ***HN21***[] When, as here, the plaintiff relies on a contract in its complaint, and indeed includes a copy of that contract as an attachment to the complaint, "it [is] proper for the district court to consider if in ruling on [a] motion to dismiss." *Darcangelo v. Verizon Comms., Inc., 292 F.3d 181, 195 (4th Cir. 2002)*.

[15] Indeed, Avendra was not created until years after the Agreement was signed.

UNITED STATES DISTRICT JUDGE

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LexisNexis®

Four B Corp. v. Daicel Chem. Indus.

United States District Court for the District of Kansas

February 26, 2003, Decided

CIVIL ACTION No. 01-2394-CM

Reporter

253 F. Supp. 2d 1147 *; 2003 U.S. Dist. LEXIS 4703 **; 2003-1 Trade Cas. (CCH) P74,062

FOUR B CORP., et al., Plaintiffs, v. DAICEL CHEMICAL INDUSTRIES, LTD., et al., Defendants.

Disposition: [1]** Defendants' Motion for Judgment on Pleadings denied.

Core Terms

full consideration, damages, plaintiffs', sorbates, purchasers, indirect, defendants', antitrust, limitations period, treble damages, products, antitrust claim, plain language, absurd result, price fixing, provisions, statute of limitations, anti trust law, state court, Pleadings, decisions, eligible, courts

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)* is governed by the same standards as a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted. A court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that a plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, or when an issue of law is dispositive. a court accepts as true all well-pleaded factual allegations in a complaint, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of a plaintiff. The issue in resolving a motion such as this is not whether a plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Legal Issues

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

HN2[] **Federal & State Interrelationships, Erie Doctrine**

A federal court sitting in diversity must apply the substantive law of the forum state. Accordingly, in a diversity action presenting issues of Kansas statutory law, a federal court's role is to apply Kansas state law as it exists, or if state law is silent, rule as it believes the state supreme court would rule. Where no state cases exist on a point, the federal court must turn to other state court decisions, federal decisions, and the general weight and trend of authority for guidance.

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

HN3[] **Private Actions, Remedies**

See *Kan. Stat. Ann. § 50-115* (Supp. 2000).

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

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

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

HN4[] **Private Actions, Purchasers**

See *Kan. Stat. Ann. § 50-161(b)*, *(c)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

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

HN5[] **Purchasers, Indirect Purchasers**

Where a state supreme court has not addressed a question before a federal district court the district court must determine what decision the state court would make if faced with the same facts and issue by considering state court decisions, decisions of other states, federal decisions, and the general weight and trend of authority.

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

HN6[] **Private Actions, Standing**

A court has held that indirect purchasers have "standing" to sue for full consideration of a product purchased that is artificially increased in price due to unlawful antitrust activity.

Governments > Legislation > Interpretation

HN7[] Legislation, Interpretation

When construing a statute, the fundamental rule is that the intent of the legislature governs. In determining legislative intent, courts may consider the background of the enactment, the circumstances attending its passage, and the effect the statute may have under the suggested constructions.

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

Business & Corporate Compliance > ... > Types of Damages > Consequential Damages > Actions for Price

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Business & Corporate Compliance > ... > Remedies > Buyer's Damages & Remedies > General Overview

HN8[] Private Actions, Remedies

Kan. Stat. Ann. § 50-115 specifically contemplates full consideration recovery for indirect purchasers when it specifies that any person injured or damaged may sue for and recover the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination. Arguably, under the plain language of the statute, when a product is advanced in price by an unlawful combination, a person damaged by the unlawful combination may recover the full consideration paid for the product.

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

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

HN9[] Private Actions, Purchasers

It is clear from the plain language of *Kan. Stat. Ann. § 50-161(b)* that indirect purchasers are eligible for treble damages. Significant to a court, no distinction is made between the "person" allowed to recover treble damages under *§ 50-161(b)* and the "person" allowed to recover full consideration damages under *Kan. Stat. Ann. § 50-115*. The only distinction made between eligible persons in the statute is the addition of the state as an additional "person" eligible for recovery under *§ 50-161(b)*.

Governments > Legislation > Interpretation

HN10[] Legislation, Interpretation

It is a venerable principle that a law will not be interpreted to produce absurd results, and Kansas courts have recognized that statutes should be construed to avoid unreasonable results.

Constitutional Law > Substantive Due Process > Scope

HN11[] **Constitutional Law, Substantive Due Process**

State law damages provisions are unconstitutional when in their actual operation such statutes work an arbitrary, unequal, and oppressive result which shocks the sense of fairness the *Fourteenth Amendment* was intended to satisfy in respect of state legislation.

Constitutional Law > Substantive Due Process > Scope

Governments > Legislation > Interpretation

HN12[] **Constitutional Law, Substantive Due Process**

One of the cardinal rules governing federal courts is never anticipate a question of constitutional law in advance of necessity of deciding it. Moreover, with respect to federal statutes, the United States Supreme Court has noted that the delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Governments > Legislation > Interpretation

HN13[] **Constitutional Law, Substantive Due Process**

A party questioning a statute bears the burden of proof to establish its unconstitutionality.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN14[] **Statute of Limitations, Time Limitations**

A claim which arises from a statute does not automatically constitute a "penalty" or "forfeiture" so as to trigger a one-year statute of limitations period, even if a plaintiff is entitled to recover more than his actual damages.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN15[] **Statute of Limitations, Time Limitations**

Determination of whether *Kan. Stat. Ann. § 60-514*'s one year limitation period applies to an action requires an examination of the nature of the right which has been injured, rather than the remedy therefor.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN16[] **Regulated Practices, Private Actions**

The Kansas Supreme Court has indicated that an action based upon a claimed violation of the anti-trust laws of Kansas, *Kan. Stat. Ann. § 50-101, et seq*, is governed by the three year limitations period set out in *Kan. Stat. Ann. § 60-512*, as an action upon a liability created by statute.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN17[] **Statute of Limitations, Time Limitations**

Similar to *Kan. Stat. Ann. § 60-512*, *Kan. Stat. Ann. § 60-306* sets a three-year limitations period for an action upon a liability created by statute, other than a forfeiture or penalty.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN18[] **Legislation, Effect & Operation**

As set out by Kansas courts, the appropriate inquiry to determine whether a liability is created by a statute (thus making *Kan. Stat. Ann. § 60-512(2)* applicable) is whether liability for resultant damages would not arise but for the statute. A statute that merely provides a procedure for obtaining relief does not trigger *Kan. Stat. Ann. § 60-512(2)*; it must provide a new substantive right that does not otherwise exist at common law.

Counsel: For Four B Corp, Consentino Group Inc, Consentino Enterprises, Inc., Mid Am Food Enterprises, Inc., Plaintiffs: Amy E. Bauman, Stueve Helder Siegel LLP, Kansas City, MO, LEAD ATTORNEY. Jan P. Helder, Jr., Stueve Helder Siegel LLP, Kansas City, MO, LEAD ATTORNEY. Patrick J. Stueve, Stueve Helder Siegel LLP, Kansas City, MO, LEAD ATTORNEY. Todd E. Hilton, Stueve Helder Siegel LLP, Kansas City, MO, LEAD ATTORNEY.

For Daicel Chemical Industries, LTD., Defendant: Herbert S Washer, New York, NY, LEAD ATTORNEY. Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY.

For Daicel (U.S.A), Inc., Defendant: David E. Everson, Jr., Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY. Herbert S Washer, New York, NY, LEAD ATTORNEY. Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY.

For Nippon Synthetic Chemical Industry Co., LTD, The, Defendant: James J Garrett, Morrison & Foerster LLP, Walnut Creek, CA, LEAD ATTORNEY. Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY.

For Mitsui & Co. (USA), **[**2]** Inc., Kanematsu USA Inc, Defendants: John J. Miller, Kansas City, MO, LEAD ATTORNEY.

For Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients GmbH, Defendants: Aton Arbisser, Los Angeles, CA, LEAD ATTORNEY. Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY.

For Hoechst Celanese Corp., CNA Holdings, Nutrinova Inc, Defendants: Aton Arbisser, Los Angeles, CA, LEAD ATTORNEY. David E. Everson, Jr., Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY. Victoria L. Smith, Stinson Morrison Hecker LLP, Kansas City, MO, LEAD ATTORNEY.

For Eastman Chemical Company, Defendant: Robert A. Horn, Horn, Aylward & Bandy LLC, Kansas City, MO, LEAD ATTORNEY. Sarah Yehle Fulkerson, Horn, Aylward & Bandy LLC, Kansas City, MO, LEAD ATTORNEY.

Judges: CARLOS MURGUIA, United States District Judge.

Opinion by: CARLOS MURGUIA

Opinion

[*1149] **MEMORANDUM AND ORDER**

This purported class action arises out of an alleged international conspiracy to fix the prices of sorbates, including potassium sorbate and sorbic acid, which are chemical preservatives used in food products. Plaintiffs are "indirect purchasers" of sorbates, who allegedly purchased **[**3]** products containing sorbates that were manufactured and sold by defendants. Plaintiffs allege that defendants engaged in the manufacture and sale of sorbates throughout the world and specifically in Kansas. Plaintiffs further allege that defendants' conspiracy to control the prices of sorbates affected over $ 1 billion in U.S. commerce and that they sustained damages due to defendants' actions. Plaintiffs contend that defendants' actions in fixing the prices of sorbates were in violation of Kansas ***antitrust law***, *Kan. Stat. Ann. § 50-101, et seq.* Pending before the court is defendants Daicel Chemical Industries, Ltd., Daicel (U.S.A.), Inc., The Nippon Synthetic Chemical Industry Co., Ltd., a/k/a Nippon Gohsei, Hoechst Aktiengesellschaft, a/k/a Hoechst AG, CNA Holdings f/k/a HNA Holdings, Inc. and Hoecsht Celanese, Nutrinova Nutrition Specialties & Food Ingredients GmbH, Nutrinova, Inc. and Eastman Chemical Company's Motion for Judgment on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)*. (Doc. 103). [1] All moving defendants (referenced collectively herein as "defendants") move the court to grant judgment in their favor on each of plaintiffs' claims. As set forth herein, defendants' **[**4]** motion is denied.

. Judgment on the Pleadings Standard

HN1[] A motion for judgment on the pleadings pursuant to

Fed. R. Civ. P. 12(c) is governed by the same standards as a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted. *See* *Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 528 (10th Cir. 1992)*. The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *see* *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998)*, **[**5]** or when an issue of law is dispositive. *See* *Neitzke v. Williams, 490 U.S. 319, 326, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989)*. The court accepts as true all well-pleaded factual allegations in the complaint, as distinguished from conclusory allegations, *see* *Maher, 144 F.3d at 1304*, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *See* *Witt v. Roadway Express, 136 F.3d 1424, 1428*

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[1] Although defendant Ueno Fine Chemicals Industry, Ltd. and defendant Chisso Corporation joined in the pending motion (Docs. 113 & 114), on January 8, 2003, the court dismissed these defendants from the lawsuit for lack of personal jurisdiction.

(10th Cir. 1998). The issue in resolving a motion such as this is not whether the plaintiff will **[*1150]** ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *See* Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), *overruled on other grounds,* Davis v. Scherer, 468 U.S. 183, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984).

. Discussion

Plaintiffs allege defendants violated provisions of the Kansas Restraint of Trade Act (the Kansas Act or Act) by engaging in price fixing of sorbates. Plaintiffs further allege that defendants' actions caused plaintiffs to incur damages. Defendants seek judgment on the pleadings on each of **[**6]** plaintiffs' claims. In support, defendants argue that plaintiffs' theory of recovery contradicts the plain language of Kansas ***antitrust law***, that plaintiffs' suggested application of Kansas ***antitrust law*** would render it unconstitutional, and that plaintiffs' claims are untimely under the applicable statute of limitations period. As set forth below, defendants' motion is denied.

Whether Theory of Recovery Contradicts Kansas Antitrust LawDefendants first contend that the monetary remedy sought by plaintiffs is not authorized by Kansas ***antitrust law***. Specifically, defendants assert that plaintiffs, as indirect purchasers of sorbates, "do not have standing" to pursue the full consideration remedy set out in Kan. Stat. Ann. § 50-115. (Defs.' Mem. at 6). In addition, defendants contend that the Kansas legislature could not have intended the result of allowing plaintiffs here to recover both under the full consideration provision and the treble damages provision of the Kansas Act.

HN2[] A federal court sitting in diversity must apply the substantive law of the forum state. Commerce Bank, N.A. v. Chrysler Realty Corp., 244 F.3d 777, 780 (10th Cir. 2001). **[**7]** Accordingly, in this diversity action presenting issues of Kansas statutory law, this court's role is to apply Kansas state law as it exists, or if state law is silent, rule as it believes the state supreme court would rule. Coletti v. Cudd Pressure Control, 165 F.3d 767, 775 (10th Cir. 1999). Where "no state cases exist on a point," the federal court must "turn to other 'state court decisions, federal decisions, and the general weight and trend of authority'" for guidance. Barnard v. Fireman's Fund Ins. Co., 996 F.2d 246, 248 (10th Cir. 1993) (quoting Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988)).

As relevant here, ***HN3***[] the Kansas Act provides for two remedies--the full consideration paid and treble the damages sustained. Specifically, with respect to violations of sections 112and 113 of the Act, which declare unlawful trusts, combinations and agreements in restraint of trade and free competition, the Act provides that: any person injured or damaged by any such arrangement, contract, agreement, trust or combination, described inK.S.A. 50-112 and 50-113, and amendments thereto, may sue for and recover in any court **[**8]** of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed.

Kan. Stat. Ann. § 50-115 (Supp. 2000) (emphasis added). In addition, ***HN4***[] with respect to violations of any provision of the Kansas Act, the Act provides, as an "alternative and in addition to any other remedies now provided by law," that: any person who may be damaged or injured by any agreement, monopoly, trust, conspiracy or combination which is declared unlawful by any of the acts contained in chapter 50 of the Kansas Statutes Annotated, relating to unlawful acts, agreements, monopolies, trusts, **[*1151]** conspiracies or combinations in restraint of trade, shall have a cause of action against any person causing such damage or injury. Such action may be brought by any person who is injured in such person's business or property by reason of anything forbidden or declared unlawful by this act, regardless of whether such injured person dealt directly or indirectly with the defendant. The plaintiff in any action commenced hereunder **[**9]** in the district court of the county wherein such plaintiff resides, or the district court of the county of the defendant's principal place of business, may sue for and recover treble the damages sustained.

Id. § 161(b)&(c) (emphasis added).

The Supreme Court of Kansas has not addressed the question presented to this court, i.e., whether the full consideration remedy provided for in § 50-115 is available to indirect purchasers such as plaintiffs in this action. Stated another way, the issue presented is whether plaintiffs, as indirect purchasers, have "standing" in this antitrust case to pursue full consideration damages. [2] Accordingly, **HN5**[] this court "must determine what decision the state court would make if faced with the same facts and issue . . . [by] considering state court decisions, decisions of other states, federal decisions, and the general weight and trend of authority." Armijo, 843 F.2d at 407 (internal citations omitted).

[10]** Significant here, although the highest court in Kansas has not examined the issue presented, one lower court has issued an unpublished journal entry opinion that is arguably on point. In *Smith v. Philip Morris Companies*, the District Court of Seward County, Kansas examined whether indirect purchasers were eligible for full consideration damages under the Kansas Act. Examining arguments similar to those raised by defendants here, the *Smith* court found that indirect purchasers are eligible to receive full consideration damages under § 50-115. The *Smith* court first recognized that the Kansas legislature amended the Kansas Act in 1985 to reflect the State's intent to allow indirect purchaser actions despite the Supreme Court's finding in 1977 that such actions were disallowed under the federal antitrust statutes. Next, the *Smith* court recognized that although the 1985 amendments placed a specific reference to indirect purchasers only in the treble damages provision of the Kansas Act (§ 50-161(b)), [3] this did not reflect the Kansas legislature's intent to preclude an indirect purchaser's recovery of full consideration damages under § 50-115 of the Act. Interpreting **[**11]** the **Kansas Act**, the *Smith* court found that the Kansas legislature "recognized its statute of K.S.A. 50-115 as being fully sufficient for an indirect purchaser to sue for the full consideration of the product." Accordingly, **HN6**[] the *Smith* court held that indirect purchasers have "standing" to sue for full consideration of a product purchased that is artificially increased in price due to unlawful antitrust activity. Defendants assert that the *Smith* decision is not dispositive here because the factual direct purchaser scenario presented in *Smith* is separate and distinct from the factual direct **[*1152]** purchaser situation presented here. The court acknowledges that the *Smith* case may involve a different factual situation, but finds the difference does not detract from the *Smith* court's reasoning and persuasiveness in this case.

[12]**

This court must now determine whether the Kansas Supreme Court would adopt the finding and reasoning of the *Smith* court. **HN7**[] When construing a statute, the fundamental rule is that the intent of the legislature governs. City of Wichita v. 200 S. Broadway Ltd. P'ship, 253 Kan. 434, 436, 855 P.2d 956, 958 (1993). "In determining legislative intent, courts may consider the background of the enactment, the circumstances attending its passage, and the effect the statute may have under the suggested constructions." Lee v. Boeing Co.-Wichita, 21 Kan. App. 2d 365, 368, 899 P.2d 516, 518 (1995) (citing West v. Collins, 251 Kan. 657, 840 P.2d 435, Syl. P 4 (1992)).

Defendants argue that the plain language of § 50-115 makes clear that full consideration damages are not available to plaintiffs because plaintiffs did not purchase "any goods, wares, merchandise and articles included in or advanced or controlled in price by" defendants' alleged antitrust behavior. (Defs.' Mem. at 6). Instead, defendants argue that plaintiffs purchased products that contained defendants' sorbates and that these indirect purchases **[**13]** preclude recovery under § 50-115. The court disagrees that, on its face, § 50-115's statutory language should be so narrowly construed. Section 50-115 **HN8**[] specifically contemplates full consideration recovery for indirect purchasers when it specifies that "any person injured or damaged . . . may sue for and recover . . . the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced

[2] *See generally* Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540, (1982) (examining the concept of "standing" in the antitrust context); Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (noting "the focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine).

[3] Although the *Smith* court cites the treble damages provision as § 50-801, an examination of the historical statutes of Kansas shows that § 50-801 is a predecessor of § 50-161.

or controlled in price by such combination." *Kan. Stat. Ann. § 50-115* (emphasis added). Arguably, under the plain language of the statute, when a product is "advanced . . . in price" by an unlawful combination, a person damaged by the unlawful combination may recover the full consideration paid for the product.

In addition, ***HN9***[] it is clear from the plain language of *§ 50-161(b)* that indirect purchasers are eligible for treble damages. Significant to the court, no distinction is made between the "person" allowed to recover treble damages under *§ 50-161(b)* and the "person" allowed to recover full consideration damages under *§ 50-115*. *Kan. Stat. Ann. §§ 50-115& 50-161(b)*. The only distinction made between eligible persons in the *Kansas Act* **[**14]** is the addition of the state as an additional "person" eligible for recovery under *§ 50-161(b)*. *Id.* Therefore, based on these considerations and in light of the Kansas Supreme Court's reference that the *Kansas Act* provides for "broad remedies," the court finds the plain language of *§ 50-115* allows for the full consideration damages sought by plaintiffs. *See* *Bergstrom v. Noah, 266 Kan. 847, 879, 974 P.2d 531, 556 (1999)*.

Defendants next argue that if plaintiffs here were allowed full consideration damages, an "absurd result" would be produced. (Defs.' Mem. at 7). Plaintiffs assert in their Complaint that the purchase of food products containing sorbates during the relevant period in Kansas amounted to over $ 100 million. (Compl. at P 4). Plaintiffs seek entitlement to this sum under the full consideration provision of the *Kansas Act and* entitlement to treble the full consideration amount under the treble damages provision of the Act. It is this potential "$ 450 million" award that defendants contend would be an absurd result under plaintiffs' reading of the *Kansas Act*'s damages provisions. (Defs.' Mem. at 7).

[*1153] In support of this argument, **[**15]** defendants contend that the appropriate estimation of the dollar value of the sorbates contained in the food products purchased by plaintiffs should be determined by reference to the settlement amount--approximately $ 50,000--agreed to by sorbate manufacturers and indirect purchasers in the *Williams* class action, a class action from which plaintiffs in this lawsuit opted out. [4] **[**17]** Defendants appear to contend that when using this "actual" value of the sorbates indirectly purchased by plaintiffs, allowing plaintiffs to recover the full consideration paid for the products--as plead, an amount in excess of $ 100 million--would produce absurd results. However, without specific information about the amount and value of the sorbates contained in the products at issue, or access to the reasoning of the parties in reaching the settlement amount, this court is unwilling to rely on the parties' determination as to the proper value of the sorbates purchased by the plaintiffs here who opted out of the *Williams* class. [5] Accordingly, the court finds that without evidence of the percentage of overcharge created by the inclusion of defendants' price fixed sorbates in the products purchased **[**16]** by plaintiffs, the court cannot assume that an "absurd result" would result from the allowance of full consideration and treble damages to plaintiffs here. Therefore, although ***HN10***[] "it is a venerable principle that a law will not be interpreted to produce absurd results," *K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 n.2, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988)*, and the Kansas courts have recognized that "statutes should be construed to avoid unreasonable results," *Wells v. Anderson, 8 Kan. App. 2d 431, 433, 659 P.2d 833, 835 (1983)*, given the record before it at this stage of the proceeding, the court cannot determine that plaintiffs' suggested interpretation of the *Kansas Act*'s damages provision would produce absurd or unreasonable results.

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[4] The *Williams* action refers to *Williams Foods, Inc. v. Eastman Chemical Co.*, Case No. 99C 16680, brought on behalf of Williams Foods, Inc. and similar individuals and entities that indirectly purchased sorbates in the State of Kansas from certain named defendants from January 1, 1979, through December 31, 1996. The state court approved a settlement in *Williams* on July 25, 2001.

[5] The court recognizes that the Kansas District Court in Johnson County, Kansas gave final approval to the *Williams* settlement and noted that "based on the difficulty in calculating class-wide damages for end consumers and business entities who purchased products containing sorbates solely for resale (such as grocery stores and restaurants)," and "considering the hundreds of grocery stores who have not chosen to opt-out or file objections" to this amount, and based on the facts presented to support the award, that the *cy pres* award of $ 50,000 agreed to by the parties was reasonable. However, this court must base its decision on the record before it on this Motion for Judgment on the Pleadings.

Accordingly, considering the Kansas state court decision in *Smith*, the plain language of *§ 50-115*, and considering the sparse record at this stage of the proceedings, the court finds, based on the record before it, that *§ 50-115 of the Kansas Act* allows for the full consideration damages sought by plaintiffs here. Defendants' motion is denied on this basis.

.Whether **[**18]** Proposed Application of ***Antitrust Law*** Renders it Unconstitutional

Defendants next contend that plaintiffs' proposed application of the remedial provisions of the *Kansas Act* would render it unconstitutional. Specifically, defendants contend that allowing the indirect purchaser plaintiffs to recover full consideration damages would produce an unconstitutional disproportionate recovery in violation of the *Fourteenth Amendment. See* *Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, 44-45, 67 L. Ed. 115, 43 S. Ct. 55 (1922)* (finding ***HN11***[] state law damages provisions are unconstitutional "when **[*1154]** in their actual operation . . . such statutes work an arbitrary, unequal, and oppressive result . . . which shocks the sense of fairness the *Fourteenth Amendment* was intended to satisfy in respect of state legislation . . . ."). Defendants contend that allowing the indirect purchaser plaintiffs here to recover full consideration would produce absurd results not only in the circumstances of this case, but also in other economic situations.

The court finds that this issue is prematurely raised, as there has been no finding of actual damages to plaintiffs from which a constitutional **[**19]** proportionality analysis can be made. As noted above, the court is unwilling to assume that the *Williams* settlement amount is the proper valuation of plaintiffs' claims. Therefore, the court cannot say that the overcharge created by defendants' allegedly unlawful antitrust behavior is disproportionate to the full consideration amount of over $ 100 million that plaintiffs allege was paid for the products containing the sorbates. That is, given the record before it, the court cannot say that there would be a disproportionate recovery that would "shock[] the sense of fairness" under the *Fourteenth Amendment.* *Chicago & Northwestern Ry. Co., 260 U.S. at 44-45*.

HN12[] One of the cardinal rules governing federal courts is "never anticipate [a] question of constitutional law in advance of necessity of deciding it." *Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985)* (internal quotations omitted). Moreover, with respect to federal statutes, the Supreme Court has noted that "the delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus **[**20]** imagined." *United States v. Raines, 362 U.S. 17, 22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)*.

Therefore, keeping in mind that a statute is presumed constitutional, the court finds that at this stage of the proceeding, defendants have not met their burden to establish the unconstitutionality of the*Kansas Act*. *State v. Perez, 269 Kan. 340, 342, 11 P.3d 52, 54 (2000)* (noting ***HN13***[] the party questioning the statute bears the burden of proof to establish its unconstitutionality). Defendants' motion on this basis is denied at this time.

. Applicable Statute of Limitations

Finally, defendants contend that the one-year statute of limitations set forth in *Kan. Stat. Ann. § 60-514(c)* applies to each of plaintiffs' claims. Defendants further contend that the limitations period began to accrue, at the latest, on September 30, 1998--the date defendant Eastman agreed to enter a guilty plea on sorbates price fixing charges brought by the U.S. Department of Justice. Therefore, defendants assert plaintiffs' antitrust claims related to sorbates price fixing are untimely filed. In response, plaintiffs contend that it is the three-year limitations **[**21]** period set forth in *Kan. Stat. Ann. § 60-512(2)* that governs their claims. Accordingly, plaintiffs contend their action has been timely filed. As set forth below, the court finds plaintiffs' antitrust claims were timely filed.

. *Section 60-514(c)* Not Applicable

Plaintiffs' Complaint asserts that defendants' actions in fixing the prices of sorbates were in violation of Kansas ***antitrust law***, *Kan. Stat. Ann. § 50-101, et seq.* Kansas state law governs the statute of limitations applicable to plaintiffs' state statutory claims in this diversity action. Defendants contend that *§ 60-514(c)*'s one year limitation period applies because plaintiffs seek treble damages, in excess of their actual damages and, therefore, plaintiffs' claims are claims "upon statutory penalty or forfeiture." *Kan. Stat. Ann. § 60-514(c)*. The court disagrees.

HN14[] A claim which arises from a statute does not automatically constitute a "penalty" or **[*1155]** "forfeiture" so as to trigger a one-year statute of limitations period, even if a plaintiff is entitled to recover more than his actual damages. *See* *Alexander v. Certified Master Builders Corp., 268 Kan. 812, 820, 1 P.3d 899, 905-06 (2000)* **[**22]** (finding one year limitation period under *§ 60-514(c)* inapplicable to statutory *Kansas Consumer Protection Act* claim, even where plaintiff sought to recover both actual damages and civil penalties).

HN15[] Determination of whether *§ 60-514*'s one year limitation period applies to an action requires an examination of the "*nature* of the right which has been injured," rather than "the *remedy* therefor." *Haag v. Dry Basement, Inc., 11 Kan. App. 2d 649, 651, 732 P.2d 392, 394 (1987)* (citing *Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, 6-7 (N.C. App. 1979)* (noting that although state antitrust legislation had punitive elements, it was not considered a penal statute where it had "multiple objectives of which some are not penal in nature" and claims raised addressed individual, rather than public, harms)). "To let the limitations be determined by the remedy would be to have the tail wag the dog." *Id.*

Here, the plaintiffs' action seeks to recover upon an antitrust liability created by the *Kansas Restraint of Trade Act*. Although the remedial statutory scheme in that Act provides for recovery of treble damages, the **[**23]** court must focus on the nature of the right alleged-- the right to be free from antitrust behavior-- rather than the remedy sought--treble damages. Here, considering the guidance of the Kansas courts, this court finds that plaintiffs' statutory antitrust claims are not claims "upon statutory penalty or forfeiture." Therefore, *§ 60-514(c)*'s limitation period is not applicable to plaintiffs' claims. Defendants' motion is denied on this basis.

o Section *§ 60-512(2)* Applicable

Significantly, the highest court in Kansas has addressed the limitations period applicable to antitrust claims brought under its state antitrust statute. In *McCue v. Franklin*, ***HN16***[] the Kansas Supreme Court indicated that an action "based upon a claimed violation of the anti-trust laws of Kansas, . . . *[§] 50-101, et seq*," is governed by the three year limitations period set out in *Kan. Stat. Ann. § 60-512*, [6] as an "action[] upon a liability created by statute." *156 Kan. 1, 7, 131 P.2d 704, 707-08 (1942)*.

[24]** ***HN18***[] As set out by Kansas courts, the "appropriate inquiry to determine whether a liability is created by a statute (thus making *K.S.A. 60-512[2]* applicable) is whether liability for resultant damages would not arise but for the statute." *Haag, 11 Kan. App. 2d at 650, 732 P.2d at 393*. A statute "that merely provides a procedure for

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[6] At the time *McCue* was decided, a predecessor provision of *§ 60-512* was in effect. The statutory provision referenced in *McCue*--*Kan. Stat. Ann. § 60-306--is* identical in relevant part to *Kan. Stat. Ann. § 60-512*. ***HN17***[] Similar to *§ 60-512*, *§ 60-306* set a three-year limitations period for "an action upon a liability created by statute, other than a forfeiture or penalty." *See* Notes to *Kan. Stat. Ann. § 60-512(2)*; *Bd. of Comm'rs of Montgomery County v. McKittrick, 141 Kan. 283, 285-86, 40 P.2d 352, 354 (Kan. 1935)* (citing *Kan. Stat. Ann. § 60-306*).

obtaining relief does not trigger *K.S.A. 60-512(2)*; it must provide a new substantive right that does not otherwise exist at common law." *Wright v. Kan. Water Office, 255 Kan. 990, 996, 881 P.2d 567, 572 (1994)*.

Here, the basis for plaintiffs' claims rest on provisions of the *Kansas Restraint of Trade Act, § 50-101, et seq.* There is no indication that plaintiffs' claims alleging liability for antitrust behavior under Kansas law would arise outside the provisions of the Kansas statute. Accordingly, the **[*1156]** court finds that liability for the antitrust behavior alleged here arises out of the Kansas antitrust statute, rather than state common law.

Accordingly, considering the ruling in *McCue* and the statutory basis for the antitrust liability alleged by plaintiffs, the court finds the applicable statute **[**25]** of limitations is three years, as set out in *§ 60-512(2)*.

. Application of *§ 60-512(2)* Three Year Limitation Period

Defendants contend that the discovery rule applies to determine the date on which plaintiffs' antitrust claims began to accrue. Specifically, defendants assert that the statute of limitations "began to run, at the latest, when Plaintiffs acquired constructive knowledge of the facts underlying the misconduct Plaintiffs now allege - i.e., 'when, through reasonable diligence, [they] could have learned of the acts or conduct giving rise to [their] injuries.'" (Defs.' Reply at 12 (citing *In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 11351, No. Misc. 99-197, 2000 WL 1524912, at *5 (D.D.C. July 14, 2000)* (examining limitations period applicable to Kansas antitrust claim)).

Even if the court were to find that plaintiffs' claims began to accrue on the date asserted by defendants--no later than September 30, 1998-- the court finds that plaintiffs' claims were timely filed. Plaintiffs filed their claims herein in Kansas state court on July 9, 2001--well within the three-year limitation period. Therefore, upon application of *§ 60-512(2)*'s three-year **[**26]** limitation period, the court finds that plaintiffs' claims were timely filed. Defendants' motion is denied on this basis.

. Order

IT IS THEREFORE ORDERED that defendants' Motion for Judgment on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)* (Doc. 103) is hereby denied.

IT IS SO ORDERED. Dated this 26th day of February 2003, at Kansas City, Kansas.

CARLOS MURGUIA

United States District Judge

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